



THE ARCHITECT'S GUIDE TO

DESIGN-BUILD

S E R V I C E S



THE AMERICAN INSTITUTE OF ARCHITECTS

Design-Build on Government Projects



8

Heather Shore, Esq.
Eugene Commander, Assoc. AIA, Esq.
Shughart Thomson & Kilroy, PC
Denver, Colorado

Some of the largest growth in the use of design-build delivery is in the public sector, as more and more laws are passed authorizing government agencies to use this method of project delivery. As of January 2003, 38 states had legislation addressing design-build. These laws vary considerably, though, so not all state agencies have wholesale authority to engage in design-build delivery on every project. For example, in Arizona, Florida, Idaho, Nevada, and West Virginia, broad laws permit extensive use of design-build by the state and, in some cases, local governments and school districts, with detailed statutes outlining the selection process. By contrast, in Delaware, Louisiana, Massachusetts, and Missouri, very narrow legislation permits limited use of design-build on specific projects or by a particular government entity, such as the Department of Transportation. Twelve states had no design-build law on the books at all. With more than 40 design-build statutes, California was the leading state in the number of laws addressing design-build delivery, but this was due to the limited manner in which the state legislature handled design-build—passing separate laws for separate government entities and, in some cases, for single projects. Design-build delivery has also grown steadily in the federal sector as a result of several laws that opened the doors to widespread use of this form of project delivery.

This chapter discusses some of these laws, highlighting hurdles in the procurement of design-build contracts that result from statutory restrictions regarding competitive bidding and qualifications-based selection.

USE OF DESIGN-BUILD BY FEDERAL AGENCIES

The federal public sector is by far one of the largest users of design-build contracting.¹ During the last half century, more than a dozen federal agencies, including the Navy, the Department of Energy, the Federal Highway Administration, the Federal Bureau of Prisons, the Department of Housing and Urban Development, the Air Force, NASA, the U.S. Postal Service, the Army Corps of Engineers, and the General Services Administration have used the design-build method of project delivery.²

Broad enabling legislation passed in 1996 has dramatically increased the use of design-build by federal agencies. Even so, some impediments to the use of design-build remain in the federal arena, the most prevalent being the procurement process, which has traditionally required federal government agencies to bid contracts competitively.

The first documented federal government design-build project occurred in the late 1950s and early 1960s when NASA used design-build to ensure the rapid delivery of launch and research facilities. Shortly thereafter, in 1969, Congress and the secretary of defense authorized the use of turnkey construction to build military family housing quickly and efficiently. Since that time, federal government use of the design-build method has accelerated rapidly, expanding into dormitories, military facilities, border stations, courthouses, mail distribution facilities, laboratories, and highways. The largest growth has been in this last area, highways.

In 1986 Congress passed a law allowing the military to use a "one-step turnkey selection procedure" utilizing the design-build method of construction.³ In 1992 Congress passed legislation allowing the Federal Transit Administration (FTA) to use design-build for ten pilot projects.⁴ The FTA has authorized two pilot design-build projects: the \$300 million Union Station Gateway terminal in Los Angeles and a \$160 million extension of Baltimore's light rail system. In 1999 the Department of Energy embarked on its first design-build project, building a \$100 million, 267,000-square-foot supercomputer facility known as the Los Alamos National Laboratory, in New Mexico. In 2001 the Department of Defense (DoD) awarded a design-build contract for construction of 60 two- and three-story town houses at Bolling Air Force Base in the District of Columbia.

Looking ahead, it is clear not only that more and more federal agencies are authorizing design-build as a preferred method of project delivery, but some are making it a mandate. For example, in 1998 the Federal Highway Administration (FHWA), a long and ardent proponent of design-build on federally funded transportation projects, announced plans to implement the Transportation Equity Act for the 21st Century, known as TEA-21.⁵ Under this act, the FHWA is required to develop limited design-build regulations for projects for which the process is suited and to report on the effectiveness of design-build delivery by June 9, 2003.

The Corps of Engineers is using design-build on a variety of projects for the military. In 2000 the Corps was directed to use the two-phase design-build method enacted by the Federal Acquisition Reform Act of 1996 on five civil works pilot projects.⁶ In response to this directive, the Corps solicited proposals of no more than \$30 million in November 2000 for an athletic facility to be built for the Air Force Academy. Other Corps design-build projects include a hangar and taxiway at Wright Patterson Air Force Base and Defense Equal Opportunity Management Institute facilities at Patrick Air Force Base, estimated to cost more than \$10 million.

The Federal Bureau of Prisons (FBOP), which has led the nation in the use of design-build delivery for years, has requested \$1.3 billion from Congress to help finance the construction of several prisons in 2002 and 2003.⁷ The bureau is using design-build delivery to construct a \$139 million high-security facility and minimum-security prison camp in Martin County, Kentucky, and a \$129 million high-security prison in Preston County, West Virginia, with an adjacent minimum-security camp to house up to 300 men. In order to handle the sharp increase in the prison population since 1980, the FBOP has decided to use this method for all future construction of prison systems.⁸

The Two-Phase Bid Selection Process

For decades, the "traditional methods" of procuring public federal projects required the use of a low-bid, price-based selection process. To address these impediments to design-build contracting by federal agencies, in 1996 Congress passed legislation, known as the Clinger-Cohen Act, to permit a uniform two-step approach to major design-build contracts.⁹ The act provides detailed guidance on the factors that may be considered in determining whether use of two-phase contracting procedures is appropriate.¹⁰ The act permits selection of a limited number of design-build contractors in phase one, based predominantly on an evaluation of ability. Cost-related factors are not permitted in this phase, eliminating competition based solely on price and allowing for a comparison of cost to quality.

Selection of the final contractor occurs in phase two, based on price and design approach. Limiting price considerations to the second phase of the selection process essentially prequalifies the prospective teams and streamlines the expenses associated with preparing a phase two design proposal to only those bidders with a strong chance of being awarded the contract. The design-build contract is ultimately awarded to the team with the highest overall ranking, based on both qualifications and cost.

