

CONSTRUCTION AND THE LAW IN TEXAS

Alternative Delivery Methods: Design-Build: Vertical

This month, we will discuss the Design-Build: Vertical (D/B Vertical) alternative delivery method. Before we delve into the details of the D/B Vertical method, it is important to first provide a general overview of design-build. In any design-build process, an owner contracts with one entity that performs both the design and construction work for a project. This method is attractive to owners because they only have to enter into one contract for both services, so the owner does not have to function as an intermediary between the architect and contractor. Additionally, if performed well, a design-build team can provide efficiencies to the schedule and delivery of the final project, and therefore create cost savings not available from other methods.

Texas procurement law provides for two design-build methods: Design-Build: Vertical, and Design-Build: Civil. The D/B Vertical method is only available for the construction, rehabilitation, alteration, or repair of a building or associated structure, and is not available for “horizontal” (Civil) construction such as highways, bridges, underground utilities, or related civil engineering construction projects. Civil construction projects are governed by the Design-Build: Civil alternative delivery method. In next month’s column, we will discuss the D/B Civil alternative delivery method and compare it to the D/B Vertical method.

The D/B Vertical procurement process is outlined in subchapter G, chapter 2269 of the government code. This method enables an owner to enter into a single contract with a design-build firm to design and construct a building or associated structure. A design-build firm must be a sole proprietorship, partnership, corporation, or other legal entity and must include an architect or engineer and a construction contractor. However, the design-build firm cannot serve as the owner’s representative: only an architect or engineer, separate and

independent from the design-build firm, can serve in this role.

The D/B Vertical procurement process is similar to the two-step CMAR procurement process. Selection of a design-build firm begins with the issuance of a request for qualifications (RFQ) and a design criteria package. The RFQ must include general information regarding the project site and scope, special systems, selection criteria and weighted value for each criterion, and any other information that would help the owner select the design-build firm. The design criteria package must specify qualities the owner requires in the project, including site description, survey information, interior space requirements, cost or budget estimates, time schedules, quality assurance and control requirements, site development requirements, applicable codes and ordinances, utility provisions, and parking requirements. Note that cost- and price-related evaluation factors are strictly prohibited. Such a prohibition allows owners, and the design-build firms responding to the RFQs, to focus on the quality of the proposed firm rather than the price of the proposed firm. Although such a process may seem like a headache, this is the “new norm” in procurement practice, as public entities are increasingly pressured to demonstrate arms-length transaction practices.

A design-build firm should pay close attention to the details included in the RFQ before it responds. Just like an RFQ in the CMAR process, the criteria outlined in the RFQ can be used as a “playbook,” allowing the design-build firm to advertise its company in a way that highlights the elements most valued by the owner.

Responses to RFQs are evaluated by the owner based on the qualifications of the design-build firm. Qualifications are generally based on a firm’s experience, technical competence, capability to perform, past performance of the firm and members of the firm, and other appropriate factors



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submitted in response to the RFQ. Once all responses are evaluated and ranked, the owner may select up to five responders to submit proposals that contain additional information, and, if requested by the owner, to interview for final selection.

The owner can request any additional information related to competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the firm to meet schedules, or a firm’s costing methodology. A firm’s costing methodology includes its policies on subcontractor markup, definition of general conditions, range of cost for general conditions, policies on retainage and contingencies, discounts for prompt payment, and expected staffing for administrative duties. The owner is prohibited from requesting a guaranteed maximum price or bid for overall design or construction at this time.

The owner shall rank each proposal on the basis of the criteria set forth in the RFQ, select the highest-ranked design-build firm, and attempt to negotiate a contract with the selected firm. If the negotiations are unsuccessful, the owner must formally end negotiations in writing and begin negotiations with the next ranked firm until a contract is reached or negotiations with all ranked firms end. Within seven days after the design-build contract is awarded, the owner must make the rankings public. The statute does not specify where the owner should publicly post this information. Generally, it is

advised that owners post the rankings on their website.

The selected design-build firm must then submit all design elements for review and determination of scope compliance to the owner’s architect or engineer either before or concurrently with construction, and must provide a set of record drawings at the end of the project. Although neither a payment or performance bond is required for the design portion of the design-build contract, both a payment and performance bond are required for the construction portion of the contract. If a fixed contract amount or guaranteed maximum price has not been determined when the contract is awarded, the bonds must each be in an amount equal to the construction budget.

Design-build is not a new project delivery system. Firms who have experienced success with design-build in the private sector should take the time to familiarize themselves with this unique procurement process in Texas. We hope this column encourages readers to consider submitting responses to a D/B Vertical RFQ in the near future. Once firms understand the procurement process exists to demonstrate transparency, transition to the D/B Vertical system will not be as complicated as it may first appear. ●



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