

A New Solution for Public Construction Projects: Sequential Designer Led Design-Build

By Mark C. Friedlander and Ruth E. Krugly

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Regardless of complexity, most public construction projects share a few basic goals:

- High quality design and construction by companies that stand behind their work.
- Delivery of the project within the approved budget.
- Minimizing project duration and avoiding delays.
- Avoiding construction disputes and claims for additional compensation.

Public sector construction projects typically face more difficult problems and obstacles than private sector projects. The formality of the budgeting process renders cost overruns unusually troublesome, and the realities of public administration of the projects often result in delays and claims. The requirement of most public procurement laws that the construction contract be awarded to the lowest responsible bidder often leads to an adversarial claims process that is not only costly but also damages public perception of the project and the internal harmony among the participants.

The traditional construction process has not worked well for public projects. It consists of hiring an architect or engineer (A/E), waiting for the A/E to produce a full set of construction documents which are then distributed for competitive bidding, and then hiring the contractor with the cheapest bid to build the project. The primary advantage of this delivery structure is that it is old and familiar, so everyone knows what to expect. However, as most public entities have discovered to their detriment, this method has numerous and serious drawbacks:

- It maximizes project duration since bidding cannot begin until after construction documents are complete, and construction cannot begin until the bidding phase is complete and the construction contract awarded.
- The cost of the project is unknown until after bids have been received on the completed construction documents.
- It is difficult to establish a budget early in the design process with any degree of certainty.
- The bidding process is cumbersome and prone to challenge.
- Problems or omissions in the construction documents lead to contractor claims for extra compensation.
- The project is difficult to administer because of adversity between the A/E and contractor.
- The contractor's primary interest is to make money, not to ensure a high quality project.
- Many contractors "lowball" their bids, generating claims and change order requests to make up the difference.
- If there is a problem in the completed construction, the A/E and contractor often deny responsibility, blaming the other.

With such a long list of drawbacks to the traditional construction process, it is not surprising that municipalities and other public entities have experimented with and/or adopted other more innovative project delivery methods to try to better meet their goals. Some of these methods have worked to a greater or lesser extent, but none has been wholly satisfactory. Below are brief summaries of some of the more common methods used.

Fast Tracking. Where shortening project delivery times is of paramount concern, some public owners begin the competitive bidding process with preliminary drawings and award a construction contract prior to completion and final detailing of the construction documents. Although the ability to begin procurement and early construction activities before final completion of the drawings does save significant time, it plays havoc with cost control. Contractors use the late provision of design details as reasons to seek costly change orders and time extensions, and adversity between the contractor and A/E may lead to frequent and expensive claims and litigation.

Agency Construction Management. In this project delivery method, a contractor-type entity provides various types of pre-construction services and then supervises and coordinates the construction, but with no risk or liability for construction price, schedule or quality. Experience has shown this method to be marginally better at early price determination than traditional construction, but there have been many instances in which the estimate provided by the construction manager, who would not suffer any consequences from underestimating, proved to be unrealistically low when trade contractor bids were ultimately obtained and compiled. Rather than being reduced or eliminated, the A/E's adversity to the contractor was merely transferred downstream to the multiple prime trade contractors. Moreover, the owner became the target of claims by trade contractors for lack of coordination, items omitted in the buy-out, etc.

At-Risk Construction Management. In this structure, the construction manager becomes contractually responsible for the project costs and schedule, somewhat like ordinary general contracting where the contractor provides pre-construction services. At-risk construction managers are less willing to commit to early price determination because they are responsible for cost overruns and do not have control over how the construction documents are detailed and completed. As in traditional construction, the construction manager has adverse interests to those of the A/E and often asserts claims for additional time and/or compensation on account of real or fictitious errors or omissions in the construction documents.

Each of the above project delivery methods (and other less common methods as well) has strongly opinionated supporters and detractors. But most public officials experienced in construction know that none of these methods meets all of the above-listed goals or solves most of the problems with traditional construction. This has led to a surge in popularity of design-build methods of project delivery which, while as old as the pyramids (literally), have enjoyed a meteoric growth in popularity in both the private and public sectors in this country.

Design-Build: An Improvement But No Panacea

In design-build, the A/E and contractor are hired as a team. Instead of the owner having one contract for design and a different contract with a different party for construction, the owner enters into a single contract (or series of contracts) with a single entity who agrees both to design and to construct the project. The design-builder may be a single entity with both design and construction capabilities; it may be some kind of joint business venture that consists of an A/E and a contractor; or the contract may be just with one member of the team, who then enters into a subcontract with the other.

Historically, the design-build team has been controlled and dominated by the contractor. In the majority of design-build projects, the owner enters into a design-build contract with the contractor, who then subcontracts the professional design services to the A/E. Even in joint business ventures, the contractor tends to control the entity by virtue of being the recipient of approximately 90% of the project revenue. Traditionally, contractors are more likely to be risk-takers than A/Es, and they naturally tend to assume the prime position with the owner, responsible for guaranteeing price and schedule.

