Construction Bills: Recent Changes to Construction Laws

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Design-Build Continues Its Advance Into Public Contracts

As noted in one of this issue's lead articles, 2013 saw many state legislatures continuing the trend of permitting and promoting design-build project delivery in state and local government contracting. Design-build uses an integrated delivery system that consolidates design and construction services into one contract so that a single entity is responsible for both design and construction performance. Proponents claim design-build promotes collaboration among parties, cost savings, faster delivery, and higher quality results over traditional design-bid-build contracting methods and that consolidated contracting reduces administrative costs and results in fewer change orders and litigation claims. According to the Design-Build Institute of America (DBIA), the unit cost of a design-build project is 6.1 percent less than a traditional design-bid-build project and delivery speed is 33.5 percent faster than projects completed through traditional contracting.[1] Some critics raise concerns that single-source contracting denies the owner the independent advice of an architect/engineer throughout the design and construction process. According to the DBIA, 40 percent of the nonresidential construction market nationwide has shifted to design-build.[2]

North Carolina Enacts Progressive Design-Build Legislation

On August 23, 2013, the governor of North Carolina signed one of the nation's most progressive design-build laws, House Bill 857 (H.B. 857), authorizing state and local governments to pursue projects through design-build, design-build bridging, and public-private partnerships.[3]

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Design-build is not new to North Carolina; in the last decade, the state's department of transportation completed 76 design-build projects worth $3.7 billion and now has 12 design-build projects worth $1 billion under contract.[4] Observing the department of transportation's successes, municipalities sought to use design-build as well. Prior to passage of H.B. 857, design-build was not a statutorily sanctioned delivery method in North Carolina for public projects; municipalities circumvented this by seeking project-specific legislative approval through local-only bills, a process that added months to project time lines, almost negating the benefits of design-build as a project delivery method. The North Carolina General Assembly would entertain local-only bills for one-off design-build projects in communities but made no effort to assure consistency between bills or give local governments guidance on bidding, awarding, or administering design-build projects. H.B. 857 not only codifies design-build as a delivery method for public contracts in North Carolina but also sets forth the state-sanctioned procurement and administrative process for such projects.

H.B. 857 expands qualification-based contracting from architectural and engineering services to contracts for design-build and public-private partnership construction services; under qualification-based contracts, municipalities are exempt from awarding contracts based solely on price.[5] To utilize design-build contracts, public owners must "establish in writing the criteria used for determining the circumstances under which the design-build method is appropriate for a project," addressing several required elements, including a comparison of the costs and benefits of using the design-build method over other delivery methods, including separate prime bidding, single prime bidding, and construction management at risk.[6] The government entity must then issue a public request for qualifications, setting forth, for example, the criteria for selection and weighting of qualifications.[7] After receipt of at least three responses, the public owner must rank the three most highly qualified responders and then seek to negotiate with the highest-ranked candidate[8] a "fair and reasonable" fee.[9]

So as not to deny the owner the independent advice and recommendations of an architect/engineer throughout the design and construction phases, H.B. 857 permits design-build bridging, under which the owner may directly contract with a separate architect/engineer, called a design criteria design professional (DCDP) under the statute, to serve as the owner's representative throughout the procurement, design, and construction phases.[10] The DCDP, chosen though a similar process as the design-builder,[11] prepares

35 percent construction documents and a design criteria package establishing several elements, including the project's programming needs, material quality standards, and performance criteria.[12] The design-builder then bears the responsibility of completing the design and establishing the construction methodology. If the government entity uses a DCDP and a design-build bridging contract, the public entity must utilize a hybrid quality-price bidding process to select the design-builder, awarding the design-build contract to the lowest bidder among the top-three qualified respondents.[13]

Noting that some government entities within the state lack the financial resources required to undertake capital building construction projects, H.B. 857 permits public-private partnerships (P3) between public owners and private developers to acquire, lease, design, construct, and operate public capital improvements.[14] To protect the integrity of the contracting process, the legislature has required that prior to proceeding on a P3 project, the public entity must give written notice of its "critical need" for the public infrastructure project and may be required to present such "critical need" at a public meeting for comment.[15] The public entity must also set forth the programming requirements of the improvement, determine the criteria for review of private developers, and then publicly advertise the solicitation for private developer involvement.[16] In any P3 project, the private developer must provide at least 50 percent of the financing of the total cost of the project[17] and cannot self-perform the design or construction unless the previously engaged contractor defaults and a replacement contractor cannot be engaged.[18]

