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Innovative Approaches to Building Infrastructure: Thinking Beyond Design-Bid-Build

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About Us



12

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Best Best & Krieger serves as a trusted partner and strategist to public and private sector clients across the nation. With offices spanning from coast to coast, the firm's attorneys provide innovative legal solutions and cost-effective representation, working to protect and advance clients' interests at every turn. BB&K is recognized for decades of groundbreaking successes, loyal service, and a culture of inclusion and respect.

Agenda



1. Introduction
2. Project Delivery Methods for Local Agencies
3. What is Progressive Design-Build?
4. Senate Bill 706 (and Other PDB Statutes)
5. The Benefits, Lessons Learned, and Potential Drawbacks of Progressive Design-Build
6. Legal Considerations
7. Other Alternate Project Delivery Methods
8. Q&A

Project Delivery Methods for Public Agencies

Subtitle

Project Delivery Methods for Public Agencies



- Design-bid-build
- Prequalification
- Design-build
- Construction manager at-risk
- Construction manager/general contractor
- Progressive design-build
- Energy conservation contracts
- Fee-producing infrastructure facilities
- Others

What is Progressive Design-Build?

Subtitle

What is Progressive Design-Build?

“A project delivery process in which both the design and construction of a project are procured from a single entity that is selected through a qualifications-based selection at the earliest feasible stage of the project.”



What is Progressive Design-Build?: Phase 1 – Preconstruction Services

- Design-Builder collaborates with owner to create or confirm the project's basis of design and then advances the design.
- Design-Builder provides owner with a formal proposal for Phase 2 services (finish design and construction) when the design has achieved an appropriate level of definition that aligns with the owner's needs.
- If, for any reason, the parties cannot reach agreement on the Phase 2 pricing, the owner has the right to exercise an "off-ramp" where it can use the design developed by the Design-Builder and move forward with the project through other project delivery methods.



What is Progressive Design-Build?:

Phase 2 – Final Design and Construction

- Once the owner and Design-Builder agree upon commercial terms, the Design-Builder will complete the design and construction of the project in accordance with those terms.
- The Design-Builder will also be responsible for any testing, commissioning, and other services that have been agreed upon.



Senate Bill 706 (and Other Progressive Design-Build Statutes)

Subtitle

Senate Bill 706

- Effective January 1, 2024
- Codified at Public Contract Code section 22185 *et seq.*

“A local agency may procure progressive design-build contracts and use the progressive design-build contracting process described in this chapter for up to 10 public works projects in excess of five million dollars (\$5,000,000) for each project.”



Senate Bill 706



- Key features of SB 706
 - Applicable to cities, counties, and special districts on any project over \$5 million except on state-owned or state-operated facilities.
 - Local agency must adopt a standard organizational conflict-of-interest policy.
 - 1-step RFQ process that includes a standard template request for statements of qualifications.
 - The Design-Builder must provide an enforceable commitment that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades with an exception if there is a Project Labor Agreement.

Senate Bill 706



- Key features of SB 706
 - Selection of the Design-Builder is based on certain factors such as technical design and construction expertise along with other non-price related factors.
 - The local agency may require that a preliminary cost estimate be included in the design-build entities' responses and consider those costs in evaluating the statements of qualifications.

Senate Bill 706



- Key features of SB 706
 - Once a Design-Builder is awarded a contract, they can begin design and preconstruction activities sufficient to establish a GMP.
 - For subcontractors, the local agency may either identify specific types of subcontractors in the SOQ or, on projects over \$10,000,000 and where the value of the subcontract exceeds $\frac{1}{2}$ of 1% of the contract price, the Design-Builder must follow a competitive bidding process and award subcontracts on a best value process.
 - After agreement on a GMP, the contract is amended to contract for completion of the design and construction of the project.

Senate Bill 706



- Key features of SB 706
 - Any costs exceeding the GMP are the responsibility of the Design-Builder. The parties can also agree to a cost sharing agreement for any costs less than the GMP.
 - If the parties do not reach agreement on a GMP, the local agency may solicit proposals from those firms that submitted SOQs or solicit pricing from other PDB entities and award a contract based on a best value basis.