Design-build offers some significant advantages over traditional construction and avoids many of the problems that typically plague public construction projects. It allows construction to be fast-tracked without loss of cost control since the contractor cannot logically claim that it did not know how its own A/E teammate would complete the detailing of the plans. It allows prices and budgets to be determined at an early stage with cost input given constantly to the design professional so that the completed plans can be built within the budget and so that the owner can rely on the design-builder's conceptual estimating to forecast project costs at an early stage. Furthermore, the owner does not suffer from any adversity between the A/E and contractor, resulting in a significant reduction in claims and litigation. The federal government has experienced considerable success from and is encouraging design-build procurement, and many units of state and local government have begun to follow its lead.

But design-build is not without some criticism. The two most prevalent criticisms are interrelated and pertain to design quality. Some critics of design-build complain that design quality suffers because design-builders tend to focus on issues of cost, schedule and constructability rather than ultimate quality. A related criticism is that the A/E is loyal to the contractor rather than the owner and does not advise or consult with the owner regarding issues of quality in the design and construction. There is no way to prove or disprove empirically the validity of these criticisms, and there certainly have been some design-build projects of excellent quality, but the logic and prevalence of these criticisms force public officials to take them seriously. Fortunately, there is a small but growing variant of design-build – designer-led design-build – that preserves all of the advantages of design-build without the criticisms.

Designer-Led Design-Build

Designer-led design-build is merely a form of design-build in which the A/E contracts directly with the owner and leads the design-build team. It may subcontract the construction to the contractor or otherwise contractually bind the contractor to a relationship controlled primarily by the A/E. From a practical standpoint, this is a more logical structure than when the contractor leads the team. The design professional usually has the longer relationship with the owner and can be hired based on qualifications rather than low bid. Furthermore, design issues usually occur in a construction project long prior to construction issues, so it is natural for an owner to be working with an A/E even before a contractor has been identified.

The criticisms of design-build do not apply when the A/E leads the team. Design professionals dedicate their endeavors to achieving high design quality. Their reputation and future marketing depend on being associated with high quality projects. If anything, they are criticized for insufficient attention to cost issues in their pursuit of quality. Furthermore, the A/E is contractually prime to the owner and owes the owner its duties of loyalty and assistance. The A/E is free of the conflict of interests that results when it has been hired by the contractor, who may forbid it from communicating its concerns about design or construction quality directly to the owner.

There have been reasons suggested (usually by contractors) about why A/Es should not lead design-build teams, but upon closer examination these arguments appear to have little merit. In traditional construction, architects (and to a lesser extent engineers) are often criticized for over-designing projects and not being able to stay within budget. In designer-led design-build, this criticism is invalid for two reasons: (i) unlike traditional construction, in this delivery method the A/E receives constant feedback regarding costs from its contractor teammate during the design phase and can adjust accordingly; and (ii) as the

design-builder, the A/E signs a contract guaranteeing a maximum price or lump sum, so the owner will not have to pay any cost overruns. Designer-led design-build has also been criticized because the A/E who leads the team rarely has sufficient finances to secure all of the construction obligations. However, its teammate, the contractor, typically does have sufficient financial resources to secure the construction, which are ultimately available as security to the owner through the upstream chain of contracts. And although contracted to the A/E, the contractor can have its performance bond name the owner as an additional obligee.

Public Procurement of Design-Build Services

Most design-build public projects today are procured via a two-step approach. First, requests for qualifications (RFQs) are sent to potential design-builders and design-build teams. Based on the responses to the RFQs, 3-5 design-builders are short-listed and are given a Request for Proposal (RFP) seeking competitive submittals, the winner of the process being awarded the design-build contract.

This is the federal approach to design-build. (See Federal Acquisition Reform Act of 1996, 41 U.S.C. § 253M(a).) Numerous states and municipal entities follow a similar two-step approach to design-build public projects. At the end of this article is a fifty state survey of design-build legislation at both the state and local levels (as of early 2006), illustrating a broad acceptance of the two-step approach to procurement.

It is striking that a review of fifty-one jurisdictions (the fifty states and the District of Columbia) uncovered only eight instances where there is no authority whatsoever for the use of design-build. Although a number of states and/or municipalities allow design-build to be used only (1) for limited public purposes (e.g. transportation projects), or (2) for test or pilot programs, or (3) by certain governmental entities, most states have experimented with the use of the design-build procurement method. Indeed, in one of the most compelling illustrations of the utility and flexibility of the design-build procurement method, the Louisiana legislature enacted legislation in the wake of Hurricane Katrina allowing the Department of Transportation to utilize the design-build method on any transportation infrastructure project in an area impacted by a hurricane, pursuant to a two-step RFQ/RFP procedure. (See LSA-R.S. § 250.4.)