Public entities using design-build, design-build bridging, and P3 have reporting requirements so that progress under H.B. 857 may be monitored by the department of administration.[19] Reports, due within 12 months of beneficial occupancy, must include a detailed explanation of the reason why the particular delivery method was chosen over traditional procurement models, including the benefits anticipated, the terms of the contract, a list of the firms considered but not selected, and the form of bidding utilized for first-tier contractors.[20]

Finally, H.B. 857 calls for the establishment of a Purchase and Contract Study Committee made up of legislators and industry stakeholders to study "the issue of prequalification on public nontransportation construction work" in an effort to possibly develop "one or more objective and nondiscriminatory systems for prequalification to permit all appropriately licensed North Carolina general contractors to have the opportunity to bid in open competition for public construction projects in the State."[21]

California Extends County Design-Build Authority Through 2016 and Extends Design-Build to Regional Transportation Agencies

With design-build authority set to expire in 2014, California Governor Jerry Brown signed Assembly Bill No. 195 (A.B. 195) into law on August 19, 2013, extending design-build authority to 2016 for certain public projects in excess of $2,500,000.[22] State law permits such contracts to be awarded to the lowest responsible bidder or by best value.[23] Under this bill, California limits its counties to design-build, as an alternate delivery method, on building and sanitation wastewater treatment facilities, specifically stating that the legislature has no intent to permit design-build on other infrastructure projects, like streets, highways, public rail transit, or water resource facilities or infrastructure.[24]

In California, public design-build projects follow a four-step process.[25]

- First, the county prepares a set of documents setting forth the scope of the project, including the size, type, and desired design character of the public improvement; the performance specifications; preliminary plans or building layout; and any other information to establish the county's needs.[26] Any design professional who assists in preparing the step-one project documents may not participate in the bidding for the design-build contract.[27]
- Second, the county prepares a request for proposals, inviting potential bidders to submit competitive sealed proposals.[28] The request for proposals shall include elements such as the significant objective factors that the county reasonably expects to consider in evaluating the proposals, including price and other nonprice-related factors.
- Third, the county must prepare a procedure to prequalify bidders using a standard questionnaire, created in consultation with the construction industry.[29] Information provided by bidders in response to the questionnaire shall be verified under oath.
- Finally, the county shall establish a procedure for final selections of the design-builder, with the award generally going to the lowest responsible bidder, though a county can use best value or other criteria set forth in the request for proposals.[30]

To protect the process, upon issuance of a contract, the county must publicly announce the award, identifying the winning contractor and providing a written decision supporting the award and stating the basis for the award.[31] The notice of award must also include the county's second- and third-ranked bidders for the design-build contract. A.B. 195 also recognizes the importance of the owner receiving independent advice and assistance; therefore, the bill permits counties to hire a design professional or construction project manager, or both, to assist the owner through the procurement process and ensure statutory compliance.[32]

In line with California's promotion of design-build as a delivery method for county projects, on October 4, 2013, Governor Brown signed into law Assembly Bill 401 (A.B. 401), which allows regional transportation agencies to utilize the design-build method of procurement, based on either best value or lowest responsible bidder, for the design and construction of projects adjacent to the state highway system, including nonhighway portions of the

project.[33] The Orange County Transportation Authority (OCTA) already intends to pursue a design-build procurement process for the Capital SouthEast Connector in San Diego. The OCTA claims that use of design-build will reduce the Connector's construction schedule by two to three years and save up to $100 million.[34] The proposed 35-mile parkway-style Capital SouthEast Connector will connect Interstate 5 South with Highway 50 in El Dorado County. Phase 1, estimated to cost more than $300 million and to be completed between 2018 and 2023, includes four lanes; expanded at-grade intersections at major access points; a pedestrian, bike, and equestrian path; and right-of-way acquisition and preservation for future expansion and interchange construction. Phase 2, including additional interchange construction and additional lanes, would be completed over the next few decades as needs demand and funds become available.

