

**1999 DRAFTING REQUEST**

**Bill**

Received: **09/25/98**

Received By: **shoveme**

Wanted: **As time permits**

Identical to LRB:

For: **Gary George (608) 266-2500**

By/Representing: **Karena Bierman**

This file may be shown to any legislator: **NO**

Drafter: **shoveme**

May Contact:

Alt. Drafters:

Subject: **Counties**

Extra Copies: **JTK, MES**

**Pre Topic:**

No specific pre topic given

**Topic:**

Authorize Milwaukee County to let design and build public works contracts

**Instructions:**

See Attached. Same as 1997 SB 426 (-3925/2)

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typist</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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FE Sent For:

06-17-99  
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**<END>**

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FE Sent For: *13-8-99 King*

*29LP.* ~~*29LP*~~  
*IS*  
<END>

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Wanted: **As time permits**

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By/Representing: **Karena Bierman**

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Drafter: **shoveme**

May Contact:

Alt. Drafters:

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Extra Copies: *MES 1*

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**Instructions:**

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<END>



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Drafter: **shoveme**

May Contact:

Alt. Drafters:

Subject: **Counties**

Extra Copies:

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**Topic:**

Authorize Milwaukee County to let design and build public works contracts

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**Instructions:**

See Attached. Same as 1997 SB 426 (-3925/2)

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**Drafting History:**

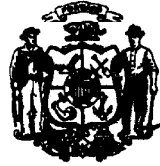
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11NES 9/28/98

FE Sent For:

<END>

# State of Wisconsin



GARY R. GEORGE  
SENATOR

DATE: September 16, 1998

TO: Legislative Reference Bureau  
-Pamela J. Kahler, Esq.  
-Jefren E. Olsen, Esq.  
-Marc E. Shovers, Esq. ✓  
-Madelon J. Lief, Esq.  
-Pamela J. Kahler, Esq.  
-Paul E. Nilsen, Esq.

FROM: Karena Bierman

RE: Drafting Requests

Attached please find a Senate Bill which Senator George would like to have re-drafted for the upcoming Session. At this time there are no content changes required to the previous drafts. Please let me know if further information is necessary.

Thank you for your attention to this request.

MES:kg  
RMNR

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~



1

**AN ACT ... relating to: ???**

*~~Analysis by the Legislative Reference Bureau~~*

*~~The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:~~*

2

~~(END)~~





**1997 SENATE BILL 426**

January 28, 1998 - Introduced by Senators GEORGE, RUDE, DARLING and WELCH, cosponsored by Representatives MORRIS-TATUM, STASKUNAS, JENSEN, RILEY and NOTESTEIN. Referred to Committee on Economic Development, Housing and Government Operations.

- 1 **AN ACT** *Gen Cat* **to amend** 59.52 (29) (a); and **to create** 59.52 (29) (c) of the statutes;  
2 **relating to:** authorizing certain counties to let public works contracts under  
3 the design and build construction process.

***Analysis by the Legislative Reference Bureau***

In general, under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$20,000 may be let by a county, a class 1 notice of the proposed construction must be given by the county board. Also under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$10,000 may be let by a municipality (2nd, 3rd or 4th class city, or a village or town), a class 1 notice of the proposed construction must be given by the municipality's governing body. Before a contract for public construction with a value that exceeds \$20,000 may be let by a county, or exceeds \$10,000 in the case of a municipality, certain other requirements, such as a lowest responsible bidder requirement, must be met. A county board, by a three-fourths vote of its membership, may also authorize the county itself to perform any class of public work if the estimated cost of the work exceeds \$20,000.

This bill authorizes a county with a population of at least 500,000 (presently only Milwaukee County) to let a public works contract using the design and build construction process, which is defined as a method of construction under which the engineering, design and construction services are provided by a single entity.

For further information see the **local** fiscal estimate, which will be printed as an appendix to this bill.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

- 4 SECTION 1. 59.52 (29) (a) of the statutes is amended to read:

**SUBMITTAL  
FORM**

**LEGISLATIVE REFERENCE BUREAU  
Legal Section Telephone: 266-3561  
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 10/12/98

To: Senator George

Relating to LRB drafting number: LRB-0347

**Topic**

Authorize Milwaukee County to let design and build public works contracts

**Subject(s)**

Counties

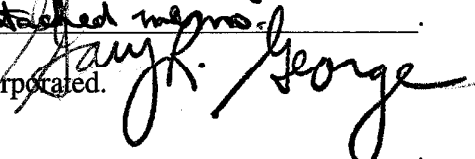
1. **JACKET** the draft for introduction \_\_\_\_\_

in the **Senate** \_\_\_\_ or the **Assembly** \_\_\_\_ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached \_\_\_\_\_

*Please incorporate changes indicated in the attached memo.*

A revised draft will be submitted for your approval with changes incorporated.



3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction \_\_\_\_\_

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Marc E. Shovers, Senior Legislative Attorney  
Telephone: (608) 266-0129

# State of Wisconsin



GARY R. GEORGE  
SENATOR

MEMORANDUM

CONFIDENTIAL

TO: Marc E. Shovers,  
Legislative Reference Bureau Drafting Attorney

FROM: Dan Rossmiller *DR*

DATE: December 21, 1998

RE: Drafting Request

*redraft  
- 0347/1/1*

Senator George would like to have a bill he introduced last session re-drafted with certain changes.

Senator George would like to have 1997 Senate Bill 426, relating to authorizing certain counties to let public works contracts under the design/build construction process, redrafted with the following changes/additions:

- a) Authorize municipalities to let public works contracts under the design/build construction process;
- b) Authorize sewerage districts (and, in particular, the Milwaukee Metropolitan Sewerage District) to let public works contracts under the design/build construction process.

Thank you for your assistance.

Please feel free to contact me (6-2500) if you have any questions.



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-0347/2

MES:kg/jm

SOON

1999 BILL

FMR

note

open

Cities, Villages, towns,

metropolitan  
sewerage districts,  
technical colleges and  
federated public libraries

1 AN ACT to amend 59.52 (29) (a); and to create 59.52 (29) (c) of the statutes;  
2 relating to: authorizing ~~certain~~ counties to let public works contracts under  
3 the design and build construction process.

**Analysis by the Legislative Reference Bureau**

In general, under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$20,000 may be let by a county, a class 1 notice of the proposed construction must be given by the county board. Also under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$10,000 may be let by a municipality (2nd, 3rd or 4th class city, or a village or town), a class 1 notice of the proposed construction must be given by the municipality's governing body. Before a contract for public construction with a value that exceeds \$20,000 may be let by a county, or exceeds \$10,000 in the case of a municipality, certain other requirements, such as a lowest responsible bidder requirement, must be met. A county board, by a three-fourths vote of its membership, may also authorize the county itself to perform any class of public work if the estimated cost of the work exceeds \$20,000.

This bill authorizes a county with a population of at least 500,000 (presently only Milwaukee County) to let a public works contract using the design and build construction process, which is defined as a method of construction under which the engineering, design and construction services are provided by a single entity.

JNS  
ANL



**BILL**

For further information see the *local* fiscal estimate, which will be printed as an appendix to this bill.

---

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 59.52 (29) (a) of the statutes is amended to read:

2           59.52 (29) (a) All Except as provided in par. (c) 2., all public work, including any  
3 contract for the construction, repair, remodeling or improvement of any public work,  
4 building, or furnishing of supplies or material of any kind where the estimated cost  
5 of such work will exceed \$20,000 shall be let by contract to the lowest responsible  
6 bidder. Any public work, the estimated cost of which does not exceed \$20,000, shall  
7 be let as the board may direct. If the estimated cost of any public work is between  
8 \$5,000 and \$20,000, the board shall give a class 1 notice under ch. 985 before it  
9 contracts for the work or shall contract with a person qualified as a bidder under s.  
10 66.29 (2). A contract, the estimated cost of which exceeds \$20,000, shall be let and  
11 entered into under s. 66.29, except that the board may by a three-fourths vote of all  
12 the members entitled to a seat provide that any class of public work or any part  
13 thereof may be done directly by the county without submitting the same for bids.  
14 This subsection does not apply to highway contracts which the county highway  
15 committee or the county highway commissioner is authorized by law to let or make.

16           **SECTION 2.** 59.52 (29) (c) of the statutes is created to read:

17           59.52 (29) (c) 1. In this paragraph, "design and build construction process"  
18 means a method of construction under which the engineering, design and  
19 construction services are provided by a single entity.



**BILL**

1

*Any*  
2. ~~In a county with a population of at least 500,000, any public works contract~~ *work*

2

described in par. (a) may be let using the design and build construction process.

3

(END)

INS  
3-3 ✓

Done →

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0347/2ins  
MES:kg:lp

INS ANL

*contract for*  
*construction*

This bill authorizes municipalities, 1st class cities (presently only Milwaukee), counties, metropolitan sewerage districts, technical colleges and federated public library systems to let a public ~~works contract~~ using the design and build construction process, which is defined as a method of construction under which the engineering, design and construction services are provided by a single entity.

INS 3-3

SECTION 1. 60.47 (2m) of the statutes is created to read:

60.47 (2m) DESIGN AND BUILD CONTRACTS. Any public contract under sub. (2) may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1.

SECTION 2. 61.55 of the statutes is amended to read:

**61.55 Contracts involving over \$10,000; how let; exception.** All contracts for public construction, in any such village, exceeding \$10,000, shall be let by the village board to the lowest responsible bidder in accordance with s. 66.29 insofar as said section may be applicable. If the estimated cost of any public construction exceeds \$5,000, but is not greater than \$10,000, the village board shall give a class 1 notice, under ch. 985, of the proposed construction before the contract for the construction is executed. This provision and s. 281.41 are not mandatory for the repair and reconstruction of public facilities when damage or threatened damage thereto creates an emergency, as determined by resolution of the village board, in which the public health or welfare of the village is endangered. Whenever the village board by majority vote at a regular or special meeting declares that an emergency no longer exists, this exemption no longer applies. Any contract for public

construction under this section may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1. ✓

History: 1975 c. 244; 1985 a. 183; 1995 a. 227.

**SECTION 3.** 62.03 (1) of the statutes is amended to read:

62.03 (1) This subchapter, except ss. 62.071, 62.08 (1), 62.09 (1) (e) and (11) (j) and (k), 62.15 (1m) (b), 62.175 and 62.23 (7) (em) and (he), does not apply to 1st class cities under special charter.

History: 1977 c. 151; 1979 c. 90 s. 21; 1979 c. 221, 260, 355; 1981 c. 281 s. 17; 1983 a. 395, 532, 538; 1989 a. 113; 1993 a. 400.

**SECTION 4.** 62.15 (1m) of the statutes is created to read:

62.15 (1m) DESIGN AND BUILD CONTRACTS. (a) ✓ Any contract for public construction under sub. (1) may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1. ✓

(b) Any contract for public construction let by a 1st class city may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1.

**SECTION 5.** ~~66.24~~<sup>6</sup> (5) (e) of the statutes is created to read:

*66.24(5)(e)* → ~~66.24~~<sup>6</sup> (5) (e) *Design and build contracts.* Any contract for public construction under this subsection may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1. ✓

**SECTION 6.** 66.904 (2) (a) of the statutes is amended to read:

66.904 (2) (a) Except as provided in par. (b), all work done and all purchases of supplies and materials by the commission shall be by contract awarded to the lowest responsible bidder complying with the invitation to bid, if the work or purchase involves an expenditure of \$7,500 or more. If the commission decides to proceed with construction of any sewer after plans and specifications for the sewer are completed and approved by the commission and by the department of natural resources under ch. 281, the commission shall advertise by a class 2 notice under ch.

985 for construction bids. All contracts and the awarding of contracts are subject to s. 66.29, except that any contract for public construction under sub. (1) may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1. ✓

History: 1981 c. 282, 391; 1985 a. 29.

**SECTION 7.** 66.904 (2) (e) of the statutes is amended to read:

66.904 (2) (e) Paragraphs (a) to (d) do not apply to contracts awarded under s. 66.905, except that any contract for public construction under s. 66.905 may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1. ✓

History: 1981 c. 282, 391; 1985 a. 29.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0347/2dn  
MES:kg:lp

I believe that this bill achieves your intent in that it specifically authorizes municipalities, sewerage districts and counties to use the design and build method, although I don't see anything in current law ~~s.~~ s. 59.52 (29), 60.47, 61.55 or 62.15 that would prohibit the use of the design and build method now. Because s. 62.03 exempts 1st class cities from most of the provisions in ch. 62, I had to amend that section to ensure that the bill *does* apply to the City of Milwaukee, although the city may have in effect an ordinance that already adopts s. 62.15. Is this OK, or do you want to exclude 1st class cities from the changes made in this bill to s. 62.15? Also, because of statutory cross-references, this bill will apply to technical colleges and federated library systems. Is this OK? See ss. 38.18<sup>✓</sup> and 43.17 (9) (a).<sup>✓</sup>

Marc E. Shovers  
Senior Legislative Attorney  
266-0129

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-0347/2dn  
MES:kg:ijs

February 8, 1999

I believe that this bill achieves your intent in that it specifically authorizes municipalities, sewerage districts and counties to use the design and build method, although I don't see anything in current law s. 59.52 (29), 60.47, 61.55 or 62.15 that would prohibit the use of the design and build method now. Because s. 62.03 exempts 1st class cities from most of the provisions in ch. 62, I had to amend that section to ensure that the bill *does* apply to the City of Milwaukee, although the city may have in effect an ordinance that already adopts s. 62.15. Is this OK, or do you want to exclude 1st class cities from the changes made in this bill to s. 62.15? Also, because of statutory cross-references, this bill will apply to technical colleges and federated library systems. Is this OK? See ss. 38.18 and 43.17 (9) (a).

Marc E. Shovers  
Senior Legislative Attorney  
266-0129

# State of Wisconsin



GARY R. GEORGE  
SENATOR

MEMORANDUM

CONFIDENTIAL

TO: Marc E. Shovers,  
Legislative Reference Bureau Drafting Attorney

FROM: Dan Rossmiller *DR*

DATE: January 29, 1999

RE: Re-Draft Request (per our phone conversation)

Thank you for redrafting 1997 Senate Bill 426, relating to authorizing certain counties to let public works contracts under the design/build construction process with the changes/additions requested in the previous memo dated December 21, 1998. As I noted on the phone, Senator George would like to make the following additional modifications to the most recent draft:

- a) Authorize all counties to let public works contracts under the design/build construction process;
- b) Raise to \$50,000 the dollar amount threshold level below which municipalities are exempt from utilizing competitive bidding for construction projects;
- c) Exempt from competitive bidding requirements those construction projects in which the materials are donated or labor is provided by volunteers.

Thank you for your assistance. I have attached a memo from the Legislative Fiscal Bureau indicating that the Legislature acted last session to raise the dollar amount threshold for state construction projects to be exempt from competitive bidding from \$30,000 to \$100,000. In addition, I have enclosed a memo from the Curt Witynski of the League of Municipalities that provides additional background. Pertinent sections are highlighted.

Please feel free to contact me (6-2500) if you have any questions.



## Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

January 11, 1999

TO: Senator Gary George  
Room 118 South, State Capitol

FROM: David Worzala, Fiscal Analyst

SUBJECT: Threshold for Competitive Bidding Process

This memo responds to your request for information on the dollar amount threshold for construction projects to be exempt from the state competitive bidding process.

In general, construction projects that are under \$100,000 may be exempt from the lowest qualified responsible bidder and public notice contracting requirement if the project would be constructed in accordance with simplified procedures established by the Building Commission. 1997 Wisconsin Act 27 raised the limit from \$30,000 to \$100,000. The statutory reference is s. 13.48(29).

While projects under \$100,000 are exempt from most of the competitive bidding process requirements, current reporting and contracting requirements relating to minority contracts continue to apply to these projects.

DW/dls



## MEMORANDUM

To: Kathy Bull, Assistant Director

From: Curt Witynski, Legal Counsel *Curt*

Date: September 17, 1998

Re: Ways of Improving the Competitive Bidding Statutes

Some legislators have indicated an interest in revising the competitive bidding requirements applicable to municipal construction projects. You asked me for a report on what problems municipalities have been experiencing with the competitive bidding procedures and in what ways, if any, the law might be improved.

There are a number of ways in which the competitive bidding laws might be improved. Generally speaking, municipalities would like more flexibility to enter into public construction contracts without being required to submit such contracts for bids. Municipalities would like to have the option of using a request for proposals, design/build approach or other methods of selecting a contractor to perform public construction. Several specific proposed law changes are described below. However, before discussing possible modifications to the law, I'll first provide you with some background information on the competitive bidding statutes.



### I. What the Competitive Bidding Law Requires

In general, state law requires cities and villages to competitively bid for "public construction," the estimated cost of which exceeds \$10,000. If the estimated cost exceeds \$5,000 but is not greater than \$10,000, the municipality must give a class I notice, under ch. 985, Stats., of the proposed construction before the contract is executed. Secs. 61.55 (villages) and 62.15 (cities), Stats. The term "public construction" is not defined in the state statutes.

The statutes require municipalities to let public construction contracts to the "lowest responsible bidder." Cities may also, by a three-fourths vote of all the members-elect provide by ordinance that any class of public construction may be done directly by city employees without submitting the work for bids. Villages may take advantage of this option by adopting the city bid law, which they are authorized to do.

Another statute relevant to this topic is sec. 66.29, Stats., which contains a number of provisions governing the bidding process, including sections dealing with bidder's proof of responsibility, rejection of bids, correction of errors in bids, separation of contracts, and release of funds to contractors. Section 779.14, Stats., is also relevant to the bidding process. It deals with performance and payment bonds.

## II. Ways in Which Bidding Law Might Be Improved

1. **Increase Threshold at Which Competitive Bidding Applies.** Currently, state law requires municipalities to competitively bid for "public construction," the estimated cost of which exceeds \$10,000. The amount at which the competitive bidding requirement applies has been \$10,000 since 1986, when it was increased from \$5,000 to \$10,000. A lot of municipalities believe complying with the competitive bidding requirements adds to the cost of a project and delays the time in which work can begin on a project. This is especially true for small projects (e.g., projects under \$150,000). I believe raising the dollar amount at which the competitive bidding requirement applies, for example from \$10,000 to \$50,000, would make it possible for municipalities to complete small projects more efficiently and less expensively. 
2. **Clarify Repair and Maintenance Work as well as Demolition Work Are not Subject to Competitive Bidding.** Current law provides that "repair and reconstruction of public facilities" may be done without bidding when damage or threatened damage creates an *emergency*. Secs. 61.55 & 62.15(lb), Stats. This implies that repair work in general must be competitively bid. It would be beneficial to municipalities if the law were changed to expressly provide that repair and maintenance work is not subject competitive bidding requirements. 

It is unclear under current law whether demolition work constitutes public construction subject to the competitive bidding requirement. Legislation expressly exempting demolition work from the competitive bidding requirement would clarify the issue.

3. **Make it Easier to Avoid Paying State Sales Tax on Municipal Projects.** Legislation should be enacted, similar to 1997 Assembly Bill 471, making it easier for municipalities to take advantage of the state sales tax exemption applicable to municipal purchases of materials. The DOR has strictly interpreted the sales tax exemption to apply only when the municipality directly purchases any supplies and materials to be incorporated into a construction project. Typically, however, municipalities in this state rely on

contractors to procure the materials necessary for completing a public construction project. As a result, the municipality is seldom able to take advantage of the sales tax exemption applicable to municipal purchases.

- 4. Exempt Volunteer Projects or Projects Funded By Gifts From Bidding Process.** Municipalities are sometimes approached by individuals, groups or organizations interested in volunteering their services or offering to donate materials or money to help in the construction of a public facility or other public works project. Volunteer laborers and donated materials can make it possible for a municipality to construct a facility or undertake a public works project which may otherwise not have been undertaken due to budgetary constraints.



However, the competitive bidding statutes provide no exception from the bidding requirements for public construction projects in which some or all of the work is performed by volunteers, involves donated materials or is funded by a gift. Thus, for example, if a local organization volunteers to donate labor and materials for construction of a park shelter, the municipality must still competitively bid the project if the estimated cost of the project exceeds \$10,000 even if no municipal funds will be used to pay for the construction.

