

**Design-Build in California**  
**Current Law and Practice**

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## **I. Introduction and Overview**

Design-build contracting for public projects has a strong foothold in California. This alternative to the conventional design-bid-build method for constructing public improvements offers both opportunities and risks for public agency owners. This paper addresses the following:

- What is Design-Build?
- Why Consider Design-Build? Potential Benefits and Cautions.
- Procedures for Design-Build Projects.
- Special legal considerations in utilizing Design- Build.

Finally, we will offer some tips for successful design-build projects.

## **II. Discussion**

### **A. What is Design-Build?**

Design-build may be defined best in contrast to the design-bid-build (DBB) method of contracting for public projects. DBB has long been the typical project delivery method<sup>1</sup> for local agency public construction. In DBB, the agency contracts with an architectural or engineering firm, which designs the project and prepares a complete (100%) set of construction documents. The agency solicits bids from contractors based on the completed documents and awards the construction contract to the "responsible bidder"<sup>2</sup> that offers the lowest price. During construction, the agency (through either staff or a construction manager) administers the project, including communications between the contractor and the design team, such as requests for

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<sup>1</sup> Project delivery methods establish the roles and responsibilities and allocate risk among the construction project team (owner, design professionals, contractors). Project delivery methods include design-bid-build (the traditional delivery method for local public works), construction management, and construction management at risk.

<sup>2</sup>For public bidding purposes, a "responsible bidder" is one who "has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract." Public Contract Code Section 1103.

information. The agency is responsible for the project design; the contractor will seek additional time and/or money for defects in the design documents.

Design-build is a project delivery method in which the owner contracts with a single entity for both design and construction. The design-build contract is based on the owner's "program," a statement of project requirements. The program materials may include preliminary design documents, and identifies the agency's specific project needs, such as size, special uses, adjacencies, and appearance. The agency solicits proposals from qualified design-build teams (including contractor and architect/engineer) based on the program, and may select the successful design-build team based on low bid, "best value," or other criteria. The selected design-build entity completes the project design and prepares construction documents. Once the owner has approved the design, the design-build contractor builds the project. Unlike the DBB method, the design-build contractor is responsible for its design documents and cannot seek additional time and/or money for defects in its own design documents.

Although design-build is sometimes discussed as a "new" project delivery method, particularly for public projects, the system has been in use for decades, and its use is increasing.<sup>3</sup> In California, design-build is expressly authorized as a project delivery option for certain state agencies, the University of California, California State University, school districts, designated counties, and some transit agencies.<sup>4</sup> As discussed below, it is also available to cities in various ways.

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<sup>3</sup> The Design-Build Institute of America and F.W. Dodge Dataline2 report that the total number of design-build contracts is increasing more than 100 percent per year. 3 Dataline 3, May-June 1996, at 1, 9, 11 (Design-Build Institute of America). See also N. Haldrup and M. Goldsmith, "Legislative Update: Design-Build in the Public Sector," The Construction Lawyer (October, 1998) pp. 38-40 (summarizing design-build surveys).

<sup>4</sup> For examples, see Public Contract Code §§ 10503 (University of California), 10708 (California State University), 20133 (Alameda, Butte, Contra Costa, Del Norte, El Dorado, Fresno, Humboldt, Kings, Los Angeles, Madera, Mariposa, Mendocino, Merced, Monterey, Napa, Orange, Placer, Sacramento, San Diego, San Joaquin, San Luis Obispo, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Tulare, Yolo, and Yuba); 20209.6 (Transit Districts); 20301.5 (Santa Clara Valley Transportation Authority).

## **B. Why Consider Design-Build?**

### **1. Potential Benefits of Design-Build**

**Reduced Design Effort and Cost for Owner.** Instead of retaining an architect or engineer to prepare 100% complete plans and specifications, the agency prepares performance-type specifications “setting forth the scope of the project” that include information to “describe adequately the city's needs.”<sup>5</sup>

**Innovative Solutions to Construction Challenges.** Construction documents suitable for competitive bidding under DBB need to address all construction issues in detail, and the solutions may not be the most advantageous to the owner.<sup>6</sup> In the course of completing the construction documents, the design-builder may arrive at a better solution. This flexibility also means that the agency must define its expectations clearly and monitor the developing design closely to ensure that it meets the program requirements.

**Improve Project Delivery Schedule.** The initial design phase may be reduced because the agency does not prepare complete construction documents. The design-build contractor may be able to complete the design more quickly because it is not preparing a set of documents for bidding. Subject to permitting procedures, a design-build contractor may be able to begin construction before final plans for entire project are complete; grading, site work, foundations and base building can be underway before design for interior finishes, mechanical systems, and special purpose areas is finalized.