This two-step process may not be the most advantageous for a public owner who desires to procure design-build services for a construction project. Its traps or drawbacks include the following:

- The need to prepare an RFP often forces the owner to hire an additional design professional (often called the "criteria professional") who can develop preliminary design documents to be included in the RFP package.
- There may be a lack of continuity between the "criteria professional" and the "design-build team" in which owner goals and objectives are lost.
- The RFP documents may be prepared with more detail than is optimal, depriving the owner of some of the design-builder's creativity.
- The cumbersome bidding process for traditional construction is replaced by an equally cumbersome RFQ/RFP process.
- Many good companies/teams may refuse to participate in the process because the cost of preparing competitive proposals outweighs the profits from the percentage of projects actually awarded to them.
- It may be difficult effectively to require the design-build team to be led by the A/E.
- There may still be "lowball" claims contracting: the disputes would concern the scope of the project and errors or omissions in the RFP documents rather than in the construction documents.

A Better Approach: "Sequential" Designer-Led Design-Build

There is a different way for a public owner to procure designer-led design-build services when the leader of the design-build team is the A/E. It is a more gradual process, involving multiple contracts over time, but it is ultimately more advantageous for the owner. The process involves three steps:

Step One: The A/E and public owner enter into an ordinary contract for design services. The contract includes an option that permits the owner to request the architect to issue, at a mutually agreeable future time, a lump sum (or guaranteed maximum price) proposal to complete the plans and to manage construction of the project.

Step Two: Early in the project, usually during design development, when scope of the project is sufficiently defined, the A/E issues the formal design-build proposal for the owner to accept or decline at its option. The proposal is prepared with the assistance of the A/E's contractor teammate and promises to complete the design and manage construction of the project at-risk for cost and schedule.

Step Three: After the owner has accepted the design-build proposal, when the project is far enough along to begin procurement and/or construction, the public owner and A/E enter into a new contract, which supersedes the previous contracts between them, which provides for the A/E to complete the construction documents and act as construction manager at-risk in accordance with the terms of the design-build proposal issued in step two.

Through this three-step process, the A/E becomes the design-builder by virtue of being contractually responsible both for design and construction. Price competition is maintained by the fact that the trade contracts can be required to be competitively bid. As construction manager at-risk, the A/E may be required to procure the trade contracts on an "open book" basis, after owner input, and award the work to the low bidder or in accordance with established criteria — similar to how many construction management projects are structured today.

There is a significant additional advantage to the public owner from employing this sequential method of designer-led design-build: the owner does not have to commit to a design-build method of project delivery at the onset of the project. Instead, the owner can start the project traditionally, contracting for the usual A/E services. After the owner has become comfortable with the concept of designer-led design-build, and with the work of the chosen A/E, it can elect whether or not to exercise its option to convert the project to design-build. This is not possible with the two-step procurement process, nor with contractor-led design-build.

Sequential designer-led design-build is a construction procurement method that appears to meet all of the criteria frequently articulated by public construction officials. It has been used in the private sector with considerable success. Although sequential designer-led design-build is not yet very frequent or common in the public sector, it is both more logical and more comfortable for most public entities.

Furthermore, many jurisdictions recognize construction management as a professional service, subject to qualifications based selection, rather than competitive bidding. Indeed, even in some of the jurisdictions which provide no specific authority for design-build, such as Kansas and North Dakota, construction management is recognized as a professional service and is excluded from the competitive bidding requirements.

In light of the increasing acceptance of design-build in many jurisdictions, together with the increasing recognition of construction management as a professional service, sequential designer-led design-build in the public sector is a concept whose time has arrived. Public officials should consider talking to their A/E consultants about leading a design-build team for the next project.

Design Build for the Public Sector – A Fifty State Survey^{*}

State Name	Authority	State	Political Subdivisions	Notable Case Law	Construction Manager Exemption
Alabama	No ⁱ	No	No	No	Yes
Alaska	Yes ⁱⁱ	Yes	Yes	Yes	No
Arizona	Yes ⁱⁱⁱ	Yes	Yes	No	Yes
Arkansas	Yes ^{iv}	Yes	Yes	No	Yes
California	Yes ^v	Yes	Yes	Yes	No
Colorado	Yes ^{vi}	Yes	No	No	No
Connecticut	Yes ^{vii}	Yes	No	No	Yes
Delaware	Yes ^{viii}	Yes	No	No	Yes
District of Columbia	No ^{ix}	No	No	No	No
Florida	Yes ^x	Yes	Yes	No	Yes
Georgia	Yes ^{xi}	Yes	Yes	No	Yes
Hawaii	Yes ^{xii}	Yes	Yes	Yes	No
Idaho	Yes ^{xiii}	Yes	Yes	Yes	Yes
Illinois	Yes ^{xiv}	Yes	No	No	No
Indiana	Yes ^{xv}	Yes	Yes	Yes	Yes
Iowa	No ^{xvi}	No	No	No	No
Kansas	No ^{xvii}	No	No	No	Yes

^{*} Explanation of Table. The “Authority” column reflects whether there is any specific authority in the State statutes allowing use of the design-build procedure as of early 2006. The next two columns (“State” and “Political Subdivisions”) indicate whether that authority is conferred at the State level, and/or on other agencies or units of local government in the State. If there is any significant case law in the State, that fact is reflected in the column entitled “Notable Case Law.” Finally, States which contain provisions exempting “Construction Managers” from the traditional competitive bidding requirements are reflected in the final column. A very brief description of the authority found in each State for design-build is contained in the end notes. This chart is intended to give a brief overview of design-build authority in the fifty States, and not to describe all of the instances in which design-build is allowed in a particular jurisdiction, or to describe all of the conditions and procedures which must be satisfied in order to utilize the design-build method of procurement. Finally it is critical to note that the law in this area is constantly evolving. While the trend is for more and more States to adopt legislation permitting design-build, a number of statutes currently allowing design-build have sunset provisions and will expire unless renewed by the state legislature. Accordingly, it is vital to check the law in each relevant jurisdiction when considering a design-build project.

