



Construction Delivery Methods: How to Choose?

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Choosing the Right Delivery Method

Introduction.

Many California public agencies develop large building and infrastructure projects infrequently and agency staff and the attorneys representing these agencies may have limited experience with the options available to procure design and construction services. Over the past several years the legislature has authorized new procurement methods for local agencies and in some cases expanded the range of local agencies that can take advantage of these methods.

The default approach for public design and construction is generally design-bid-build, where plans and specifications are prepared by licensed architects or engineers hired by the agency, the work is put out to competitive bid among contractors, and the lowest, responsible bidder is selected to construct the work.¹ For many decades, public construction projects proceeded on this design-bid-build model.

Starting in the 1990s, the Legislature began authorizing alternative project delivery methods on a limited basis for certain agencies and projects. In the 2000s, the legislature added authority for construction manager at risk delivery methods, and then in 2014 authorized local agency design-build projects through SB 785. In 2022, the legislature passed SB 706 to authorize local agency progressive design-build, which has some significant differences from the earlier design-build statute. Public agencies may be able to utilize these procurement methods and even public-private partnerships that may allow financing and flexibility outside of the Public Contract Code. The local agency procurement landscape today is for more complex and can require an investment of time to decipher.

This paper provides a brief overview of the available procurement methods, key reasons they offer an alternative to design-bid-build, provide you with a working understanding of each method, and provide a few practical considerations for a public agency evaluating procurement methods.

Procurement Considerations.

The design-bid-build delivery method lets a public owner secure competitive pricing on a defined scope of work and, in concept, should provide the owner with the lowest price and a commitment from the contractor to complete the work within the time specified. In practice, design-bid-build does not always result in certainty on time and price. Some of the reasons for this lack of certainty are addressed in the alternative delivery approaches.

First, in design-bid-build, the contractor is given a set of drawings and specifications and a relatively short period of time to price the work. The Contractor is unlikely to make assumptions or draw inferences from the design and will bid only what is shown. Because the procurement is price-competitive, a Contractor may feel pressure to adjust its bid pricing

1. The Government Code requires a public entity's engineer to prepare and file either complete and accurate plans and specifications or a work authorization describing the work to be performed, together with an estimate of the cost thereof, prior to the commencement of the work. Failure to comply with this requirement is a misdemeanor. (Gov. Code §§ 4004, 4007). These provisions effectively require design-bid-build in the absence of an express authorization under some other provision of law.

downward to secure the contract (to be the lowest bidder). The outcome is often that requests for additional compensation by the contractor (in the form of change requests and/or) claims become part of the design-bid-build process.

Second, in design-bid-build, when issuing plans and specifications for bidding, the agency owner warrants to bidders that the plans and specifications are complete and accurate. This warranty concept is often referred to as the *Spearin* doctrine after the case *United States v. Spearin* (1918) 248 U.S. 132, where the Supreme Court awarded a contractor damages after it constructed a non-functioning dry dock and sewer based on faulty plans and specifications.² However, the agency owner receives no corresponding warranty of accuracy/completeness from its project designers (architects/engineers), who will generally be held responsible for errors in plans and specifications only on a showing that the designers' work fell below the standard of care. The result is that the owner may be faced with a liability gap if the project design documents do not satisfy its legal warranty to the contractor.

Third, in design-bid-build, the public owner has limited freedom to select a contractor. The lowest, responsible bidder³ must generally be awarded the work. Prequalification statutes may allow an agency to screen potential bidders based on qualification criteria, but on design-bid-build projects public owners generally cannot weigh non-price factors when making the selection. On certain projects a public owner may prefer to consider and give more weight to qualifications, past experience with similar projects, proposed teams, and proposed work plans, rather than price alone.

These three considerations are a significant motivator for public owners to look for alternatives to design-bid-build.

Construction Manager At-Risk; CM/GC Delivery Method

The Construction Manager At-Risk⁴ ("CMAR") delivery method allows the owner to engage a contractor to provide both preconstruction services and general contracting services for construction. The CMAR is typically engaged while the architect/engineer is still developing the design. When the design is approximately 60% complete the CMAR provides preconstruction review of the design to offer a 'contractor's eyes' on schedule, materials, means and methods of construction, and other items that should make the project more efficient and less costly during construction. A second review is typically conducted when the design is 90% complete. The CMAR will also break up the work into trade packages for subcontractor bidding.