**Define Cost Early in the Process.** The price of a fully designed (DBB) project is not known until the owner opens bids. At that time, the agency may discover that it cannot afford to build the project as designed. Design professionals are notoriously poor cost estimators, and the rapid

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<sup>5</sup> Public Contract Code § 20175.2 (d)(1)(A).

<sup>6</sup> See "Design Build Contracts as an Alternative Method for Public Construction by California Cities," by W. Samuel Niece, first presented to the City Attorneys' Department at the League of California Cities Annual Conference, Sept. 8, 2003; reprinted at [www.constructionweblinks.com/Resources/Industry\\_Reports/Newsletters](http://www.constructionweblinks.com/Resources/Industry_Reports/Newsletters)

cost escalation of some construction materials has made cost forecasting even more difficult. Cost-reduction changes delay construction and increase design costs. Price escalation during the delay makes the budget a moving target. With design-build, the owner knows what the building will cost when it awards the contract, provided there are no material changes to the program or unforeseen conditions.

**Reduce Owner's Exposure to Contractor Claims for Design Deficiencies.** As a matter of law, a public agency that provides construction documents (either by preparing them itself or by contracting with an architectural or engineering firm to do so) warrants that the documents are complete and accurate.<sup>7</sup> Accordingly, when the contractor uses the owner's documents to prepare its bid price, and later incurs additional costs because the owner's documents were not complete or contained inaccurate information, the contractor is entitled to recover those costs from the owner.

Even when the defects are the result of deficiencies in the design professional's services, however, the owner's ability to recover the costs incurred on account of those defects from the design professional is limited. Defects in a design professional's performance are generally assessed using a negligence standard.<sup>8</sup> The fact that the design documents contained an error is not, alone, sufficient to make the design professional liable for any resulting damages; the design professional must have failed to meet the professional standard of care. Gagne v. Bertran (1954) 43 Cal.2d 481.

The difference in the standards used to assess the owner's liability to the contractor and the design professional's liability to the owner leaves the owner in a difficult position: the contractor may be entitled to additional compensation due to a defect in the construction documents, while the owner cannot recover the costs from the design professional. Coordination issues, where the

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<sup>7</sup> United States v. Spearin, 248 U.S. 132 (1918). See e.g. Souza & McCue Construction Co. v. Superior Court (1962) 57 Cal.2d 508; Howard Contracting, Inc. v. G.A. MacDonald Construction Co. (1998) 71 Cal.App.4<sup>th</sup> 38, 55.

<sup>8</sup> This standard can be modified by contract, so that the design professional is liable for all defects in the documents on a breach of contract theory. However, design professionals resist such provisions vigorously, for two primary reasons: design fees do not reflect this level of liability, and claims arising from breach of contract are generally not covered by professional liability insurance. Since design firms often lack financial depth, the effort required to obtain the higher standard may not be justified, as payment for any substantial liability will be available only through the designer's professional liability insurance. Professional liability insurance typically covers only negligent performance.

construction documents put two or more components of a project in conflicting locations, are common examples of this situation.

On a design-build project, the owner does not furnish complete construction documents. The coordination and dimensional conflicts that give rise to so many change orders are generally resolved within the design-build team.

**Allow Owner to Consider Factors Other Than Price in Selecting the Design-Build Contractor.** One statute that expressly authorizes cities to use design-build allows award based upon "best value and other criteria" such as technical design, construction expertise and life cycle costs.<sup>9</sup> The Infrastructure Financing Act, discussed below, provides for the public agency to award the contract based on "competitive negotiations," but does not define the term.<sup>10</sup>

## **2. Cautions Re: Design-Build.**

**Agency Gives Up Design Control and Gets Only What it Specifies.** In DBB, the owner participates in developing design documents that specify every element of the project, including details of finishes, colors and fixtures. In design-build, the owner defines its project requirements through the program in broad terms. The requirements may be subject to interpretation, and there are many different construction methods and materials that may meet the stated requirements. As long as the structure the design-build contractor produces is consistent with those requirements, the design-build contractor has met its obligations.

Accordingly, the owner may get some surprises. On one design-build project, ductwork and piping remained exposed in the completed building. On another, the stairwells were enclosed as required, but there were no openings at the landings other than doorways. Both buildings met the owner's stated requirements. The owner of the first building elected to live with the industrial look; the owner of the second paid to have the design-build contractor add windows at the landings for safety and aesthetic reasons.

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<sup>9</sup> Public Contract Code Section 20175.2(d)(4)(B).

The agency's program documents should clearly define the most important project features, so it is essential for the agency to involve end-users and interested members of the community at the beginning and then address the highest priorities in the program. For example, if the building's appearance (height, style, features and color) is critical because the building is in a historic district, the program documents should include elevations and require consistency with the appearance of surrounding structures. In other projects, adjacency (or separation) of specific uses may be critical. In a police station, for example, evidence and weapons storage must be separated from areas accessible to the public and people in custody. Those factors are more important than the final building appearance, and the agency's program documents should reflect that priority.

