

Building a Design-Build Team



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A Balanced Approach to Construction Law.

Alternative delivery methods such as design-build continue to gain momentum across Texas. For many of these projects, the design-builder that submits a proposal is not an integrated design-build firm. Often, a traditional general contractor will assemble a design-build team to submit a proposal for a project on a one-off basis. This business arrangement, while similar to a joint venture that many contractors are familiar with for larger projects, provides unique challenges and risks that should be addressed by the various team members that are separate and distinct from the challenges and risks vis-a-vis the owner. Typical design-build contracts address the risks and responsibilities as to the owner, but those agreements do not attend to the issues that exist between design-build team members.

When assembling a design-build team, the team members must initially consider the manner in which they will formally join together for purposes of contracting with the owner. Assuming the owner bids the project under the authority of chapter 2269 of the Texas Government Code, the design-build subchapter requires the owner enter into a single contract with a design-build firm who proposes on the project in response to a request for qualifications. The law further mandates that for a vertical project the design-build firm must be a sole proprietorship, partnership, corporation, or other legal entity or team that includes an architect or engineer and a construction contractor. For a civil works project, the law requires the design-build firm be a partnership, corporation, or other legal entity or team that includes an engineer and a construction contractor qualified to engage in civil works construction in Texas.

The legal requirements concerning the relationship of the design-build firm presents the initial challenge team members must anticipate and address. A single purpose entity can be established fairly easily in Texas by creating a multi-member limited liability company or a limited partnership. These legal arrangements are compliant with the statutory mandate and allow team members to partner on a single project. If the team members intend to propose on multiple projects together, then forming a new corporation may be advisable. Alternatively, a joint venture is a legally recognized entity that can be established by contract.

A different approach to the formation of a new company, corporation, or partnership for either vertical or civil design-build is to have an established construction contractor subcontract with a design professional for performance of the design phase obligations as well as construction phase services.

Shifting focus away from the design-builder's relationship in entering into a contract with the owner, team members should address the risks and potential liability that may arise between them. Intra-team liability issues can arise from issues of untimely performance, defective design or construction, nonpayment and other typical issues that may arise on a project. The primary difference when these issues arise within a design-build team rather than on a traditional design-bid-build project is that the team members must answer to each other and overcome any obstacles without being able to seek accommodation or compensation from the owner. Certainly, that statement does not apply to any issues caused by the owner that affect the design-builder's performance, but it does apply when a team member creates an issue that other team-members must address or causes damages to another team member.

Team members should consider both team formation from a member/entry perspective as well as the legal mechanism for binding each to one another for the project they will propose to design and build for the requesting owner. The team composition from a design perspective should involve considerations and determination concerning which design professional will lead the design and whether that firm will sub-consult with specific disciplines or bring those disciplines into the team as members. Further consideration should be given to the owner's role in provision of information concerning the design criteria package and which of that information, if any, might require further development by the design team to ensure effective design and a successful project.

The construction team should also consider whether any particular project components require special expertise and if the specialty or trade contractors involving that scope might need to be consulted during the design phase for constructability concerns. Similarly, the

construction team should consider bonding capacity and which entity will be responsible for procuring the required bonds. To that end, the entity that provides the bonds should bear in mind the effect of the general indemnity agreement that the entity and its principals must sign and the potential effect with non-signatory team members in the event that the surety pays a claim and then seeks reimbursement via indemnity.

Similar to the considerations about bonding, the members of the construction team should evaluate each's insurance program to help protect against potential liabilities that may arise during and after the completion of the project. Consideration of the various responsibilities each member assumes and the available policies that may provide coverage for anticipated risks should be performed. Assuming that general coverage maintained by each member will be sufficient in the event of a claim or loss may be an assumption that proves problematic. Team members on both the design and construction side of the effort should evaluate available policy and project specific insurance to ensure that risks are covered in light of the fact that the design-build team will not likely have a continuing relationship beyond project completion.

Finally, the design-build team should also consider mechanism's in their contract or company agreement to allocate responsibility for various project tasks such as design deliverables and construction milestones in order to maintain the promised project schedule as to the owner. Such allocation should also include project management within the team and agreements for proportioning responsibility and liability between team members if certain anticipated issues arise during performance. Recognizing the risks that may reduce the anticipated reward at the outset of team formation can help ensure a successful project for the design-build team in addition to a successful project for the owner.

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