Within a year after passing the Clinger-Cohen Act, Congress amended the Federal Acquisition Regulations (FAR), which regulate the procurement practices of certain government agencies.¹¹ The amendments incorporated design-build policies and procedures federal agencies must follow when selecting and evaluating design-build proposals under the two-phase process. The FAR provides significantly more detail about how government agencies should approach the act's two-phase selection procedures.

Like the Clinger-Cohen Act, the FAR excludes technical or price information from phase one considerations. However, it includes performance-based considerations such

as technical qualifications, capability to perform, and past performance. After evaluating phase one proposals, the most highly qualified bidders are chosen and requested to submit a phase two proposal. The FAR provides specific examples of phase two evaluation factors, including design concepts, proposed technical solutions, management approach, and pricing information.

Federal Regulations Restricting Design-Build

Section 36.209 of the Federal Acquisition Regulations, which regulates the bidding of projects by federal entities, prohibits the awarding of federal contracts to the same architecture or engineering firm that designed the project, "except with the approval of the head of the agency or authorized representative." In 2000 an engineering firm was barred from competing for a design-build contract for the Lake Pleasant sewage treatment plant in Phoenix, Arizona, because the firm had performed technical studies for the city before the decision was made to use the design-build method for the project.¹²

Some federal agencies have avoided the requirements of FAR 36.209 by carving out special exceptions in their regulations to allow for designer-led design-build projects. For example, the U.S. Department of Agriculture regulations permit the head of contracting to award a contract to the person or entity (inclusive of its subsidiaries or affiliates) who designed the project (48 C.F.R. § 436.209). Under this exception, an architecture or engineering firm could act as prime contractor on a design-build project or could form a subsidiary or affiliate to do so.

STATE LAWS GOVERNING DESIGN-BUILD

Traditionally, states have not used design-build as a method for procuring design and construction of public utilities, buildings, and similar projects because of strict competitive bidding laws requiring public entities to award contracts to the lowest bidder. Even where design-build has been authorized, some limitations still exist. Indeed, although as many as 27 states expressly allowed the use of design-build in awarding public design and construction contracts in the year 2000, a significant majority provided for only limited use for certain agencies under certain circumstances.¹³

Although few, if any, state and local procurement laws expressly prohibit design-build delivery, many nevertheless create barriers to the use of the method. For example, some state procurement laws have the effect of prohibiting design-build because they require that a project be split into separate design and construction phases and that plans and specifications be prepared before bids are selected. Other states prohibit the award of a single construction contract to a general contractor by requiring different tasks to be bid by different trade contractors. Some set forth strict requirements that must be followed in using design-build methods. Still others impose qualifications-based selection, competitive bidding, and licensing laws on state agencies. All of these types of requirements make it difficult for a state or local agency to procure design and construction under a single contract.¹⁴

Other states present no obstacles to design-build delivery, although they do not expressly permit it either. Therefore, in many cases it is not clear whether this method of design and construction is acceptable.¹⁵

The recent surge in legislation approving the design-build method for use on state and local projects suggests that state officials are beginning to understand and appreciate the significant financial benefits of design-build construction. The increase in use of the design-build method, generally, is based on a variety of economic factors, including but not limited to the following:¹⁶

- ▲ A greater number of complex transactions at the inception of projects, which create a desire for more definitive budget plans early in the project
- ▲ Instability in the financial marketplace, which provides more debt financing for institutional projects and can significantly affect project costs if the construction period is extended
- ▲ An increase in technological complexity and innovation in building material components and systems, which causes product suppliers and fabricators to take on more responsibility for design and quality control
- ▲ Growing concern about disputes and litigation, which drives up construction and transaction costs

For example, in 2000 Arizona made significant changes in its procurement laws by modifying, repealing, and amending its professional and construction services statutes to allow government agencies at all levels to use design-build delivery.¹⁷ Similarly, Nevada amended its statutes in 2001 to authorize certain public bodies to contract with a design-build team for certain public works projects and to eliminate some of the state's strict notice requirements for advertising for preliminary proposals from design-build teams.¹⁸ In 1999 Colorado passed legislation allowing the Colorado Department of Transportation (CDOT) to use the design-build method of project delivery.¹⁹ Following the passage of this legislation, Colorado voters approved funding for the largest design-build transportation/transit project in the country, known as "T-Rex," to be administered jointly by CDOT, the Regional Transportation District, the Federal Highway Administration, and the Federal Transit Administration.²⁰

In 2001 Maine repealed its procurement statutes governing public improvements and enacted laws that specifically allow the use of the design-build method of construction.²¹ Maine also enacted legislation authorizing the Department of Transportation to use the design-build method of project delivery, to be evaluated on either a best-value or low-bid basis.²² Minnesota, traditionally a state that abides by strict competitive requirements for procurement of construction contracts, recently passed legislation to allow the design-build process to be used for transportation projects.²³ The legislation contains guidelines that require the use of a two-step competitive process utilizing public solicitation for design-build services.²⁴

In 2000 the state of Washington reenacted and amended legislation pertaining to

public works contracting procedures, extending the time the state may use alternative public works contracting procedures, including design-build, from contracts signed before 2001 to contracts signed before 2007.²⁵

Project-Specific Statutes

Rather than pass blanket legislation that allows for the use of design-build delivery by either an entire state or its departments, some states enact statutes that authorize the use of design-build only for a particular project. Often these statutes do not identify a particular project but simply describe the project in general terms in order to avoid constitutional prohibitions against passing legislation for just one project. For example, many states have agreed to allow the use of design-build for the specific purpose of constructing water and wastewater plants.²⁶ Kansas authorized the use of design-build delivery to construct a single parking garage. Missouri authorized the building of a particular detention center using the design-build method. Massachusetts passed a statute to allow for design-build delivery in development of the state's hospital network capital facility projects, as well as legislation to build a \$28 million prison facility in Berkshire County.²⁷