**Owner is Responsible for Specified Equipment and Systems.** The owner remains responsible for defects in the program materials and any equipment or process it specifies. Some owners have tried to maintain control over project details and shed responsibility for the design by creating advanced design documents for the design-builder to complete. The courts have generally rejected such efforts, holding that the agency cannot have both design control and protection from design liability. See White v. Edsell Construction Company, Inc., 296 Fed.3d 1081 (Fed. Cir. 2002) (design-build contractor entitled to recover costs to change specified system of lifting steel hanger doors); Donahue Electric, Inc. (2002 VABCA LEXIS 13); 2003-1 BCA (CCH) ¶32,129 p.1. In Donahue Electric, one piece of owner-specified equipment was incompatible with another. The court noted that if the owner had specified only one piece of equipment, the design-build contractor would have been responsible for ensuring that all other parts of the system were compatible. Because the agency specified both components, however, it was responsible for the cost of making the system operational.

**Reduced Project Administration May be a Myth.** Under DBB, the owner must manage the complete design process and the bidding process, then provide administration throughout construction. While building the project, communications between the contractor and design professionals, including requests for information, submittals, field bulletins and change orders,

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<sup>10</sup> The federal procurement system provides a framework for this process. See Federal Acquisition Regulation (FAR) 15.300.

all go through the owner and require monitoring or action. On a design-build project, routine communications between the contractor and design professionals are matters internal to the design-build entity and do not involve the owner. However, the statutes authorizing design-build contain administrative requirements that may outweigh these savings, specifically prequalification and a labor compliance program.<sup>11</sup>

**Owner Must Monitor and Verify that it is Getting What it Specified.** In DBB, the architect or engineer provides some protection for the owner's interests against those of the contractor. This system of checks and balances is not available in design-build, because the design professional and contractor are one and the same. Accordingly, the owner needs a qualified representative (often an independent design professional) to confirm that the final design and construction meet the program and contract requirements.

### **C. Procedures for Design-Build.**

#### **1. Identify Authority for Using Design-Build.**

The award of construction contracts by cities is generally governed by sections 20160 et seq. of the Public Contract Code. Those statutes require that all construction contracts in excess of \$5,000 be awarded based on sealed bids received following publication of notice, and awarded to the responsible bidder that submits the lowest monetary bid. Public Contract Code Sections 20162, 20164. There are exceptions to these requirements for emergency, Public Contract Code Section 20168, and where the city determines, after receiving bids, that the project can be performed more economically with the city's own forces. Public Contract Code Section 20167. Cities can also elect to use alternative bidding procedures provided in the Uniform Public Construction Cost Accounting Act, Public Contract Code Sections 22000 et seq.

There is no express prohibition against cities using design-build. The problem arises from conflicting statutory obligations to select design-professionals based on demonstrated skills and experience, Government Code § 4525 et seq., and to award construction contracts to the lowest responsible bidder. Public Contract Code § 20164. By definition, a design-build contract

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<sup>11</sup> See Public Contract Code Section 20175.2(b)(5).

includes both design and construction, making it difficult for an agency to satisfy both requirements.

There are several options for cities that want to use design-build, which were reviewed at length in the paper prepared by W. Samuel Niece for the LOCC's Annual Conference in 2003. See citation in note 6, above. Accordingly, just a brief summary follows. It is important to identify the authority and comply with all specified procedures and requirements.

**Public Contract Code Section 20175.2.** Effective January 1, 2006, the legislature authorized all cities in the Counties of Solano and Yolo to use design-build as an alternative procedure for bidding on building construction projects, subject to city council approval. A copy of this legislation is attached to this paper. The legislation sunsets January 1, 2011. The bill applies to building projects only, and expressly excludes transportation facilities, roads and bridges.<sup>12</sup> The legislature gave these cities the option of awarding the contract based on low bid or “best value,” but mandated prequalification considering specific information and the establishment of a labor compliance program.

**Charter Cities.** Charter cities have the exclusive power to govern their “municipal affairs.” California Constitution, Art. XI, Section 5. The method by which a charter city enters into contracts is a municipal affair. Piledrivers Local Union No. 2375 v. City of Santa Monica (1984) 151 Cal.App.3d 509. However, in 2001, the legislature enacted Section 1100.7 of the Public Contract Code. That statute states that the Public Contract Code “applies [to charter cities] in the absence of an express exemption or a city charter provision that conflicts with the relevant provision of this code.” Accordingly, if a charter city wants to exempt a project from bidding requirements, or alter those requirements to accommodate design-build or other project delivery methods, it must take specific action to do so, either by amending its charter or enacting an ordinance. For examples, see ordinances adopted by the cities of Alameda and Richmond.