State Name	Authority	State	Political Subdivisions	Notable Case Law	Construction Manager Exemption
Kentucky	Yes ^{xviii}	Yes	Yes	No	Yes
Louisiana	Yes ^{xix}	Yes	Yes	No	No
Maine	Yes ^{xx}	Yes	Yes	No	Yes
Maryland	Yes ^{xxi}	Yes	Yes	No	Yes
Massachusetts	Yes ^{xxii}	Yes	Yes	No	Yes
Michigan	No ^{xxiii}	No	No	No	No
Minnesota	Yes ^{xxiv}	Yes	Yes	No	Yes
Mississippi	Yes ^{xxv}	Yes	No	No	No
Missouri	Yes ^{xxvi}	Yes	No	Yes	Yes
Montana	Yes ^{xxvii}	Yes	No	No	Yes
Nebraska	Yes ^{xxviii}	No	Yes	No	Yes
Nevada	Yes ^{xxix}	Yes	Yes	No	No
New Hampshire	Yes ^{xxx}	Yes	No	No	Yes
New Jersey	Yes ^{xxxi}	Yes	No	No	Yes
New Mexico	Yes ^{xxxii}	Yes	Yes	No	Yes
New York	Yes ^{xxxiii}	Yes	No	No	No
North Carolina	Yes ^{xxxiv}	Yes	Yes	No	Yes
North Dakota	No ^{xxxv}	No	No	No	Yes
Ohio	Yes ^{xxxvi}	Yes	No	Yes	Yes
Oklahoma	Yes ^{xxxvii}	Yes	Yes	No	Yes
Oregon	Yes ^{xxxviii}	Yes	Yes	Yes	No
Pennsylvania	Yes ^{xxxix}	Yes	No	Yes	Yes
Rhode Island	No ^{xl}	No	No	No	No
South Carolina	Yes ^{xli}	Yes	Yes	No	Yes

State Name	Authority	State	Political Subdivisions	Notable Case Law	Construction Manager Exemption
South Dakota	Yes ^{xlii}	Yes	Yes	No	Yes
Tennessee	Yes ^{xliii}	No	Yes	Yes	Yes
Texas	Yes ^{xliv}	Yes	Yes	No	Yes
Utah	Yes ^{xlv}	Yes	Yes	No	Yes
Vermont	Yes ^{xlvi}	Yes	No	No	Yes
Virginia	Yes ^{xlvii}	Yes	Yes	No	Yes
Washington	Yes ^{xlviii}	Yes	Yes	Yes	Yes
West Virginia	Yes ^{xlix}	Yes	Yes	No	No
Wisconsin	Yes ⁱ	Yes	Yes	Yes	No
Wyoming	No ⁱⁱ	No	No	No	No

ⁱ Alabama does not have any specific authority allowing the use of design-build for public projects.

ⁱⁱ Alaska law provides that when the Commissioner of Transportation and Public Facilities determines that it is advantageous to the State, a procurement officer may issue a request for proposals requesting the submission of offers to provide construction in accordance with the design provided by the offeror. Ak. St. § 36.30.200, *et seq.* The Alaska Administrative Code provides that a school district may use design-build for the construction of public schools, if the Department of Education approves the method in advance of any solicitation, the proposed method is in the State’s best interest, and the school district concurs in any directives the department makes concerning the type of selection and award of the contract Alaska Admin. Code Tit. 4, § 31.080. In *Breck v. Olmer*, 745 P.2d 66 (Alaska 1987), the Alaska Supreme Court held that where the municipal corporation was advised by its attorney that the design-build method of contract procurement was defensible under applicable law, the court could not hold that the competitive-bidding procedures constituted clearly established law. The court therefore refused to invalidate the design-build contract.