The law should be modified to exempt public construction projects from the competitive bidding requirements when all of the work is performed by volunteers, involves donated materials or is entirely funded by a gift. Under such circumstances, the concerns the competitive bidding requirements are designed to address are not at issue. Statutory bidding requirements "are designed to prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to insure that the public receives the best work or supplies at the most reasonable price practicable."<sup>1</sup>

- 5. Authorize Municipalities To Enter Into Design/Build Public Construction Contracts.** Under a design/build approach to public construction, the municipality contracts with a single entity to provide both the design and construction. Such an approach is not allowed under current law because it is inconsistent with the requirement that cities and villages award public construction contracts to the lowest responsible bidder using a competitive bidding process. Thus, enabling legislation is necessary to allow municipalities to use design/build. The advantages to design/build include having one entity responsible for the entire project, which may increase efficiency and cut down on costs. It also allows a municipality to fix a total project cost early in the process.

Handwritten signatures and notes including a star symbol, the name "Jensen", and the name "Schools + Brewster G.".

<sup>1</sup> *Waste Management, Inc. v. Wisconsin Solid Waste Recycling Authority*, 84 Wis.2d 462, 267 N.W.2d 659, 663 (1978).

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### **III. Final Comments**

These are just a few ideas for improving the competitive bidding laws. You may want to ask a couple of municipal attorneys for their thoughts on this matter. Let me know if you are interested, and I can give you the names of several who are particularly knowledgeable about the competitive bidding process. For your information, I've attached an FAQ on public construction contracts and the bidding process.



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-0347/2

MES:kgrijs

3  
FMR

1999 BILL

1 AN ACT *repeal* to amend 59.52 (29) (a), 61.55, 62.03 (1), 66.904 (2) (a) and 66.904 (2) (e);  
 2 and to create 59.52 (29) (c), 60.47 (2m), 62.15 (1m) and 66.24 (5) (e) of the  
 3 statutes; relating to: authorizing cities, villages, towns, counties,  
 4 metropolitan sewerage districts, technical colleges and federated public  
 5 libraries to let public works contracts under the design and build construction  
 6 process

competitive bidding requirements

*Changing the threshold amounts that require competitive bidding, and providing an exemption from under public works contracts*

**Analysis by the Legislative Reference Bureau**

In general, under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$20,000 may be let by a county, a class 1 notice of the proposed construction must be given by the county board. Also under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$10,000 may be let by a municipality (2nd, 3rd or 4th class city, or a village or town), a class 1 notice of the proposed construction must be given by the municipality's governing body. Before a contract for public construction with a value that exceeds \$20,000 may be let by a county, or exceeds \$10,000 in the case of a municipality, certain other requirements, such as a lowest responsible bidder requirement, must be met. A county board, by a three-fourths vote of its membership, may also authorize the county itself to perform any class of public work if the estimated cost of the work exceeds \$20,000.

This bill authorizes municipalities, 1st class cities (presently only Milwaukee), counties, metropolitan sewerage districts, technical colleges and federated public

*amount*  
 The bill also increases the threshold that requires competitive bidding on public works contracts to \$50,000 for counties and municipalities, and exempts from competitive bidding public works contracts in which the building materials library systems to let a contract for public construction using the design and build construction process, which is defined as a method of construction under which the engineering, design and construction services are provided by a single entity.  
 For further information see the local fiscal estimate, which will be printed as an appendix to this bill.

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

*or labor is donated.*

1           **SECTION 1.** 59.52 (29) (a) of the statutes is amended to read:

2           59.52 (29) (a) ~~All Except as provided in par. (c) 2.,~~ all public work, including any  
 3 contract for the construction, repair, remodeling or improvement of any public work,  
 4 building, or furnishing of supplies or material of any kind where the estimated cost  
 5 of such work will exceed ~~\$20,000~~ <sup>\$50,000</sup> shall be let by contract to the lowest responsible  
 6 bidder. Any public work, the estimated cost of which does not exceed ~~\$20,000~~ <sup>\$50,000</sup>, shall  
 7 be let as the board may direct. If the estimated cost of any public work is between  
 8 \$5,000 and ~~\$20,000~~ <sup>\$50,000</sup>, the board shall give a class 1 notice under ch. 985 before it  
 9 contracts for the work or shall contract with a person qualified as a bidder under s.  
 10 66.29 (2). A contract, the estimated cost of which exceeds ~~\$20,000~~ <sup>\$50,000</sup>, shall be let and  
 11 entered into under s. 66.29, except that the board may by a three-fourths vote of all  
 12 the members entitled to a seat provide that any class of public work or any part  
 13 thereof may be done directly by the county without submitting the same for bids.  
 14 This subsection does not apply to highway contracts which the county highway  
 15 committee or the county highway commissioner is authorized by law to let or make.

16           **SECTION 2.** 59.52 (29) (c) of the statutes is created to read:

17           59.52 (29) (c) 1. In this paragraph, "design and build construction process"  
 18 means a method of construction under which the engineering, design and  
 19 construction services are provided by a single entity.

BILL

1 2. Any public works contract described in par. (a) may be let using the design  
2 and build construction process.

3 SECTION 3. 60.47 (2m) of the statutes is created to read:

4 60.47 (2m) DESIGN AND BUILD CONTRACTS. Any public contract under sub. (2)  
5 may be let using the design and build construction process, as defined in s. 59.52 (29)

6 (c) 1.

7 SECTION 4. 61.55 of the statutes is amended to read:

8 **61.55 Contracts involving over \$10,000; how let; exception.** All contracts

9 for public construction, in any such village, exceeding ~~\$10,000~~ <sup>\$5,000</sup>, shall be let by the  
10 village board to the lowest responsible bidder in accordance with s. 66.29 insofar as

11 said section may be applicable. If the estimated cost of any public construction  
12 exceeds \$5,000, but is not greater than ~~\$10,000~~ <sup>\$5,000</sup>, the village board shall give a class

13 1 notice, under ch. 985, of the proposed construction before the contract for the  
14 construction is executed. This provision <sup>such</sup> and s. 281.41 are not mandatory for the

15 repair and reconstruction of public facilities when damage or threatened damage

16 thereto creates an emergency, as determined by resolution of the village board, in

17 which the public health or welfare of the village is endangered. Whenever the village

18 board by majority vote at a regular or special meeting declares that an emergency

19 no longer exists, this exemption no longer applies. Any contract for public

20 construction under this section may be let using the design and build construction

21 process, as defined in s. 59.52 (29) (c) 1.

22 SECTION 5. 62.03 (1) of the statutes is amended to read:

23 62.03 (1) This subchapter, except ss. 62.071, 62.08 (1), 62.09 (1) (e) and (11) (j)  
24 and (k), 62.15 (1m) (b), 62.175 and 62.23 (7) (em) and (he), does not apply to 1st class

25 cities under special charter.

INS  
3-3

INS  
3-6

*or if the labor for a project is provided by  
volunteers, and this provision*

*does not apply to public construction if the materials for a project are donated*

**BILL**

INS  
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**SECTION 6.** 62.15 (1m) of the statutes is created to read:

**62.15 (1m) DESIGN AND BUILD CONTRACTS.** (a) Any contract for public construction under sub. (1) may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1.

(b) Any contract for public construction let by a 1st class city may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1.

**SECTION 7.** 66.24 (5) (e) of the statutes is created to read:

**66.24 (5) (e) *Design and build contracts.*** Any contract for public construction under this subsection may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1.

**SECTION 8.** 66.904 (2) (a) of the statutes is amended to read:

**66.904 (2) (a)** Except as provided in par. (b), all work done and all purchases of supplies and materials by the commission shall be by contract awarded to the lowest responsible bidder complying with the invitation to bid, if the work or purchase involves an expenditure of \$7,500 or more. If the commission decides to proceed with construction of any sewer after plans and specifications for the sewer are completed and approved by the commission and by the department of natural resources under ch. 281, the commission shall advertise by a class 2 notice under ch. 985 for construction bids. All contracts and the awarding of contracts are subject to s. 66.29, except that any contract for public construction under sub. (1) may be let using the design and build construction process, as defined in s. 59.52 (29) (c) 1.

**SECTION 9.** 66.904 (2) (e) of the statutes is amended to read:



**BILL**

1           66.904 (2) (e) Paragraphs (a) to (d) do not apply to contracts awarded under s.  
2           66.905, except that any contract for public construction under s. 66.905 may be let  
3           using the design and build construction process, as defined in s. 59.52 (29) (c) 1.

4

(END)

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0347/3ins  
MES:kg:ijs

**Ins 3-3** ✓

**SECTION 1.** 60.47 (2) (a) of the statutes is amended to read:

60.47 (2) (a) No town may enter into a public contract with an estimated cost of more than \$5,000 but not more than ~~\$10,000~~ \$50,000 unless the town board, or a town official or employe designated by the town board, gives a class 1 notice under ch. 985 before execution of that public contract.

History: 1983 a. 532; 1989 a. 272.

**SECTION 2.** 60.47 (2) (b) of the statutes is amended to read:

60.47 (2) (b) No town may enter into a public contract with a value of more than ~~\$10,000~~ \$50,000 unless the town board, or a town official or employe designated by the town board, advertises for proposals to perform the terms of the public contract by publishing a class 2 notice under ch. 985. The town board may provide for additional means of advertising for bids.

History: 1983 a. 532; 1989 a. 272.

**Ins 3-6** ✓

**SECTION 3.** 60.47 (5) of the statutes is amended to read:

60.47 (5) EXCEPTION FOR EMERGENCIES AND DONATED MATERIALS AND LABOR. This section is optional with respect to public contracts for the repair and construction of public facilities when damage or threatened damage to the facility creates an emergency, as declared by resolution of the town board, that endangers the public health or welfare of the town. This subsection no longer applies when the town board declares that the emergency no longer exists. This section is optional with respect to a public works contract if the materials <sup>related to the contract</sup> for the public works are donated or if <sup>that is necessary to execute the</sup> the labor ~~for~~ <sup>the public works</sup> is provided by volunteers.

History: 1983 a. 532; 1989 a. 272.

contract

**Ins 4-1** ✓

**SECTION 4.** 62.15 (1) of the statutes is amended to read:

**62.15 (1) CONTRACTS; HOW LET; EXCEPTION FOR DONATED MATERIALS AND LABOR.** All public construction, the estimated cost of which exceeds ~~\$10,000~~ \$50,000, shall be let by contract to the lowest responsible bidder; all other public construction shall be let as the council may direct. If the estimated cost of any public construction exceeds \$5,000 but is not greater than ~~\$10,000~~ \$50,000, the board of public works shall give a class 1 notice, under ch. 985, of the proposed construction before the contract for the construction is executed. This provision does not apply to public construction if the materials for <sup>such</sup> a project are donated or if the labor for <sup>such</sup> a project is provided by volunteers. The council may also by a vote of three-fourths of all the members—elect provide by ordinance that any class of public construction or any part thereof may be done directly by the city without submitting the same for bids.

**History:** 1975 c. 244, 390, 421; 1985 a. 183; 1987 a. 378; 1991 a. 316; 1995 a. 225, 227.

-0347

Sen. George

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU - LEGAL SECTION

(608-266-3561)

Dan  
Fossmiller

allow design-build for projects  
w/ estimated costs that exceed  
\$1 million (as estimated by governing  
body)

~~to~~ Raise threshold from 10K to  
\$20K (will now raises J to \$50K)

# State of Wisconsin



GARY R. GEORGE  
SENATOR

MEMORANDUM

CONFIDENTIAL

TO: Marc E. Shovers,  
Legislative Reference Bureau Drafting Attorney

FROM: Dan Rossmiller *DR*

DATE: March 2, 1999

RE: Drafting Request

Senator George would like to have 1997 Senate Bill 426, relating to authorizing certain counties to let public works contracts under the design/build construction process, redrafted with the following changes/additions:

- a) Authorize cities of the First Class (i.e., Milwaukee) to let public works contracts under the design/build construction process;
- b) Authorize the Milwaukee Metropolitan Sewerage District to let public works contracts under the design/build construction process.

Thank you for your assistance.

Please feel free to contact me (6-2500) if you have any questions.

# State of Wisconsin



GARY R. GEORGE  
SENATOR

MEMORANDUM

CONFIDENTIAL

TO: Marc E. Shovers,  
Legislative Reference Bureau Drafting Attorney

FROM: Dan Rossmiller *DR*

DATE: March 18, 1999

RE: Re-Draft Request (per our phone conversation)

Thank you for your work on LRB 0347 relating to authorizing certain local government entities to let public works contracts under the design/build construction process and increasing the threshold amounts for required competitive bidding.

As I noted on the phone, Senator George would like to modify the most recent draft as follows:

- a) Authorize public works contracts utilizing the design/build construction process only where the estimated construction cost exceeds \$1 million; and
- b) Raise to \$20,000 the dollar amount threshold level below which municipalities are exempt from utilizing competitive bidding for construction projects;

In addition, I have attached a memo I received from Atty. Barbara Boxer outlining some changing in the design/build selection process that I believe she has discussed with you. These could be incorporated into the redraft as well.

Thank you for your assistance.

Please feel free to contact me (6-2500) if you have any questions.

# State of Wisconsin



GARY R. GEORGE  
SENATOR

MEMORANDUM

CONFIDENTIAL

TO: Marc E. Shovers,  
Legislative Reference Bureau Drafting Attorney

FROM: Dan Rossmiller *DR*

DATE: April 5, 1999

RE: Additional Materials for Re-Draft of LRB 0347

Thank you for your work on LRB 0347 relating to authorizing certain local government entities to let public works contracts under the design/build construction process and increasing the threshold amounts for required competitive bidding.

I have sent back the bill jacket so redrafting can proceed.

Attached, please find copies of three documents I received from contractor groups outlining concerns they have with the design build selection process. These materials are:

- 1) "Design-Build in Wisconsin for Public Owners" written by the Associated General Contractors of Wisconsin/ American Institute of Architects-- Wisconsin / Associated General Contractors of Greater Milwaukee Coalition on Design Build;
- 2) "Recommended Guidelines For Procurement Of Design-Build Projects in the Public Sector" published by the American Institute of Architects and the Associated General Contractors of America; and
- 3) a Memorandum on the American Bar Association Model Procurement Code prepared by the Associated General Contractors of America.

Item #1 above (particularly pp. 7-11) is derived from Item #2. Please review especially pp. 7-11 of Item #1 and pp. 9-12 of Item #2. These sections spell out how a two-phase selection process would operate.

Many of the concerns expressed about the previous draft regarded the lack of a description of the selection process to be utilized for design-build projects. In response to concerns raised to us, we would like to incorporate a two-phase selection process very much in line with what is described in the attached materials.

The first phase would be used to develop a short list (of from 3 to 5) candidates based on the qualifications demonstrated by those who submit proposals in response to the owner's Request for Proposal. The main purpose of this phase would be to determine on an objective (qualification-based)

The second phase would select from among the short-list qualifiers in an interview and presentation phase according to final selection criteria that clearly state what weight is to be assigned to each criterion. (Criteria might include design, completion schedule, on-site management of the project, ability to obtain bonding and price, among other things.) The design and price proposals should be submitted in separate sealed envelopes. Design proposals should be reviewed first, with price proposals reviewed only after the design evaluation is complete.

Because the design-build process requires more up-front expenditure by those who submit proposals, the draft should provide for a modest stipend for unsuccessful design build teams to cover their costs. The initial solicitation (RFP) should state the amount of the stipend. The initial solicitation should also describe the selection process, including detailed submission requirements and selection procedures, the composition of the selection panel, and a timetable for the entire procurement process and it should provide credible assurance that the project is fully funded.

*4/13 instruction*  
} make the stipend optional, but if one is offered, it must be mentioned in the RFP

The selection panel should be a several member team or committee and should include:

*composition may include...*

- design and construction professionals from within the government entity developing the RFP (e.g., city engineer). (Outside advisors (e.g., consulting engineers with no interest in any of the firms submitting proposals) could fill this role if the government entity does not have such professionals (e.g., engineers) on staff.
- members of the government entity's governing body (e.g., mayor, council members).



*may  
include*

- end user representatives (e.g., representatives of the government entity or agency that will use the facility).

Contractor representatives have indicated it would be useful if the draft could specify a two-part contract process, whereby upon completion of the design phase, the government entity would make a go/no-go decision. As I understand it, the design-build team would provide the owner with a guaranteed maximum price and both the design and price could be taken back to the governing body for authorization to proceed.

It would also be useful if the draft could specify that design-build projects must be bonded. It was suggested that the bond requirement might be set at some percentage of the size of the municipality. (If you would like me to provide some additional explanation of this, please let me know and I will try to get some clarification.)

There is a great deal of detail in these materials. Please use your discretion regarding how much of this needs to go into statutory language.

Thank you for your assistance.

Please feel free to contact me (6-2500) if you have any questions.



MEMORANDUM

TO: Chad Taylor (Via Facsimile No. (608) 266-5123)

FROM: Barbara K. Boxer *BKB*

DATE: March 8, 1999

SUBJ: Notes to the Drafter (Marc Shovers)  
Changes to Hahn/George LRB0347/3

*Dan*  
*6-7381*

Section 1 is okay. — *Changes made per. Sen. George*

Section 2 59.52(29)(c)1:

Line 4 delete quotations around design and build. *Not done*

Line 4 delete the and between design and build; replace with hyphen so it reads design-build.

*Not done*

Line 5 delete method of construction; replace with a negotiated acquisition. Delete engineering. Therefore the section should read: *not done - why dot*

Section 2 59.52(c)1. In this paragraph, design-build construction process means a negotiated acquisition under which the design and construction services are provided by a single entity.

This section should include language from Wis. Stat. §13.48(19) and §16.855(14)(a) as language on selection process and procedures described instead of what our draft suggested. Marc suggested these sections be added, so he should know what language to lift from the statutes.

*2*

Sections 3-12 are okay.

Section 12 line 15 should add the following:  
66.904(2)(b) is re-numbered as 66.904(2)(b)2. *why? There's no p.66.904(2)(b)1 created*

Section 13 should be renumbered as Section 14 and the new Section 13 should read:

281.41 of the statutes is amended to read:

"281.41 APPROVAL OF PLANS. (1) Except as provided under sub. (2), every owner within the time prescribed by the department, shall file with the department a certified copy of complete plans of a

proposed system or plant or extension thereof, in scope and detail satisfactory to the department, and, if required, of existing systems or plants, and such other information concerning maintenance, operation and other details as the department requires, including the information specified under s.281.35(5)(a), if applicable. Owners contracting for a system, plant or extension thereof under the design-build construction process defined and described in sections 59.52(29)(c)1.a and b (may) submit plans consisting of performance objectives and preliminary design in scope and detail satisfactory to the department. Material changes with a statement of the reasons shall be likewise submitted. Before plans are drawn a statement concerning the improvement may be made to the department and the department may, if requested, outline generally what it will require. Upon receipt of such plans for approval, the department or its duly authorized representative shall notify the owner of the date of receipt. Within 90 days from the time of receipt of complete plans or within the time specified in s. 281.35(5)(c), if applicable, the department or its authorized representative shall examine and take action to approve, approve conditionally or reject the plans and shall state in writing any conditions of approval or reasons for rejection. Approval or disapproval of such plans and specifications shall not be contingent upon eligibility of such project for federal aid. The time period for review may be extended by agreement with the owner if the plans and specifications cannot be reviewed within the specified time limitation due to circumstances beyond the control of the department or in the case of extensive installation

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involving expenditures of \$350,000 or more. the extension shall not exceed 6 months. Failure of the department or its authorized representative to act before the expiration or its authorized representative to act before the expiration of the time period allowed for review shall constitute an approval of the plans, and upon demand a written certificate of approval shall be issued. Approval may be subject to modification by the department upon due notice. Construction or material change shall be according to approved plans only. the department may disapprove plans which are not in conformance with any existing approved areawide waste treatment management plan prepared pursuant to the federal water pollution control act, P.L. 92-500, as amended, and shall disapprove plans that do not meet the grounds for approval specified under s. 281.35(5)(d), if applicable. the department shall require each person whose plans are approved under this section to report that person's volume and rate of water withdrawal, as defined under s. 281.35(1)(m), and that person's volume and rate of water loss, as defined under s. 281.35(1)(L), if any, in the form and at the times specified by the department.

Section 13 is okay.

Please call with questions or concerns or have Marc Shovers call me. Thanks

BKB/drw

X:\xf\client\66467\0001\drw6099.w52\03/08/99

Item # 1

## **Design-Build In Wisconsin For Public Owners**

**AGC of Wisconsin/AIA Wisconsin/AGC of Greater Milwaukee Coalition on Design-Build**

### **A. Introduction To Public Construction In Wisconsin.**

Traditionally, public property owners in Wisconsin, such as villages, towns, cities, counties and the state<sup>1</sup>, used the *design-bid-build* system of project delivery, in which the public owner hires a design professional to prepare a design and develop the construction documents necessary to provide general contractors with enough information to formulate a competitive bid and, upon award of the project, to bring the project to fruition. The general contractor is bound by the price submitted in its bid to the owner, absent any change orders which serve to raise or lower the overall project cost.