2. This doctrine is reflected in part in Pub. Cont. Code § 1104 provides in part that "[n]o local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design build projects."

3. The term "responsible," as applied to bidders, is defined in Pub. Cont. Code § 1103, which defines a "Responsible Bidder" as "a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract."

4. This approach is also referred to as Construction Manager/General Contractor (CM/GC). Pub. Cont. Code § 20146 authorizes counties to utilize construction manager at risk for certain project types and is an example of enabling legislation for this delivery method.

The CMAR develops a Guaranteed Maximum Price (“GMP”) for the work based on the scope of work and schedule. The GMP is typically assembled from subcontractor estimates or bids, the CMAR’s own expected costs for general conditions and general requirements, and an allowance for clarifications, profit and contingencies. If the GMP is acceptable to the owner, the parties typically execute a change order incorporating the GMP into the contract and the CMAR begins construction.

This delivery method addresses two of the three procurement considerations noted above. First, the CMAR has much more significant time to evaluate the design, to provide feedback and input that may result in changes to the design, and an opportunity to develop a GMP over time with this knowledge. As a result, the owner’s price risk may be reduced as the GMP is expected to accurately reflect the scope of work based on the schedule.

The owner can also consider the use of an incentive contingency, often 3% of the GMP. If changes occur during construction that could have been avoided through the CMAR’s preconstruction work, the costs to pay for the change are drawn from the contingency. Any remaining contingency may be available to the contractor at project end. This may act as an incentive for the contractor to carefully perform its preconstruction services.

Second, most statutes authorizing CMAR allow for contractor selection on a ‘best value’ basis, meaning a public owner can consider non-price factors.⁵ The owner can consider factors like the contractor’s proposed team, its proposed work plan, qualifications and past projects, and performance in interviews. The public owner can develop a scoring system that weighs certain factors greater than others based on its needs.

The CMAR delivery method does not resolve the owner’s *Spearin* risk but in theory should reduce the likelihood of such claims. The CMAR’s constructability review is generally within the scope of its license as a general contractor and is not equivalent to a peer review by a licensed architect or engineer. However, early engagement of the CMAR and the CMAR’s participation in preconstruction services should minimize CMAR contentions that it misunderstood the scope or work or priced only what was shown.

Design-Build Project Delivery: Local Agency Design-Build Act

The concept in design-build procurement is that the design builder – often a contractor/design firm team – assumes responsibility for both design and construction of the project. This contrasts with design-bid-build, where the owner separately contracts with the design firms and with the contractor.

The Local Agency Design-Build Act (the “Local Agency Act”) became effective January 1, 2015.⁶ The local agency prepares a set of documents setting forth the scope and estimated price of the project, which include performance specifications and plans that must be prepared by

5. See, e.g., Pub. Cont. Code § 20146(b)(1): “‘Best value’ means a value determined by objective criteria related to the experience of the entity and project personnel, project plan, financial strength of the entity, safety record of the entity, and price.”

6. Pub. Cont. Code § 22164.

licensed design professionals.⁷ In practice, these initial plans and specifications are referred to as ‘bridging documents’ because they bridge the gap between conceptual ideas and more definitive design. Bridging documents are typically prepared to 35%, complete enough for the public owner to have control over major design decisions but still leaving significant room for the design-build team to use its skills and expertise to complete them.

For procurements under the Local Agency Act, the public owner engages in a two-step process to select a design-build team. First, the agency issues a request for qualifications to either pre-qualify or shortlist design-build teams for final selection. The request for qualifications must set forth information regarding the project, the procedure for selection of a design-build team, and the factors the agency will use in making the selection. Prequalification allows the owner to secure a bench of firms that will submit proposals and is typically scored on a ‘pass/fail’ basis. Shortlisting is a process where only the top ranked proposers (often the top 3) are allowed to submit proposals.

Once the request for qualifications process is complete, the agency moves to step two, a request for qualifications. The prequalified or shortlisted firms are invited to submit competitive, sealed proposals based on the bridging documents and other project information developed by the agency. Here the agency has two options: it can select a firm based on ‘best value’ or based on the lowest lump sum price submitted. If using ‘best value’, the local agency shall weigh price, technical design and construction expertise, and life cycle costs of 15 or more years as well as other relevant factors. The proposal responses must be ranked, with the award going to the firm offering the best value to the public agency.