**Joint Powers Authorities.** Joint powers authorities provide another avenue for public agencies seeking flexibility in contracting procedures. The Joint Exercise of Power Act, Government

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<sup>12</sup> The legislature has authorized specific agencies to use design-build for transportation facilities. See note 4, above.

Code Sections 6500 et seq., provides that any joint powers authority is subject to the restrictions upon the manner of exercising the power of one of the component parties, as designated in the joint powers agreement. Government Code Section 6509. This rule allows a public agency that wants to do a design-build project but is subject to conflicting statutory requirements to enter into a joint powers agreement with an agency for which design-build is an option.

**Development Agreements.** Any city, county, or city and county can enter into a development agreement with a property owner seeking approval for a development project that requires the developer to finance and/or construct public facilities. Government Code Sections 65864 et seq. The developer is not bound by the contracting requirements applicable to the agency. Upon completion, the facilities are transferred to the public agency. The types of facilities that can be constructed in this manner include streets, sewers, transportation, drinking water, school and utility facilities. Public agencies can impose similar requirements on subdivisions through the approvals process. Government Code Section 66411.1 et seq.

**The Local Government Privatization Act.** Government Code Sections 54250 et seq. allow local agencies to contract with private entities for the financing, design, construction, repair, replacement, maintenance and operation of sewer and wastewater operations. The statutes do not restrict the project delivery method, but require the public agency to select the privatizer “through a competitive process which is not based solely on price.” Before entering into the privatizing agreement, the agency is required to evaluate the project design, capacity, feasibility, and cost of the proposed project and alternatives, and determine that the project cost is equal to or lower than conventional financing. The agency must also determine that the privatizer has the expertise to ensure continued operation and maintenance of the plant. Private sewer and water treatment facilities must meet applicable federal and state water quality standards.

**The Infrastructure Financing Act.** The Infrastructure Financing Act has the potential to revolutionize construction of fee-based infrastructure projects, yet has received surprisingly little attention.<sup>13</sup> Government Code Sections 5956 et seq. were enacted in 1996 to give local government agencies “the authority and flexibility to utilize private investment capital to study,

plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate” fee-producing infrastructure facilities. The types of projects eligible for financing under these statutes include irrigation, drainage, energy or power production, water supply, treatment and distribution, flood control, inland waterways, harbors, municipal improvements, commuter and light rail, highways or bridges, tunnels, airports and runways, purification of water, sewage treatment, disposal and water recycling, and refuse disposal, and structures or buildings, “except structures or buildings that are to be utilized primarily for sporting or entertainment events.” Government Code Section 5956.4.

The statutes allow the use of a “competitive negotiation process”<sup>14</sup> to select contractors to provide some or all of the activities listed in the statute, notwithstanding otherwise applicable provisions of the Public Contract Code. Government Code Section 5956.5. The process must utilize “demonstrated competence and qualifications” as the primary selection criteria, and must ensure that the facility is operated at prices that are “fair and reasonable” to users. *Id.*

One open question is whether the public agency would have to get voter approval for the fees in accordance with Proposition 218. At least one commentator has concluded that Proposition 218 does not apply to privatized infrastructure. See E. Brown, California Public Works Projects (Ernest Brown & Company, 3rd ed. 2003) p. 45.

**Bidding Not Advantageous.** A case decided by the California Court of Appeal twenty years ago, Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal.App.3rd 631, is frequently cited to support a public agency’s decision not to follow competitive bidding requirements in awarding a contract. In Graydon, the court held that the Redevelopment Agency was not required to seek competitive bids in awarding a contract for construction of a parking garage because the time required to solicit and obtain bids would interfere with bond financing for the project. This holding has been generalized and used to excuse public agencies from complying with bidding requirements when bidding “fails to produce an advantage and when the advertisement for competitive bids is undesirable, impractical or impossible.” The case is often extended far beyond the specific facts of Graydon.

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<sup>13</sup>E. Brown, California Public Works Projects (Ernest Brown & Company, 3rd ed. 2003), p 45.

<sup>14</sup> This term has no definition in California public procurement law, but is commonly used in federal procurement. See FAR Part 15.

## 2. The Design-Build Process.

Some common steps in implementing a design-build project:

**Identify Specific Project Benefits You Want From Design-Build.** The legislature has identified several potential benefits: reduce project cost, expedite project completion, provide design features not achievable through DBB. Public Contract Code Section 20175.2(b)(4). Industry commentators generally agree that design-build does not necessarily reduce project costs, but that this project delivery method can reduce the overall project schedule and provide innovative solutions to design challenges.

**Evaluate Trade-Offs.** As discussed above, the agency needs to be prepared to surrender a substantial measure of design control in exchange for the benefits of design-build. Can the agency really define and prioritize its needs accurately without going through a detailed design process? Will there be negative political consequences if the building doesn't meet specific expectations? Gather information from similar agencies and others in the industry about successful projects. It may be helpful to retain a construction consultant experienced with the kind of project you want to build who can elaborate on particular factors that may affect your project.