### **B. The Use Of Design-Build As An Alternative To Competitive Bidding.**

In recent years, *design-build* has seen increasing use as an acceptable alternative to the design-bid-build system, in Wisconsin and throughout the country. The term "design-build" is defined as a method of designing and constructing a building by contracting with a single source of responsibility for both design and construction services. The owner accomplishes this task by hiring a design-build entity; that is to say, either a partnership of a contractor and a design professional, or a design-build company which possesses the necessary in-house professional design and construction expertise.

Public owners groups in Wisconsin are seeking to modify existing competitive bid statutes to permit public owners to design-build. Currently, most public entities are subject to competitive bidding laws prior to letting any contract for an improvement of real property. This means that

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<sup>1</sup> A number of statutes govern public contracting requirements: §59.08 (counties), §60.47 (towns), §61.55 (villages), §62.15 (cities), §66.24 (municipal sewerage districts), §199.16(4) (Milwaukee School District), each of which are supplemented by § 66.29, which establishes the prerequisites for public contracting, including, among other things, the form, substance, certification, rejection and correction of bids for competitively bid work. A notable exception to the competitive bid statute is most public school construction which does not require the same competitive bid process established for other public owners.

public entities are required to let construction work to the "lowest qualified responsible bidder."<sup>2</sup> There are few exceptions to Wisconsin's competitive bidding laws. Emergency work and work on landmark buildings can be undertaken without involving the time-consuming process of soliciting bids. To promote innovative design, the state may bypass the competitive bidding process and has done so; however, only in a few special situations. Today, design-build is no longer an "innovative" form of project delivery and likely would not withstand judicial scrutiny solely on that basis. The State has, on a selective basis, utilized design-build on a number of projects after obtaining prior authorization for the work from the State of Wisconsin Building Commission.

### C. Project Delivery Systems

Private owners have a number of different options when selecting the project delivery system by which they procure design and construction services. The system chosen will, in turn, affect who performs what services at various stages of the construction project. There are several factors which need to be considered when choosing from the options set forth below, however, whichever project delivery system is selected by the *public* owner needs to have objective standards to ensure a fair and impartial selection of the team chosen to deliver the project, owner, the public, design professional and the contractor.<sup>3</sup>

The following are the three most commonly accepted project delivery systems in use today:

#### 1. Design-Bid-Build.

*Design-bid-build* is probably the most widely used process. The traditional design-bid-build approach is common because many owners want to know exactly what they will ultimately receive before they agree on price prior to start of construction. Design-bid-build

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<sup>2</sup> Absent specific statutory exemption, most public owners must award construction contracts by competitive bid for projects whose cost exceeds \$10,000. There is, at the time this White Paper was prepared, Senator George and Representative Hahn introduced a Bill which, should it pass, would to raise the ceiling to \$50,000.

<sup>3</sup> The Wisconsin Supreme Court summarized the public policy reasons behind Wisconsin's enactment of public bid statutes with these words: "to prevent fraud, collusion, favoritism and improvidence in the administration of public business as well as to insure that the public receives the best work or supplies at the most reasonable price practicable." Nelson, Inc. Of Wisconsin v. Sewerage Commission, 72 Wis.2d 400, 241 N.W.2d 390, 395 (1976).

projects typically proceed in three phases. First, the owner retains an outside design professional. The design professional, whether an architect or engineer, then typically acts as the owner's representative. Projects are not bid on by construction contractors until the design professional satisfactorily completes construction drawings and specifications. Second, once the drawings and specifications are complete, those documents are used for bidding for the project. The bid represents the total sum the general contractor believes it will take to construct the project, absent agreed upon changes to the scope of the project. Finally, the owner contracts with the general contractor to complete construction of the project.

A. Advantages of Design-Bid-Build.

The principle advantages to the design-bid-build approach to construction are its widespread use and familiarity. The design-bid-build process readily lends itself to traditional competitive bidding laws and ensures fair competition among the participants. The design-bid-build process assigns clear roles to each party, requires a complete design package prior to construction and the assignment of an owner's representative for project oversight; typically, the architect or engineer. The public's faith in a fair, open process is assured by the process by which the public owners accept sealed bids for the work. Finally, public work must be bonded; that is to say, the successful contractor must post payment and performance bonds to insure completion of the project.

B. Disadvantages of Design-Bid-Build.

The design-bid-build system also has several disadvantages; chiefly, the length of the process, and it is noted for claims, disputes and the creation of adversarial relationships. Change orders and claims for delay more commonly arise in the design-bid-build process than any other project delivery system. Also, plans and specifications are produced without the benefit of input regarding constructibility from the contractor. This process more likely stifles innovation and restricts the flow of useful communication between the contractor, design professional and owner.

## 2. Construction Management.

*Construction Management* is similar to design-bid-build and comes in many variations, although construction management is, and will be, different things to different people. Essentially, the construction manager adds another layer to the construction team to oversee such elements as scheduling, cost, construction, project management or building technology. The construction manager may assume all or part of the scheduling, cost-estimating and constructibility duties of the design professional, but need not be a design professional itself. The construction manager may be an architect, engineer, contractor and may assume some of the design professional's observation and payment-evaluation duties, but the owner hires the general contractor to build the project. The owner pays the construction manager a fee for the services performed, either a flat-rate or a percentage of the project's overall cost. Public owners typically employ a CM on large or complex projects requiring extensive coordination between the design professional, consultants, the contractor and subcontractors.

### 1. Advantages of Construction Management.

The advantages of construction management as a project delivery system are generally realized in large-scale, complex projects where the owner lacks the in-house expertise to coordinate project supervision between the architect and contractor or where the owner wishes to delegate the construction oversight to an experienced construction manager who monitors the day-to-day operations of the contractor. This type of arrangement benefits the public owner by creating another level of oversight of the architect and contractor, careful monitoring of the project cost and schedule and continuous project oversight.

### 2. Disadvantages of Construction Management.

The disadvantages of construction management include the cost, confusion of traditionally accepted roles, more complex relationships and a lengthy process. Another disadvantage in this type of relationship is the decrease in direct communication between the owner and architect or engineer and the general contractor, which can lead to the creation of an adversarial relationship, particularly where the CM's compensation is contingent upon meeting certain project deadlines.



3. Design-Build.

*Design-build* is a method of designing and constructing a facility by contracting with a single source of responsibility for both design and construction services. The owner achieves this by hiring a design-build entity. This can either be a team comprised of a contractor and design professional or a design-build company with both professional design and construction expertise in-house. The design-builder is responsible for both design and construction services under one contract with the owner.

A. Advantages of Design-Build.

The notion of single-source responsibility has great appeal for public owners as does obtaining final price at a very early point in construction. Design-build is noted for the relatively swift pace at which a project proceeds from design to completion. Contractor participation in the process facilitates innovative design and claims for extras are reduced or eliminated. Design-build, at its best, minimizes the owner's financial risk.

B. Disadvantages of Design-Build.

The design-build process is, however, fraught with risks for the public owner that lacks construction sophistication or fails to acquire the necessary expertise to manage the design-build process. Design-build requires extensive coordination between the design-builder, consultants and subcontractors. Additionally, the design professional is not the owner's representative and this may lead to a break-down in communication between the architect or engineer and the owner and necessitates additional costs to hire an owner's representative. ]★

Design-build also presents several problems for Wisconsin's surety industry. As set forth above, all work on public works projects must be bonded. Commercial contractors engaged in conventional design-bid-build projects build up a history with their bonding companies through the course of their relationships with the surety, who measures the contractor's ability to perform through constant monitoring of the contractor's capital, capacity and character:

*Capital:* Surety companies are reluctant to bond companies with insufficient capital, as is the case with most design firms who traditionally have small retained earnings on their balance sheets because of profit distribution to partners. The responsibility for adequate capital capacity in a design-build venture, therefore, usually falls on the builder.

*Capacity:* Sureties are skeptical that a traditional builder has the necessary in-house design skills and experience to complete a project, even when the design builder is a joint venture between a builder and a design firm. Some recent court holdings suggest that surety bonds cover all services under a design-build contract, including design. Sureties have had problems determining their exposure resulting from the potential for failures in design, which may arise many years after completion of the work.

*Character:* The principal(s) of the design-build entity must demonstrate to the surety how management has analyzed its risk exposure, with the design exposure and construction exposure separately described and analyzed.

**D. The Design-Build Players: Owner, Architect and Contractor.**

Prior to selecting design-build as a viable project delivery system, the public owner needs to assess its own needs and determine how compatible those needs are with the other project participants to define the roles each will play in the process:

1. The Public Owner.

Design-build can give *owners* a single source of responsibility, early knowledge of project costs, shortened project schedule, and reduced number of change orders. On the other hand, owners may face higher contingency costs, loss of independent professional representation, less inclusive an effort, less participation in design and a loss of decision-making ability.

2. The Design Professional.

*Design professionals* may gain greater control over project constructibility through the strengthened direct relationship with the builder and the design relationship opens up new avenues of business. However, along with the potential benefits come a decreased control over design quality, complex liability implications, and a more passive role during construction. Design professionals risk the high cost of responding to design-build request for proposals, (RFPs), which may require 5 to 35 percent design completion, increased potential for long-term liability for construction issues due to lack of adequate insurance coverage and bonding, and diminishment of design and public safety issues in favor of cost issues.

3. The Contractor

*Contractors* can achieve improved business performance through hands-on involvement in the early design phase, increased project control, and reduced project risk as many design "unknowns" are identified and resolved prior to construction. On the other hand, builders face increased liability, an increased obligation to the owner and increased organizational difficulties in allocating responsibilities between construction and design professionals.

E. **Recommended Guidelines For Design-Build.**

The *AIA/AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector*, suggests that public owners examine the following general criteria when determining whether a project is suitable for design-build:

- (1) Time constraints for delivery of the project;
- (2) The capability and experience of the potential teams with the design-build process;
- (3) The suitability of the project for use in the design-build process; and,

- (4) The capability of the project owner to manage the project, including personnel to oversee the project who are familiar with the design-build process.

1. Soliciting For Design-Builders.

At the outset, the solicitation for a design-builder should describe the selection process, including detailed submission requirements and selection procedures, the composition of the selection panel, and a timetable for the entire procurement process. Finally, the solicitation should provide the design-builder with credible assurance that the project is fully funded. Failure to comply with this last requirement may detract from attracting quality firms.

- A. The Statement Of Project Requirements.

In the event a public owner satisfies the fore-mentioned criteria, the owner will need to develop a Statement of Project Requirements (SPR). The SPR must set forth an owner's needs with sufficient clarity to assure there is a comprehensive understanding of program requirements, project scope, and business requirements. Scope of work documents should include, at a minimum:

- (1) Project statements for the facility that describe space needs, design goals and common objectives;
- (2) Equipment requirements;
- (3) Other pertinent criteria, such as energy use, or accommodation for future expansion or adaptation;
- (4) Site information, including a site survey and soil boring report describing subsurface conditions;
- (5) Any minority business enterprise, (MBE), women business enterprise, (WBE), or disadvantage business enterprise, (DBE), requirements;

- (6) An outline of specifications;
- (7) Budget parameters; and,
- (8) Project schedule.

The role the owner's representative plays in the selection process is very important and should be identified in the solicitation. During the solicitation, the owner should also provide a copy of the contract the design-builder is expected to sign in order to avoid problems and disputes at the end of the competition.

## 2. The Selection Process.

Traditionally, design professionals are selected on qualifications and builders are selected on lowest bid. Because design-build is a melding of both design and construction, the owner should develop a short list of candidates based on qualifications from those submitting a proposal in response to a Request for Proposals (RFP) developed by the owner. The owner should then evaluate the responses and create a short list of 3 -5 design-builders to participate in the final stage of the selection process. ~~The AIA and AGC recommend the following design-build selection process for public owners.~~ The RFP must include pre-selected site and program information, a description of the selection and evaluation process and the compensation amount for non-selected proposals, a proposed contract that clearly identifies funding sources, and other pertinent information. The RFP should also specify the level of detail required in the design-build selection process, including the type and extent of design drawings necessary, specifications, project management strategy, ~~and price.~~

After receiving submittals, the public owner compiles a short list of pre-qualified finalists. During this stage, the public owner can qualify candidates based on their credentials (background and credentials of each team member), experience in the project type, (design-build, specific building type), similar projects, project staff, (specific team member roles in the process), financial strength, (including surety capacity), and organizational ability to manage and deliver the project, (i.e., current workload and available resources), track record on related projects with performance specifics on cost, schedule, quality, claims and litigation, licensure, and other pertinent information.

The number of competitors who submit final proposals should be limited. Finalists typically produce relatively detailed proposals and failure to limit the number can mean that the owner and selection panel must spend an inordinate amount of time and money comparing and evaluating proposals. Producing final proposals is expensive and time-consuming for each competing design-build team. The more unsuccessful teams there are, more dissatisfaction with process. It is beneficial to owners and design-builders in the selection process to eliminate as early as possible those competitors who have no realistic chance to be selected. The short list compilation, of 3 to 5 design-build entities, is enough to assure competition and is also a manageable number for the selection panel. The short list must be based on an objective comparison of qualifications. Price quotations from design-builders should not be considered at the stage.

Final selection criteria for the design-builders must state clearly what weight will be assigned for each criterion. Otherwise, qualified competitors may unnecessarily emphasize criteria of lesser weight to the detriment of criteria of greater weight. This may lead to the best competitor not being awarded the project. Criteria typically include the excellence of the proposed design and construction approach to complete the project, demonstrated satisfaction of the program requirements, a management plan for the project, and the estimated cost of the project.

In the design-build selection process, price varies significantly as a valuation factor. An owner who is more interested in design and less on the total cost may choose to ask design-build teams to work towards a specific fixed budget. Under a fixed budget, an owner sets the total cost of the project and asks the design-builders to provide a building within the budget. A fixed budget allows the design-builders to prepare proposals on a level playing field. When a fixed budget is specified by the public owner, the design-builders will be evaluated on the value they can supply within the fixed budget. The benefit of this approach is the design-builders will maximize their focus on design. At the same time, by fixing the project's budget, the owner has also control the cost of the project.

Another option is to ask for price as a lump sum. In this instance, teams provide the designed project for the lowest possible price (guaranteed maximum price). Price becomes

~~a competitive factor which will probably drive prices down. However, this price competition will affect the quality of the design.~~

A thorough evaluation should measure each proposal's responsiveness to the RFP, design quality, compatibility with the owner's time schedule and cost expectations and the design-builder's ability to execute the project. In general, owners will receive the greatest project value if the proposals are reviewed based on the overall value the owner would gain, rather than on the cost of construction alone. The best way to do this is to evaluate the design proposal first and independently of the cost proposal, and then correlate the two using a mathematical value weighting system. This can be easily accomplished by requesting in the RFP that the design and price proposals be submitted in separate sealed envelopes. The design proposals should be reviewed first and thoroughly evaluated based on their intrinsic merit and responsiveness to the RFP. The price proposals should be reviewed only after the design evaluation is complete and design scores have been determined.

Finally, a stipend should be paid to each of the unsuccessful design-build teams that completes the second phase requirements and the amount of the stipend should be stated in the initial solicitation. Design-build teams spend a great deal of time and money on the design submissions in the pre-selection process, far beyond what is required in traditional design-bid-build process. In fairness, design-build entities should be compensated for their services in providing creative concepts and designs to the owner. By providing a stipend, public owners will benefit by attracting quality teams to participate in the design-build process.

#### **G. Conclusion.**

The AIA/AGC Design Build Coalition cautions against the use of design-build as a delivery system for public owners unless the selection process used to choose the design-build entity is fair and responsive to the needs of the public, the owner, the design-builder, contractors and design professionals. The traditional competitive bidding process enables the public owner to select from a variety of service providers, whether design professionals or contractors, and thus maximizes the likelihood that the public owner will obtain the most responsive service at the best price. This system allows all interested parties to become involved in the process and works to ensure that a project award will be based on price and quality, rather than by collusion or fraud. Accordingly, should design-build proceed for public owners, procedural safeguards need to be developed to ensure

that all design-builders have an equal opportunity to be considered for the project.

The single largest barrier to participation in public design-build is the inordinate amount of time and money that candidates may be required to invest in order to properly prepare their proposals. Typically, the design-builder must complete a substantial portion of the design work in advance of a successful award for the project. As such, the design-builder will likely incur more non-reimbursable expenses when offering proposals for design-build projects than when being selected under the design-bid-build system. Further, some design-builders are reluctant to release intellectual property, such as design proposal, absent a guarantee that the public owner will not use one's design while awarding the project to another based solely upon price. Qualified design-builders have cited these concerns when articulating reasons for bypassing participation in the design-build system.

Design-build may be seen as a viable public contracting project delivery system, provided that:

- The design-build entity is qualified for the project; and,
- The public owner has the experience or knowledge and the staff or consultants necessary to oversee adequate design and cost proposals and to make informed decisions throughout design and construction; and,
- The project scope, funding and schedule can be adequately defined. For projects with major elements of uncertain scope, such as complex environmental studies or significant public outreach and interaction, design-build may not be suitable.



Item #2



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# **AIA/AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector**

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**AIA/AGC  
Recommended Guidelines  
for Procurement of  
Design-Build Projects  
In the Public Sector**

**Endorsed by:  
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## EXECUTIVE SUMMARY

The American Institute of Architects (AIA) and the Associated General Contractors of America (AGC) were approached recently by a public official who asked if the organizations had any recommended procedures for how public officials should procure design and construction services when using the design-build method of procurement. While this publication's intent is to provide guidance for public owners, this publication is not intended to endorse design-build or suggest it is the best method by which public owners should procure design and construction services. Rather, AIA and AGC have recognized that design-build is one of many viable project delivery systems available to the public sector. These Guidelines are intended to improve the process and hopefully establish some uniform standards which can be used by public owners for the mutual benefit of owners and the design and construction community. The Guidelines were written for public owners who are unfamiliar with the design-build process as well as owners who have used the design-build process in the past.

The **Introduction** is intended for public owners who are unfamiliar with how design and construction services are procured. It describes the three phases of all construction projects: project definition, design and construction, and describes the activities carried out during each phase. The Introduction also describes the different project delivery methods by which design and construction services can be procured, including the design-build method.

The **Overview** begins to focus on design-build and concludes that adherence to these Guidelines will provide the following benefits to public owners:

- Reduce misunderstandings and protests;
- Accelerate the selection process;
- Encourage quality firms to participate; and
- Provide owners with proposals that meet their needs.

The **Recommended Guidelines** are the main body of the publication and focus on specific procedures that should be adopted for design-build, bridging, a variation on design-build, and develop-design-build, a method of financing design-build and bridging projects. This portion of the publication pertains equally to owners unfamiliar with design-build as well as those who are familiar with the process.

As the Overview section of this publication suggests, AIA and AGC do not intend these Guidelines to be rigid but an outline of the major issues that should be addressed with suggestions on how to address each issue successfully. We hope the Guidelines are used in this fashion and will aid in bringing some uniformity and consistency to the design-build process in the public sector.

## INTRODUCTION<sup>1</sup>

### What activities is a project comprised of?

Once a project proceeds from an idea to reality, it is time for an owner to select a process for its design and construction. The design and construction of all projects can be divided into three distinct activities: project definition, design, and construction. These three steps can be overlapped, subdivided, or regrouped, but none can be eliminated. If one step is incomplete or performed unsatisfactorily, the following step will be adversely affected which will ultimately cause the entire project to suffer. The following is a discussion of the various components of each activity:

#### Project definition:

This stage can be divided into two distinct activities:

- Discovery — the identification and analysis of project requirements and constraints; and
- Integration — the description of the project and the plan, including an estimate of cost and time for delivering it.

#### Design:

Typically, design is divided into three separate activities:

- Schematic design — the basic appearance and plans;
- Design development — an evolution of design that defines the functional and aesthetic aspects of the project and the building systems that satisfy them; and
- Construction drawings and specifications — the details of assembly and construction technology.

#### Construction:

Construction can also be divided into several basic activities:

- Shop drawings — the final fabrication drawings for building systems which are performed by the contractor who is selected to construct the project to meet the design intent of the architect;
- Fabrication, delivery, and assembly — the manufacture and installation of the manufactured components of the building; and
- Site construction — the labor-intensive field construction and the installation of systems and equipment.

<sup>1</sup>Portions of the Introduction have been taken from a paper, "Project Delivery Strategy: A discussion of contracting methods for design and construction by 3D/International," presented by Charles B. Thomsen, FAIA, President and Chief Executive Officer of 3D/International. January 20, 1994.