Virginia passed special legislation to permit use of design-build delivery for the construction of Onion Mountain State Prison, a \$72 million correctional facility.²⁸ In preparation for the Winter 2002 Olympic Games, Salt Lake City relied on legislation allowing the state Department of Transportation to use design-build delivery to resurface and repair Interstate 15, one of the largest design-build projects ever performed in the United States, at a cost of over \$1.59 billion.²⁹

State Laws Prohibiting or Restricting Use of Design-Build

As previously stated, few states, if any, expressly prohibit the use of design-build to procure public works construction contracts. For example, in 2001 Kentucky amended its state procurement laws to prohibit local governments from hiring one firm to provide both architectural services and construction management services on the same project.³⁰ Significantly, the amendment exempts design-build projects, presumably in cases in which, for example, an architect provides the design and then acts as construction manager to oversee the trade contractors.

In Pennsylvania, architects are not prohibited from using design-build services as long as they are done in strict accordance with practices established by the legislature.³¹ This requirement makes it difficult for a public entity in Pennsylvania to use the design-build method for construction. Furthermore, Pennsylvania law requires public entities to contract separately with the lowest bidders for plumbing, heating, ventilation, and electrical work.³² Accordingly, Pennsylvania courts have prevented design-build contracts from going forward because all the trades were bundled into one contract.³³

New York has similar laws, known as "Wicks Laws," that require separate contracts for plumbing, heating, air-conditioning, and electrical work on projects of more than \$50,000.³⁴ Similarly, New Jersey encourages the awarding of separate contracts in con-

nection with plumbing, heating and ventilation systems, electrical work, and structural steel and ornamental iron work when the costs associated with the project exceed \$17,500.³⁵ These laws effectively bar design-build contracts where a single contract is awarded to design and build the entire project, including these specialty trades.

Some state laws prohibit architects or engineers from bidding on the projects they design. For example, Vermont generally prohibits an engineering firm that does not hold a contractor's license from entering into design-build contracts with a public entity and then subcontracting the work to a prime contractor, except when the services are for the design and construction of small residential projects, storage buildings or garages incidental to a dwelling, farm buildings, or pre-engineered buildings or buildings for which plans have been stamped or sealed by a licensed professional in his or her applicable field.³⁶

Under Arizona's design-build statutes, a firm cannot be considered for the "short list" on a design-build project if that firm has previously provided any services related to the project.³⁷ In 2000 this restriction prevented an engineering firm from competing for a design-build contract for a sewage treatment plant because the firm had conducted technical studies for the city before the city decided to use the design-build method to construct the project.³⁸ The engineering firm challenged its disqualification, but the city countered that under Arizona design-build laws, the contract selection committee could not "short-list" any person or firm associated with a firm that had provided services relating to the project. The Design-Build Institute of America testified in support of the engineering firm, arguing that when preliminary work has been performed and the delivery method changes (from traditional procurement to design-build), the consultant should not be excluded from participating in the project on a design-build team as long as the information the consultant provides is made available to all bidders. This is intended to prevent an unfair competitive advantage being given to a firm that had prior experience with the owner and the project design. The city disagreed, and the project proceeded without the engineering firm.

Trends and Developments in State Design-Build Laws

There has been significant change in the public sector in allowing state and local entities to procure construction projects using the design-build method—even in states with long-standing competitive bidding requirements. For example, Pennsylvania's licensing board had declared that design-build had to be designer-led, based on the legislature's prohibition against the offering or rendering of design services by anyone but a licensed professional. Beginning in 1998, however, three major developments occurred that paved the way for Pennsylvania entities to procure public works projects using design-build delivery. First, the Commonwealth Court held that a prime contractor did not violate the state's laws governing architects by offering "free customized designs" with its bid.³⁹ Second, the legislature amended the laws governing the licensing of architects to expressly include the approval of design-build contracting.⁴⁰ Third, the State Board of Architects promulgated regulations that expressly omitted previously proposed regulations that would have addressed the role of architects in design-build projects.⁴¹

In light of this dramatic increase in acceptance of the use of design-build delivery, legislatures are also beginning to establish committees of qualified persons to oversee the bidding and construction process. Often, these groups must establish specific factors to be used in evaluating design-build proposals and specific systems that measure their quality and technical merits.⁴² For example, in 2001, Texas amended the state's contracting methods for construction of state facilities, granting the procurement commission authority to use design-build.⁴³ In doing so, the legislature required the commission to designate an engineer or architect to act as its representative and established strict guidelines for the commission to follow during the bidding and selection process.

Some states, such as Virginia and West Virginia, have created administrative design-build boards to ensure compliance with state procurement requirements.⁴⁴

Model Regulations for Design-Build Procurement

Anticipating the states' move away from strict competitive bidding requirements and toward alternative two-phase selection methods more appropriate for design-build, in 1996 the Design-Build Institute of America decided to publish a Model Regulation for Design-Build Procurement.⁴⁵ The model outlines standard procedures to be followed in selecting design-build firms that encourage a public agency to, in the first phase, solicit qualification statements using public announcement procedures, such as newspaper advertisements. From the response, the agency can prepare a short list of three to five teams based on those qualifications.⁴⁶ The agency then can prepare a design criteria package, using a design professional selected by the applicable professional selection law or an agency design professional.

The DBIA model recommends that the design criteria package be presented to the short list of teams, in a second phase, who would be invited to develop the following two detailed proposals: (1) a "qualified proposal" with preliminary designs, outline specifications, schedule and other data, and (2) a "price proposal," submitted in a separate sealed package. The agency would then evaluate each qualified proposal and rate each team based on its submission. DBIA suggests the price proposals be opened later at a public forum and considered jointly with each team's rating for the qualified proposal. DBIA also states that the contract should be awarded to the team with the "best value" of quality and cost.