Design-build under the Local Agency Act addresses all three of the procurement considerations noted above. First, the local agency has the option to select a design-build firm on a lump sum basis (i.e., price only) but can also select based on best value criteria. The Local Agency Act defines certain factors that must be considered but allows the agency to include other criteria and weigh the criteria accordingly.

Second, when using a ‘best value’ selection, the public owner can request development of a GMP for the work following award. As with the CMAR delivery method, a GMP should provide the owner with greater price certainty. When selecting a design-builder using a lump sum approach, the procurement process should provide the design-builder with sufficient time and the ability to develop costs as part of its response to the requests for proposal.

Third, the public agency can likely transfer the *Spearin* doctrine risk to the design builder. Pub. Cont. Code § 1104 provides in part that “[n]o local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, *except on* clearly designated design build projects.” The legislature expressly contemplated this risk transfer.

One disadvantage of the Local Agency Act is the two-step selection process. Although the Local Agency Act does not expressly require the development of bridging documents to a particular level of completion, licensed professionals are typically engaged to do so, a process

7. Pub. Cont. Code § 22164(a)(1).

that requires time and money. The design firms preparing the bridging designs are generally disqualified from participating on the design-build teams that construct the work, as discussed below.

Design build firms proposing on projects under the Local Agency Act may also be required to undertake significant work to prepare their responses to the second step, the request for proposals. Particularly when proposal evaluations include review of aesthetic aspects and detailed cost submissions, proposing firms may be forced to incur substantial expense for what may be an unsuccessful result. Some owners have tried to ameliorate these issues with the use of stipends for firms that do not win the job.

The progressive design-build statute addresses these issues by providing a single step selection process that does not contemplate development of bridging documents.

Progressive Design-Build.

The progressive design-build statute became effective on January 1, 2024. There are two primary differences between design-build under the Local Agency Act and the progressive design-build statutes.

First, the progressive design-build statute provides for a single step procurement, rather than the two-step process required under the Local Agency Act. The local agency must prepare and issue a request for qualifications to select a design-build entity, including the “size, type, and desired design character of the project” plus the expected cost range, the method used to evaluate proposer qualifications, and any other information deemed necessary by the agency.⁸

Further detailed requirements for the request for qualifications package are listed in the statute. After receipt of responses to the request for qualifications, the local agency may evaluate the submissions based solely upon the information provided and has the option of interviewing “some or all” of the proposers to further evaluate qualifications.⁹ There is no second step requiring a request for proposals for progressive design build.

Second, after selection of a design-build firm, the local agency may enter into a contract to begin design and preconstruction services to develop a GMP for the project. Upon agreement of the GMP, the local agency may amend the contract for the remaining design, preconstruction, and construction work to complete the project. The local agency has “sole and absolute” discretion whether to enter into the amendment, however, and the statute provides the local agency with an ‘off ramp’ if it decides not to amend. The local agency may (1) solicit completion proposals from the other firms that responded to the request for qualifications, or (2) upon written determination, formally solicit proposals from other design-build entities on a ‘best value’ basis.¹⁰

8. Pub. Cont. Code § 22185.3(a)(1).

9. Pub. Cont. Code § 22185.3(c).

10. Pub. Cont. Code § 22185.5(c)(1).

This statutory ‘off ramp’ provides the local agency with options if the GMP is not acceptable and should create incentives for the design-build team because it must secure the second phase of work with an acceptable GMP.

As with design-build under the Local Agency Act, progressive design build addresses the three concerns with design-bid-build: pricing, design risk transfer, and more freedom in contractor selection. Progressive design build also shares features of the CMAR process in that it involves a single step procurement and two phases of work, with preconstruction, design, and GMP development followed by a second construction phase.

Common Features of the Design-Build Statutes.

There are several common features for design-build under the Local Agency Act and the progressive design statute that staff and counsel should be aware of:

Conflict of Interest Issues. Gov. Code section 1090 and case decisions interpreting the statute generally prevent design firms involved in master planning from working as part of a design-build team. This rule is grounded in the concept that the designer should not be allowed to set the scale of the project – which will have a direct relationship to the cost of the work – and then be allowed to participate in the profits. The more recent design-build statutes require public agencies to develop conflict of interest policies to address these issues. Generally, firms that are involved in master planning or development of bridging documents are excluded from participating in design-build teams.