**Prepare Program Documents.** These are one of the most important elements of a successful design-build project. The documents need to depict the owner's constraints and priorities accurately, and, at the same time, allow proposers flexibility. The level of detail in the program can vary greatly: for some projects, like a parking garage, a narrative description of size, function and location may be sufficient. Other projects require more specifics, such as space allocations, adjacencies, particular materials or equipment, and appearance. All of the agency's end users should contribute to and approve the program, because they will have to live with the results. Again, a consultant may be able to assist the agency in preparing a program appropriate for the particular project. Public Contract Code Section 20175.2 states that the documents "shall be prepared by a design professional who is duly licensed and registered in California."

**Prequalify Design-Build Teams.** Whether the contract will be awarded based on price alone, best value or some other criteria, the agency should establish minimum requirements for the design-build teams. (Public Contract Code Section 20175.2 expressly requires this step.) Address any special expertise, such as historic rehabilitation, seismic upgrades, or public safety facilities. Ideally, the prequalification process should yield at least three qualified teams.

**Create Appropriate Contract Documents.** Design-build involves issues different from DBB, some of which are discussed below. The agency's standard construction documents may not be suitable for a design-build project. Various construction organizations, including the Design-Build Institute of American, American Institute of Architects, and Engineers Joint Construction Documents Committee, have forms that can be used as a starting point for drafting appropriate agreements. (Note, however, that these documents are not prepared to protect cities' best interests, and should be revised accordingly.)

**Evaluate Proposals.** The request for proposals should state selection criteria clearly so that prospective design-build teams can prepare responsive proposals tailored to the project. Clear drafting will also help protect the selection process from challenges. Some selection processes require the design-build teams to prepare proposals that involve design effort or other activity beyond preparing a price. Consider offering a stipend for detailed proposals. Doing so will help retain the interest of prospective vendors, encourage high-quality proposals and may give the agency the option of utilizing the material from unsuccessful proposals.<sup>15</sup>

### **3. Consider Special Legal Issues.**

**Ownership of Documents.** On DBB projects, the owner owns the design documents, subject to the terms of its agreement with the design professional. The owner provides the documents to whatever contractor it selects to build the project. If that contractor is terminated or abandons the project, the owner simply gives the documents to another contractor. In contrast, the design-

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<sup>15</sup> For a more detailed discussion of this practice, see N. C. Smith and C. D. Ryan, "Design-Build Stipends and Payment for Work Product," Nossaman Guenther Knox & Elliott LLP Memorandum dated April 20, 2004.

build entity creates the construction documents and, absent an agreement giving the agency rights, can retain the documents if the project does not go forward or there is a dispute. The owner can be liable for copyright infringement if it uses the documents to complete the project through another contractor.<sup>16</sup> The owner will also incur substantial additional costs in having a replacement design-build contractor prepare new documents, and may lose the ability to use certain details of the design.

**Subcontractor Listing.** The Subletting and Subcontracting Fair Practices Act, Public Contract Code Sections 4100 et seq., requires prime contractors to list, in their bid documents, the names of all subcontractors who will perform work or supply and install specially fabricated materials valued in excess of one-half of one percent of the contractor's bid price and the work each listed subcontractor or supplier will perform. The statutes prohibit prime contractors from subcontracting work that exceeds the listing threshold for which no subcontractor is listed in its bid and restrict substitution of subcontractors to limited circumstances specified in the statutes. These requirements conflict with design-build because the contractor generally cannot get subcontractor bids until the design documents are finalized and approved. Early subcontractor commitments would limit the design-build contractor's ability to negotiate with subcontractors. Public Contract Code 20175.2 addresses this issue by requiring the design-build entity to award subcontracts through a competitive process. See Public Contract Code Section 20175.2(f).

**Bonding and Insurance Issues.** The changes in contractual arrangements that go with design-build require adjustments to the usual insurance requirements for construction projects. A contractor's commercial general liability (CGL) policy may not provide coverage for risks inherent in design-build, specifically economic damages due to design errors or omissions. The "joint venture exclusion" may exclude claims arising from the conduct of partnerships or joint ventures unless the entity is specifically listed as a named insured.

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<sup>16</sup> See Nelson-Salabes v. Morningside Development, 284 F.3d 505 (4th Cir. 2002), discussed in J. Holland's article, "Copyright Infringement of Design Documents" (International Risk Management Institute, November 2002).