LOCAL GOVERNMENTS AND DESIGN-BUILD DELIVERY

In addition to the increase in statewide design-build procurement, cities are beginning to pass ordinances allowing for the use of design-build for bidding construction projects. For example, in Virginia, all local public entities may establish their own purchasing procedures, which may include provisions that do not require the use of competitive sealed bidding as long as the procedures are set forth in writing and the purchase does not exceed \$50,000.⁴⁷ Likewise, municipalities may procure construction con-

tracts using a fixed price or not-to-exceed price design-build agreement.⁴⁸ In 2001 the state of Washington passed new legislation allowing its cities with a population greater than 70,000 to utilize design-build for public works contracting.⁴⁹

Local municipalities in some states may avoid competitive bidding procurement requirements by regulating themselves under a local "home rule" charter. In Colorado, the City and County of Denver adopted an ordinance allowing the Department of Public Works⁵⁰ and the Denver International Airport and all similar aviation facilities⁵¹ to use methods other than competitive bidding, such as design-build. Specifically, the manager of public works and the manager of aviation have authority to award construction contracts based on either the lowest competitive bid or a competitive selection process as defined by ordinance.⁵² In the absence of an ordinance defining the competitive selection process, either manager may determine how the selection process will be defined, which could include design-build.

In California, despite many statutes that effectively limit use of design-build delivery, some local agencies have found ways to structure construction bidding for the design-build method without express authority from the state.⁵³ The City of Los Angeles awarded a \$712 million design-build contract, as part of a joint agency formed with the City of Long Beach, to construct a 10-mile double-track underground rail system known as the "Mid Corridor" project.⁵⁴ The city constructed the rail system pursuant to an exception to the Los Angeles charter that provides an alternative to the competitive bidding process in cases where competitive negotiations are based on the "ultimate lowest cost."

Local municipalities have also developed creative ways of utilizing and financing the design-build method of procurement without express legislative authority. Denver built its new Civic Center using design-build delivery, which was accomplished by separately financing the construction, and then arranging for the building to be leased back to the city.⁵⁵ As design-build gains momentum in the public sector, it is likely that local municipalities will continue to find ways to get around competitive bidding restrictions in considering and accepting proposals to construct complex projects using the design-building method.

CONFLICTS BETWEEN DESIGN-BUILD AND COMPETITIVE BIDDING LAWS

Design-build projects do not focus solely on the cost of construction; rather, they take into account other factors such as experience and skill. As such, design-build projects often conflict directly with competitive bidding statutes that require public works construction contracts to be awarded to the lowest-cost bidder. This has led to a number of lawsuits filed by contractors and taxpayers who feel that price should be the only basis for awarding construction contracts.

In 1987 a taxpayer brought suit against the City of Juneau, Alaska, based on its decision to award a design-build contract in excess of \$5 million for the construction of a

parking garage and marine park.⁵⁶ She alleged the city's contract violated competitive bidding requirements set forth in the city charter and ordinance code. The matter was in litigation for years and resulted in two published opinions from the state Supreme Court. The superior court agreed with the taxpayer and issued an injunction when the structure was 50 percent completed. The Alaska Supreme Court reversed this decision, concluding that for purposes of qualified immunity, the conduct of the city in awarding the contract fell within the scope of their authority, was discretionary, and did not violate clearly established law.⁵⁷

Similarly, in a 2000 Oregon case, *Associated Bldrs & Contr., Inc., v. Tri-County Metro. Trans. Dist.*, 12 P.3d 62 (Ore. Ct. App. 2000), the Court of Appeals upheld an exception to the state's competitive bidding laws that allows public agencies to use "alternate contracting and purchasing practices," including design-build, if the local contract review board finds that certain conditions have been met. The Tri-County Metropolitan Transportation District in Portland, Oregon (TMTDP) declared exempt from competitive bidding requirements a \$125 million design-build contract by Bechtel Infrastructure Corporation (Bechtel) to extend an existing light rail system to Portland International Airport. Associated Builders & Contractors, Inc. (ABC) challenged the decision, saying it violated state competitive bidding laws, and lost. ABC appealed, claiming among other things that even though the TMTDP may exempt a contract from competitive bidding, it is not excused from requiring another form of competitive procurement.

The appellate court disagreed, concluding that because of the unique terms of the contract, Bechtel was essentially a "sole source entity" for the light rail extension agreement. Further, the court held, as a local contract review board, that TMTDP had the power to award the contract based on a provision in the competitive bidding statutes that permits a public agency to exempt a contract from competitive bidding by employing an alternative contracting method. In doing so, the court held, TMTDP did not favor Bechtel over any other contractor, encourage favoritism, or substantially reduce competition. For these reasons, the appellate court affirmed the lower court's decision and allowed the procurement to proceed.

Similarly, the Alabama Supreme Court upheld a local board of education's decision to award a contract to perform an energy audit on county school facilities, which led to the procurement of an additional \$1 million contract for the installation, design, and construction of systems to make it possible for school facilities to attain a certain level of energy conservation.⁵⁸ A taxpayer challenged the board's decision, citing state competitive bidding laws. The court rejected the taxpayer's challenges, concluding the energy audit contract was exempt from competitive bidding under the "engineering services" exception and finding that the additional equipment was merely "incidental to the purchase of the [original contract]."