The bill also allows the California Department of Transportation (CalTrans) to use design-build on up to 10 state highway projects before 2024, based on best value or lowest responsible bidder.[35]

Much like North Carolina, California intends to track the benefits of such contracts, requiring CalTrans and regional transportation authorities to file reports with the legislature on the progress of design-build projects and compliance with state law.[36]

Tennessee Defines "Good and Solvent Bonds" for Public Works Projects

Under Tennessee law dating back at least to 1899,[37] before a contract for a public works project is let, the contractor must first have executed a "good and solvent bond" under which the contractor will pay for all labor and materials used by the contractor. Under the current Tennessee Code,[38] this requirement applies to any contract in excess of $100,000 with any city, county, or state authority and requires that such payment bond be written in an amount equal to at least 25 percent of the contract price.

Despite more than a century of laws requiring that contractors submit such good and solvent bonds, what constituted a good and solvent bond was never defined. This changed with the adoption of Tennessee Public Acts Chapter 195, signed into law April 23, 2013, amending Tennessee Code Annotated section 12-4-201. The new law provides:

> A good and solvent bond means a bond written by a surety or insurance company listed on the United States department of the treasury financial management service list of approved bonding companies which is published annually in the *Federal Register* at the time the bond is provided in accordance with this part.[39]

The law also prohibits the bond from being written for an amount "in excess of the amount indicated as approved for sureties or insurance companies" on that treasury list.[40] Any surety meeting this requirement must also be licensed and authorized to do business in Tennessee as a surety or insurer.[41]

The law further states that any bond that is not in accordance with the law's requirements shall be null and void and must be rejected by the public authority. Interestingly, although the law nullifies such bonds, it does not state what would happen in the event that an owner fails to reject such a bond and the contractor later defaults. As written, the law would make the contractor's bond null and void, thereby allowing a surety to avoid liability on its bond simply because the contractor did not provide a bond meeting the statute's definition, regardless of whether the bond would provide an actual remedy.

Endnotes

1. Press release, Design Build Inst. of Am. (Jan. 15, 2014), http://www.dbia.org/news/Pages/default.aspx.
2. *Fact Sheet*, Design Build Inst. of Am. (Jan. 15, 2014), http://www.dbia.org/news/Documents/dbia130603.pdf.
3. N.C. Gen. Stat. § 143-128(6)–(8) (2013).
4. Richard Thomas, *North Carolina Embraces Design Build*, Design Build Inst. of Am. Blog (Jan. 15, 2014 9:47 PM), http://www.dbia.org/advocacy/design-build-blog/Pages/North-Carolina-Embraces-Design-Build.aspx.
5. N.C. Gen. Stat. § 143-64.31(a) (2013).
6. *Id.* § 143-128.1A(b).
7. *Id.* § 143-128.1A(c).
8. *Id.* § 143-128.1A(d).
9. *Id.* § 143-64.31(a).
10. *Id.* § 143-128.1B.
11. *Id.* § 143-128.1B(b).
12. *Id.* § 143-128.1B(c).
13. *Id.* § 143-128.1B(e).
14. *Id.* § 143-128.1C(b).
15. *Id.*
16. *Id.* § 143-128.1C(h).
17. *Id.* § 143-128.1C(a)(4).
18. *Id.* § 143-128.1C(f).
19. *Id.* § 143-64.31(b).
20. *Id.* § 143-64.31(b), (d).
21. 2013 N.C. Sess. Laws 2013-401(8).
22. Cal. Pub. Cont. Code § 20133(a) (West 2013).
23. *Id.*
24. *Id.* § 20133(b)(1).
25. *Id.* § 20133(d).
26. *Id.* § 20133(d)(1)(A).
27. *Id.* § 20133(d)(1)(B).
28. *Id.* § 20133(d)(2).
29. *Id.* § 20133(d)(3).
30. *Id.* § 20133(d)(4).
31. *Id.* § 20133(d)(4)(B)(iv).
32. *Id.* § 20133(i).
33. *Id.* § 6821(b) (West 2014).
34. *OCTA Praises Passage of Design-Build Legislation*, Orange Cnty. Transp. Auth. (Jan. 15, 2014), http://www.octa.net/newsstory-freeways.aspx?id=3347.
35. Cal. Pub. Cont. Code § 6821(a) (West 2014).
36. *Id.* § 6821(f).
37. 1899 Tenn. Pub. Acts. ch. 182, Thompson's-Shannon's Code, § 1135a et seq.
38. Tenn. Code Ann. § 12-4-201 (2013).
39. *Id.* § 12-4-201(a)(2).
40. *Id.* § 12-4-201(a)(3).
41. *Id.* § 12-4-201(a)(4).