ⁱⁱⁱ Arizona allows state agencies and units of local government to use design-build. See Ariz. Rev. Stat. § 41-2503, *et seq.* (state procurement provisions) and Ariz. Rev. Stat. § 34-101, *et seq.* (procurement provisions for counties, cities, towns, and certain special districts). In general, both statutes provide that the first step in the procurement of design-build services is to request qualifications for contract. The purchasing agency then convenes a selection committee, creates a short list of firms that are most qualified, and enters into negotiations for a contract with the highest qualified firm on the short list (and, if necessary, the next highest qualified firm and so on), until a satisfactory agreement is reached. Both titles 34 and 41 provide for the alternate two-step RFQ/RFP selection process. See Ariz. Rev. Stat. § 41-2578(F); and § 34-603(F). The State Board of Education and local school districts also have authority to use design-build. See Ariz. Rev. Stat. §§ 15-213, 341. The State Department of Transportation has the authority to use design-build pursuant to the two-step RFQ/RFP selection process. See Ariz. Rev. Stat. § 28-7361, *et seq.*

^{iv} In Arkansas, the State Highway Commission is authorized to use design-build (A.C.A. 25-65-107), as are school districts (A.C.A. 19-11-807) and local sanitation systems (A.C.A. 22-9-203).

^v The California Legislature has numerous statutes authorizing design-build to be utilized by various state and local entities and for various state and local projects. The authority to use design-build is often conferred on a project-by-project basis. In *Sierra Club v. Babbitt*, 69 F.Supp.2d 1202 (1999) the district court held that even though defendants' failure to develop a revegetation plan for highway reconstruction payment was clearly attributable to the design-build method of construction and resulted in an impairment of plaintiffs' ability to assess the environmental impacts of the project, the plaintiffs did not demonstrate irreparable injury in connection with the tardy completion of the revegetation-plan sufficient to support a grant of injunctive relief.

^{vi} In Colorado, the Department of Transportation is authorized to utilize design-build pursuant to a two step RFQ/RFP process. See C.R.S.A. § 43-1-1401, *et seq.*

^{vii} Connecticut law provides that the Commissioner of Public Works may designate a project as a "designated total cost basis project," and may enter into a single contract with a private developer which may include such project elements as site acquisition, architectural design and construction. Contracts for such projects are based on competitive proposals received by the Commissioner. C.G.S.A. § 4b-24. Connecticut also allows the State Board of Education to establish a limited pilot program using design-build for school construction projects. C.G.S.A. § 10.285f.

^{viii} Although Delaware law does not contain any general grant of authority for design-build, the Secretary of Transportation is designated to utilize design-build for specific transportation projects authorized by the legislature. 2 Del.C. § 2003.

^{ix} The District of Columbia prohibits design-build projects. There is an exception, however, if the design-build entity forms a subsidiary or "affiliate" to perform the construction services, and if approval is received from the Director of Administrative Services. See Design Build Deskbook, 3d Ed., citing D.C. Mun. Reg. Tit. 27.

^x Florida law authorizes the use of design-build by state agencies, counties, municipalities, special districts, and other political subdivisions, including through the use of the two-step RFQ/RFP selection process or the competitive proposal selection process. See F.S.A. §§ 189.441, 225.20, 287.055, 337.107, 337.11, 337.14, and 1013.45.

^{xi} The Georgia Local Government Public Works Construction Law provides that governmental entities (defined as a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission but not any authority, board, department or commission of the state, or a public transportation agency) are authorized to utilize any construction delivery method, provided that all public works contracts (i) place the bidder or offeror at risk for construction, and (ii) require labor or building materials in the execution of the contract. Such contracts can be awarded on the basis of competitive sealed bidding or competitive sealed proposals. Ga. Code § 36-91-20. The Department of Transportation has separate authority to enter into design-build contracts pursuant to an RFQ/RFP selection process. Ga. Code §§ 32-2-61, 81.

^{xii} The Hawaii Public Procurement Code allows for design-build projects through the use of competitive sealed proposals, which may be utilized when it is not practicable or advantageous to the State to procure services through competitive bidding. See HRS § 103D – 303.

^{xiii} The State of Idaho allows the design-build method of construction to be used by the State and units of local government for public works projects. See I.C. 67-2309 and 67-5711A. Although it is unclear which competitive selection requirements are applicable to such contracts, it appears likely that they would be subject to the competitive situation provisions for professional service contracts outlined in I.C. 67-2320. See also *Dana v. Board of Commissions of Canyon County*, 864 P.2d 632 (1993) (discussing the difference between an invitation for bids and a request for proposals for professional services).

^{xiv} The Illinois General Assembly has recently enacted legislation enabling the State's capital development board to use the design-build delivery method for public projects if it is shown to be the state's best interest for that particular project. See Public Act 94-0716 (the "Design-Build Procurement Act"). The Act provides for a two phase RFQ/RFP procedure for the selection of the successful design-build entity.

^{xv} The State of Indiana recently passed legislation allowing public agencies (defined as state agencies, state educational institutions, units, bodies corporate and politic created by state statute, and school corporations) to use design-build services pursuant to the two step RFQ/RFP process. See IC 5-30-1-1 *et seq.* In *Negley v. Lebanon Community School Corporation*, 362 N.E.2d 178 (Ind. App. 1977) the court held that a school building corporation, when constructing a school building for lease to a school corporation, was not required to comply with statutes mandating competitive building and could use the design-build process.

^{xvi} Iowa does not have any specific authority allowing the use of design-build procurement services for public projects.