Conversely, in the Virgin Islands, a contractor successfully sought an injunction against the government for improperly negotiating a design-build contract for construction of a \$25 million prison.⁵⁹ The Virgin Islands procurement statutes require most public construction contracts to be competitively bid, but they allow an exception for contracts for professional services, such as architectural design work, which

may be procured through negotiation. Relying on the professional services exception, the government negotiated a design-build contract; C&C Manhattan challenged the decision after learning its low bid had been rejected. The court found in favor of C&C Manhattan, concluding the exception cited by the government applies "only to highly technical contracts 'where the crux of the project package' is an exempt service and the requirement of non-exempt services are merely incidental to the professional services." The court concluded that, because the construction work on the prison project accounted for nearly 70 percent of the total contract, it did not satisfy these requirements. According to the court, if it had found in favor of the government, "the exception for professional services would swallow the requirements of competitive bidding for public works construction projects, contrary to the legislative intent of the statute."⁶⁰

THE BROOKS ACT AND ARCHITECT SELECTION LAWS

In 1972 Congress enacted legislation governing how public funds are to be spent in procuring construction projects.⁶¹ The Brooks Act prohibits the competitive selection of design professionals on federal projects and requires that selection be based solely on "demonstrated competence and qualification[s]" rather than price. The underlying premise of the Brooks Act is that federal projects, which must be built using the lowest-cost contractor, are to be designed by the most qualified design firm. This method of choosing architects and engineers to design federal projects is known as *qualifications-based selection* (QBS).

The QBS method is widely used by government entities for hiring architects and engineering professionals. However, QBS conflicts directly with the government's competitive bidding requirements, which are based solely on price. Many government agencies get around the competitive bidding requirements by soliciting bids from principal contractors and requiring them to select and contract with the architect or engineer.⁶² Often, this method undermines the Brooks Act requirement that design professionals be the most qualified, because most principal contractors pursue the least expensive design firm in order to qualify as the lowest bidder. This raises significant legal issues such as whether a public body can delegate the selection of the design firm to a low-bidding contractor and whether the design firm can be hired, directly or indirectly, on the basis of competitive bidding.

State Mini-Brooks Acts

Many states have passed laws patterned after the federal Brooks Act, requiring state and local agencies to utilize the QBS system for procuring professional design services on public projects. Others have adopted regulations or executive orders that accomplish the same objectives as the federal act. These laws and regulations, known as "mini-Brooks Acts," allow state and local entities to negotiate contracts for architectural or engineering services in lieu of the more formal bidding procedures.

Conflicts between the Brooks Act and Design-Build Procurement

Because of the inherent conflicts between hiring architects based on qualifications and contractors based on competitive bidding, public use of design-build often generates a challenge from some sector. In Florida, a group of architects filed a lawsuit against the City of Lynn Haven, seeking an injunction against the expenditure of public funds for a contract that would permit a design-build contractor to choose the architect for a construction project.⁶³ The obvious concern, of course, was that the low-bidding contractor might select an architect based on price, not qualifications. The Court of Appeals agreed with the architects, finding that the city's procedures violated the state's mini-Brooks Act and undermined the effectiveness of the state's procurement act.

Some states have referred these conflicts to their state attorney general, who have issued opinions that specifically detail the state's procurement policies in light of the design-build method. For example, the Texas attorney general has opined that design-build contracts awarded on the basis of competitive bids violate the Texas Professional Services Procurement Act because the act prohibits the purchase of architectural or engineering services by competitive bidding.⁶⁴ Similarly, in 1993 the Arkansas attorney general issued an opinion questioning whether design-build delivery violated the state's architect-engineering selection statute.⁶⁵

DESIGN-BUILD SELECTION LAWS

There are many ways to prepare and respond to requests for qualifications (RFQs) and requests for proposals (RFPs) for design-build work, and several groups publish guides on these subjects. In 1995 the DBIA published "Design-Build RFQ/RFP Guide for Public Sector Projects." That same year, the AIA and AGC jointly published a handout titled "AIA/AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector," which encourages the following basics:

- ▲ Adopt general criteria to determine what projects will be appropriate for design-build.
- ▲ Formally adopt general procedures for selecting design-build contractors.
- ▲ Review local laws and regulations that might limit design-build.
- ▲ Prepare a solicitation that clearly spells out the procedures to be followed in selection of the design-builder and management of the project.
- ▲ Set out criteria to be used for selection and identify the composition of the selection panel.

- ▲ Provide assurance that the project is fully funded.
- ▲ Set out the scope of work, program, equipment needs, and so on.
- ▲ Provide site information, survey, and borings.
- ▲ Provide all budget requirements, MBE/WBE requirements, schedule, and an outline specification.

The AIA/AGC Guideline recommends a two-phase (or two-envelope) selection process similar to that used by the federal government.

The "Two-Envelope System"

The design-build method of selection can be based solely on qualifications, solely on price, or on a combination of price and qualifications. Public sector procurement of design-build delivery is accomplished primarily through a combination of price and qualifications. This combination is typically achieved through a weighted scoring system known as the "two-phase" or "two-envelope" selection process. In it, design-build teams are first ranked according to qualifications to prequalify (or short-list) up to a certain number of teams. In the second phase, teams submit cost proposals. The team with the best overall score is awarded the contract. The two-step procedure separates the technical proposals from the fixed price and is an effective way to deliver the best value to the public entity because designer-builders are most often chosen on their past performance and not simply their quoted price.

AIA, AGC, and DBIA all recommend use of this two-phase process. The AIA goes one step further in recommending the payment of a "stipend" to the unsuccessful teams to help offset the costs of preparing the design and proposals. Specifically, the AIA/AGC Guidelines state that selection criteria should provide the "weight" that will be given to each criterion. Under these guidelines, during phase one but after submittals are received, a "short list" of prequalified finalists is established consisting of three to five design-build teams. The guidelines state that the short list to may be based on written submittals alone or may include personal interviews. The criteria used to establish a short list are limited to the following:

1. The ability to satisfactorily carry out the project design and construction requirements
2. Past performance of team members
3. Relevant experience of the team or team members
4. Financial capacity to perform

During phase one, the soliciting entity may not receive or consider cost. Bifurcating technical factors from price prevents the review of qualifications from being tainted. In the second phase, competitors submit proposals concerning their design and construction approach to the project, ability to meet program requirements, management plan, and price for design and construction of the project. The weight given to price

varies; but the guidelines recommend that this determination be made before the design-build proposal is solicited.