**What are the different ways in which a project can be procured?**

Owners have a number of different options in how they can procure design and construction services which will, in turn, affect who performs the different stages of a project. Following are a number of generally accepted procurement approaches in use today:

- The traditional **design-bid-build** approach is common because many owners want to know exactly what they will get before they agree on the price or start of construction. Projects are not bid on by construction contractors until construction drawings are completed by a separate architect-engineer (AE) firm. Once the drawings and specifications are completed by an AE, the architect, acting as the owner's representative, will then ask contractors to bid a lump sum amount that it will take to construct the project.
- **Design-build** contracts are typically negotiated before project definition, or just after. All design (including construction drawings) is done by a single entity<sup>2</sup>, the design-build contractor. This single entity has responsibility for both design and construction of the project.
- **Bridging** is a hybrid of the traditional design-bid-build process and design-build. An owner selects an AE to develop a project design through design development (approximately 30 percent—50 percent of the design work), and prepares scope of work documents which form the basis for competitive selection of the project delivery team. The AE specifies the project's functional and aesthetic requirements but leaves the details of construction technology up to the contractor. Construction technology is specified with performance specifications. The project delivery team then has single-point responsibility for final design and constructing the project.
- **Develop-Design-Build (Turnkey), Design-Build-Lease, Lease-Purchase** are financing methods in which an owner retains an entity which has single-point responsibility for developing a project: in addition to design and construction, the selected entity is responsible for providing one or more other project development functions, such as selecting and acquiring a site, financing, and even owning or operating the facility which is leased to the owner (with or without an option to purchase).

This introduction is intended to provide a context for the more extensive discussion of design-build, bridging, and develop-design-build contained in this publication.

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<sup>2</sup>The terms "single entity" or "design-build teams" or "competitors" will be used throughout this publication to describe the organizations that submit design-build proposals. These so-called teams can take a number of forms such as a partnership, a joint venture between an architectural-engineering firm and a construction contractor, or a single corporation that has in-house design and construction capability. The type of "design-build team" formed should not, however, influence a public owner's design-build program requirements.

## **OVERVIEW — PURPOSE OF GUIDELINES**

As discussed above, "Design-Build" is one of many methods used in both the private and public sectors to organize the selection of architects, other design consultants, and contractors for building projects. Design-build is a method of project delivery in which the owner contracts with a single entity to take responsibility for the design and construction of a project. Like every other type of project delivery method, design-build has advantages and disadvantages that make it more appropriate for some situations and projects than for others.

Public sector owners carrying out construction projects must select architects, other design consultants and contractors according to local, state, or federal procurement laws and therefore face circumstances different from private owners. Nevertheless, there are many ways for public owners to select design-build teams and to manage the design-build process. Experience has shown that some design-build selection procedures are more equitable and effective than others in meeting the needs of owners, the public, architects, and contractors for quality projects delivered on time, on budget, and fulfilling owner expectations. Based on their collective experience, the American Institute of Architects (AIA) and the Associated General Contractors of America (AGC) have compiled the following design-build guidelines for public owners. This document is not intended to be rigid, but an outline of major issues that should be addressed in a design-build procurement with suggestions for how to address each issue successfully.

AIA and AGC believe that adherence to these guidelines by public owners will provide the following benefits:

- Reduce misunderstandings and protests,
- Accelerate the selection process,
- Encourage quality firms to participate, and
- Provide owners with proposals that meet their needs.



## **RECOMMENDED GUIDELINES**

### **Design-Build—General Authorizing Considerations For All Design-Build Projects**

#### **Criteria for Using Design-Build**

Public agencies should adopt general criteria to be used to determine what projects will be delivered using the design-build method. The criteria should also address when to use the traditional design-bid-build and other project delivery methods, listing the comparative advantages and disadvantages of each project delivery method. Criteria that might be considered for determining when to use design-build include (1) time constraints for delivery of the project; (2) the capability and experience of potential teams with the design-build process; (3) the suitability of the project for use of the design-build process; and (4) the capability of the public owner to manage the project, including personnel to oversee the project who are familiar with the design-build process.

The introduction of each public design-build solicitation should contain an explanation of how the specific project fits the criteria for use of the design-build method.

#### **Design-Build Procedures**

Public agencies should formally adopt general procedures for selecting design-build entities and for managing design-build projects. Formal adoption will permit the public and the design and construction communities to comment on the procedures and will assure that fair, uniform, and effective procedures are followed.

The following specific project considerations can be adopted to satisfy this purpose. Of course, local laws and regulations, which in some jurisdictions limit the use of design-build, should be reviewed prior to requiring these specific recommendations.

### **Specific Project Considerations For All Design-Build Projects**

A solicitation for a design-build project should clearly spell out the procedures to be followed in conducting the design-build selection and subsequent management of the project, including the project program and scope of work, criteria for selection, requirements for presentations, timetable for the selection process, the composition of the jury (or selection panel), and all other issues described below. It is important that these procedures be described in full at the outset to avoid misunderstandings and selection protests later. Clear procedures will also enable the process to produce a quality project, on time, and within budget.

**Rationale For  
Selecting Design-Build  
and Description of  
Process**

At the outset, the solicitation should explain how the design-build method of procurement meets the criteria in law or regulation for use of the design build method. It should then describe the selection process, including detailed submission requirements and selection procedures, the composition of the selection panel, and a timetable for the entire procurement process. Finally, it should provide credible assurance that the project is fully funded. Failure to comply with this last requirement may detract from attracting quality firms.

**Scope of Work**

The statement of project requirements should set forth an owner's needs with sufficient clarity to assure there is comprehensive understanding of program requirements, project scope, and business requirements. Scope of work documents should include, at a minimum: (1) program statements for the facility that describe space needs, design goals, and objectives; (2) equipment requirements; (3) other pertinent criteria, such as energy use or accommodation for future expansion or adaptation; (4) site information, including a site survey and soil boring report describing subsurface conditions; (5) any minority business enterprise (MBE), women business enterprise (WBE), or disadvantaged business enterprise (DBE) requirements; (6) an outline of specifications; (7) budget parameters; and (8) project schedule.

The role of the owner's representative in the selection process is very important and should be identified in the solicitation. During the solicitation, the owner should also provide a copy of the contract that the winning competitor is expected to sign in order to avoid problems and disputes at the end of the competition.

In order to translate the needs of the users into a set of criteria that teams can bid on with some certainty, the scope of work should be prepared by an architect and other appropriate design professionals. The scope of work should be as flexible as possible, for several reasons:

First, a flexible scope of work will elicit creative responses from competitors that may reduce the cost of the project in the short term and improve life cycle costs in the long term. A generally stated set of program requirements will allow competing teams to suggest imaginative ways to meet the requirements by combining or reorganizing functional areas or by applying innovative design ideas, construction methods, materials, or systems.

Second, procedures for discussions between the owner and the competitors should be designed to facilitate scheduled communication to avoid possible misunderstandings of the program requirements. Nonetheless, it can be expected that, following the selection, the give-and-take between owner and the selected design-build team will result in changes to the building program and/or the design. When selections are based on flexible rather than very detailed programs, unsuccessful competitors will have little grounds to protest the selection. Thus, delays can be minimized.

Third, more projects are requiring public participation and only following the selection can the owner begin to submit the design to formal review bodies or public participation processes. Formal reviews and public participation processes may result in changes to the design, so time spent developing overly detailed designs before the selection may be time and effort wasted. Moreover, citizen groups may object to being presented with an all-but-complete design before they are consulted.

## Two-Phase Selection Process

### Phase One (Prequalification) Selection

The number of competitors who submit final proposals should be limited. Finalists typically produce relatively detailed proposals, and failure to limit the number can mean that the owner and its selection panel must spend an inordinate amount of time and public money comparing and evaluating proposals. Producing final proposals is expensive and time-consuming for each competing design-build team. The more unsuccessful teams there are, the more dissatisfaction with the process. It is beneficial to owners and competitors in design-build procurements to eliminate as early as possible those competitors that have no realistic chance to be selected.

Therefore, a two-phased procurement process is recommended. In the first phase, after receiving submittals, a short list of prequalified finalists is compiled. The short list should consist of three to five design-build entities, which is enough to assure competition, but a manageable number for the selection panel. Selection of a short list should be accomplished by reviewing applications packages, supplemented by brief interviews if possible, and should be based on a comparison of qualifications, to include: (1) the ability of the competitor to satisfactorily carry out the project design and construction requirements; (2) past performance of individual members of the competitor; (3) relevant experience or potential performance of the design-build competitor as a team, if the competitor is a joint venture or other teaming of separate contractors; and (4) financial capacity to perform. Price quotations from competitors should not be considered at this stage.

### Phase Two (Final) Selection

Final selection criteria need to state clearly what weight will be assigned to each criterion. Otherwise, qualified competitors may unnecessarily emphasize criteria of lesser weight to the detriment of criteria of greater weight. This may lead to the best competitor not being awarded the project. Criteria typically include: excellence of the proposed design and construction approach to the project, demonstrated satisfaction of the program requirements, management plan for the project, and estimated cost of the project.

In design-build competitions, price can vary significantly as an evaluation factor. In some competitions, price is a relatively unimportant factor and, in other competitions, price can be the most important factor. An owner must make a determination, prior to a design-build solicitation, about the significance of price. This determination will be based on whether a project's design is of paramount importance or conversely if price is the most important consideration. In most instances, owners will be interested in accomplishing both: maximizing design at the lowest possible price.

An owner who is more interested in design and less on the total cost may choose to ask design-build teams to work towards a specific fixed budget. Under a fixed budget, an owner sets the total cost of the project (e.g. \$15 million) and asks the teams to provide a building within that budget. A fixed budget allows the design-build teams to prepare proposals on a level playing field. When a fixed budget is specified by an owner, the teams will be evaluated on the value they can supply within the fixed budget. The benefit of this approach is that teams will maximize their focus on design. At the same time, by fixing the project's budget, the owner has also controlled the cost of the project.

Another option is to ask for price as a lump sum. In this instance, teams provide a designed project for the lowest possible price. Price becomes a competitive factor which will probably drive prices down. However, this price competition may adversely affect the quality of the design.

The purpose of this discussion is to emphasize that there are a number of ways to establish price in a design-build competition. The ideas stated here are two out of a number of different options available. There is no right or wrong way. Owners must evaluate their priorities and use price as a evaluation factor in a way that fulfills their goals. From the design-build teams' perspective, it is important for an owner to decide what role price will play and inform the teams in advance in order to avoid misunderstandings and protests.

**Limited Phase  
Two Presentation  
Products**

The amount of documentation required in submissions should be limited to the minimum necessary to judge adequately between competing proposals. Curtailing the detail required in phase two submissions (for example, by limiting the size and number of drawings allowed, not allowing presentation of models or renderings, etc.) reduces the time and expense to the owner as well as to the design-build competitors. Limiting the number of presentation products will attract more initial teams and also assist in creating a level playing field for all the design-build teams: better financed teams will not have an advantage simply by being able to create more lavish presentation products. Better financed teams may not necessarily translate into the best design-build entity for a particular project.

**Selection Panel  
or Jury**

Selection in both phases should be objective, based on qualifications and responses to the project requirements and selection criteria. The selection panel should include design and construction professionals from within the government agency who are familiar with the project. The jury should also include representatives of the government agency that will use the facility because, if the ultimate users are involved in the process, changes requested by the users later during the project can be avoided which can save substantial amounts of time and money. If government regulations require final selections to be made by a government official, state and federal ethics regulations may permit outside advisors to participate on panels, often without a vote. Including outside advisors is highly recommended, since they often bring fresh perspectives to the discussions and will be able to assist the agency in selecting the most qualified team.

The jury should be selected early enough so that it can review and comment on the project program prior to the issuance of the solicitation: this assures that the jury is knowledgeable about and in accord with the program requirements. The same panel should make the first and second phase selections, in order to provide continuity and consistency in the judging process.

The names of jury members should be made public and be included in the initial solicitation. Potential competitors will thereby know what design and other predilections the jury members have and can make an informed decision about whether to participate in the selection process. Moreover, qualified jurors will attract a better level of competition. Competitors and jurors should agree not to have any communications about the project or selection other than communications permitted by the selection procedures.

## **Compensation**

A stipend should be paid to each of the unsuccessful design-build teams that completes the second phase requirements and the amount of the stipend, should be stated in the initial solicitation. In the past, teams have spent much time and money on their design submissions in the pre-selection process, far beyond what is required in the traditional design-bid-build process. By providing a stipend, owners will benefit by attracting quality teams to participate in the design-build procurement process.

If limits are imposed on the materials and documents that the competitors are required to produce during the second phase (see #4, above), it is possible to provide a modest yet fair stipend which will partially compensate the competitors for their efforts.

The winning competitor's total project compensation typically includes what was spent on its Phase Two submission, since that submission becomes the basis for developing and delivering the project. If the project does not go forward for any reason, the winning competitor should be compensated for its Phase Two costs at a minimum on the same basis as the unsuccessful competitors. If the project goes partly forward and is then terminated or suspended, the winning team should be compensated for its Phase Two costs and for its work up to the notice of termination or suspension. This recommendation is a further acknowledgment that a design-build project is far more expensive to prepare in the pre-selection process than the traditional design-bid-build process and therefore some amount of compensation is in order or quality teams will be less inclined to compete for such projects.

Furthermore, design, construction, or other concepts or methods proposed by unsuccessful competitors should not be used by the owner without compensation to the appropriate competitor. Design work generated for a proposal should be the property of each of the individual design-build teams unless and until the proposal is accepted by the owner. An owner has no need for the design work and the design-build team may have a proprietary interest in all or part of the design.

## **Feedback To Competitors During The Second Phase**

There is a widespread misconception that "blind" competitions are fair and so competing teams are often forbidden to have private conferences with the owner's representatives (both the owners' project managers and the jury) until the competition is over. In order to answer the inevitable questions about the program, agencies often arrange public question-and-answer sessions at which all teams are present, or else written questions and agency answers are circulated to all teams. The problem is that, under either format, teams are reluctant to ask important questions that would divulge their design or financing intentions to other competitors. There is no real give-and-take between competitors and owner, and, as a result, very little useful information is exchanged.

A better solution has been used in some successful design-build projects. Each short-listed team is given an equal opportunity for direct and private communication with the owner's representatives; each team gets the same fixed amount of time. Basic elements of fairness are retained and each team can ask any questions of the owner. The result is proposals that respond more directly to the agency's intentions. A side benefit is that the agency managers have an opportunity to evaluate how each team approaches the project and how it interacts in a private working session that is akin to how owners and team will have to work together to carry out the project.

### **After Selection**

It is extremely important to provide candid feedback to unsuccessful teams after the selection process has been completed. This recommendation can not be overemphasized as, aside from compensation to short listed teams (see #6, above), a failure to debrief unsuccessful competitors has been one of the main complaints of design-build competitors. This issue is important because fairness on the part of owners will lead to more satisfied competitors who will want to compete on future projects.

Written jury reports should be provided after each phase describing why the successful competitors were selected. Waiting until a contract is signed, as is often the practice, means there is a significant delay between the time of selection and the jury report and the delay often contributes to a sense of frustration and perceptions that the process may not have been fair. Teams want and need to know why they were unsuccessful and how they can improve themselves for future design-build competitions. A more thorough debriefing will reduce the possibility of formal protests on design-build selections; in return for a more complete debriefing, finalists may agree to waive their right to protest.

### **How is bridging different than design-build?**

## **Bridging**

Bridging, as defined earlier in this publication, is a variation of the typical design-build process already described. In a bridging procurement, teams are provided bid documents that define the functional and aesthetic characteristics of a project by a separate architect-engineer (AE) who has a separate contract with the owner. This separate AE entity takes the design through to design development and is normally precluded from participating on a design-build team and serves as the owner's consultant during the final design and construction phase. The project is then bid on by teams that complete the final construction drawings and the team becomes the architect-of-record. Unlike a typical design-build project, a number of issues previously discussed in the context of design-build do not apply to a bridging procurement. Thus, limited phase two presentation products are not of the same concern because there is no design work. Similarly, jury selection and compensation for the short-listed teams are not as significant issues in bridging because the design concept has been established and, after prequalification in phase one, phase two deals with price only.

### **Additional Considerations**

1. It is necessary to delineate clearly the boundaries between the responsibilities of the designer who performs the preliminary design and the design-build entity's responsibilities for design and construction. The solicitation needs to be clear about the first designer's responsibilities on the project beyond his or her initial effort.
2. For a discussion of the options for obtaining price proposals, see pages 9-10.

## **Develop-Design-Build (Turnkey), Design-Build-Lease, Lease-Purchase**

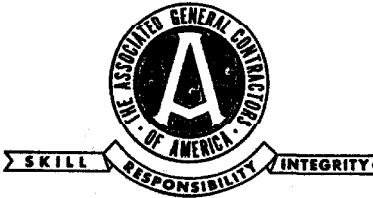
Develop-Design-Build and the other types of design-build described in the above heading are not actually procurement systems for delivering the design and construction of a project. These systems are financial arrangements that could apply to both design-build and bridging procurements.

### **Additional Considerations**

Since the design-build entity is expected to perform in areas beyond design and construction, the entity must be evaluated in those additional areas. This will require adding evaluation criteria during both phases of selection as well as adding to the selection jury members who can evaluate the additional areas of competence required, which are largely issues of financial capability.

## **CONCLUSION**

AIA and AGC believe that these Guidelines will improve the selection process for design-build projects. When implemented, AIA and AGC believe that these Guidelines will benefit public owners as well as the design and construction community by bringing uniformity and consistency to the design-build process in the public sector.



Item #3

## THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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February 4, 1999

### MEMORANDUM

To: AGC Executive Committee  
AGC Chapter Executives  
AGC Project Delivery Systems Committee Members

From: Dirk Haire, direct dial 202-383-2713

Re: American Bar Association Model Procurement Code Revision Project

#### I. Overview

The American Bar Association ("ABA") is revising its Model Procurement Code ("Code") for state and local governments. The original Code ("1979 Code"), issued in 1979, favored traditional lump sum, low-bid procurement, by restricting when other construction delivery methods were authorized. The current draft of the revised Code ("1999 Revised Code"), expected to be issued in August 1999, authorizes state and local governments to choose design-build and other delivery systems through competitive sealed proposal procurements. Under the 1999 Revised Code, states and local governments are given much greater discretion to choose a delivery system on a project-by-project basis.

Crucial dates for the 1999 Revised Code include:

- May 22, 1999 (ABA Public Contract Law Section Committee vote to recommend approval of the 1999 Revised Code)
- August 7, 1999 (ABA House of Delegates vote to adopt the 1999 Revised Code)



Model codes typically are drafted for the purpose of adoption and enactment by state and local jurisdictions. Thus, assuming the ABA's House of Delegates adopts the 1999 Revised Code during August 1999, AGC chapters can expect to see legislative efforts in their states following August 1999. For most states, this indicates legislation may be drafted as early as January 2000. As discussed more fully in paragraph IV below, even assuming a state enacts the 1999 Revised Code, most significant project delivery selection decisions are to be decided by state regulation.

AGC Chapter Executives, Project Delivery Systems Committee members, and Executive Committee members are encouraged to review the 1999 Revised Code and this memorandum. **To assure responsiveness to the ABA, please provide any comments you may have to me by Friday, March 12, 1999.** The 1999 Revised Code, including comments received, will be a discussion item during the Project Delivery Systems ("PDS") Committee meeting at the 1999 AGC National Convention in Las Vegas, Nevada. The PDS Committee meets Tuesday, March 23, 1999 from 9:30 a.m. to 11:00 a.m. in Bellagio Room 7.

Below is a more detailed analysis of relevant provisions.

## II. 1999 Revised Code § 5.101—Definitions

- a. This section defines statutorily terms including "Design-Bid-Build" ("DBB"), "Design-Build" ("DB"), "Design-Build-Finance-Operate-Maintain" ("DBFOM"), and "Design-Build-Operate-Maintain" ("DBOM").<sup>1</sup>
- b. There is no definition of "Construction Management" ("CM")—at risk, agency, or otherwise.<sup>2</sup> The Model Procurement Code Revision Project ("Project") co-directors believe CM in any variant should properly be viewed as a variant of DBB. AGC believes it would be better to include CM as its own defined delivery system under the 1999 Revised Code.
- c. The Independent Checking Engineer ("ICE") concept is introduced. The ICE provides "independent professional peer review of significant engineering and architectural design decisions made by the architect-engineers providing design services for DB, DBOM, and DBFOM contracts awarded under this Article."<sup>3</sup> The rationale for using an ICE is to provide a quality check on projects where design and construction are consolidated under one contract. The Project co-directors believe this quality check is important to maintain public confidence in single contract procurements for both design and construction.

