



Beyond Design-Bid-Build: Issues to Consider in Alternative Project Delivery Systems

By Emily Kahn

August 12, 2015

Over the last 20 years, owners and developers have increasingly elected to use alternate project delivery systems such as design-build, construction manager at-risk and integrated project delivery (IPD) for constructing complex capital projects.

As a result, many contractors that in the past had worked almost exclusively under the more traditional design-bid-build model have been asked to bid on, and deliver projects, under these alternative project delivery systems.

The decision as to which project delivery system is optimal is a complex one, and much has been written to advise owners on how to select from among the available options. From the contractor's perspective, the rewards of working under an alternate delivery system may be attractive if the associated risks can be appropriately managed. This briefing is intended to give a high-level overview of the most common project delivery systems, and highlight some of the issues contractors should consider when bidding on and working under an alternate delivery system.

Following are the four most widely recognized types of project delivery systems.

1. **Design-Bid-Build:** This is the traditional delivery method where an owner contracts with the designer/engineer to develop a project design and bid package, and then the selected contractor contracts directly with the owner for the construction phase of the project. The risk of design error remains with the owner, as the contractor is entitled to rely on the sufficiency of the owner's design, resulting in a fairly clear delineation of risk between the design phase and the construction phase. The contractor is solely responsible for construction performance and the quality.
2. **Construction Manager At-Risk:** Here the contractor acts as a construction manager during the design/engineering phase and is

typically paid an hourly fee, or lump sum, for consulting services. Once the design is completed, the contractor becomes the general contractor and is responsible for construction performance during the construction phase. The use of construction manager at-risk begins to blend the design and construction phase, as construction can begin prior to 100 percent design completion and the construction manager will be providing input into the design. This allows for value engineering and fast-track construction.

3. **Design-Build:** Under design-build, there is one contract between the owner and the contractor or the designer, pursuant to which the contractor or designer has responsibility for both design and construction. (The design-build contractor can be either a contractor or a designer, or both.) Design-build is most often performed for fixed price/lump sum compensation, and like construction management at-risk, provides ample opportunity for value engineering and fast-track delivery. While the owner benefits from having one party responsible for the design and construction of the project, the owner has little input or control over the project once the initial functional or performance specification has been provided to the design-build contractor.
4. **IPD:** IPD is the newest project delivery system, and often takes the form of a multi-party (typically owner, contractor and designer, though major subcontractors may also be included) agreement intended to both foster and require collaboration among owner, designer and contractor. The risks for cost overruns and rewards for cost savings are collectively managed and shared by the key parties, and each is incentivized to realize savings and find efficiencies as the project is developed and constructed.

High-level issues for contractor consideration will generally relate to cost or performance risk.

- **Construction Manager At-Risk:** When working as construction manager at-risk, a contractor typically will be compensated via a lump sum, if the project design is sufficiently progressed or a cost-plus subject to a guaranteed maximum price (GMP) if the construction price is to be established at some agreed percentage of design completion. With respect to cost, considerations of risk should include an evaluation of the amount of design information available when the GMP is established and the amount of contingency included (in each case, if applicable), and the owner's willingness (if any) to share in the risk of cost overruns. With respect to performance, the greater the contractor's involvement in reviewing, commenting on and "managing" the designer's work (when acting as construction manager and as an

agent of owner) during the design phase, the greater the risk that the contractor could be held responsible for design errors. Recent case law in Massachusetts has suggested that a contractor acting as construction manager at-risk cannot be certain that the delineation between the owner's responsibility for design and contractor's responsibility for construction performance will be upheld in litigation.

- **Design-Build:** Design-build projects typically are performed on a fixed fee basis, with cost-plus subject to a GMP also used, and often include liquidated damages for delay (as speed of construction is a primary benefit to using design-build). With respect to cost, consideration should be given to the potential for delay and associated liability for delay liquidated damages, and for cost overruns, which will generally be the contractor's responsibility absent owner-directed scope changes. With respect to performance, the design-build contractor is responsible for both design sufficiency and the quality of construction work. If the finished project does not meet the owner's purposes, whether due to gaps in the technical specifications provided by owner or the complexity of the project, there is ample opportunity for disputes between owner and design-build contractor. Therefore, the design-build contractor should be highly focused on the capabilities and performance by its team members: the designer, the subcontractor and other material suppliers. To the extent that relevant owner/design-build contractor contractual provisions flow down the contractual chain (e.g., from design-build contractor to sub-designers and subcontractors and suppliers), the design-build contractor's risk will be mitigated.
- **IPD:** Compensation in an IPD project is typically composed of three components:
 - each party's cost reimbursement;
 - each party's overhead and profit; and
 - incentives for achieving shared project goals and risks.

Eligibility for incentive payments based on project success may mean that a contractor or designer may be asked to put its profit at risk (i.e., a shared "gain" and a shared "pain"). A contractor working under this compensation structure should expect a requirement to be as transparent as possible (e.g., open book), and should be certain that all incentive-related compensation is clearly stated in the multi-party agreement. With respect to performance, working under an IPD requires a very different approach and mindset from working under a more traditional delivery system. Instead of each party retaining risk/responsibility for its own work, there is a clear intent for shared responsibility for project success and for the correction of any project defects. Industry-standard contractual language creating this

collaborative structure is evolving, but to-date does not have the degree of certainty that contractors will be accustomed to.

Working under an alternate project delivery system may offer the contractor an opportunity to participate in the economic rewards associated with potentially greater assumed risks. Although any payment method could be used, in the more typical scenarios described above:

- in construction management at-risk, the contractor receives fees for performance of construction management services, and may be able to participate in cost savings if the project is eventually completed for less than the GMP;
- under design-build, costs savings are retained by the design-build contractor if the project is completed for less than the fixed price; and
- in IPD, the ability to share in project savings which result from the collaborative IPD structure may be an attractive incentive for a contractor comfortable with the owner and the other members of the project team.



Emily Kahn is a partner at Bernstein Shur, one of northern New England's largest law firms, and a member of the firm's Construction Law and Energy Law Practice Groups. Kahn has spent nearly two decades assisting clients in the development, financing, construction, and operation of energy generation facilities. Formerly, she was in-house counsel to Wheelabrator Technologies, Inc., a developer and operator of renewable energy projects. She is a resident of Kennebunk, Maine.

More at <http://www.bernsteinshur.com/attorney/emily-l-kahn/>. Contact her at 207.228.7246.