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- xvii Kansas does not have any specific authority allowing the use of design-build procurement services for public projects.
- xviii The State of Kentucky allows both the state and units of local government to utilize the design-build method of procurement. See KRS §§ 45A.030 *et seq.* Capital projects to be constructed using the design-build method may include a multiple phase proposal that is based on qualifications, experience, technical requirements, guaranteed maximum price, and other criteria as set forth in the request for proposal.
- xix The State of Louisiana allows the design-build method of procurement to be used for certain specific projects and certain specific entities. See LSA – RS § 33:2740.27 (authority to use design-build granted to Algiers Development District) LSA – RS § 48:250.2 (authority granted to Department of Transportation allowing design-build method to be used for pilot program). In the wake of Hurricane Katrina, the legislature enacted legislation allowing the Department of Transportation and Development to utilize the design-build method on any transportation infrastructure project in an area impacted by a hurricane, pursuant to a two step RFQ/RFP procedure. See LSA-RS § 250.4.
- xx The State of Maine allows the design-build method of project delivery to be used by the State or its agencies for public improvement projects in accordance with the two step RFQ/RFP process. See 5 M.R.S.A. § 1743. Contracts for the construction, major alteration, or repair of school buildings involving a total cost in excess of \$100,000 must be awarded by competitive bids, although they “may be waived in individual cases involving unusual circumstances” with the approval of the Director of the Bureau of Public Improvements and the Commissioner of Education. 5 M.R.S.A. § 1743-A.
- xxi Maryland allows the use of design-build for the construction of certain county education facilities, for certain suburban sanitary district projects, and for capital projects undertaken by units of state government. See MD Code §§ 4-126, 3-102, and 3-602.
- xxii Massachusetts allows any “awarding authority” to utilize the design-build procurement method for public works projects estimated to cost not less than \$5,000,000 and with the approval of the inspector general pursuant to a two phase RFQ/RFP selection process. The term “awarding authority” is defined as the “commonwealth, or any political subdivision, department, agency, board, commission, authority, or other instrumentality thereof, or any county, city, town, or district.” See M.G.L.A. 149A, § 14 *et seq.*
- xxiii Michigan does not have any specific authority allowing the use of the design-build procurement method of services for public projects.
- xxiv The State of Minnesota authorizes the State and its agencies to use the design-build method of procurement services for public improvements, on the basis of either a qualification based or a design and price based selection process). M.S.A. § 16C.32, *et seq.* Separate authority exists for the Commissioner of Transportation to utilize design-build for transportation projects pursuant to the two-step RFQ/RFP process. See M.S.A., § 161.3410 *et seq.*. See also M.S.A., § 383B.158 *et seq.* authorizing Hennepin County to use design-build for roadway projects pursuant to the two-step process, and M.S.A. § 473.3993 authorizing the use of design-build for transit plans. In *W.V. Nelson Construction Co. v. City of Lindstrom*, 565 N.W.2d 434 (1997), the Minnesota Court of Appeals held that a mixed design services and building construction contract for a municipal liquor store was a contract subject to competitive bidding statutes. (“The city cannot circumvent the requirements of the competitive bidding statutes simply by including a design component in a contract for the construction of a public building.”)
- xxv The State of Mississippi allows the design-build method of procurement to be used as a pilot program for a handful of capital development projects. See Miss. Code Ann., §§ 31-11-3 and 65-1-85.
- xxvi Missouri law grants authority to the State Highways and Transportation Commission to enter into a total of three design-build project contracts for highway construction projects pursuant to the RFQ/RFP selection process. See V.A.M.S. § 227.107. In the recent case of *Murphy Company Mechanical Contractors and Engineers v. Director of Revenue*, 156 S.W.3d 339 (Sup. Ct. of Mo. 2005) the court held that a design-build contractor was an “engineering firm” within the meaning of the sales tax exemption statute because it provided professional engineering services.
- xxvii Montana has enacted legislation authorizing the State Transportation Commission to utilize a design-build contracting pilot program for highway construction pursuant to the two step RFQ/RFP selection process. See M.C.A. § 60-2-134, *et seq.*
- xxviii Nebraska law authorizes school districts to utilize the design-build method project delivery for certain school projects, pursuant to the two step RFQ/RFP selection process. See Neb. Rev. St., § 79-2002, *et seq.*

^{xxix} Nevada allows a public body to contract with a design-build team for the design and construction of a public work that is a discrete project if the public body has approved the use of a design-build team for that purpose and the public work (a) is the construction of a park and appurtenances thereto, the rehabilitation or remodeling of a public building, or the construction of an addition to a public building or (b) has an estimated cost which exceeds ten million dollars. See N.R.S. § 338.1711 *et seq.* A public body means the state, county, city, town, school district or any public agency of the state or its political subdivisions sponsoring or financing a public work. See N.R.S. § 338.010. The selection process is based on an RFQ/RFP two step process. There is also specific design-build authority for the Department of Transportation for the construction, reconstruction, or improvement of a highway. See N.R.S. § 408.3876 *et seq.*

^{xxx} New Hampshire allows the state commissioner of administrative services to use design-build for any buildings that are part of capital projects. See N.H. Rev. Stat. § 21-I:80. It also allows statewide transportation improvement program projects with a cost not to exceed five million dollars to be developed and constructed utilizing the design-build concept. See N.H. Rev. Stat. § 228:4.