▲ INCREASING ACCEPTANCE OF DESIGN-BUILD DELIVERY

As design-build gains momentum in the public sector, both federal and state agencies must continue to work through the issues of procuring contracts for construction services and materials on the basis of something other than the traditional competitive lowest-bid method. With increased use of the design-build method of procurement, the public sector is likely to continue to question whether they have actually received the best value for their tax dollars. However, the questions and issues concerning the use of design-build delivery are being hammered out, and more laws are being created and special exceptions to existing legislation made. Through the resulting increase in use of this delivery method in the public arena, it is likely that state and federal agencies, as well as the general public, will begin to appreciate the cost savings and other advantages of using the design-build method of procurement.

▲ NOTES

1. See K. Molenaar, A. Songer, and M. Barash, "Public-Sector Design-Build Evolution and Performance," *Journal of Management in Engineering* 54 (March/April 1999).
2. See, e.g., Design-Build Institute of America, "Guide to the Federal Design-Build Marketplace," (March 2000). This publication lists federal agencies that use the design-build process and recaps the historical use of the design-build method by the federal government.
3. See 10 U.S.C. § 1682.
4. U.S. Department of Transportation, Federal Transit Administration, "Design/Build: A New Approach" (January 1994).
5. See U.S. Department of Transportation, Federal Highway Administration, Special Experimental Project No. 14, "FHWA Initiatives To Encourage Quality Through Innovative Contracting Practices," (October 23, 1999).
6. See S. 2796, Design-Build Contracting, 146 Congressional Record, H11624, H11631 (October 31, 2000).
7. See T. Ichniowski and S. Winston, "Prisons: A Positive Signal for Fiscal 2001 Budget Boost," *Engineering News-Record* (March 13, 2000), 11.
8. Ibid.
9. See Clinger-Cohen Act of 1996, Pub. Law 104-106.
10. See 10 U.S.C. § 2305a. Title 41, section 253 of the Clinger-Cohen Act provides no additional guidance; rather, it leaves the statutory implementation to the individual contracting agency that chooses to use the two-step procedure. See 41 U.S.C. § 253m.
11. See 48 C.F.R. §§ 36.102-36.104 & 36.300-36.303-2.
12. See "Phoenix Court Hears Bid Protest," *Design-Build Dateline*, (November 2000), 11.
13. These states are Alaska (Alaska Stat. § 36.30.200) (all agencies using state funds); Arizona (Ariz. Rev. Stat. §§ 28-3051 & 28-7362) (transportation emergencies); California (Cal. Pub. Cont. Code §§ 10503(b) and 10708, 20221.1, 20360, 20381, Cal. Pub. Utility Code

- §§ 10013, 130238 & 130242) (public-private partnership authority, universities, BART, Los Angeles MTA, West Bay Rapid Transit Authority, local wastewater and sewer); Connecticut (Conn. Gen. Stat. Ann. § 8-21c, 7-483) (housing, municipalities-public/private urban development); Delaware (De. Code Ann. tit. 29 §§ 6404 & 6901 *et seq.*) (solid waste authority) (as amended); Florida (Fla. Stat. Ann. § 235.211(5) (as amended) (education); Hawaii (Haw. Rev. Stat. § 103D-304, 206X-7) (governmental bodies, Honolulu Convention Center Authority); Idaho (Idaho Code § 67-5711A) (Department of Administration); Kansas (Kan. Stat. Ann. §§ 68-2001 *et seq.*) (turnpike authority); Kentucky (Ky. Rev. Stat. Ann. § 164A.575(9) (higher education facilities); Louisiana (La. Rev. Stat. Ann. §§ 40:451, 44:408) (Resource Recovery and Development Authority, housing, State Archives); Maryland (Md. Code Ann. State Fin. & Proc. § 3-602(g)(1) (as amended) (capital projects); Massachusetts (Mass. Gen. Laws Ann. ch. 7, § 42B, ch. 29, § 7E, ch. 149 § 44A) (West 1996) (capital facility projects); Montana (Mont. Code Ann. § 60-2-112) (West 2001) (DOT); Nebraska (Neb. Rev. Stat. § 79-2952) (education finance); Nevada (Nev. Rev. Stat. § 338.010, as amended, 338.155, as amended, 338.1727, 341.171) (public improvements and works); New Hampshire (N.H. Rev. Stat. Ann. § 228:4(I)(f) (capital budget projects); New Jersey (N.J. Pub. L. ch. 108, § 13) (transit); New York (N.Y. Gen. Mun. Law § 120-w) (solid waste); North Carolina (1991 N.C. Sess. Laws., ch. 689, § 239(f), as amended, 1993 N.C. Sess. Laws ch. 321, § 162) (DOC, DOT); South Carolina (S.C. Code Ann. § 57-3-200) (DOT); Tennessee (Tenn. Code Ann. §§ 12-3-202, 12-3-203, 4-15-102(c)(1), 7-32-107) (State, State Building Commission, special assessment improvements); Utah (Utah Code Ann. §§ 63-56-36.1, 63-56-21) (highway, all other agencies); Virginia (Va. Code Ann. §§ 2.2-4303(D)(1) (state and local agencies); Washington (Wash. Rev. Code Ann. §§ 36.58.090, 47.46.010) (solid waste, DOT); West Virginia (W. Va. Code §§ 5D-1-5(15), 18-5-9a(c) (Public Energy Authority, energy-saving contracts for county boards of education); Wisconsin (Wis. Stat. Ann. §§ 13.48(19), as amended, 16.855) (State). None of these statutes have been repealed, but many have been amended and new ones added to extend the use of the design-build method by state agencies.
14. See, e.g. Ala. Code Ann. § 41-16-20 (West 2000) (allowing design-build contracts, but requiring a competitive style bidding method for contracts over \$7500 which essentially precludes design-build); D.C. Code Ann. §§ 1-1110, 1-1183 *et seq.* (requiring competitive bidding for contracts over \$10,000 and requiring sealed bids except when sealed bids are not practical or feasible); Ga. Code Ann. § 32-10-7 (Michie 1982-1995) (requiring the state highway authority to hold competitive bidding based on plans and specifications that are approved by the department); 30 ILCS 505/6 *et seq.* (West 1995) (mandating, among other things, that all state agencies employ competitive bidding, but carving out expectations to the rule for purchases of \$10,000 or less or in cases of emergency); but see 30 ILCS 535/75 ("Nothing in this Act shall be deemed to prohibit a State agency from contracting for a Design-Build project.") (West 2000); Neb. Rev. Stat. §§ 72-803, 81-1715 & 83-134 (West 1995) (requiring contracts for state buildings and other improvements costing more than \$40,000 to be awarded to the lowest responsible bidder, making it difficult to ascertain whether design-build is an acceptable procurement method); Pa. Stat. Ann. § 34.15(9) (stating that architects are not prohibited from using design-build services, so long as they are done in strict accordance with certain practices established by the legislature); Va. Stat. § 11-41(C)(2) (as amended) (requiring strict competitive bidding for public contracts, but allowing for design-build on a fixed-price basis in certain instances where competitive sealed bidding is either not practicable, not fiscally advantageous or in cases of emergency).
 15. See, e.g., Ark. Code Ann. § 22-9-203(d) (as amended) (stating that public contracts must be