The design-build entity will need to provide professional liability insurance. These policies are generally written on a “claims made” basis, so the insurance policy must be in effect at the time a claim is made in order for coverage to arise. Most of these policies have a period of only one year, and must be renewed annually to keep coverage available. In California, the statute of limitations for patent defects is four years from the date of substantial completion, and the outside statute of repose for defects is ten years from the date of substantial completion. Code of Civil Procedure Sections 337.1, 337.15. If the design-build entity is a joint venture or other business entity that may not maintain coverage after the project is complete, it is important to purchase an extended reporting period for claims (sometimes called a “tail”) so that errors and omissions insurance will be available for defects discovered after the project is in use.<sup>17</sup> Without an extended reporting period, the claimant may have little effective recourse for design-based defects that appear years after a facility is complete.

On a design-build project, a performance bond equivalent to those provided on conventional construction projects (which covers completion of the entire project in accordance with the plans and specifications) would include design services. The surety industry objected to assuming design risks, and the legislature has limited bonding requirements on design-build contracts awarded pursuant to Public Contract Code Section 20175.2 to the amount necessary “to cover the contract amount for nondesign services.” Public Contract Code Section 20175.2(e)(1). This limitation is consistent with previous decisions. See Sheffield Assembly of God Church, Inc. v. American Insurance Co. et al., 870 S.W.2d 926.

**Warranty.** As discussed above, on a DBB project, the owner warrants the completeness and accuracy of the plans and specifications. As a result, if the contractor constructs the project in accordance with the plans and specifications and industry standards of workmanship, the contractor is not responsible if the completed project does not meet the owner’s expectations. In design-build, however, responsibility for design and construction merge, and courts are holding design-build entities responsible for performance of the completed project. See Arkansas Rice Growers Co-op. Ass’n v. Alchemy Industries, Inc., 797 F.2d 565 (C.A. 8 1986). In Arkansas

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<sup>17</sup> G. Hunt, “Practice Tips: The Allocation of Risks in a Design/Build Construction Project,” 21 Los Angeles Lawyer 21 (January, 1999) (hereafter “Practice Tips”).

Rice, the court found that the design-build entity's failure to provide a design capable of achieving performance criteria (burning rice hulls at a specified rate) constituted a material breach of contract that relieved the owner of any obligation to pay for the plant. The court interpreted the design-build entity's liability very broadly; the fact that the owner supplied some equipment that was compromising plant operations did not affect the court's decision. Because the designer approved the owner-supplied equipment, the court held that it was responsible for ensuring that the equipment would not have adverse effects on other parts of the facility.

### **III. Summary**

There is substantial room for improving delivery of public construction projects. Design-build is not a cure-all. It is, however, a project delivery option that, when implemented properly, can benefit cities.

### **IV. Tips for Successful Design-Build Projects**

- Retain a design consultant experienced in the type of project and in preparing design-build program materials to advise the City throughout the project.
- Involve end-users early.
- Address all priorities in program materials. What you specify is what you get.

#### **BUT**

- Leave room for flexibility in resolving design and construction challenges; don't over specify.
- Monitor design and construction for compliance with program requirements.
- Raise and resolve questions early.
- Be fair.

## **Public Contract Code Section 20175.2.**

(a) (1) This section provides an alternative procedure for bidding on building construction projects applicable in cities in the Counties of Solano and Yolo upon approval of the appropriate city council.

(2) These cities may award the project using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable cities to utilize cost-effective options for building and modernizing public facilities. The Legislature also recognizes the national trend, including authorization in California, to allow public entities to utilize design-build contracts as a project delivery method. It is not the intent of the Legislature to authorize this procedure for transportation facilities, including, but not limited to, roads and bridges.

(2) The Legislature also finds and declares that utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process. The Legislature also finds that the cost-effective benefits to cities are achieved by shifting the liability and risk for cost containment and project completion to the design-build entity.

(3) It is the intent of the Legislature to provide an alternative and optional procedure for bidding and building construction projects for cities.

(4) The design-build approach may be used, but is not limited to use, when it is anticipated that it will: reduce project cost, expedite project completion, or provide design features not achievable through the design-bid-build method.

(5) If a city council elects to proceed under this section, the city council shall establish and enforce, for design-build projects, a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code. This requirement shall not apply to any project where the city or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

(c) As used in this section:

(1) "Best value" means a value determined by objectives relative to price, features, functions, and life-cycle costs.

(2) "Design-build" means a procurement process in which both the design and construction of a project are procured from a single entity.

(3) "Design-build entity" means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services, as needed, pursuant to a design-build contract.

(4) "Project" means the construction of a building and improvements directly related to the construction of a building, but does not include streets and highways, public rail transit, or water resources facilities and infrastructure.

(d) Design-build projects shall progress in a four-step process, as follows:

(1) (A) The city shall prepare a set of documents setting forth the scope of the project. The documents may include, but are not limited to, the size, type, and desired design character of the buildings and site, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the city's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California. (B) Any architect or engineer retained by the city to assist in the development of the project-specific documents shall not be eligible to participate in the preparation of a bid with any design-build entity for that project.