^{xxxi} New Jersey allows design-build to be used for projects awarded by the New Jersey Transit Corporation in accordance with applicable regulations promulgated by the corporation. See N.J.S.A. § 27:25-11.

^{xxxii} In New Mexico, except for road and highway construction or reconstruction projects, a design-build project delivery system may be authorized when the state purchasing agent or central purchasing office makes the determination in writing that it is appropriate and in the best interest of the state or local public body to use the system on a specific project with a maximum allowable construction cost of more than ten million dollars and in accordance with certain criteria set forth in the statute. New Mexico provides for a two phase RFQ/RFP procedure to be used for awarding design and build contracts. See N.M.S.A. § 13-1-119.1.

^{xxxiii} New York provides specific authority for the state university to award design-build contracts for approved university-related economic development facilities. McKinney's Education Law, § 376.

^{xxxiv} In North Carolina, the State Department of Transportation has authority to use design-build for the construction of a limited number of contracts if it finds it is not in the public interest to comply with normal design and construction contracting procedures. See N.C.G.S.A. § 136-28.11. Further, the State, or a county, municipality, or other public body may under certain circumstances utilize "alternative contracting methods" (which are defined in the administrative code to include design-build) to erect, construct, alter, or repair buildings. See N.C.G.S.A. § 143-128.

^{xxxv} North Dakota does not have any specific authority allowing the use of design-build on public projects.

^{xxxvi} Although Ohio does not have any general authority allowing design-build for a public project, the legislature has, in the past, authorized department of transportation to use design-build for specific pilot projects. In *Zeveski v. Ohio Board of Examiners of Architects*, 2002 WL 1938251 (Oh. Ct. App. 2002), the court held that the phrase "experienced and registered architect's office" in a statute which permitted an applicant for registration as an architect to substitute two years of practical or equivalent experience in a registered architect's office for each year of professional education did not exclude experience in a so-called "design-build firm" where the applicant was at all times working under the supervision of a registered architect. In *Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash*, 666 N.E.2d 654 (Oh. Ct. App. 1995) the court held that a city's use of design-build bidding for public improvements was a proper exercise of its home rule power under its charter, even though it differed from the bidding process contained in the Ohio Revised Code.

^{xxxvii} Oklahoma allows a state agency to use design-build delivery methods, subject to approval of the Director of Central Services. Municipalities, counties, public trusts, and other political subdivisions in the State are not required to obtain the approval of any other State agency in order to use the design-build delivery method, although they are subject to other statutory requirements. See 61 Okl. St. Ann. §§ 202 and 202.1.

^{xxxviii} Oregon allows state and local governments to exempt public improvement contracts from competitive bidding requirements subject to findings of the contracting agency that it is unlikely the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts, and that the awarding of public improvement contracts under the exemption will result in substantial cost savings to the contracting agency. In granting an exemption, the governmental entity must, "when appropriate, direct the use of alternate contracting methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition." In the event a contract qualifies for the exemption, the contract can be awarded through a system of "competitive proposals," and thereby avoid some of the requirements applicable to competitive bidding. See O.R.S. § 279C.335 and § 279C.400. In

Associated Builders and Contractors, Inc. v. Tri-County Metropolitan Transportation District of Oregon, 12 P.3d 62 (Or. Ct. App. 2000) it was held that the findings of the Board of Directors of the Metropolitan Transportation District in exempting, from competitive bidding, a contract to construct a light rail extension to an airport, were sufficient under the statute then in effect.

xxxix Pennsylvania allows certain county economic development authorities to use an "alternative contracting procedure" for selected public purpose facilities if it is determined that such procedure is the "most efficient, economical and timely method to proceed with the project." See 16 P.S. § 5517. The Department of General Services of the Commonwealth may also use design-build under certain circumstances for public projects. See 62 Pa. C.S.A. § 322. In *Mechanical Contractors Association of Eastern Pennsylvania, Inc. v. Southeastern Pennsylvania Transportation Authority*, 654 A.2d 119 (Comm. Ct. Pa. 1995), the court held that the "separation acts" requirement of separate contracts for plumbing, heating, ventilating, and electrical work on public construction contracts was intended to protect subcontractors from unscrupulous general contractors and that the Southeastern Pennsylvania Transportation Authority was therefore obligated to contract directly with the subcontractors for work on a bus maintenance facility and could not solicit bids for the award of a single design-build contract.

xl Although there is no specific authority in Rhode Island allowing the use of design-build, there is a provision in the State Purchasing Act which allows a purchasing agent to avoid a contract by competitive negotiation where competitive sealed bidding is "not practicable." See R.I. St. §§ 37-2-18 and 37-2-19.