- awarded to the lowest bidder only if "the best interests of the taxing unit would be served thereby"); Ga. Code Ann. § 42-4-97(5) (Michie 1982-1995) (allowing the regional jail authority to enter into contracts, including those for the construction of jails, on a negotiated basis, without competitive bidding); Haw. Rev. Stat. Ann. § 103D-303 (allowing the state to evaluate submitted proposals using a numerical rating system based on a variety of factors if it decides that traditional competitive bidding is not practical) (1997); Mich. Comp. Laws Ann. § 247.661c (West 2001) (requiring that all construction contracts in excess of \$100,000 be awarded by competitive bidding unless the department finds that the use of some other method is in the public interest); Minn. Stat. Ann. § 16.B.08(4)(b) (allowing contracts to be negotiated at the discretion of the commissioner); Mont. Code Ann. § 7-5-4302 (mandating the state's agencies negotiate first with the best-qualified design firm and, if negotiations fail, then with the next-best-qualified firm); Neb. Rev. Stat. §§ 39-1343, 39-1348 & 39-1349 (West 1995) (requiring state highway works contracts to be awarded to the lowest responsible bidder, but allowing the department to direct the work to be done in a manner it chooses in cases of an emergency or if any and all bids are rejected by the department); Or. Rev. Stat. § 382.105, 383.320, 383.340 (toll bridges); Vt. Stat. Ann. tit. 26 § 124 (Vermont requires licensing for design professionals such as architects and engineers; however, this provision provides exemptions that may enable design professionals to avoid the unlicensed practice of architecture or engineering); Wyo Stat. Ann. §§ 9-2-1016 & 9-2-1027 to 9-2-1033 (requiring agencies to competitively contract in excess of \$7,500, but requiring all state agencies to negotiate with the most qualified firm before procuring design services).
16. Jesse B. Grove III, *Risk Allocation From the Contractor's Perspective, Philosophies of Risk Allocation*, 467 *PLI/Real* 41, 128-29 (April 2001).
 17. H.B. 2340, 44th Leg., Second Reg. Session (Az. 2000). See also H.B. 2425, Ch. 227, First Reg. Session of the 45th Leg. (Az. 2001) (making additional modifications to these laws).
 18. See S. 61,71st Leg., Reg. Session, 2001 Nev. Laws ch. 410.
 19. See Colo. Rev. Stat. §§ 43-1-1401 to 1409 (West 2000).
 20. Referendum A vested the state with authority to borrow \$1.7 billion for critical highway projects, primarily the widening of Interstate 25 southbound from Denver to Lincoln Avenue in Douglas County, from 6 to 10 lanes. Referendum 4-A gave the Regional Transportation District authority to borrow \$457 million to pay for concurrent construction of light rail and new additions along I-225.
 21. See 2001 Me. Leg. Serv. ch. 271 (S.P. 351) (L.D. 1165). Cf. Me. Rev. Stat. Ann. tit. 5 § 1743 (not posing significant statutory barriers to the use of design-build, but making it unclear about whether design-build could be utilized).
 22. See 2001 Me Leg. Serv. ch. 140 (S.P. 211) (L.D. 776) (enacting tit. 23 Me. Rev. Stat. Ann. § 753-A).
 23. See 2001 Minn. Sess. Law Serv., 1st Sp. Session ch. 8 (S.F. 7), at 84 (establishing Article 3, found at Sections 161.3410 to 161.3428).
 24. See 2001 Minn. Sess. Law Serv., 1st Sp. Session ch. 8 (S.F. 7), at 85 (Newly created "Sections 161.3410 to 161.3428 apply only to transportation project using the two-step competitive process utilizing public solicitation for design-build services.").
 25. See generally Wa. Rev. Code. Ann. § 39.10.120 (as amended); 2001 Wash. Leg. Serv. ch. 226 (S.H.B. 1680).
 26. See Stephen H. Daniels, "Master Model Makers," McGraw-Hill Construction *Design-Build* (December 2000), 42-48. This article discusses the use of design-build for water projects in states such as California, Michigan, Texas, Florida, and Georgia).