<sup>1</sup> 1999 Revised Code §§ 5.101(4)-(7).

<sup>2</sup> CM At Risk is discussed in the commentary to 1999 Revised Code § 5.101(4).

<sup>3</sup> 1999 Revised Code § 5.101(9).

- d. “Infrastructure Facility” is defined expansively.<sup>4</sup> It includes “government office buildings; schools; courthouses; jails; water treatment plants, collection systems, and pumping stations . . . public roads and streets; highways . . .”<sup>5</sup> and numerous other works constructed by AGC members. Effectively, the ABA intends for the 1999 Revised Code to apply to virtually all non-federal government construction work in the United States.

### III. 1999 Revised Code § 5.201—Project Delivery and Source Selection Methods

- a. AGC believes a definition of CM should be added under this section.
- b. 1999 Revised Code § 5.201(2) is a crucial provision. **This provision authorizes a government official to select a particular project delivery system—DBB DB, DBOM, or DBFOM—on virtually any project.**<sup>6</sup> The specific relevant text reads: “Unless otherwise authorized by law, all [State] [Agency] [City] [Town] [County] [Authority] [District] contracts relating to the provision of infrastructure facilities and/or services shall be awarded as provided in section 5.201(4) by competitive sealed bidding, competitive sealed proposals, or the qualifications based selection process for architect-engineer and land surveying services . . .”<sup>7</sup>
- c. 1999 Revised Code § 5.201(4),<sup>8</sup> Commentary,<sup>9</sup> uses the term “fair and open competition” as the benchmark of public procurement. This is in contrast to the Federal language that uses the term “full and open competition.”<sup>10</sup> While the use of “fair” versus “full” may seem trivial, it is conceivable that “full” creates a legally heightened level of competition. AGC chapters may wish to examine the standard of competition currently applied in their states.
- d. 1999 Revised Code § 5.201(4), Commentary paragraph (12), assumes “Construction Management At Risk” as a variant of DBB. AGC believes this language is misleading and should be changed to provide express, separate recognition of CM At Risk. AGC supports a definition of CM At Risk under 1999 Revised Code §§ 5.101 and 5.201(1).
- e. 1999 Revised Code § 5.201(3), Commentary paragraph (12), states as an objective intent of the Project “. . . to provide procurement officials with

<sup>4</sup> 1999 Revised Code § 5.101(10).

<sup>5</sup> Id.

<sup>6</sup> Exceptions are provided for “Small Purchases”, “Sole Source Procurement[s]”, and “Emergency Procurements”. 1999 Revised Code § 5.201(2)(a)-(c).

<sup>7</sup> 1999 Revised Code § 5.201(2).

<sup>8</sup> Please note that the project co-directors have listed two consecutive sections as § 5.201(4). This typo will be remedied. To reduce confusion, I have not renumbered either section.

<sup>9</sup> 1999 Revised Code § 5.201(4), Commentary (1) & (2).

<sup>10</sup> 10 U.S.C. § 2304 and 41 U.S.C. § 253.

the flexibility to examine different configurations of the portfolio of existing and proposed infrastructure facilities, using budget constraints and project delivery methods as variables in the procurement planning process.” This language, read consistently with language in 1999 Revised Code §§ 5.201(2) and 5.202(1), indicates that Project co-directors intend to provide procurement officials with substantial latitude to determine which project delivery system to apply on a project-by-project basis.

- f. 1999 Revised Code § 5.201(4)(a) indicates that A/E selections will continue to be qualifications-based selections.
- g. 1999 Revised Code § 5.201(4)(b) states: “Construction contracts shall be awarded by competitive sealed bidding, as set forth in Section 5-203 (1)(b), except as otherwise provided in Section 5-201 (2).” Prior to reading Section 5-201(2), this provision appears to provide a significant endorsement of DBB as applied to construction procurements. However, as discussed above at paragraph III.b., there are few inherent limits on when government officials may use DB or other delivery systems.<sup>11</sup>
- h. 1999 Revised Code § 5.201(4), Commentary paragraph (2), states: “Subsection (1) [of section 5.201] establishes competitive sealed bidding as the preferred method of procurement.” Section 5.201(1) **does not** contain any language that specifies or implies that competitive sealed bidding is the preferred method of procurement. As discussed above at paragraph III.g., § 5.201(4)(b) establishes a preference for competitive sealed bidding for construction contracts; however, this preference is not binding and procurement officials may choose to disregard it if they believe an alternative delivery system is more appropriate.<sup>12</sup>
- i. 1999 Revised Code § 5.201(4)(d) requires that DB services be procured by competitive sealed proposals.
- j. The absence of a CM At Risk definition under 1999 Revised Code § 5.201 is concerning. The 1999 Revised Code considers all CM a variant of DBB.<sup>13</sup> At present, it is completely unclear how CM services are to be procured (competitive sealed bidding, competitive sealed proposals, qualifications-based selection, or some combination). Definitions for CM, CM At Risk, and CM Agency should be added.

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<sup>11</sup> See also discussion *infra* at paragraph IV.

<sup>12</sup> 1999 Revised Code § 5.201(4), Commentary (2)(12), provides in pertinent part: “There are numerous occasions, however, where the integration of design with construction (Design-Build) . . . offers such significant quality, cost, and time benefits to government, to taxpayers, and to ratepayers, that prudent procurement officials have little choice but to carefully consider the potential impact of these methods on government’s ability to plan and deliver a portfolio of projects within budget constraints.”

<sup>13</sup> *Id.*

IV. 1999 Revised Code § 5.202—Responsibility for Selection of Project Delivery Methods For Infrastructure Related Facilities and Services.

- a. 1999 Revised Code § 5.202(1) provides authority to states to promulgate regulations. Under section 1999 Revised Code § 5.202(1)(b), a state's "Chief Procurement Officer" or equivalent is authorized to "select the appropriate project delivery method for a particular project."<sup>14</sup> **In other words, the 1999 Revised Code authorizes adopting states to promulgate specific regulations that describe when each project delivery system is discretionary, mandatory, or prohibited.**<sup>15</sup> Recall that under 1999 Revised Code § 5.201(2), there is no bar to using any particular project delivery system on any particular project. It is the regulatory process that will place any—or no—limits on the use of any particular project delivery system for any government project constructed under a 1999 Revised Code jurisdiction. Also keep in mind that **the 1999 revised Code authorizes one procurement scheme for all "Infrastructure Facilit[ies]." which specifically includes buildings, highways, wastewater treatment plants, and virtually every other type of government project AGC members construct.**<sup>16</sup> The 1999 Revised Code does not authorize a separate procurement process or triggering threshold for building and highway construction. For those states that adopt the 1999 Revised Code, the rules of the game will likely be as follows:
1. Following Code enactment into law, the appropriate state procurement agency will be tasked with drafting implementing regulations.
  2. The state procurement agency will seek industry input in drafting implementing regulations.
  3. The rulemaking will take place over a period of months. Public notice and comment rules should apply.
  4. New procurement rules will be promulgated.
- b. 1999 Revised Code § 5.202(c) requires the state to describe bonding and insurance that will apply to each "project."<sup>17</sup> This assumes that state regulators will establish bonding and errors & omissions insurance requirements for each project delivery system (e.g., design-build). How these regulations are adopted will significantly impact whether a firm is

<sup>14</sup> 1999 Revised Code §§ 5.202(1)(a) & (b).

<sup>15</sup> AGC recommends its textbook *Project Delivery Systems for Building Construction* (1997) to those who seek a thorough analysis of the benefits and challenges of the major delivery systems.

<sup>16</sup> 1999 Revised Code § 5.101(10).

<sup>17</sup> The 1999 Revised Code likely means "project method" instead of "project." It is obviously impossible to promulgate a bonding and insurance requirement for a specific project that is not yet ascertained.

qualified to lead a project. The bonding and insurance provisions under the 1999 Revised Code<sup>18</sup> are substantially the same as those under the 1979 Code.<sup>19</sup>

- c. 1999 Revised Code § 5.202(e) requires the state to “execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery for each project.” This is a positive statement and should provide a safeguard against arbitrariness or political misconduct during the selection process.
- d. The commentary to 1999 Revised Code § 5.202 elaborates on the policies supporting expansion of alternative delivery systems for public construction projects. This commentary is confusing and should be deleted in full. The term “Construction Manager At Risk” should be defined under 1999 Revised Code §§ 5.101 and 5.201(1). Any commentary substituted under this provision should be limited to matrix format and describe appropriate use parameters for specific project delivery systems.

V. 1999 Revised Code § 5.203—Design-Bid-Build (“DBB”)

This provision is substantially the same as corresponding 1979 Code text.<sup>20</sup> Under this provision, A/E selection is qualifications based, analogous to the Brooks Act, and construction contractor selection is competitive sealed bid. There are no surprises here.

VI. 1999 Revised Code § 5.204—Operations and Maintenance Services

AGC has no comment on language under this section.

VII. 1999 Revised Code § 5.205—Competitive Sealed Proposals for Design-Build (“DB”), Design-Build-Operate-Maintain (“DBOM”), Design-Build-Finance-Operate-Maintain (“DBFOM”) Services

- a. 1999 Revised Code § 5.205(1) mandates a competitive sealed proposal process for DB.
- b. Proposals are to be evaluated based on criteria specified in the solicitation. The 1999 Revised Code provides: “Only criteria disclosed in the solicitation may be used to evaluate the items bid or proposed.”<sup>21</sup> This

<sup>18</sup> “Part C—Bonds, Insurance, Guarantees.”

<sup>19</sup> 1979 Code §§5-301—303. The Code itself has no material differences from the Federal Miller Act. The 1999 Revised Code establishes additional security requirements for the new project delivery systems it authorizes (e.g., DB, DBOM, DBFOM).

<sup>20</sup> 1979 Code §3-202.

<sup>21</sup> 1999 Revised Code, § 5.205(1), Commentary (2).

language is similar to language in the Federal Acquisition Regulation (“FAR”).<sup>22</sup>

c. 1999 Revised Code § 5.205(2)—Request for Proposals

1. 1999 Revised Code § 5.205(2) requires the public owner to include “Schematic Design Requirements” in its RFP and the proposer to include “Design Development Documents” in its proposal.<sup>23</sup> Requiring proposals to include 30% design documents will add significant cost to DB competitions. This requirement may also increase delivery time.
2. Notions of fundamental fairness and sound public policy favor payment of a stipend to unsuccessful proposers who submit proposals including 30% design documents. Not providing a stipend would result in de facto limits on competition for government projects.
3. AGC supports the AIA-AGC “Two-Phase Selection Process” for DB procurements.<sup>24</sup> RFP language in this section should be consistent with the AIA-AGC language.
4. Draft Commentary under this section should be deleted.

d. 1999 Revised Code § 5.205(5)—Evaluation Factors

1. This section does not provide an adequate legislative framework. A major industry concern under Federal negotiated procurement rules is the lack of specificity required in the solicitation concerning the relative importance of evaluation factors.<sup>25</sup> AGC anticipates significant litigation over the next several years as courts decipher the Federal rules. To avoid this circumstance under the 1999 Revised Code, AGC recommends deleting the language currently under 1999 Revised Code § 5.205(5) and replacing it with the following new language:

“The Request for Proposals shall state the relative importance of all evaluation factors in clear terms. Each evaluation factor that accounts for five percent or more of the total award shall be described in the solicitation as accounting for between 5%-15%;

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<sup>22</sup> See FAR Part 15.305(a).

<sup>23</sup> The 1999 Revised Code considers schematic design completion at 5% design completion and design development completion at 30% design development. 1999 Revised Code § 5.205(5), Commentary.

<sup>24</sup> *AIA-AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector*, at 9-12 (January 1995). Full document reprinted *infra* at Appendix A.

<sup>25</sup> FAR Part 15.304(d)-(e).

16%-25%; 26%-35%; 36%-45%; 46%-55%; or more than 55% of the total award.”

2. The first Commentary paragraph under this section should be deleted.
3. The second Commentary paragraph under this section is more relevant to 1999 Revised Code § 5.205(2). If it is kept, it should be moved under § 5.205(2).

e. 1999 Revised Code § 5.205(6)—Discussion with Responsible Offerors and Revisions to Proposals

The language under this section is confusing and, when read in conjunction with the Commentary under this section, leads to the conclusion that offerors may not be treated equally. For example, this section mandates that offerors be accorded “fair and equal treatment with respect to any opportunity for discussion and revision of proposals . . .” Although this seems reasonable, two problems arise.

First, Commentary paragraph (2) under this section introduces a new term—“negotiations”—in explaining what constitutes “fair and equal treatment.” Specifically, Commentary paragraph (2) states that “[f]air and equitable treatment of competitors dictates that *negotiations* be conducted in accordance with *ethical business standards* . . .” (Emphases added.) This raises the following questions:

1. Is a “discussion” a different process from a “negotiation”?<sup>26</sup>
2. Does “ethical business standards” mean that all offerors must be treated equally? Not equally?
3. Are there two different standards that are capable of being applied under the Code?

Second, What is the intended standard of review?

These issues may seem trivial, however, under the federal negotiated procurement rules, “discussions” and “negotiations” specifically provide discretion to contracting officers with respect to the “scope and extent of

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<sup>26</sup> The FAR expressly treats “discussions” and “negotiations” synonymously. FAR Part 15.306(d). There is no express intention under the 1999 Revised Code. If this is the intention, the language should expressly so provide.

discussions”<sup>27</sup> for each offeror so long as they do not “[f]avor[] one offeror over another.”<sup>28</sup>

AGC encourages adoption of a straightforward standard of review for discussions. Under the “Two-Phase Selection Process,” the owner’s selection team spends a fixed amount of time with each of the most highly rated offerors. This process accommodates fundamental fairness while affording a meaningful opportunity for the owner’s team to explore relevant issues with each proposer.<sup>29</sup>

f. 1999 Revised Code § 5.205(7)—Award

This section requires a written document in file explaining the contracting officer’s rationale as to why the awardee’s proposal is most advantageous to the government. There is no similar requirement applicable to federal procurements. AGC supports this requirement as a positive safeguard against arbitrariness and misuse of political influence during the selection process.

VIII. 1999 Revised Code § 5.206—Provisions Specific to Design-Build (“DB”) Services

This section currently has no text. AGC recommends adopting the AIA-AGC “Two-Phase Selection Process” as described in *AIA-AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector*.<sup>30</sup>

IX. 1999 Revised Code § 5.207—Provisions Specific to Design-Build-Operate-Maintain Services (“DBOM”)

AGC has no comment under this section.

X. 1999 Revised Code § 5.208—Provisions Specific to Design-Build-Finance-Operate-Maintain Services (“DBFOM”)

AGC has no comment under this section.

XI. 1999 Revised Code § 5.301—Bid Security

AGC supports the language in this section.

XII. 1999 Revised Code § 5.302—Contract Performance and Payment Bonds

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<sup>27</sup> FAR Part 15.306(d)(3).

<sup>28</sup> FAR Part 15.306(e)(1).

<sup>29</sup> *Supra* note 24 at 11.

<sup>30</sup> See Appendix A to this memorandum.



AGC supports the language in this section, pending the following clarifications:

- a. 1999 Revised Code § 5.302(1)(a) inserts the term "construction" immediately preceding the term "price." Why?
- b. 1999 Revised Code § 5.302(1)(b) inserts the term "construction" immediately preceding the term "work." Why?
- c. 1999 Revised Code § 5.302(2) deletes the term "contract" immediately preceding the term "price" and inserts the phrase "of construction" immediately following the term "price." Why?

XIII. 1999 Revised Code § 5-303—Bond Forms and Copies

AGC supports the language under this section.

XIV. 1999 Revised Code § 5-304—Errors & Omissions Insurance

AGC reserves the opportunity to comment on the language under this section.

XV. 1999 Revised Code § 5-305—Other Forms of Security

AGC has no comment on the language under this section.

XVI. 1999 Revised Code § 5-401—Contract Clauses and Their Administration

AGC reserves the opportunity to comment on the language under this section.

XVII. 1999 Revised Code § 5-402—Fiscal Responsibility

AGC reserves the opportunity to comment on the language under this section.

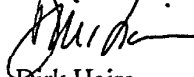
XVIII. Conclusion

Please contact me with your follow up by one of the following:

- E-mail: [haired@agc.org](mailto:haired@agc.org)
- Phone: (202) 383-2713
- Fax: (202) 347-4004.

Thank you in advance for your interest and review.

Sincerely,



Dirk Haire  
Director, Building Division

Second Discussion Draft

ARTICLE 5 - PROCUREMENT OF INFRASTRUCTURE SERVICES

Construction, Architect-Engineer, Land Surveying, Operations and  
Maintenance, Finance

Part A-Definitions

5-101 Definitions

- (1) *Architect-Engineer and Land Surveying Services* are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of this State.

COMMENTARY:

This definition was included in the 1979 Model Procurement Code as Section 5-101 (1).

- (2) *Construction* means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

COMMENTARY:

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. This definition can also be found in Section 1-201 (4) of the 1979 Model Procurement Code.

- (3) *Cost-Reimbursement Contract* means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Code, and a fee, if any.

COMMENTARY:

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. This definition was included in the 1979 Model Procurement Code as Section 3-101(1).

- (4) *Design-Bid-Build ("DBB")* means a project delivery method in which the procuring agency sequentially awards separate contracts for architect-engineer services to design the project and a second contract to build the project according to the design.

COMMENTARY:

This definition is new to the Model Procurement Code, although Design-Bid-Build ("DBB") is a proven, commonly used public procurement method throughout the United States. Included within the concept of Design-Bid-Build ("DBB") is a widely used variation of DBB known as Construction Management At-Risk, in which the timing of the award of the construction portion of the project occurs prior to the completion of the design. With both the contractor and the designer under contract prior to the completion of design, the contractor's scope of work typically includes cooperating with both the Owner and the designer in the finalization of the design and completing the project in accordance with scope, quality, time, and competitively established price constraints. The contractor assumes a general obligation to properly complete the project at the price and per the schedule, and is called a Construction Manager ("CM") At-Risk. The intent of the Code is to permit the [State] [Agency] [City] [Town] [County] [Authority] [District] to employ Construction Management At-Risk or DBB, based upon the authority contained in Section 5-203.

- (5) *Design-Build ("DB")* means a delivery method in which the procuring agency enters into a single contract for design, and construction of an infrastructure facility.

**COMMENTARY:**

This definition is new to the Model Procurement Code. Design-Build is a viable alternative to sequential design-bid-build and construction management at risk methods. Design-Build can be a productive, competitive alternative to DBB and CM At Risk when the government has established the functional requirements (or design criteria) of a project. The Model Procurement Code defines these "functional requirements" or "design criteria" as Schematic Design Requirements (see Section 5-101 (18)).

- (6) *Design-Build-Finance-Operate-Maintain ("DBFOM")* means a delivery method in which the procuring agency enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility and/or infrastructure service over a contractually defined period. No [State] [Agency] [City] [Town] [County] [Authority] [District] funds are appropriated to pay for any part of the services provided by the DBFOM contractor during the franchise period.

**COMMENTARY:**

This definition is new to the Model Procurement Code. DBFOM is another proven delivery method, in common use throughout the world, and in American antiquity. In addition to the integration of design with construction (as accomplished with the Design-Build method), DBFOM integrates long term operation and maintenance, as well as project finance, into a single competition. DBFOM also depends on the prior establishment by the government of the functional requirements of a project. Note the distinctions between the definition of DBFOM and DBOM. In DBFOM, no agency funds are appropriated to pay for any part of the services provided by the contractor during the franchise period. This distinction is an important one in the statutory scheme, since the government RFP process is structured on the premise that proposers will be required to finance the project, without any expectation of state appropriation. This project delivery method should be very carefully and very sparingly used by government. DBFOM makes practical sense only where the government has made a preliminary determination that project revenues are sufficient, over the length of the proposed contract, to reasonably cover development and operation costs.

- (7) *Design-Build-Operate-Maintain ("DBOM")* means a delivery method in which the procuring agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility and/or infrastructure service over a contractually defined period. All or a portion of the funds required to pay for the services provided by the DBOM contractor during the franchise period are either appropriated by the [State] [Agency] [City] [Town] [County] [Authority] [District] prior to award of the contract or secured by the [State] [Agency] [City] [Town] [County] [Authority] [District] through fare, toll, or user charges.

**COMMENTARY:**

This definition is new to the Model Procurement Code. DBOM is another proven delivery method, in common use throughout the world, and in American antiquity. In addition to the integration of design with construction (as accomplished with the Design-Build method), DBOM integrates long term operation and maintenance into a single competition. DBOM also depends on the prior establishment by the government of the functional requirements of a project. Note the differences in the definition of DBOM from that of DBFOM. Projects which are partially or completely funded by direct public appropriations or by publicly imposed user charges, fares, or tolls are defined in the Code as DBOM projects.