xli Under South Carolina law, when a state purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or advantageous to the State, a contract may be entered into by competitive sealed proposals utilizing the two-step RFQ/RFP process. See SC St. §§ 11-35-1510, 1530, and 11-35-3020. The Department of Transportation may also award highway construction contracts using a design-build procedure. See SC St. § 57-5-1625. Political subdivisions such as counties and municipalities are governed by their own procurement code for construction services. See SC St. § 11-35-50.

xlii South Dakota permits public corporations (the State and all counties, municipalities, and public school corporations) to enter into design-build contracts pursuant to a two-step RFQ/RFP procedure, and subject to certain conditions. See SDCL § 5-18-1 *et seq.*

xliii In Tennessee, public building authorities are authorized to contract for design-build services pursuant to an RFQ/RFP process (with some exceptions). In *Shankle v. Bedford County Board of Education*, 1997 WL 83662 *5 (Tenn. Ct. App. 1997), the court construed § 12-10-124 of the Tennessee Statutes noting that "in some circumstances, the General Assembly has recognized the appropriateness of the use of competitive bidding. In other cases, such as with the public building authorities, the Assembly has recognized the appropriateness of other methods."

xliv The State of Texas has enacted a variety of statutes allowing design-build services to be used on both the state and local levels pursuant to a two-step RFQ/RFP process. See, *e.g.*, V.T.C.A., Educational Code, §§ 44.031, .036, 51.780, Government Code § 2166.2531, Local Government Code §§ 271.111, 113, 119, Transportation Code § 223.203 and Water Code §§ 60.451, .454, and .460.

xlv Utah allows the State to utilize design-build for State building construction projects. See U.C.A. § 63-56-501. The State Department of Transportation and certain units of local government are also authorized to use design-build for transportation projects that have an estimated cost of at least fifty million dollars, pursuant to a two-step RFQ/RFP selection process. See U.C.A. 63-56-502.

xlvi Vermont allows the Commissioner of Buildings and General Services to use the design-build construction delivery process, by advertising or inviting three or more bids, and awarding the contract on the basis of evaluation criteria established by the Commissioner, which may include physical plant characteristics proposed, program response to space needs, ability of the design-build team, anticipated development schedule and overall cost consideration. See 29 V.S.A. § 161.

xlvii In Virginia, both the Commonwealth and other public bodies may enter into contracts on a design-build basis pursuant to the requirements set forth in the statutes, and in accordance with the two-step RFQ/RFP selection process. See Va. Code Ann. §§ 2.2-2404, *et seq.*, 2.2-4303, 2.2-4306, 2.2-4308, 23-38.88, 33.1-12, 33.1-221.8:8, 53.1-95.18, and 66-25.7.

xlviii The State of Washington allows a variety of state agencies and municipalities to utilize design-build procedures under certain circumstances through a two-step competitive process. It should be noted, however, that the statutes providing for "alternative public works contracting procedures" are only effective until July 1, 2007. See R.C.W.A. §§ 39.10.020, .051, .065 and .120. The Department of Transportation may use design-build for certain miscellaneous public works projects. See R.C.W.A. 47-

20.780, 785, 47.60.810, *et seq.* In *State ex rel. Citizens Against Tolls v. Murphy*, 88 P.3d 375 (Sup. Ct. Wash. 2004), the Washington Supreme Court upheld a design-build agreement entered into pursuant to the Public-Private Transportation Initiatives Act.

^{xlix} In West Virginia, the Design-Build Procurement Act, W. Va. Code, § 5-22A-1, *et seq.*, allows agencies (meaning all state departments, agencies, authorities, quasi-public corporations and all political subdivisions, including cities, counties, boards of education and public service districts) to use design-build procedures for the design, construction or alteration of a building, together with incidental structures and facilities. Design-build may not be used for any other construction projects, such as highway, water or sewer projects. The statute sets forth the criteria for design-build projects, including the two-step RFQ/RFP selection process.

ⁱ Wisconsin allows the use of design-build procedures for certain specific projects, such as the construction of a sheriff's department training academy in Milwaukee County (W.S.A. § 59.79) and local bridge construction projects (W.S.A. §§ 84.11 and 84.115). Wisconsin also allows the State Building Commission to waive its competitive projects bidding statute whenever the Building Commission determines that the use of innovative types of design and construction processes will make better use of the resources and technology available in the building industry. W.S.A. § 13.48(19). In *J.F. Ahern Co. v. Wisconsin State Building Commission*, 336 N.W.2d 679 (Wis. Ct. App. 1983), the Court of Appeals held that this statute did not constitute an unlawful delegation of legislative power to the Building Commission. In so holding, the Court considered the Commission's general purpose under the statute; *i.e.* to promote "the interest of economy, efficiency and the public welfare . . . by means of a long-range public building program", as that purpose applied to determinations as to whether it was in the State's best interest to waive its competitive bidding requirements and the fact that "alternatives [to the competitive bidding requirements] must be innovative processes which make better use of the resources and technology of the building industry."

ⁱⁱ Wyoming does not have any specific authority allowing the use of design-build procedures.