Other Progressive Design-Build Statutes

- SB 617 (Pub. Cont. Code, § 22180 *et seq.*) – Transit projects over \$5,000,000
- SB 991 (Pub. Cont. Code, § 22170 *et seq.*) – Water projects over \$5,000,000
- AB 1845 (Pub. Cont. Code, § 21568 *et seq.*) – Recycled and related water projects
- AB 137 (Pub. Cont. Code, § 10198 *et seq.*) – Department of General Services projects



Other Progressive Design-Build Statutes

- SB 146 (Pub. Cont. Code, § 10215 *et seq.*) – Caltrans/DWR projects over \$25,000,000
- AB 134 (Pub. Cont. Code, § 10199 *et seq.*) – Department of Corrections and Rehabilitation/San Quentin
- Others including for schools, etc.



The Benefits, Lessons Learned, and Potential Drawbacks of Progressive Design-Build

The Benefits of Progressive Design-Build

- What are the benefits of progressive design-build?

- Procurement
- Types of Project
- Project Administration



The Benefits of Progressive Design-Build: Procurement

- What benefits have you seen in the procurement process for progressive design-build projects?



The Benefits of Progressive Design-Build: Procurement

- Efficient procurement.
- Selection of Design-Builder based on performance and experience criteria rather than lowest price.
- One contract for design and construction of the project.
- Design to vision and budget.
- Innovation.



The Benefits of Progressive Design-Build: Types of Projects

- What types of projects been benefitted most from using progressive design-build?



The Benefits of Progressive Design-Build: Project Administration

- What benefits have you seen while administering progressive design-build projects?



The Benefits of Progressive Design-Build: Project Administration

- Design-Builder assumes responsibility for the completeness and accuracy of architectural or engineering plans and specifications.
- Reduces (theoretically) contractor change orders.
- Early procurement of equipment; early work packages.
- Collaboration and risk sharing through GMP process.
- Transparency of costs, real time pricing.



Lessons Learned of Progressive Design-Build

- What are some lessons learned from using progressive design-build?



Potential Drawbacks of Progressive Design-Build

- What are the potential drawbacks of progressive design-build?
 - Political challenges - Cost to construct the project are unknown (for the most part) at procurement time.
 - Funding source may hinder full use of progressive design-build.
 - Can be difficult to take the off ramp.
 - Requires highly involved owner's advisor/independent cost estimator.



Legal Considerations

Subtitle

Legal Considerations

A solid set of procurement and contract documents produces successful projects.

Procurement Documents:

- Follow legislation and any funding source
- Clear and concisely drafted
- Make clear how entities will be evaluated and selected
- Reserve rights to the local agency



Legal Considerations

A solid set of procurement and contract documents produces successful projects.

Contract Documents:

- Single contract covering both phases 1 and 2
- Process for GMP amendment
- Early procurement and work packages
- Clear subcontractor procurement process
- Process to cost self-performed work
- Off ramps



Other Alternate Project Delivery Methods

Subtitle

Other Alternate Project Delivery Methods

- Fee-producing infrastructure facilities (Government Code section 5956 *et seq.*)
- Energy conservation contracts (Government Code section 4217.10 *et seq.*)
- Construction manager at-risk



Other Alternate Project Delivery Methods



- Fee-producing infrastructure facilities (Government Code section 5956 *et seq.*)
 - Enables local agencies to utilize private sector investment capital to study, plan, design, construct, develop, finance, rebuild, improve, repair, or operate, or any combination thereof, “fee-producing infrastructure facilities.”
 - Includes, among other things, water projects, municipal improvements, airports, wastewater projects and buildings.
 - Qualified fee-producing infrastructure facilities may be procured through a “competitive negotiation process” and “shall not require competitive bidding.”

Other Alternate Project Delivery Methods



- Energy conservation contracts (Government Code section 4217.10 *et seq.*)
 - Alternate energy equipment (e.g., solar, wind), conservation measures, conservation services
 - Public agency must make certain findings
 - Allows for flexibility in procurement

Other Alternate Project Delivery Methods



- Construction manager at-risk (aka construction manager/general contractor)
 - Allowed for use by counties, certain local agencies, charter cities, and those local agencies not subject to the Public Contract Code.
 - The CMAR entity initially acts as a consultant to the owner during the design development phase and then transitions into a general contractor role upon commencement of the construction phase.
 - In other words, the CMAR entity wears two hats.
 - The first hat is worn during the design phase, when the CMAR entity acts as the owner's agent in providing input and advice to the project team.
 - Once the project shifts to the construction stage, the CMAR entity then switches hats and begins providing general contractor services to the owner at a negotiated GMP.



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Questions?

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Thank You for Attending



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