27. See Mass. Stat. 111 App. § 3-12(b).
28. Va. Code Ann. §§ 53.1-95-18 (West 1990) (authorizing construction of a jail); 2001 Va. Acts ch. 844, Reg. Sess. (Reconvened) (S.B. 1098) (establishing 2.2-4307 that allows for the use of design-build in constructing juvenile facilities).
29. Ut. Code Ann. § 63-56-36.1(2).
30. H.B. 347 (Ky. 2001).
31. Pa. Stat. Ann. § 34.15(9).
32. The Pennsylvania Separate Act is codified at 71 Pa. Stat. § 1618 *et seq.*
33. *Mechanical Contractors Ass'n v. Southeastern Pa. Trans. Auth.*, 654 A.2d 119 (Pa. 1995).
34. N.Y. Gen. Mun. Law § 101(1) & (2); N.Y. State Fin. Law § 135.
35. N.J. Stat. Ann. § 18A:18A-18.
36. Vt. Stat. tit. 26, ch. 3, § 124(a)(5) (1985).
37. Az. Rev. Stat. § 34-603 (as amended).
38. See *Phoenix Court Hears Bid Protest*, Design-Build Dateline, Nov. 2000, at 11 (citing Az. Rev. Stat. § 34-603C(2)(f)).
39. *McKeown v. State Arch. Lic. Bd.*, 705 A.2d 524 (Pa. 1998).
40. 1998 Pa. Legis. Serv. 129, Act No. 1998-31, H.B. No. 1291.
41. 28 Pa. Bull. 3273, 3274 (July 11, 1998).
42. See, e.g., Wash. Legis. Serv. ch. 328 (S.S.B. 5060) (West 2001) (Section 2, subsection (5) of 39.10).
43. Tex. Sess. Law Serv. ch. 1409 (S.B. 510) (West 2001) (establishing Section 2166.2531 authorizing the use of design-build).
44. See 2001 Va. Acts ch. 844, Reg. Sess. (Reconvened) (S.B. 1098) (establishing 2.2-1135 to 2.2-2406); W. Va. Code §§ 5-22A-1, *et seq.*, the West Virginia Design-Build Procurement Act.
45. See DBIA Document 402, "Model Regulation for Design-Build Procurement Act" in *Design-Build Manual of Practice* (October 1996).
46. *Ibid.*, 2. See also, e.g., 2001 Wash. Legis. Serv. Ch. 328 (S.S.B. 5060) (establishing Section 2, subsection (5) of 39.10 that utilizes the DBIA model code in setting forth standards for procurement of public works projects, including the requirement to evaluate proposals "based on the factors, weighting, and process identified in the request for proposals," and "select no fewer than three nor more than five finalists to submit best and final proposals").
47. Va. Code Ann § 2.2-4303(G) (as amended).
48. 2001 Va. Acts ch. 844, Reg. Sess. (Reconvened) (S.B. 1098) (establishing 2.2-4308).
49. See, e.g., 2001 Wash. Legis. Serv. ch. 328 (S.S.B. 5060) (Section 2, subsection (1) of 39.10).
50. Colo. Ord. Title I, Sub. B, Ch. A, Article XVI § A2.3-1 & A2.3-1(1).
51. Colo. Ord. Title I, Sub. B, Ch. A, Article XVI § A16.3-1 & A16.3-2(1).
52. See Council Bill No. 211, Committee of Pub. Works, Ord. No. 254, at 3 (Colo. 2001).
53. See generally *San Diego Serv. Auth. for Freeway Emergencies v. Superior Ct.*, 244 Cal. Rptr. 440 (Cal. Ct. App. 1998), *rev. denied*, May 5, 1988.
54. See B. Papernik and N. Smith, "In By Design," *Los Angeles Lawyer*, (July- Aug. 1999), 36 n.40.
55. Telephone interview with Scott Johnson, Esq., Attorney, City and County of Denver Department of Law (November 7, 2001).
56. *Breck v. Ulmer*, 745 P.2d 66 (Alaska 1987). See also *City and Borough of Juneau v. Breck*, 706 P.2d 313 (Alaska 1985) (related case).
57. 745 P.2d at 69-74. The parties eventually settled; however, the city was forced to appropriate monies to fund the settlement with the contractor to compensate it for construction delays resulting from the superior court's injunction.

58. *Anderson v. Fayette Cnty Bd. of Educ.*, 738 So. 2d 854 (Ala. 1999).
59. See *C&C Manhattan v. Government of the Vir. Isl.*, 1999 V.I. LEXIS, Civil No. 876/1998 * 1, * 17-26 (Feb. 12, 1999).
60. *Matter of Butt Constr. Co., Inc.*, Comp. Gen. No. B-284270 (March 20, 2000) (involving a protest of an unsuccessful proposal on a Corps of Engineers design-build project for the renovation of the Avionics Research Lab at Wright-Patterson Airforce Base in Ohio); *Coffman Specialties, Inc.*, No. B-284546, B-284546.2, 2000 CPD para. 67 (challenging the Corps of Engineers' decision to offer the design-build project to on the basis that the Corps improperly evaluated the proposal by failing to consider numerous pages in the proposal that did not conform to the format limitations in the RFP); *In the Matter of J.A. Jones/IBC Joint Venture*; *Black Constr. Co.*, No. B-285627, B-285627.2, 2000 CPD para. 161 (involving protests by two companies over the award of a design-build contract by the Navy to another entity on a project in Guam, arguing that the Navy failed to properly evaluate the award granted).
61. See 40 U.S.C. §§ 541-544; Public Law 92-582, enacted in 1972.
62. See Chris Witney, "Evolving Perspective on Design-Build Construction: A View from the Courthouse," *Construction Law* (April 1995), 1, 13.
63. See *City of Lynn Haven v. Bay Cnty Council of Reg. Arch., Inc.*, 528 So. 2d 1244, 1244 (Fla. Ct. App. 1988).
64. See 1990 Tex. Att'y. Gen. Op., No. JM-1189.
65. See 1993 Ark. Atty. Gen. Op., No. 93-051.