Handling Subcontractors. Public contracting statutes and case decisions exist to protect subcontractors from bid shopping and bid peddling¹¹ and to enforce prevailing wage laws. The primary examples are the Subletting and Subcontracting Fair Practices Act in Public Contract Code section 4100 et seq. and within the Labor Code. The Local Agency Act and the progressive design-build statute require that proposers provide and enforceable commitment that subcontractors of every tier will use a skilled and trained workforce. This requirement may be satisfied through a project labor agreement. Proposers may also be allowed to include certain trade subcontractors as part of their proposing team. Subcontractors not included in the proposal may be procured through competitive bids, or in some instances, through ‘best value’ selections. Staff and counsel must carefully review the enabling statute to ensure compliance.

Standard Template for Statement of Qualifications. Most of the enabling statutes call for the public owner to prepare a standard template for statement of qualifications to evaluate design build proposers. The statutes may require an agency to collect information regarding the proposing entity, experience on similar projects, licenses to complete the work, ability to secure required bonds and insurance, the financial ability to perform and complete the work, and an acceptable safety record.

11. Bid shopping is defined as “the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids.” *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.* (1969) 71 Cal. 2d 719, 726 n.7. Bid peddling “is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job.” *Id.*

Public Private Partnerships.

Depending on the nature of the project, staff and counsel can consider a public-private partnership model. These delivery methods generally include design and construction, with private sector financing and often a long-term commitment for operations and maintenance. These statutes may allow a public owner to develop projects without some of the constraints of the Public Contract Code.

One option is the Infrastructure Financing Act in Gov. Code section 5956 et seq. which is intended to provide local agencies with “the authority and flexibility to utilize private investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities.”¹²

This act is available to a broad range of local agencies, including cities, counties, school districts, community college district, and joint powers authorities among others. The act requires a competitive negotiation process for selection of the private entity to provide the design and construction services.

That process is generally defined in the statute, which also provides that “[o]ther than these criteria and applicable provisions related to providing security for the construction and completion of the facility, the governmental agency soliciting proposals is not subject to any other provisions of the Public Contract Code or this code that relates to public procurements.”

Other options are available through lease-leaseback transactions under the Government Code, including Sections 25515 and 54240. These delivery structures typically use an agreement between the public owner and a private corporation for the lease of a parcel of land to the corporation for construction of a facility, which is then leased back to the public owner under a sublease. The sublease payments provide compensation for the costs of construction plus a profit for the corporation. Lease-leaseback structures can provide public owners with greater flexibility and control over the terms of the agreement.

Key Considerations for Alternative Delivery Methods.

Finally, when considering an alternative to design-bid-build, staff and counsel should consider the following issues at the outset:

What is the Legal Authority for the Procurement. As noted in the introduction, the default method may be design-bid-build. The Public Contract Code contains many enabling statutes for alternative project delivery methods, some which are entity and/or project specific, while other statutes provide broad authorization. Many statutes have limits on the number of projects or cost thresholds that make them unavailable for small projects. Understanding what methods are available is an important first step.

What is the Source of Money for the Project. Legal counsel should understand the documents related to any third-party funding to know how project funds can be deployed and if

12. Gov. Code § 5956.

there are restrictions placed on the use of funds for certain delivery methods. Some agencies place restrictions on procurements based on price evaluation. Other agencies may have different requirements for disbursement of soft costs for design versus hard costs for construction. Understanding how and when funds will be available is important. Funding delays or long reimbursement cycles may create challenges that cannot be overcome in certain delivery methods.

What is the time to Project Delivery? With a design-bid-build approach, the design is complete (or nearly complete) before it is competitively priced. Some alternatives to design-bid-build allow for design to occur in parallel to construction planning and pricing, and projects can be structured for phased approaches that may speed construction times. Many people view alternative delivery methods as providing faster start to completion times.

Industry Comfort Level. For certain types of projects, the construction industry is comfortable with contracts, understands how to price the work, how to get paid for changed work, and how to manage projects. In these instances, introducing alternatives to design-bid-build could be disruptive. For other projects, the design and construction industry may be more receptive to alternative approaches.

Conclusion

The procurement landscape for local agencies has changed significantly over the past several years, giving agencies a far broader range of potential models for developing large building and infrastructure projects. Understanding the differences among those models—some slight, some significant—is the necessary first step in deciding which model best fits the project at hand.