- (8) *Design Development Documents* means drawings and other design related documents, as set forth in a Request for Proposal, which are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the project delivery method in use.

**COMMENTARY:**

This definition is new to the Model Procurement Code. The Code requires that Design Development Documents be solicited in all Requests for Proposals which use Design-Build, Design-Build-Operate-Maintain, and Design-Build-Finance-Operate-Maintain procurement methods. See, Section 5-205 (2). Competing submissions of Design Development Documents represent the competitive point at which competitive sealed proposals are evaluated by government. See, Section 5-205.

- (9) *Independent Checking Engineer ("ICE") services* are additional architect-engineer services provided by a Design-Build, Design-Build-Operate-Maintain, or Design-Build-Finance-Operate-Maintain contractor to the [State] [Agency] [City] [Town] [County] [Authority] [District], the purposes of which are (1) to provide independent professional peer review of significant engineering and architectural design decisions made by the architect-engineers providing design services for DB, DBOM, and DBFOM contracts awarded under this Article, and (2) to provide an independent check on the proper implementation of the design during construction, start-up, and operation.

**COMMENTARY:**

This definition is new to the Model Procurement Code, and is applicable to projects in which the design function is integrated with one or more of the construction, operations, and finance functions. The purpose of the ICE is to provide the [State] [Agency] [City] [Town] [County] [Authority] [District] with an independent professional peer review of key elements of the design of major public infrastructure facilities, in circumstances appropriate to the particular project. See, Section 5-205 (5). The ICE's function is not to conduct a second design alongside the designers of record, to verify proper implementation of the design during construction, nor to diffuse the obvious benefits of integrating the design and construction (and other) functions through the DB, DBOM, and DBFOM project delivery methods. Rather, the ICE's purpose is to provide the government with independent professional advice and assurance that key elements of the project are consistent with the functional description in the RFP and with the common law standard of professional care. The Code requires that the ICE be provided by the awardee for several reasons. First, the experience and qualifications of the ICE in performing the checking function is made an evaluation factor by 5-205 (5). Each offeror has every incentive to select a highly qualified ICE, in whom both the government and the proposer are likely to have confidence. Second, for many DBOM and DBFOM projects (and some DB projects), financing institutions, sureties, and insurers, are almost certain to require the successful offeror to provide services similar to that of the ICE, at the contractor's expense. The ICE provisions of the Code would permit and encourage efficiencies in these activities.

- (10) *Infrastructure Facility* means the collection of buildings, structures, pipes, equipment, controls, telecommunications, and ancillary systems which provide infrastructure services to the public. Examples include government office buildings; schools; courthouses; jails; water treatment plants, distribution systems, and pumping stations; wastewater treatment plants, collection systems, and pumping stations; solid waste disposal plants, incinerators, landfills, and related facilities; public roads and streets; highways; public parking facilities; public transportation systems, terminals, and rolling stock; airport, rail, and water port structures, terminals, and equipment.

**COMMENTARY:**

This definition is new to the Model Procurement Code.

- (11) *Infrastructure Service* means those basic services made available by the [State] [Agency] [City] [Town] [County] [Authority] [District] for regular access or use by the public, including, but not limited to, drinking water; wastewater/sewage collection and treatment; solid waste collection, treatment, and disposal; operation of public streets, highways, rail, bus, air and port transportation systems.

**COMMENTARY:**

This definition is new to the Model Procurement Code.

- (12) *Invitation for Bids* means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

**COMMENTARY:**

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. See, Article 3-101 (3) for the same definition.

- (13) *Operation-and-Maintenance (O&M) service* means a project delivery method whereby the procuring agency enters into a single contract for the operation and maintenance of an existing infrastructure facility or infrastructure service.

**COMMENTARY:**

This definition is new to the Model Procurement Code. Contracts for operations and maintenance services offers governments flexible alternatives to utilize competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-Bid-Build or Design-Build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service. Many governments will continue to produce new facilities using either the Design-Bid-Build or Design-Build project delivery method, followed by long term operations and maintenance directly by public employees. The code gives procurement officials the flexibility to use competitive sealed bidding to acquire all or a portion of the supplies and services required to maintain and operate infrastructure facilities. Negotiation with bidders after the receipt and opening of bids is not permitted. Award is made based strictly on the criteria set forth in the Invitation for Bids.

- (14) *Purchase Description* means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.

**COMMENTARY:**

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. See, Article 3-101 (4) for the same definition.

- (15) *Request for Proposals* means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

**COMMENTARY:**

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. See, Article 3-101 (5) for the same definition.

- (16) *Responsible Bidder* or offeror means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

**COMMENTARY:**

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. See, Article 3-101 (6) for the same definition.

- (17) *Responsive Bidder* means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

**COMMENTARY:**

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. See, Article 3-101 (7) for the same definition.

- (18) *Schematic Design Requirements* means the [State's] [Agency's] written description of the infrastructure facility or service to be procured under this Article, including required features, functions, characteristics, qualities, and properties; the anticipated schedule for implementation; and estimated budgets (as applicable to the specific procurement) for design,

construction, operation and maintenance. The Schematic Design Requirements may include, as appropriate, drawings and other documents illustrating the scale and relationship of required features, functions, and characteristics of the project.

**COMMENTARY:**

This definition is new to the Model Procurement Code. The Code requires that Schematic Design Requirements be set forth in all Requests for Proposals which solicit offers using the Design-Build, Design-Build-Operate-Maintain, and Design-Build-Finance-Operate-Maintain procurement methods. See, Section 5-205 (2). The government's statement in the RFP of Schematic Design Requirements provides the starting point from which offerors will prepare competitive sealed proposals for evaluation and award by the government. See, Section 5-205. The Code does not attempt to inflexibly define the content of Schematic Design Requirements, because the specifics of each project will vary. The intent of the Code, however, is that government prepare a functional description that sets forth only the essential features of each and every project, including the anticipated schedule, and the estimated budget for design, construction, operation, and maintenance. One central goal of the integrated procurement methods - DB, DBOM, and DBFOM - is to permit the government to use the competitive process to test for higher quality, lower price, quicker delivery through the integration of two or more of the design, construction, and operation, and finance functions. To the extent the government's Schematic Design Requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, "Design-Build" competitions in which the Schematic Design Requirements already include all major design decisions should be avoided as a mis-use of the Design-Build procurement method. Such competitions are fairly described as "Detail-Build", involving little innovation, little integration of the design and construction functions, and in which price is negotiated, when a lump sum sealed bid should be a preferred by the government. See, Section 5-203 (1). In addition, "Detail-Build" procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, construction, and performance problems. The Code encourages government (1) to prepare Schematic Design Requirements for each project before a procurement method is selected, and (2) to procure the design function from a single entity (by separate contract in Design-Bid-Build, or integrated with other functions in DB, DBOM, or DBFOM).

- (19) In this article, *Services* means the furnishing of labor, time, equipment, materials, or effort by a contractor in the design, delivery, finance, operation, or maintenance of an infrastructure facility or infrastructure service. This term shall not include employment agreements or collective bargaining agreements.

**COMMENTARY:**

This definition is new to Article 5 of the Model Procurement Code, and is added to permit Article 5 to stand alone. See, Article 1-101 (19) for the same definition.

This Section only defines terms with special meanings that are peculiar to this Article. Other terms having special meanings that are used both in this Article and in other Articles of this Code are defined in Section 1-301 (Definitions).

**DEFINITIONAL CROSS-REFERENCES:**

"Change Order"	Section 1-301(2)
"Chief Procurement Officer"	Section 1-301(3)
"Contract"	Section 1-301(5)
"Contract Modification"	Section 1-301(6)
"Contractor"	Section 1-301(7)
"Data"	Section 1-301(8)
"Designee"	Section 1-301(9)
"May"	Section 1-301(14)
"Person"	Section 1-301(15)
"Procurement"	Section 1-301(16)
"Procurement Officer"	Section 1-301(17)
"Public Notice"	Section 1-301(18)
"Purchasing Agency"	Section 1-301(19)
"Regulation"	Section 1-301(20)
"Services"	Section 1-301(21)
"Shall"	Section 1-301(22)
"Person"	Section 1-301(14)
"Procurement"	Section 1-301(15)
"Procurement Officer"	Section 1-301(16)
"Purchasing Agency"	Section 1-301(17)
"Regulation"	Section 1-301(18)

"Shall"	Section 1-301(20)
"Specification"	Section 4-101
"Supplies"	Section 1-301(24)
"Written" or "In Writing"	Section 1-301(26)
"Supplies"	Section 1-301(21)

## Part B - Contracting for Infrastructure Related Services

### 5-201 Project Delivery and Source Selection Methods

(1) As further provided in this Article, the following delivery methods are authorized for the procurement of infrastructure related services in this [State] [Agency] [City] [Town] [County] [Authority] [District]:

(a) Design-Bid-Build.

#### COMMENTARY

Not included in the definition of Design-Bid-Build is a third variation known as Construction Management (Agent) or (Not At Risk). In this delivery strategy, the services of a Construction Manager are procured separately by the [State] [Agency] [City] [Town] [County] [Authority] [District] to act as the [State's] [Agency's] [Owner's] agent in the management of design and construction process. The CM (Agent) typically does not contract directly with the architect-engineer or the construction contractor, for whose acts the CM (Agent) is not at risk to the [State] [Agency] [City] [Town] [County] [Authority] [District]. Procurement of Construction Management (Not At Risk) services would typically be treated as set forth in Article 3.

(b) Operations and Maintenance.

(c) Design-Build.

(d) Design-Build-Operate-Maintain.

(e) Design-Build-Finance-Operate-Maintain.

(2) Unless otherwise authorized by law, all [State] [Agency] [City] [Town] [County] [Authority] [District] contracts relating to the provision of infrastructure facilities and/or services shall be awarded as provided in Section 5-201 (4) by competitive sealed bidding, competitive sealed proposals, or the qualifications based selection process for architect-engineer and land surveying services, except as provided in:

(a) Section 3-204 (Small Purchases);

(b) Section 3-205 (Sole Source Procurement); and

(c) Section 3-206 (Emergency Procurements).

(3) Nothing in this article shall be construed to require that the [State] [Agency] [City] [Town] [County] [Authority] [District] contract for the provision of infrastructure services.

(4) Participation in the preparation of Schematic Design Requirements for a project shall not disqualify a firm from participating as a member of a

proposing team in a Design-Build, Design-Build-Operate-Maintain, or Design-Build-Finance-Operate-Maintain procurement.

**COMMENTARY:**

- (1) The purpose of this Part is to provide procurement officials with adequate authority to conduct procurement transactions by fair and open competition under varying market conditions in order to satisfy public needs for infrastructure related supplies, services, and construction at the most economical prices.
- (2) Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for hidden favoritism, and inspires public confidence that contracts are awarded equitably and economically. Since the marketplace is different for various supplies, services, and construction, this Code authorizes a variety of source selection techniques designed to provide the best competition for all types of procurements. It also permits less formal competitive procedures where the amount of the contract does not warrant the expense and time otherwise involved. Competitive sealed bidding (Section 3-202), competitive sealed proposals (Section 3-203), simplified, small purchase procedures (Section 3-204), and competitive selection procedures for certain services (Section 3-207), therefore, are recognized as valid competitive procurement methods when used in accordance with the criteria and conditions set forth in this Article.
- (11) Subsection (2) lists sole source procurements (Section 3-205), as an exception to other methods only when it is determined in writing that there is only one source for the required supply, service, or construction item.
- (12) Subsection (3) confirms that this Article does not compel government procurement officials to use any one of these methods in delivering infrastructure services and/or facilities. Rather, this article relates only to those elements of infrastructure facilities and services that government has determined to procure competitively by contract. The likely scenario is that a very high percentage of infrastructure facilities will continue to be delivered through project delivery methods that allow government to exercise step by step control over the specific content of the design package (e.g. Design-Bid-Build, Construction Management At-Risk). This factor leads many to conclude that Design-Bid-Build (and variants thereof) will continue to prevail as a basic procurement vehicle for capital project development, followed by direct agency operation and maintenance.

There are numerous occasions, however, where the integration of design with construction (Design-Build), or design with construction and operations (Design-Build-Operate), or design with finance, construction, and operations (Design-Build-Finance-Operate-Maintain) offers such significant quality, cost, and time benefits to government, to taxpayers, and to ratepayers, that prudent procurement officials have little choice but to carefully consider the potential impact of these methods on government's ability to plan and deliver a portfolio of projects within budget constraints. The factors that are likely to drive procurement officials include new technologies, improved materials, new engineering methods, new construction techniques, and improved operations and maintenance strategies. The intent of the Revised Code is to provide procurement officials with the flexibility to examine different configurations of the portfolio of existing and proposed infrastructure facilities, using budget constraints and project delivery methods as variables in the procurement planning process.

- (4) Source Selection Methods Assigned to Project Delivery Methods.
- (a) Architect-engineer and land surveying services shall be procured using the qualifications based selection process set forth in Section 5-203 (1)(a), except as authorized by Section 5-201 (2).
- (b) Construction contracts shall be awarded by competitive sealed bidding, as set forth in Section 5-203 (1)(b), except as otherwise provided in Section 5-201 (2).

**COMMENTARY:**

- (1) Competitive sealed bidding is a commonly used method for acquiring supplies, services, and construction for public use. This method does not include negotiations with bidders after the receipt and opening of bids. Award is to be made based strictly on the criteria set forth in the Invitation for Bids.
- (2) Subsection (1) establishes competitive sealed bidding as the preferred method of procurement.
- (c) Contracts for operations and maintenance services shall be awarded by competitive sealed bidding, as set forth in Section 5-204, except as otherwise provided in Section 5-201 (2).
- (d) Design-Build services shall be procured by competitive sealed proposals, as set forth in Section 5-205 and 5-206.



- (e) Design-Build-Operate-Maintain services shall be procured by competitive sealed proposals, as set forth in Section 5-205 and 5-207.
- (f) Design-Build-Finance-Operate-Maintain services shall be procured by competitive sealed proposals, as set forth in Section 5-205 and 5-208.

### 5-202 Responsibility for Selection of Project Delivery Methods For Infrastructure Related Facilities and Services.

- (1) The [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] shall promulgate regulations providing for the project delivery methods listed in Section 5-201. These regulations shall:
  - (a) set forth criteria to be used in determining which project delivery method is to be used for a particular project;
  - (b) grant to the Chief Procurement Officer, or the head of the Purchasing Agency responsible for carrying out the project, the discretion to select the appropriate project delivery method for a particular project;
  - (c) describe the bond, insurance, and other security provisions contained in Part C of this Article that apply to each project;
  - (d) describe the appropriate contract clauses and fiscal responsibility requirements contained in Part D of this Article that apply to each project; and
  - (e) require the Procurement Officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery for each project.

#### COMMENTARY:

(1) It is recognized that in addition to the project delivery methods listed in Section 5-201, the following variations on the Design-Bid-Build method are being used for control and coordination of construction projects:

- (a) Fast Track a single prime contractor (including a turnkey or design-build contractor);
- (b) Construction Contract with a Guaranteed Maximum Price.

This Section of the Code authorizes the [State] [Agency] [City] [Town] [County] [Authority] [District] to issue appropriate regulatory guidance for the use of these and other variations of the Design-Bid-Build method for infrastructure facilities and services. A contract clause which simply requires separate prime contractors to cooperate and coordinate with each other without a central planning and management coordinator is not considered an acceptable method of construction management.

(2) In addition, it is recognized that the specific terms in a Request for Proposal for Design-Build, Design-Build-Operate-Maintain, or Design-Build-Finance-Operate-Maintain services will necessarily vary based upon the specific financial, engineering, architectural, and technological issues confronting a particular project. This Section of the Code authorizes the [State] [Agency] [City] [Town] [County] [Authority] [District] to issue appropriate regulatory guidance in the appropriate application of these methods to infrastructure facilities and services.

(3) Note that new definitions of electronic, signature, public notice, and written contained in 1.301 permit determinations to be issued electronically.

### 5-203 Design-Bid-Build ("DBB")

~~(1)~~ The Design-Bid-Build project delivery method involves the sequential procurement of architect-engineer services and construction services as set forth in paragraphs (2) and (3) in this Section.

**COMMENTARY:**

The sequential use of professional design service contracts to produce complete design plans and specifications, followed by the procurement of construction services using an Invitation for Bids and award based upon sealed bids is a proven, reliable method for the delivery of infrastructure facilities. Often described as the "traditional method", in fact, DBB is an historical outgrowth of earlier forms of public procurement dating back to the end of the nineteenth century, when government procurement officials increasingly relied upon specialized consulting engineers in the emerging fields of civil, mechanical, structural, and soils engineering to incorporate new technologies and methods into the design of public buildings. This Section 5-203 preserves the traditional DBB procurement format. Paragraph 2 describes the procurement of architect-engineer and land surveying services. Paragraph 3 describes the procurement of the construction services using the design documents produced by the professional designers.

(2) Architect-Engineer and Land Surveying Services

~~(a)~~ ~~(a)~~ *Policy.* It is the policy of this [State] [Agency] [City] [Town] [County] [Authority] [District] to publicly announce all requirements for architect-engineer and land surveying services and to negotiate contracts for architect-engineer and land surveying services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

**COMMENTARY:**

Note that new definitions of electronic signature, public notice, and written contained in 1-301 permit determinations to be issued electronically.

(b) *Architect-Engineer Selection Committee.* In the procurement of architect-engineer and land surveying services, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. [The Chief Procurement Officer or the head of a Purchasing Agency, the Procurement Officer, and [the State Architect]] shall comprise the Architect-Engineer Selection Committee for each architect-engineer and land surveying services contract over [\$100,000]. The Selection Committee for architect-engineer and land surveying services contracts under this amount shall be established in accordance with regulations promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District]. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the [State] [Agency] [City] [Town] [County] [Authority] [District], together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(c) *Negotiation.* The Procurement Officer shall negotiate a contract with the highest qualified firm for architect-engineer or land surveying services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State] [Agency] [City] [Town] [County] [Authority] [District]. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the [State] [Agency] [City] [Town] [County] [Authority] [District], negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached.

#### COMMENTARY

- (1) This Section applies to procurement of all services within the scope of architecture, professional engineering, or land surveying as defined by the laws of the State whether or not construction is involved. The language is unchanged from that contained in the 1979 Model Procurement Code. See, Article, 5-501.
- (2) The principal reasons supporting this selection procedure for architect-engineer and land surveying services are the lack of a definitive scope of work for such services at the time the selection is made and the importance of selecting the best-qualified firm. In general, the architect-engineer or land surveyor is engaged to represent the [State's] interests and is, therefore, in a different relationship with the [State] [Agency] [City] [Town] [County] [Authority] [District] from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the three most qualified architect-engineers or land surveying firms are considered initially, and price negotiated later.
- (3) It is considered more desirable to make the qualification selection first and then to discuss the price because both parties need to review in detail what is involved in the work (for example, estimates of man-hours, personnel costs, and alternatives that the architect-engineer or land surveyor should consider in depth). Once parameters have been fully discussed and understood and the architect-engineer or land surveyor proposes a fee for the work, the recommended procedure requires the [State] [Agency] [City] [Town] [County] [Authority] [District] to make its own evaluation and judgment as to the reasonableness of the fee.
- (4) If the fee is fair and reasonable, award is made without consideration of proposals and fees of other competing firms. If the fee cannot be negotiated to the satisfaction of the [State] [Agency] [City] [Town] [County] [Authority] [District], negotiations with other qualified firms are initiated. Thus price clearly is an important factor in the award of the architect-engineer or land surveying services contract under this procedure. The principal difference between the recommended procedure for architect-engineer and land surveyor selection and the procedures used in most other competitive source selections is the point at which price is considered.
- (5) If an enacting jurisdiction desires to use a different selection process, then it may consider the following language:

"The Procurement Officer shall negotiate with the highest qualified firms for a contract for architect-engineer or land surveying services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State] [Agency] [City] [Town] [County] [Authority] [District]. In making such determination, the Procurement Officer shall take into account, in the following order of importance, the professional competence of offerors, the technical merits of offers, and the price for which the services are to be rendered."

- (3) Construction Services

(a) *Conditions for Use.* Construction Contracts shall be awarded by competitive sealed bidding except as otherwise provided in Section 3-201 (Methods of Source Selection).

**COMMENTARY:**

(1) Subsection (3), although new to Article 5 of the Code, comprises the competitive sealed bidding language from Article 3 of the 1979 Model Procurement Code.

