

Rebuilding Texas: Design-Build In Public Procurement

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In late August of 2017, Hurricane Harvey dropped a staggering 40-61 inches of rain across southeast Texas. Individual drops of water combined to create over \$180 billion worth of estimated damages to public and private buildings and structures statewide. The federal government has committed substantial dollars toward reconstruction efforts with the promise of more dollars to follow. Many public entities will be the recipients of those federal rebuilding dollars. For members of the construction industry who plan to enter the Texas market, and for those already in the private Texas market who wish to engage in public projects, there are important aspects to know about Texas public procurement law.



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This article is the third in a five-part series. The first provided an overview of public procurement in Texas. The second explained how Texas public procurement statutes regulate the construction manager-agent and the construction manager-at-risk project delivery methods.



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Here, the authors will explore the design-build delivery method under the Texas public procurement statutes. Design-build is a project delivery method in which the public owner hires one entity to perform both the design and construction of the public works project. Despite the presence of a design professional on the design-build team, the public entity must still hire its own independent architect or engineer, as appropriate, to act as the governmental entity's representative for the duration of the project. Under the public procurement statute, design-build projects for buildings are treated differently than design-build civil projects.

Design-Build for Buildings

A governmental entity can use the design-build method for buildings and associated structures via the following processes:

Request for Qualifications

The design-build solicitation process begins with the governmental entity preparing a request for qualifications that includes general information on the project site, project scope, budget, selection criteria, any special systems, and the weighted value for each of the selection criteria. The



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governmental entity also prepares a design criteria package, which includes more specific project requirements. The design criteria package must specify the criteria the governmental entity considers necessary to describe the project and may include any other project-related information such as: interior space requirements, special material requirements, material quality standards, conceptual criteria, special equipment criteria, cost or budget estimates, time schedules, quality assurance/quality control requirements, applicable codes or ordinances., etc. The governmental entity may not require offerors to submit architectural or engineering designs as part of a proposal or a response to a request for qualifications.

Evaluation

The next phase of the procurement process is the evaluation phase of the firms that submitted their qualifications. The governmental entity evaluates the design-build firms' experience, technical competence, capability to perform, past performances of the firms, members of the firms, and other appropriate factors submitted by the individual design-build firms. The governmental entity may not evaluate price or cost factors at this stage. At this point the governmental entity qualifies a maximum of five offerors and may request additional information from each of the offerors and may also perform offeror interviews. The governmental entity then ranks the offerors according to its established criteria and then the governmental entity selects the offeror that provides the best value for the governmental entity.

Negotiation

At this point, the governmental entity attempts to negotiate a contract with the selected firm. If that is unsuccessful, then the governmental entity moves to the next offeror and once again tries to negotiate a contract. That process is repeated until a contract is agreed to or the list of offerors is exhausted.

Bonding

Performance and payment bonds are required to be provided by the design-build firm but the performance and payment bonds do not cover the design portion of the project. The penal sum of the bonds must be in the same amount of the fixed contract amount or if there is no fixed contract amount at the time of contracting, then in an amount equal to the construction budget.

Design-Build for Civil Works Projects

A "civil works project," as defined in the main procurement statute, includes: roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, wharves, docks, airport runways and taxiways, storm drainage and flood control projects, or transit projects. The definition also includes the buildings or structures that are incidental to the types of facilities listed (i.e. toll booths, control rooms, guard shack, etc.).

Considerations

While design-build is permissible for civil projects, its use is disfavored over the more traditional competitive sealed bidding method — the method most folks think of when they think of bidding on public works projects. In order for a governmental entity to use the design-build procurement method on a civil project, it must evaluate: the extent to which the entity can adequately define the project

requirements, the time constraints for delivery of the project, the ability to ensure that a competitive procurement can be held, and the capability to manage and oversee the project, including the availability of experienced personnel or outside consultants who are familiar with the design-build delivery method. There are even limits on the number of civil design-build projects certain governmental entities may engage in at one time. For example, a governmental entity with a population of greater than 500,000 may only enter into up to six contracts in one fiscal year. A water utility of the same sized municipality may only enter into a maximum of two independent civil works contracts in one fiscal year.

Additionally, although a governmental entity hires a design professional in conjunction with the project, as well as the design-build firm, the entity still needs to engage its own independent inspection services, construction materials and testing services, and verification testing services.

Key Process Differences

Design-build on civil projects differs from design-build for building construction in significant ways with respect to the evaluation of proposals. On a civil project, both technical and cost proposals are evaluated. On a civil project, design-build firms must submit a proposal no later than the 180th day after the governmental entity makes a public request. This appears to tie in with the governmental entity's requirement to evaluate the time constraints for the delivery of the project as part of its validation for using design-build on a civil project. A longer qualification process suggests that the governmental entity had time to use a different procurement method such as design-bid-build. Unfortunately, this limitation can cause issues when the governmental entity is attempting to construct a complex project and wants to obtain the benefit of a design-build firm's experience in other similar projects, in order to assist the public entity in designing a project that effectively meets its needs.

Request for Proposal

The governmental entity's request for proposal package must include: a design criteria package, project site identification if the project site has been identified at the time of the request for proposals, detailed instructions for preparing the technical proposal, and the items to be included, including a description of the form and level of completeness of the drawings expected and the relative weighting of the technical and price proposals.

The technical proposal is delivered with the cost proposal, but it is sealed. The technical proposal must address the project approach, anticipated problems, proposed solutions to the anticipate problems, demonstrate the firm's ability to meet the schedule, conceptual engineering design and other information requested by the governmental entity.

Evaluation

Once the proposals have been received, the governmental entity opens and evaluates the technical proposals and scores them in accordance with the weighting criteria that was reported to the proposers. Then, the governmental entity opens the cost proposals and weights those in accordance with the published weighting guide in the request for proposals. The governmental entity then selects the design-build firm in accordance with the formula provided in the request for proposals. It is worth noting that a design-build firm may end up being designated as nonresponsive in the event it materially changes in the composition of its firm before the award takes place.

The governmental entity may also require the design-build firm to identify the companies that will fill key project roles, including project management, lead design firm, quality control management, and quality assurance management and those that will serve as key task leaders for geotechnical, hydraulics and hydrology, structural, environmental, utility, and right of way issues. The identified companies may not be changed by the design-build firm except under very limited circumstances.

Negotiation

After the highest ranking design-build firm is designated, the governmental entity will attempt to negotiate a contract with the selected firm. If that is unsuccessful, then the governmental entity moves to the next in the list until a contract is agreed on or the list of design-build firms is exhausted.

Unless a stipend amount is offered by the governmental entity, the unsuccessful offerors retain all of their rights to the work product they submitted in a proposal, and the governmental entity is prohibited from releasing that information to third parties. In the event the governmental entity offers a stipend and the entity makes use of the design or other intellectual property contained in the proposal, the unsuccessful proposer is absolved of liability that may arise from the use of its designs.

Bonding

The bonding requirements are the same as with design-build for buildings.

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