(2) (A) Based on the documents prepared in paragraph (1), the city shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the city. The request for proposals shall include, but is not limited to, the following elements: (i) Identification of the basic scope and needs of the project or contract, the expected cost range, and other information deemed necessary by the city to inform interested parties of the contracting opportunity, to include the methodology that will be used by the city to evaluate proposals, and specifically if the contract will be awarded to the lowest responsible bidder. (ii) Significant factors which the city reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors. (iii) The relative importance of weight assigned to each of the factors identified in the request for proposals. (B) With respect to clause (iii) of subparagraph (A), if a nonweighted system is used, the agency shall specifically disclose whether all evaluation factors, other than cost or price, when combined are: (i) Significantly more important than cost or price. (ii) Approximately equal in importance to cost or price. (iii) Significantly less important than cost or price. (C) If the city chooses to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for proposal and shall publish separately, or incorporate into the request for proposal, applicable rules and procedures to be observed by the city to ensure that any discussions or negotiations are conducted in good faith.

(3) (A) The city shall establish a procedure to prequalify design-build entities using a standard questionnaire developed by the city. In preparing the questionnaire, the city shall consult with the construction industry, including representatives of the building trades and surety industry. This questionnaire shall require information including, but not limited to, all of the following: (i) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members known at the time of bid submission who will participate in the design-build contract, including, but not limited to,

mechanical subcontractors. (ii) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, as well as a financial statement that assures the city that the design-build entity has the capacity to complete the project. (iii) The licenses, registration, and credentials required to design and construct the project, including information on the revocation or suspension of any license, credential, or registration. (iv) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance. (v) Any prior serious or willful violation of the California Occupational Safety and Health Act of 1973, contained in Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596) settled against any member of the design-build entity, and information concerning workers' compensation experience history and worker safety program. (vi) Information concerning any debarment, disqualification, or removal from a federal, state, or local government public works project. Any instance where an entity, its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive, or were found by an awarding body not to be a responsible bidder. (vii) Any instance where the entity, its owners, officers, or managing employees defaulted on a construction contract. (viii) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of Federal Insurance Contribution Act (FICA) withholding requirements settled against any member of the design-build entity. (ix) Information concerning the bankruptcy or receivership of any member of the design-build entity, including information concerning any work completed by a surety. (x) Information concerning all settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the design-build entity during the five years preceding submission of a bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this period. (xi) In the case of a partnership or other association that is not a legal entity, a copy of the agreement creating the partnership or association and specifying that all partners or association members agree to be fully liable for the performance under the design-build contract. (B) The information required pursuant to this subdivision shall be verified under oath by the entity and its members in the manner in which civil pleadings in civil actions are verified. Information that is not a public record pursuant to the California Public Records Act (Chapter 3.5 of Division 7 of Title 1 of the Government Code) shall not be open to public inspection.

(4) The city shall establish a procedure for final selection of the design-build entity. Selection shall be based on either of the following criteria: (A) A competitive bidding process resulting in lump-sum bids by the prequalified design-build entities. Awards shall be made to the lowest responsible bidder. (B) The city may use a design-build competition based upon best value and other criteria set forth in paragraph (2) of subdivision (d). The design-build competition shall include the following elements: (i) Competitive proposals shall be evaluated by using only the criteria and selection procedures specifically identified in the request for proposal.

However, the following minimum factors shall each represent at least 10 percent of the total weight of consideration given to all criteria factors: price, technical design and construction expertise, life cycle costs over 15 years or more, skilled labor force availability, and acceptable safety record. Each of these factors shall be weighted equally. (ii) Once the evaluation is complete, the top three responsive bidders shall be ranked sequentially from the most advantageous to the least. (iii) The award of the contract shall be made to the responsible bidder whose proposal is determined, in writing, to be the most advantageous. (iv) Notwithstanding any provision of this code, upon issuance of a contract award, the city shall publicly announce its award, identifying the contractor to whom the award is made, along with a written decision supporting its contract award and stating the basis of the award. The notice of award shall also include the city's second and third ranked design-build entities. (v) For the purposes of this paragraph, "skilled labor force availability" shall be determined by the existence of an agreement with a registered apprenticeship program, approved by the California Apprenticeship Council, which has graduated apprentices in each of the preceding five years. This graduation requirement shall not apply to programs providing apprenticeship training for any craft that has been deemed by the Department of Labor and the Department of Industrial Relations to be an apprenticeable craft in the five years prior to enactment of this act. (vi) For the purposes of this paragraph, a bidder's "safety record" shall be deemed "acceptable" if their experience modification rate for the most recent three-year period is an average of 1.00 or less, and their average Total Recordable Injury/Illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category, or if the bidder is a party to an alternative dispute resolution system, as provided for in Section 3201.5 of the Labor Code.