(2) Competitive sealed bidding is the commonly used method for acquiring construction services. This method does not include negotiations with bidders after the receipt and opening of bids. Award is to be made based strictly on the criteria set forth in the Invitation for Bids.

(b) *Invitation for Bids.* An Invitation for Bids ("IFB") shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement.

(c) *Public Notice.* Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth therein for the opening of bids, in accordance with regulations promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District]. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening.

**COMMENTARY:**

Public notice required by Subsection (c) should be given sufficiently in advance of bid opening to permit potential bidders to prepare and submit their bids in a timely manner. It should include as a minimum the communication (by mailing or otherwise) of Invitations for Bids to all parties on any applicable bidders mailing list. In many States, public notice will also be given by newspaper publication. Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made in Subsection (c) to define statutorily either a prescribed method of notice or the duration of its publication. However, the regulations should provide criteria and general guidelines for the method and duration of public notice, including electronic means of providing public notice. Note that new definitions of electronic signature, public notice, and written contained in 1-301 permit determinations to be issued electronically. See Section 1-301.

(d) *Bid Opening.* Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection.

(e) *Bid Acceptance and Bid Evaluation.* Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Code. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluations that are not set forth in the Invitation for Bids.

**COMMENTARY:**

(1) The only provisions of this Code that allow alteration or correction of bids are Subsection (f) of this Section and Section 5-301 (3) (Bid Security, Rejection of Bids for Noncompliance with Bid Security Requirements).

(2) Subsection (e) makes clear that judgmental evaluations of products, particularly where bid samples or product descriptions are submitted, may properly be used in determining whether a product proffered by a bidder meets the specification requirements of the procurement. Such judgmental evaluations as appearance, workmanship, finish, taste, and feel all may be taken into consideration under this Subsection. Additionally, the ability to make such determinations, and to reject as non-responsive any bid which does not meet the purchase description, is inherent in the definition of responsive bidder in Section 5-101(17) (Definitions, Responsive Bidder).

(3) The bid evaluation may take into account not only acquisition costs of supplies, but the cost of their ownership which relates to the quality of the product, including life cycle factors such as maintainability and reliability. Any such criteria must be set forth in the Invitation for Bids to enable bidders to calculate how such criteria will affect their bid price.

(4) This Subsection does not permit a contract to be awarded to a bidder submitting a higher quality item than the minimum required by the purchase description unless that bidder also has the bid price evaluated lowest in accordance with the objective criteria set forth in the Invitation for Bids. This procedure also does not permit discussions or negotiations with bidders after receipt and opening of bids.

(f) *Correction or Withdrawal of Bids; Cancellation of Awards.* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District]. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the [State] [Agency] [City] [Town] [County] [Authority] [District] or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or head of a Purchasing Agency.

COMMENTARY:

(1) Correction or withdrawal of bids before or after contract award requires careful consideration to maintain the integrity of the competitive bidding system, to assure fairness, and to avoid delays or poor contract performance. While bidders should be expected to be bound by their bids, circumstances frequently arise where correction or withdrawal of bids is proper and should be permitted.

(2) To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

(3) An otherwise low bidder should be permitted to correct a material mistake of fact in its bid, including price, when the intended bid is obvious from the bid document or is otherwise supported by proof that has evidentiary value. A low bidder should not be permitted to correct a bid for mistakes or errors in judgment.

(4) In lieu of bid correction, the [State] [Agency] [City] [Town] [County] [Authority] [District] should permit a low bidder alleging a material mistake of fact to withdraw its bid when there is reasonable proof that a mistake was made and the intended bid cannot be ascertained with reasonable certainty.

(5) After bid opening an otherwise low bidder should not be permitted to delete exceptions to the bid conditions or specifications which affect price or substantive obligations; however, such bidder should be permitted the opportunity to furnish other information called for by the invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.

(6) A suspected bid mistake can give rise to a duty on the part of the [State] [Agency] [City] [Town] [County] [Authority] [District] to request confirmation of a bid, and failure to do so can result in a non-binding award, where there is an appearance of mistake, therefore, the bidder should be asked to reconfirm the bid before award. In such instance, a bidder should be permitted to correct the bid or to withdraw it when the bidder acknowledges that a mistake was made.

(7) Correction of bid mistakes after award should be subject to the same proof as corrections before award with a further requirement that no correction be permitted that would cause the contract price to exceed the next low bid.

(8) Nothing in this Section is intended to prohibit the [State] [Agency] [City] [Town] [County] [Authority] [District] from accepting a voluntary reduction in price from a low bidder after bid opening; provided that such reduction is not conditioned on, or results in, the modification or deletion of any conditions contained in the Invitation for Bids.

(g) *Award.* The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids.

In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than [five] percent the Chief Procurement Officer, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

**COMMENTARY:**

- (1) The successful bidder must be responsive as defined in Section 5-101(17) and responsible as defined in Section 5-101(16), and the bid must be the lowest bid determined under criteria set forth in the Invitation for Bids.
- (2) Subsection (g) also provides authority to negotiate changes in construction project bid requirements with a low bidder in order to arrive at a price not in excess of available funds. This authority would be limited to situations where the excess is less than a stated percentage over the available funds. It should be noted that even where the bids exceed the percentage limitation on the discretionary authority to negotiate with the low bidder, if circumstances warrant an emergency determination, the procurement can be handled under Section 3-206 (Emergency Procurements).
- (3) When all bids are determined to be unreasonable or the lowest bid on a construction project exceeds the amount specified in Subsection (g), and the public need does not permit the time required to re-solicit bids, then a contract may be awarded pursuant to the emergency authority in Section 3-206 (Emergency Procurements) in accordance with regulations promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District].
- (4) Note that new definitions of electronic signature, public notice, and written contained in 1-301 permit determinations to be issued electronically.

## 5-204 Operations and Maintenance Services

- (1) *Conditions for Use.* Contracts for Operations and Maintenance services shall be awarded by competitive sealed bidding except as otherwise provided in Section 5-201 (2).

**COMMENTARY:**

Contracts for operations and maintenance services offers governments flexible alternatives to utilize competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-Bid-Build or Design-Build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service. Many governments will continue to produce new facilities using either the Design-Bid-Build or Design-Build project delivery method, followed by long term operations and maintenance directly by public employees. The code gives procurement officials the flexibility to use competitive sealed bidding to acquire all or a portion of the supplies and services required to maintain and operate infrastructure facilities. Negotiation with bidders after the receipt and opening of bids is not permitted. Award is made based strictly on the criteria set forth in the Invitation for Bids.

- (2) *Invitation for Bids.* An Invitation for Bids ("IFB") shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement.
- (3) *Public Notice.* Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth therein for the opening of bids, in accordance with regulations promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District]. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening.

**COMMENTARY:**

Note that new definitions of electronic signature, public notice, and written contained in 1-301 permit determinations to be issued electronically.

(4) *Bid Opening.* Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection.

(5) *Bid Acceptance and Bid Evaluation.* Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Code. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluations that are not set forth in the Invitation for Bids.

(6) *Correction or Withdrawal of Bids; Cancellation of Awards.* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District]. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the [State] [Agency] [City] [Town] [County] [Authority] [District] or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or head of a Purchasing Agency.

(7) *Award.* The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than [five] percent the Chief Procurement Officer, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

#### **5-205 Competitive Sealed Proposals for Design-Build ("DB"), Design-Build-Operate-Maintain ("DBOM"), Design-Build-Finance-Operate-Maintain ("DBFOM") Services**

(1) *Conditions for Use.* Contracts for Design-Build ("DB"), Design-Build-Operate-Maintain ("DBOM"), and Design-Build-Finance-Operate-Maintain ("DBFOM") services shall be awarded by competitive sealed proposals, except as otherwise provided in 5-201 (2) (Project Delivery and Source Selection Methods).

**COMMENTARY:**

(1) Under the 1979 Code, Competitive sealed bidding was the preferred method of procurement in the construction field. Although the formal sealed bid process remains a standard in public purchasing, the 1979 Code recognized that "there is a place for competitive negotiation" (State and Local Government Purchasing, The Council of State Governments (1975) at 2.2). In the 1979 Code, the competitive sealed proposal method (similar to competitive negotiation) was available for use when competitive sealed bidding was either not practicable or not advantageous. These distinctions are maintained in Article 3 of the 1999 Revised Code for the purchase of commercial equipment, supplies, goods, and materials.

(2) Both the competitive sealed bid and competitive sealed proposal methods assure price and product competition. The 1979 Code recognized that the use of functional or performance specifications allows proposers and bidders to consider alternative means of meeting [State] [Agency] [City] [Town] [County] [Authority] [District] needs, with evaluation, where appropriate on the basis of total or life cycle costs. The criteria to be used in the evaluation process under either method must be fully disclosed in the solicitation. Only criteria disclosed in the solicitation may be used to evaluate the items bid or proposed. See the Commentary to Article 3-203 for further details.

(3) The 1999 Revisions adopt competitive sealed proposals as the preferred source selection method when the government uses any one of the Design-Build, Design-Build-Operate-Maintain, or Design-Build-Finance-Operate-Maintain project delivery methods. This section describes the general format of the competitive sealed process for each of these three methods of project delivery. Additional provisions unique to each of the three methods can be added to the next three succeeding sections: 5-206, 5-207, 5-208, respectively.

(4) See the commentary to Article 3-203 for further background on competitive sealed proposals as a Source Selection method.

~~(A)(2)~~ *Request for Proposals.* Proposals for Design-Build, Design-Build-Operate-Maintain, or Design-Build-Finance-Operate-Maintain services shall be solicited through a Request for Proposals, which shall include Schematic Design Requirements describing the requested services in a level of detail appropriate to the project delivery method selected for the project. The Request for Proposals shall solicit Design Development Documents from each proposer.

**COMMENTARY:**

This subsection establishes two basic requirements of the competitive sealed proposal process: (1) that government clearly set forth its functional requirements when using the DB, DBOM, or DBFOM delivery methods, through Schematic Design Requirements, and (2) that government require qualified proposers to submit Design Development Documents for evaluation of the proposals which result from the RFP.

DB, DBOM, DBFOM are project delivery methods that have been used throughout American history to produce both public and private projects. Recent federally funded demonstration programs, primarily in the highway and transportation sectors, has independently confirmed the viability of design build as a project delivery method. Just as there are tradeoffs among alternatives in other fields of the law -- for example, the choice among forms of organization, e.g. sole proprietorship, partnership, C corporation, S corporation -- so there are significant tradeoffs in the selection of project delivery methods. The Design-Build method produces a competition driven by the different ways in which proposers combine engineering, architectural, construction, materials, and technological elements to meet the functional description of the project set forth in the government's RFP. The government has an increased responsibility to clearly state the functional requirements of the project so that proposers have a clear understanding of required, forbidden, and permitted elements of their proposals. Typically, government must be in a position to know and to state the functional requirements that will be included in DB, DBOM, and DBFOM proposals earlier in the procurement process than in traditional design-bid-build procurements. The benefits of such early knowledge of each project's functional requirements can be very significant, including cost and time savings. So, too, the misapplication of DB, DBOM, and DBFOM to projects for which the functional project description is inadequate can result in significant disadvantages. This is because changes in design requirements prior to the award of a DBB construction contract can be incorporated into the design package before the construction work is competitively priced. This is typically not true in DB, DBOM, or DBFOM procurements, since project characteristics, functions, qualities, features, and price are competed at the same time, in a mixed environment where these attributes and prices are evaluated concurrently. Governments that employ the DB, DBOM, and DBFOM delivery methods will find it difficult and expensive to make changes in the functional design requirements for a project after competitive award of a design-build contract.

~~(3)~~ *Public Notice.* Adequate public notice of the Request for Proposals shall be given in the same manner as provided in Section 5-203(2) and 5-204.

(4) *Receipt of Proposals.* Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared in accordance with regulations promulgated by the



[Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District], and shall be open for public inspection after contract award.

(5) *Evaluation Factors.* The Request for Proposals shall state the relative importance of price and other evaluation factors. When the price is estimated by the Procurement Officer to exceed \$10,000,000 [an amount established by regulation], the RFP shall require each proposer to identify an Independent Checking Engineer whose competence and qualifications to provide such services shall be an evaluation factor in the award of the contract.

**COMMENTARY:**

Subsection (5) requires that the Request for Proposals set forth the relative importance of the factors in addition to price that will be considered in awarding the contract. Specific numerical weighting is not required by the statute, although a clearly understood, simple numerical weighting system can serve to focus the competitors on those factors most important to the [State] [Agency] [City] [Town] [County] [Authority] [District]. Indeed, complex numerical analysis of numerous factors is likely to diffuse, rather than focus, competition among potential proposers. Nevertheless, a fair competition necessitates an understanding on the part of all competitors of the basis upon which award will be made. Competitive proposals can be sought through the simple statement of four or five evaluation factors: e.g. (1) demonstrated compliance with the schematic design requirements, (2) project price (life-cycle price in appropriate circumstances), (3) project schedule, and (4) proposer qualifications. The qualifications of the Independent Checking Engineer may be a fifth evaluation factor, see subsection (5)(a) below.

The Schematic Design Requirements give proposers a clear statement of the key performance requirements of the project, roughly equivalent to the completion of Schematic Design (5% design completion) in a typical Design-Bid-Build procurement under Section 5-203. Based upon this 5% design statement in the RFP, the [State] [Agency] [City] [Town] [County] [Authority] [District] is in position to solicit competitive proposals from contractors at the full design development (30% design completion) of the project. Roughly equivalent to the Design Development stage in a typical Design-Bid-Build procurement, an RFP that seeks proposals at the end of Design Development will provide the [State] [Agency] [City] [Town] [County] [Authority] [District] with ready comparisons of each proposal as to functional compliance, quality, price, and schedule. In addition, such proposals should provide the [State] [Agency] [City] [Town] [County] [Authority] [District] with independent confirmation of the State's assessment of the price and time required to produce a project of desired quality.

Subsection (5) also requires the use of an Independent Checking Engineer (ICE) on DB, DBOM, and DBFOM contracts above a threshold dollar value, the dollar amount of which is to be included in the statute or set by regulation. The purpose of the ICE is to provide the [State] [Agency] [City] [Town] [County] [Authority] [District] with an independent professional peer review of key elements of the design of major public infrastructure facilities. The ICE's function is not to conduct a second design alongside the designers of record, nor to diffuse the obvious benefits of integrating the design and construction (and other) functions through the DB, DBOM, and DBFOM project delivery methods. Rather, the ICE's purpose is to provide the government with independent professional advice and assurance that key elements of the project are consistent with the functional description in the RFP and with the common law standard of professional care. It is recommended that the ICE have a contractual relationship with the successful proposer and a professional obligation to the [State] [Agency] [City] [Town] [County] [Authority] [District]. By requiring that the proposer recommend an appropriate ICE (upon which the proposer is evaluated), and by requiring that the proposer pay for ICE services during performance, the [State] [Agency] [City] [Town] [County] [Authority] [District] has set in place numerous institutional incentives for the successful proposer and its ICE to align their activities with the long term interests of the [State] [Agency] [City] [Town] [County] [Authority] [District]. Contractual provisions requiring the awardee to pay the ICE, and permitting the replacement of the ICE only for cause, are appropriate means for securing this relationship.

(6) *Discussion with Responsible Offerors and Revisions to Proposals.* As provided in the Request for Proposals, and under regulations promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District], discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the

purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

**COMMENTARY:**

(1) Subsection (6) provides the procurement official an opportunity to make certain that offerors fully understand the solicitation requirements; it provides offerors an opportunity to clarify proposals where necessary so as to assure responsiveness to the solicitation. Price discussions can best be conducted when there is a mutual understanding of the contractual requirements. Clarifications are intended to be limited to exchanges between the [State] [Agency] [City] [Town] [County] [Authority] [District] and an offeror that may occur when an award is contemplated without discussions, for example, to resolve minor or clerical errors or ambiguities in proposals.

(2) When discussions and/or negotiations are contemplated after the receipt of proposals which are expected to lead to the revision of proposals or to best and final offers, fair and equitable treatment of competitors dictates that negotiations be conducted in accordance with ethical business standards, including the following. Auction techniques shall be prohibited in discussions with offerors under the competitive sealed proposal method. There must be a cut-off for the submission of revised proposals and final offers. Both Subsection (4) and Subsection (6) are intended to provide that prices; technical solutions; unique technologies; innovative use of commercial items, design, construction, or operating techniques; or other aspects of proposals submitted by one offeror must not be disclosed to competing offerors. Safeguards against abuse in the conduct of negotiations must be strictly observed to maintain the essential integrity of the process. Procedures should be specified in regulations in order to achieve these objectives.

(7) *Award.* Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the [State] [Agency] [City] [Town] [County] [Authority] [District], taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

**COMMENTARY:**

The file should show with particularity how the pertinent factors and criteria were applied in ascertaining that the successful proposal is most advantageous to the [State] [Agency] [City] [Town] [County] [Authority] [District] in order to assure offerors that their proposals were evaluated fairly and to minimize protests and litigation.

## 5-206 Provisions Specific to Design-Build ("DB") Services

The following additional provisions shall apply to the procurement of Design-Build services:

[to be added, to fit requirements of adopting jurisdiction]

## 5-207 Provisions Specific to Design-Build-Operate-Maintain Services ("DBOM")

The following additional provisions shall apply to the procurement of Design-Build-Operate-Maintain services:

[to be added, to fit requirements of adopting jurisdiction]

## 5-208 Provisions Specific to Design-Build-Finance-Operate-Maintain Services ("DBFMO")

The following additional provisions shall apply to the procurement of Design-Build-Finance-Operate-Maintain services:

[to be added, to fit requirements of adopting jurisdiction]

## Part C-Bonds, Insurance, Guarantees

### 5-301 Bid Security.

(1) *Requirement for Bid Security.* Bid security shall be required for all competitive sealed bidding for construction contracts, operations and maintenance contracts, and for all competitive sealed proposals for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain contracts when the construction price is estimated by the Procurement Officer to exceed [\$100,000 [an amount established by regulation]. Bid security shall be a bond provided by a surety company authorized to do business in this State, or the equivalent in cash, or otherwise supplied in a form satisfactory to the [State] [Agency] [City] [Town] [County] [Authority] [District]. Nothing herein prevents the requirement of such bonds on construction contracts or design-build, design-build-operate-maintain, and design-build-finance-operate-maintain contracts under [\$100,000] [the amount set by regulation] when the circumstances warrant.

(2) *Amount of Bid (Proposal) Security.* Bid security shall be in an amount equal to at least [5%] of the amount of the bid (proposal).

(3) *Rejection of Bids (Proposals) for Noncompliance with Bid Security Requirements.* When the Invitation for Bids (Request for Proposal) requires security, noncompliance requires that the bid (proposal) be rejected unless, pursuant to [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] regulations, it is determined that the bid (proposal) fails to comply in a non-substantial manner with the security requirements.

(4) *Withdrawal of Bids (Proposals).* After the bids (proposals) are opened, they shall be irrevocable for the period specified in the Invitation for Bids (Request for Proposals), except as provided in Section 5-202(6) (Competitive Sealed Bidding, Correction, or Withdrawal of Bids: Cancellation of Awards). If a bidder (proposer) is permitted to withdraw its bid (proposal) before award, no action shall be had against the bidder (proposer) or the bid security.

#### COMMENTARY:

Section 5-301 is unchanged in all material respects from the 1979 Code.

### 5-302 Contract Performance and Payment Bonds,

(1) *When Required -- Amounts.* When a construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract is awarded in excess of [\$100,000], the following bonds or security shall be delivered to the [State] [Agency] [City] [Town] [County] [Authority] [District] and shall become binding on the parties upon the execution of the contract:

- (a) a performance bond satisfactory to the [State] [Agency] [City] [Town] [County] [Authority] [District], executed by a surety company

authorized to do business in this State or otherwise secured in a manner satisfactory to the [State] [Agency] [City] [Town] [County] [Authority] [District], in an amount equal to 100% of the construction price specified in the contract; and

(b) a payment bond satisfactory to the [State] [Agency] [City] [Town] [County] [Authority] [District], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [State] [Agency] [City] [Town] [County] [Authority] [District], for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond shall be in an amount equal to 100% of the construction price specified in the contract.

**COMMENTARY:**

The intent is to continue the requirement expressed in the 1979 version of the Model Procurement Code that surety bonds be provided to secure the faithful performance of construction associated with infrastructure facilities, as well as the faithful payment of suppliers and subcontractors, irrespective of project delivery method. Paragraph (b) confirms that the surety bonds are to be provided from reputable sureties authorized to do business in the [State] [Agency] [City] [Town] [County] [Authority] [District]. Regulations requiring sureties to be listed on the U.S. Treasury list may be one appropriate vehicle for accomplishing this.

