

A Primer on Planning a Design-Build Project for Indiana Cities and Towns

By Sean T. Devenney and Robert J. Orelup¹

One of the most important decisions in the early stages of planning a construction project for a public owner is choosing the delivery method for the project. As the result of an amendment to the Indiana Code in 2005, public owners now have the freedom to utilize the “design-build” method of construction in addition to the traditional “design-bid-build” method. The decision as to which project delivery method to employ on a particular project depends on the nature and particular circumstances of the project.

This article generally introduces the fundamental differences between the traditional design-bid-build method of construction versus the design-build method and then briefly discusses the particulars of the basic Indiana Code requirements for public owners to utilize the design-build construction process.

A. Benefits of Design-Build versus Traditional Contracting Methods

One unique feature and perceived benefit to the design-build method of construction from the public owner perspective is that the public owner contracts with one entity to both design and construct the project. Essentially, the design-builder agrees to take the risk for the design *and* construction of the project, and the public owner is in the enviable position of being able to point to a single source for responsibility with respect to problems that arise on the project. By contrast, in the traditional design-bid-build model, the owner occasionally finds itself caught in the cross fire between its architect/engineering firm that designed the project and the contractor with whom the owner contracted to build the project. The architecture/engineering firm will

¹ Sean Devenney and Bob Orelup are partners in the law firm of Drewry Simmons Vornehm LLP, where they focus their practice on construction law and litigation.

sometimes take the position that its design was adequate for the contractor to perform its work while the contractor will contend that the design was flawed. As to the contractor, the owner is responsible for the plans and specifications that its architect/engineer issued. The owner can be left “holding the bag” as the two parties fight over their respective positions. By contrast, the design build method of construction requires the designer and contractor to work together because they are jointly responsible to build a project that meets the stated needs of the owner. There is no “cross fire” because the designer and contractor are both jointly responsible to the owner for both the design and construction of the project.

Another perceived benefit to the design-build method of construction is that the projects tend to cost less and can be built more quickly. Indeed, one study suggests that the design-build method saves 6% on construction costs and delivers the project 33% faster than the traditional design-bid-build process.¹

One of the alleged draw-backs to utilizing the design-build project delivery system is that the owner loses control over the design. In a “pure” design-build project delivery model, the owner outlines the basic design criteria for the project by identifying at a minimum the intended use for the project, the location of the project, and the budget for the project. The design-builder is then free to utilize its construction expertise to meet the objectively-stated needs of the owner. As such, while the end product may technically meet the needs identified by the owner, the owner may not be subjectively happy with the overall end product.

Overall, the design-build project delivery method is extremely flexible. The owner can garner more control over the project by issuing detailed design criteria. However, the more detailed the criteria, the less “freedom” the design-builder has to utilize money or time saving

ideas, which may reduce the perceived benefits of utilizing the design-build project delivery method.

B. Overview of Statutory Process for Public Owners to Employ the Design-Build Construction Method

The Indiana Design Build Statute attempts to strike a balance between the need for public control over the use of public funds versus the money or time saving benefits of the design-build project delivery system.

To get started on a design-build public project, the owner must first adopt a resolution at a public meeting that authorizes the use of design-build. The resolution shall include the names of all members of a Technical Review Committee. The Technical Review Committee must consist of a representative of the agency awarding the work and at least two of the following: a registered architect, a professional engineer, and a qualified contractor. The Technical Review Committee's function is to rate the prospective "bidders" and their respective proposals for the project.

Requests for Qualifications ("RFQ") that describe the project (by size and function, budget, and schedule) are distributed to the prospective design-builders. The RFQ furthermore describes the selection process (including communications with the agency, the schedule for selection, the review procedure, and the requirements for the design-builder's submission). Generally speaking, the successful design-build bidder should have (a) experience with projects of a similar size, duration, and cost; (b) experience with the design-build process; (c) licensing requirements; (d) financial strength; and (e) a history of engaging minority and woman owned businesses.

In response to the RFQ, the design-builder must submit a verified (or sworn) Statement of Qualifications, which shall include an identification of all prime contractors, architects, and engineering firms that are financially part of the design-build team. The Statement of Qualifications must also include a statement (a) with respect to the design-builder's experience and competency to manage and complete similarly sized projects; (b) regarding the appropriate apprenticeship certifications, licenses, insurance, and bonding capacity; (c) regarding any prior serious, repeat or criminal violations of OSHA; and (d) regarding any bankruptcies or receiverships involving the design-builder.

The Technical Review Committee must then rate the Statement of Qualifications and select at least three potential design-builders considered to be the most highly qualified to perform. In the event only one design-builder responds to the RFQ (or if only one of the responding design-builders is "qualified"), the design-build method may not be used unless the agency adopts a resolution authorizing such action. The qualified design-builders are then sent a Request for Proposal ("RFP") that must include the design criteria package developed by a registered architect or professional engineer.

The design criteria package *may* include the following: (a) legal descriptions; (b) space requirements; (c) material quality standards; (d) budget or cost estimates; (e) quality control requirements; (f) compliance with applicable codes and ordinances; (g) permits and connections to utilities; (h) soil borings and/or geotechnical information; (i) performance specifications and warranties; and (j) the project schedule. While these are discretionary, the design criteria package *must* include the following: (a) instructions, proposal forms and schedules; (b) general and special conditions; (c) the basis for the selection criteria with weight given to the criteria; (d)

determination of the common construction wage; and (e) any other information the public agency deems relevant.

The qualified design-builder's bid proposal must be submitted in two separately sealed forms. One form is for the "qualitative" proposal and the other is for the "price" proposal. The qualitative proposal must identify each person or entity with whom the design-builder proposes to subcontract for primary design and construction services, as well as additional documents, information and data requested in the RFP. The price proposal must contain either a lump sum cost for the design and construction or establish a maximum cost not to be exceeded if the design-builder's proposal is accepted without change.

The Technical Review Committee then reviews the qualitative proposals after the design criteria developer determines that the proposal conforms to the design criteria. A written score for each proposal is established. Once the proposals are scored, the price proposals are opened at a public meeting and read aloud. The price proposal is divided by the written score and the proposal is given an adjusted price. The proposal with the lowest adjusted price that provides the best "value" to the taxpayers is accepted. After acceptance, the agency may negotiate any terms *except* for those identified as non-negotiable in the RFP.

A review of the Indiana design-build law reveals that one of the major distinctions between utilizing design-build process over the traditional design-bid-build method of contracting is that the city or town employing the design-build statute can make "quality" of performance a significant part of the selection of the design-builder it intends to employ. The public owner employing the design-build project delivery method is no longer "forced" to utilize the services of the "lowest responsive and responsible" contractor. Rather, inherent in the criteria scoring done by the Technical Review Committee is a qualitative overlay to the price

component that is generally missing in the traditional design-bid-build statute that many public owners may find appealing.

C. Conclusion

No single construction delivery system is “perfect.” However, cities and towns now have options beyond the traditional design-bid-build project delivery system where the lowest responsive and responsible bidder must be awarded the project. When faced with a decision on how to perform a construction project, cities and towns should consider whether the design-build project delivery model will produce better results than the traditional design-bid-build model.

ⁱ Hubble Smith, *Design-Build Lauded as Better Approach*, available at <http://www.builderonline.com> (March 31, 2007).