(e) (1) Any design-build entity that is selected to design and build a project pursuant to this section shall possess or obtain sufficient bonding to cover the contract amount for nondesign services and errors and omissions insurance coverage sufficient to cover all design and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build entity for the purposes of purchasing necessary bonding to cover the activities of the design-build entity. (2) Any payment or performance bond written for the purposes of this section shall be written using a bond form developed by the city.

(f) All subcontractors that were not listed by the design-build entity in accordance with clause (i) of subparagraph (A) of paragraph (3) of subdivision (d) shall be awarded by the design-build entity in accordance with the design-build process set forth by the city in the design-build package. All subcontractors bidding on contracts pursuant to this section shall be afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1. The design-build entity shall do both of the following: (1) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the city. (2) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established pursuant to this section.

(g) The minimum performance criteria and design standards established pursuant to paragraph (1) of subdivision (d) shall be adhered to by the design-build entity. Any deviations from those standards may only be allowed by written consent of the city.

(h) The city may retain the services of a design professional or construction project manager, or both, throughout the course of the project in order to ensure compliance with this section.

(i) Contracts awarded pursuant to this section shall be valid until the project is completed.

(j) Nothing in this section is intended to affect, expand, alter, or limit any rights or remedies otherwise available at law.

(k) (1) If the city elects to award a project pursuant to this section, retention proceeds withheld by the city from the design-build entity shall not exceed 5 percent if a performance and payment bond, issued by an admitted surety insurer, is required in the solicitation of bids. (2) In a contract between the design-build entity and the subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld may not exceed the percentage specified in the contract between the city and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a member of the design-build entity, prior to or at the time the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the design-build entity, then the design-build entity may withhold retention proceeds in excess of the percentage specified in the contract between the city and the design-build entity from any payment made by the design-build entity to the subcontractor.

(l) Each city that elects to proceed under this section and uses the design-build method on a public works project shall submit to the Legislative Analyst's office before December 1, 2009, a report containing a description of each public works project procured through the design-build process that is completed after January 1, 2006, and before November 1, 2009. The report shall include, but shall not be limited to, all of the following information: (1) The type of project. (2) The gross square footage of the project. (3) The design-build entity that was awarded the project. (4) The estimated and actual project costs. (5) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protests. (6) An assessment of the prequalification process and criteria. (7) An assessment of the effect of retaining 5 percent retention on the project. (8) A description of the Labor Force Compliance Program and an assessment of the project impact, where required. (9) A description of the method used to award the contract. If the best value method was used, the report shall describe the factors used to evaluate the bid, including the weighting of each factor and an assessment of the effectiveness of the methodology. (10) An assessment of the project impact of "skilled labor force availability." (11) An assessment of the most appropriate uses for the design-build approach.

(m) Any city that elects not to use the authority granted by this section may submit a report to the Legislative Analyst's office explaining why the city elected not to use the design-build method.

(n) On or before January 1, 2010, the Legislative Analyst's office shall report to the Legislature on the use of the design-build method by cities pursuant to this section, including the information listed in subdivision (l). The report may include recommendations for modifying or extending this section.

(o) This section shall remain in effect only until January 1, 2011, and of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

## Other Resources

### Books

American Institute of Architects, California Council, Handbook on Project Delivery Methods (2000).

B. Bramble and J. West, eds., Design-Build Contracting Claims (Aspen Law & Business, 1999).

Design-Build Institute of America, An Introduction to Design-Build (1994).

Design-Build Institute of America, Design-Build Manual of Practice.

E. Brown, California Public Works Projects: Managing Projects and Resolving Disputes (Ernest Brown & Company, 2003), available at [www.earnestbrown.com](http://www.earnestbrown.com)

J. Heisse, The Design/Build Process: A Guide to Licensing and Procurement Requirements in the 50 States and Canada" (American Bar Ass'n Forum on the Construction Industry 1997).

J. Sweet, Sweet on Construction Law (American Bar Ass'n Forum on the Construction Industry 1997).

M. Loulakis, Design Build for the Public Sector (Aspen Publishers, 2003)

M. Loulakis, Design Build Lessons Learned (Wickwire Gavin, P.C.) (annual publication).

M. Loulakis, Design-Build Contracting Handbook (Aspen Publishers, (2nd ed. 2001)).

R. Cushman & K. Taub, Design-Build Contracting Handbook (John Wiley & Sons, Inc. 1992).

### Articles

D. Donohue and M. Loulakis, Design-Build Contracting in the Public Sector, Construction Briefings, second series, No. 99-3, February, 1999.

G. Hunt and J. Darling, "Practice Tips: The Allocation of Risks in a Design/Build Construction Project," 22 Los Angeles Lawyer 21, January, 1999.

### Other

Design-Build Institute of America website, at [www.dbia.org](http://www.dbia.org)