

CONSTRUCTION AND THE LAW IN TEXAS

Alternative Delivery Methods: Design-Build: Civil

Last month's article focused on one of the two design-build alternative delivery methods provided by Texas procurement law: the Design-Build: Vertical method. In this article, we will discuss the second framework: the Design-Build: Civil (D/B Civil) method. D/B Civil is available for "horizontal" construction such as highways, bridges, underground utilities, or related civil engineering construction projects.

The D/B Civil procurement process is outlined in subchapter H, chapter 2269 of the government code. A design-build firm must be a partnership, corporation, or other legal entity and must include an architect or engineer and a construction contractor. Unlike D/B Vertical, a D/B Civil firm cannot be a sole proprietorship. The owner must hire an engineer to serve as its representative for the procurement process and for the duration of the design-build project. Note the engineer must be independent of the design-build firm.

D/B Civil projects are constrained in number and scope by the governing statute. First, the population of a governmental entity limits the number of D/B Civil projects an owner can utilize each year. In fact, only those with a population of 100,000 or more can even use the D/B Civil method. Areas with a population of 100,000 to 500,000 can only enter 4 D/B Civil projects in one fiscal year, while areas with a population of 500,000 or more can enter into 6 D/B Civil projects per fiscal year. Additionally, a contract for D/B Civil services cannot cover multiple projects at various locations, it can only cover one single, integrated project.

The procurement process begins when an

owner issues a request for qualifications (RFQ), which looks similar to the RFQ in D/B Vertical. The RFQ should contain information on the civil works project site; project scope, budget, and schedule; criteria for selection and weighted value of same. The RFQ must also include a design criteria package that enables a prospective design-build firm to assess the scope of work and risk involved on the project, and determine the owner's intent, goals, criteria, and objectives of the project. It is critical that prospective firms closely study and comprehend the owner's intent, goals, criteria, and objectives, and ensure their response aligns with each standard. These standards will ultimately determine who moves onto the next step in selection, especially because cost cannot be considered during the RFQ stage.

The owner will evaluate each RFQ response based on the design-build firm's experience, technical competence, capability to perform, and past performance of the design-build team members. The owner will then select firms to submit additional information and, if desired, to interview for final selection. The statute does not indicate how many firms should be selected, or how this selection should be communicated. It is generally advised that owners post the rankings on their website.

The owner will then provide a request for proposals (RFP) to the selected design-build firms. Unlike the D/B Vertical process, here the RFP process requires both a sealed technical proposal and a sealed cost proposal that must be opened and evaluated separately. Selected design-build firms have 180 days to respond to the RFP unless a different date is included in the



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RFP. The 180-day turnaround exists to allow firms time to create the technical proposal, which must include a conceptual engineering design and address the project approach, anticipated problems and proposed solutions, and ability to meet schedules. Before a firm considers bidding a D/B Civil project, it should be ready and able to prepare a design package within the 180-day timeframe.

First, the technical proposals are opened and evaluated based on the criteria and weighting specified in the request for proposals. Any design-build firms who have made a substantial change to the composition of their firm as indicated in response to the RFQ may be rejected as "nonresponsive." Although the statute does not define what constitutes a "substantial change," the spirit of the statute suggests any change in the firm's experience, technical competence, or capability to perform will govern this analysis. RFPs can also request the identity of companies that will fill key project roles and key task leaders for each aspect of the project. If an owner has specifically requested this information, design-build firms are prohibited from making changes to the identified companies unless they are no longer in business, voluntarily remove themselves from the team, fail to provide enough qualified personnel to fulfill the duties identified during the proposal stage, or fail to negotiate in good faith in accordance with the teaming agreement proposed for the project. Under these exceptions, any cost-savings resulting from team changes must pass onto the owner, not the design-build firm.

Then, each cost proposal is evaluated and

ranked based on the criteria and weighting specified in the request for proposals. Ultimately, the owner will select the highest ranked design-build firm based on a combination of the technical and cost proposals and attempt to negotiate a contract. If negotiations are unsuccessful, the owner must formally end negotiations in writing and begin negotiations with the next ranked design-build firm until a contract is reached or negotiations with all ranked firms end.

If a firm is not selected after submitting a proposal in response to the RFP, it retains all rights to the work product submitted in its proposal. An owner is prohibited from using the techniques, methods, processes, and information contained in another proposal unless the owner offers to pay, and the firm agrees to accept, a stipend, set at one-half of one percent of the contract amount. The owner's use of information contained in the proposal will not confer liability on the design-build firm who received the stipend in return for its proposal.

The D/B Civil method provides a unique opportunity for design-build firms to perform civil work in Texas. By understanding the nuances in the procurement process, firms can confidently bid D/B Civil projects, and be well-prepared to meet the owner's goals and objectives on the project.



A Balanced Approach to Construction Law.