(2) *Reduction of Bond Amounts.* The [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] may promulgate regulations that authorize the Chief Procurement Officer or head of a Purchasing Agency to reduce the amount of performance and payment bonds to [50%] of the price of construction for each bond.

(3) *Authority to Require Additional Bonds.* Nothing in this Section shall be construed to limit the authority of the [State] [Agency] [City] [Town] [County] [Authority] [District] to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in Subsection (1) of this Section. See subsection 5-305 for additional security requirements associated with Design-Build-Operate-Maintain and Design-Build-Finance-Operate-Maintain contracts.

(4) *Suits on Payment Bonds--Right to Institute.* Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, in respect of which a payment bond is furnished under this Section, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractual relationship express or implied with the contractor furnishing said payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim

is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be personally served or served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.

(5) *Suits on Payment Bonds—Where and When Brought.* Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or district in which the construction contract was to be performed, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

**COMMENTARY:**

The provision of this Section with respect to suits on payment bonds essentially follows the Miller Act, 40 U.S.C. §270 (1970), and many similar State statutes. The language is unchanged in all material respects from Section 5-302 of the 1979 Code.

### 5-303 Bond Forms and Copies.

(1) *Bond Forms.* The [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] shall promulgate by regulation the form of the bonds required by this Part.

(2) *Certified Copies of Bonds.* Any person may request and obtain from the [State] [Agency] [City] [Town] [County] [Authority] [District] a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

**COMMENTARY:**

The language is unchanged in all material respects from Section 5-303 of the 1979 Code.

### 5-304 Errors & Omissions Insurance

The [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] shall promulgate regulations that authorize the Chief Procurement Officer or head of a Purchasing Agency to require proposers to provide appropriate errors and omissions insurance coverage for architect-engineer services provided to the [State] [Agency] [City] [Town] [County] [Authority] [District] under the project delivery methods set forth in Section 5-201 (1) (a), (c), (d), and (e).

**COMMENTARY:**

Section 5-304 is new to the Model Procurement Code. The intent of this provision is to provide flexibility to procurement officials in requiring proposers to provide appropriate errors & omissions insurance with respect to the design component of any of the four delivery methods authorized in Section 5-201 which include professional design services. Errors & omissions insurance may be of increased importance in the project delivery methods which integrate design and construction (DB, DBOM, DBFOM), particularly when the successful proposer is a joint venture or special purpose corporation formed particularly for the instant project. The inclusion of the public owner as a named insured on the E&O policy furnished to the contractor by the designer may be a prudent procurement strategy.

## 5-305 Other Forms of Security

The [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] shall promulgate regulations authorizing the Chief Procurement Officer or head of a Purchasing Agency to require an RFP to include one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of Design-Build-Operate-Maintain or Design-Build-Finance-Operate-Maintain services:

- (1) Operations Period Surety Bonds that secure the performance of the contractor's operations and maintenance obligations under the project delivery methods set forth in Section 5-201 (1) (b), (d) and (e);
- (2) Letters of Credit in an amount appropriate to cover the cost to the [Agency] of preventing infrastructure service interruptions for a period up to twelve months under the project delivery methods set forth in Section 5-201 (1) (b), (d) and (e); and
- (3) Appropriate Written Guarantees from the contractor (or depending upon the circumstances, from parent corporations) to secure the recovery of reprourement costs to the [State] [Agency] [City] [Town] [County] [Authority] [District] in the event of a default in performance by the contractor.

### COMMENTARY:

Section 5-305 is new to the Model Procurement Code. For those project delivery method which include long term operations and maintenance of infrastructure facilities, the forms of security described in Sections 5-301 through 304 are either not applicable or not particularly helpful. Design-Build-Operate-Maintain, Design-Build-Finance-Operate-Maintain, and pure Operations & Maintenance contracts will likely require separate forms of security to assure contract performance of infrastructure services that complies with contract requirements and is uninterrupted, even in the event of contractor default. A DBO contractor's who demonstrates, prior to contract award, its ability to produce a surety bond covering operations period performance provides indirect assurance of the surety's independent investigation of that contractor's credit worthiness, competence, and cash flow. A Letter of Credit setting aside immediately available funds in the event of a contractor default provides ready assurance to the government that emergency cash funds will be available to continue service if contractor termination and reprourement is necessary. A corporate guarantee may be advisable in situations where the apparent successful bidder is a joint venture, or a special purpose entity formed only to provide the procured service. Corporate or parent corporation guarantee(s) may be required to secure the payment of reprourement costs over and above the limits already secured by operations period bonds and letters of credit. This section require procurement official to issue regulations describing the appropriate use of these additional forms of security in RFP's for DBOM, DBFOM, and pure O&M services, the cost of which is then included in the overall price.

## Part D- Contract Clauses and Fiscal Responsibility

### 5-401 Contract Clauses and Their Administration.

(1) *Contract Clauses.* The [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] shall promulgate regulations requiring the inclusion in [State] [Agency] [City] [Town] [County] [Authority] [District] contracts issued under this Article 5 of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

- (a) the unilateral right of the [State] [Agency] [City] [Town] [County] [Authority] [District] to order in writing:
  - (i) changes in the work within the scope of the contract; and
  - (ii) changes in the time of performance of the contract that do not alter the scope of the contract work;
- (b) variations occurring between estimated quantities of work in a contract and actual quantities;
- (c) suspension of work ordered by the [State] [Agency] [City] [Town] [County] [Authority] [District]; and
- (d) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] need not be included in a contract:
  - (i) when the contract is negotiated;
  - (ii) when the contractor provides the site or design; or
  - (iii) when the parties have otherwise agreed with respect to the risk of differing site conditions.

**COMMENTARY:**

This language is unchanged from Section 5-401(1) of the 1979 Code. The addition of four new delivery methods – Operations and Maintenance, Design-Build, Design-Build-Operate-Maintain, and Design-Build-Finance-Operate-Maintain – does not eliminate the need for regulations that incorporate standard contract clauses. The Changes, Suspension of Work, and Variations clauses are standard mechanisms for government to maintain flexibility, and should be applicable to all procurement methods in Article 5. The principles underlying the Differing Site Conditions clause still apply to the Design-Bid-Build process, and may apply to the negotiated processes (DB, DBOM, DBFOM), depending upon the government's structuring of the competition. Procurement officials may properly decide to collect and furnish subsurface information to prospective offerors, with the intent of asking those offerors to rely on the information furnished in submitting offers. In such circumstances, a standard Differing Site Conditions clause is appropriate. However, government may properly conclude, particularly on long term, large dollar DBOM and DBFOM procurements where the initial construction price is small relative to overall life cycle costs, that there is sufficient time and resources available for offerors to investigate site conditions themselves. Indeed, the integrated project delivery methods permit procurement officials to conduct a competition that includes dealing with varying site conditions. The intent of the Code is to permit the regulations to specify the conditions under which the risk of differing site conditions are included in (or excluded from) the offerors' prices.

The phrase "or other contract provisions" of this Section is not intended to alter the price adjustment provisions set forth in Subsection (2) of this Section. This Subsection is intended to enable the parties to deal with the effects of changes, variations in estimated quantities, suspensions of work, and differing site conditions on matters other than price or time for performance. For example, where a change order revises the specification, not only price or time for performance may be affected, but other terms or conditions such as insurance or inspection may also be affected.

**(2) Price Adjustments.**

- (a) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:

- (i) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (ii) by unit prices specified in the contract or subsequently agreed upon;
  - (iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
  - (iv) in such other manner as the contracting parties may mutually agree; or
  - (v) in the absence of agreement by the parties, by a unilateral determination by the [State] [Agency] [City] [Town] [County] [Authority] [District] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the [State] [Agency] [City] [Town] [County] [Authority] [District] in accordance with applicable sections of the regulations promulgated under Article 7 (Cost Principles) and subject to the provisions of Article 9 (Legal and Contractual Remedies).
- (b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 3-403 (Cost or Pricing Data).
- (3) *Additional Contract Clauses.* The [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] shall promulgate regulations requiring the inclusion in [State] [Agency] [City] [Town] [County] [Authority] [District] construction contracts of clauses providing for appropriate remedies and covering the following subjects:
- (a) liquidated damages as appropriate;
  - (b) specified excuses for delay or nonperformance;
  - (c) termination of the contract for default; and
  - (d) termination of the contract in whole or in part for the convenience of the [State] [Agency] [City] [Town] [County] [Authority] [District].
- (4) *Modification of Required Clauses.* The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] under Subsection (1) and Subsection (3) of this Section for inclusion in any particular [State] [Agency] [City] [Town] [County] [Authority] [District] construction contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice



of any such material variation be stated in the Invitation for Bids or Request for Proposals.

**COMMENTARY:**

(1) The language is unchanged in all material respects from Section 5-401 (2) to (4) of the 1979 Code. This Section directs the [Policy Office] [State] [Agency] [City] [Town] [County] [Authority] [District] to promulgate contract clauses that call for adjustment of price, time for performance, or other contract provisions as appropriate with respect to situations that continually develop on construction projects. It does not require these situations to be treated in any particular way, but it does require that they be anticipated and addressed.

(2) Subsection (2) permits price adjustments pursuant to any clauses promulgated under Subsection (1) to be determined in accordance with the contract terms or by agreement. Absent an agreement, the Procurement Officer will make a unilateral determination of the price adjustment which is subject to appeal under Article 9 (Legal and Contractual Remedies).

(3) In using unit prices it must be remembered that great variations in the number of units required may necessitate adjustments in the unit price.

(4) Other clauses not normally subject to the pricing formulas of Subsection (2) are also required to be included in the contract as appropriate by Subsection (3).

### **5-402 Fiscal Responsibility.**

Every contract modification, change order, or contract price adjustment under a construction contract with the [State] [Agency] [City] [Town] [County] [Authority] [District] in excess of [\$ \_\_\_\_] shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section.

**COMMENTARY:**

The language is unchanged in all material respects from Section 5-402 of the 1979 Code.



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-0347/3

MES:kg:lp

RMR

1999 BILL

D-NOTE

SOON

Gen. Cat.

design-build

1 AN ACT to amend 59.52 (29) (a), 60.47 (2) (a), 60.47 (2) (b), 60.47 (5), 61.55, 62.03  
 2 (1), 62.15 (1), 66.904 (2) (a) and 66.904 (2) (e); and to create 59.52 (29) (c), 60.47  
 3 (2m), 62.15 (1m) and 66.24 (5) (e) of the statutes; relating to: authorizing cities,  
 4 villages, towns, counties, metropolitan sewerage districts, technical colleges  
 5 and federated public libraries to let public works contracts under the design  
 6 and build construction process changing the threshold amounts that require  
 7 competitive bidding under public works contracts and providing an exemption  
 8 from competitive bidding requirements.

**Analysis by the Legislative Reference Bureau**

In general, under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$20,000 may be let by a county, a class 1 notice of the proposed construction must be given by the county board. Also under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$10,000 may be let by a municipality (2nd, 3rd or 4th class city, or a village or town), a class 1 notice of the proposed construction must be given by the municipality's governing body. Before a contract for public construction with a value that exceeds \$20,000 may be let by a county, or exceeds \$10,000 in the case of a municipality, certain other requirements, such as a lowest responsible bidder

**BILL**

*, the estimated cost of which exceeds \$1,000,000,*

*(local governmental units)*

requirement, must be met. A county board, by a three-fourths vote of its membership, may also authorize the county itself to perform any class of public work if the estimated cost of the work exceeds \$20,000.

This bill authorizes municipalities, 1st class cities (presently only Milwaukee), counties, metropolitan sewerage districts, technical colleges and federated public library systems to let a contract for public construction, using the design-build construction process, which is defined as a method of construction under which the engineering, design and construction services are provided by a single entity.

*INS ANL*

The bill also increases the threshold amount that requires competitive bidding on public works contracts to ~~\$50,000~~ *\$20,000* for counties and municipalities, and exempts from competitive bidding public works contracts in which the building materials or labor is donated.

For further information see the *local* fiscal estimate, which will be printed as an appendix to this bill.

*\$20,000*

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 59.52 (29) (a) of the statutes is amended to read:

2           59.52 (29) (a) ~~All~~ Except as provided in par. (c) 2., all public work, including any

3 contract for the construction, repair, remodeling or improvement of any public work,

4 building, or furnishing of supplies or material of any kind where the estimated cost

5 of such work will exceed ~~\$20,000~~ ~~\$50,000~~ shall be let by contract to the lowest

6 responsible bidder. Any public work, the estimated cost of which does not exceed

7 ~~\$20,000~~ ~~\$50,000~~, shall be let as the board may direct. If the estimated cost of any

8 public work is between \$5,000 and ~~\$20,000~~ ~~\$50,000~~, the board shall give a class 1

9 notice under ch. 985 before it contracts for the work or shall contract with a person

10 qualified as a bidder under s. 66.29 (2). A contract, the estimated cost of which

11 exceeds ~~\$20,000~~ ~~\$50,000~~, shall be let and entered into under s. 66.29, except that the

12 board may by a three-fourths vote of all the members entitled to a seat provide that

13 any class of public work or any part thereof may be done directly by the county

14 without submitting the same for bids. This subsection does not apply to highway

*Plain*

**BILL**

1 contracts which the county highway committee or the county highway commissioner  
2 is authorized by law to let or make.

3 **SECTION 2.** 59.52 (29) (c) of the statutes <sup>to (e) are</sup> created to read:

4 59.52 (29) (c) 1. In this <sup>subsection</sup> ~~paragraph~~, "design ~~and~~ build construction process"  
5 means a method of construction under which the engineering, design and  
6 construction services are provided by a single entity <sup>under a process described</sup>

7 2. Any public works contract described in par. (a) <sup>under par. (d) or</sup> may be let using the design  
8 ~~and~~ build construction process. <sup>the estimated cost of</sup>  
which exceeds \$1,000,000,

3-8  
BINS

9 **SECTION 3.** 60.47 (2) (a) of the statutes is amended to read:

10 60.47 (2) (a) No town may enter into a public contract with an estimated cost  
11 of more than \$5,000 but not more than \$10,000 <sup>\$20,000</sup> ~~\$50,000~~ unless the town board, or a  
12 town official or employe designated by the town board, gives a class 1 notice under  
13 ch. 985 before execution of that public contract.

14 **SECTION 4.** 60.47 (2) (b) of the statutes is amended to read:

15 60.47 (2) (b) No town may enter into a public contract with a value of more than  
16 \$10,000 <sup>\$20,000</sup> ~~\$50,000~~ unless the town board, or a town official or employe designated by  
17 the town board, advertises for proposals to perform the terms of the public contract  
18 by publishing a class 2 notice under ch. 985. The town board may provide for  
19 additional means of advertising for bids.

20 **SECTION 5.** 60.47 (2m) of the statutes is created to read:

21 60.47 (2m) DESIGN AND BUILD CONTRACTS. Any public contract under sub. (2)  
22 <sup>to (e)</sup> may be let using the design ~~and~~ build construction process, as defined in s. 59.52 (29)  
23 (c) 1.

24 **SECTION 6.** 60.47 (5) of the statutes is amended to read:

**BILL**

**SECTION 6**

1           60.47 (5) EXCEPTION FOR EMERGENCIES AND DONATED MATERIALS AND LABOR. This  
 2 section is optional with respect to public contracts for the repair and construction of  
 3 public facilities when damage or threatened damage to the facility creates an  
 4 emergency, as declared by resolution of the town board, that endangers the public  
 5 health or welfare of the town. This subsection no longer applies when the town board  
 6 declares that the emergency no longer exists. This section is optional with respect  
 7 to a public contract if the materials related to the contract are donated or if the labor  
 8 that is necessary to execute the public contract is provided by volunteers.

9           **SECTION 7.** 61.55 of the statutes is amended to read:

10           **61.55 Contracts involving over \$10,000; how let; exception.** All contracts  
 11 for public construction, in any such village, exceeding \$10,000 <sup>\$20,000</sup> ~~\$50,000~~, shall be let  
 12 by the village board to the lowest responsible bidder, in accordance with s. 66.29  
 13 insofar as said section may be applicable. If the estimated cost of any public  
 14 construction exceeds \$5,000, but is not greater than \$10,000 <sup>\$20,000</sup> ~~\$50,000~~, the village  
 15 board shall give a class 1 notice, under ch. 985, of the proposed construction before  
 16 the contract for the construction is executed. This provision does not apply to public  
 17 construction if the materials for such a project are donated or if the labor for such a  
 18 project is provided by volunteers, and this provision and s. 281.41 are not mandatory  
 19 for the repair and reconstruction of public facilities when damage or threatened  
 20 damage thereto creates an emergency, as determined by resolution of the village  
 21 board, in which the public health or welfare of the village is endangered. Whenever  
 22 the village board by majority vote at a regular or special meeting declares that an  
 23 emergency no longer exists, this exemption no longer applies. Any contract for public  
 24 construction under this section <sup>may be let using the design and build construction</sup> ~~may be let using the design and build construction~~  
 25 process, as defined in s. 59.52 (29) (c) 1.

, the estimated cost of which exceeds \$1,000,000,

**BILL**

1           **SECTION 8.** 62.03 (1) of the statutes is amended to read:

2           62.03 (1) This subchapter, except ss. 62.071, 62.08 (1), 62.09 (1) (e) and (11) (j)  
3 and (k), 62.15 (1m) (b), 62.175 and 62.23 (7) (em) and (he), does not apply to 1st class  
4 cities under special charter.

5           **SECTION 9.** 62.15 (1) of the statutes is amended to read:

6           62.15 (1) CONTRACTS; HOW LET; EXCEPTION FOR DONATED MATERIALS AND LABOR. All  
7 public construction, the estimated cost of which exceeds \$10,000 ~~\$50,000~~ <sup>\$20,000</sup> shall be let  
8 by contract to the lowest responsible bidder; all other public construction shall be let  
9 as the council may direct. If the estimated cost of any public construction exceeds  
10 \$5,000 but is not greater than \$10,000 ~~\$50,000~~ <sup>\$20,000</sup>, the board of public works shall give  
11 a class 1 notice, under ch. 985, of the proposed construction before the contract for  
12 the construction is executed. This provision does not apply to public construction if  
13 the materials for such a project are donated or if the labor for such a project is  
14 provided by volunteers. The council may also by a vote of three-fourths of all the  
15 members-elect provide by ordinance that any class of public construction or any part  
16 thereof may be done directly by the city without submitting the same for bids.

17           **SECTION 10.** 62.15 (1m) of the statutes is created to read:

18           62.15 (1m) DESIGN ~~AND~~ BUILD CONTRACTS. (a) Any contract for public  
19 construction under sub. (1) may be let using the design ~~and~~ build construction  
20 process, as defined in s. 59.52 (29) (c) 1.

21           (b) Any contract for public construction let by a 1st class city may be let using  
22 the design ~~and~~ build construction process, as defined in s. 59.52 (29) (c) 1.

23           **SECTION 11.** 66.24 (5) (e) of the statutes is created to read:

*, the estimated cost of which exceeds \$1,000,000,*

**BILL**

hyphen

1           66.24 (5) (e) *Design ~~and~~ build contracts.* Any contract for public construction  
2 under this subsection may be let using the design ~~and~~ build construction process, as  
3 defined in s. 59.52 (29) (c) 1.

4           **SECTION 12.** 66.904 (2) (a) of the statutes is amended to read:

5           66.904 (2) (a) Except as provided in par. (b), all work done and all purchases  
6 of supplies and materials by the commission shall be by contract awarded to the  
7 lowest responsible bidder complying with the invitation to bid, if the work or  
8 purchase involves an expenditure of \$7,500 or more. If the commission decides to  
9 proceed with construction of any sewer after plans and specifications for the sewer  
10 are completed and approved by the commission and by the department of natural  
11 resources under ch. 281, the commission shall advertise by a class 2 notice under ch.  
12 985 for construction bids. All contracts and the awarding of contracts are subject to  
13 s. 66.29, except that any contract for public construction under sub. (1) may be let  
14 using the design ~~and~~ build construction process, as defined in s. 59.52 (29) (c) 1.

hyphen

15           **SECTION 13.** 66.904 (2) (e) of the statutes is amended to read:

16           66.904 (2) (e) Paragraphs (a) to (d) do not apply to contracts awarded under s.  
17 66.905, except that any contract for public construction under s. 66.905 may be let  
18 using the design ~~and~~ build construction process, as defined in s. 59.52 (29) (c) 1.

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If a local governmental unit wishes to construct a public work using the design-build construction process, the local governmental unit must use a 2 stage selection process. Under the first stage, the local governmental unit must publish a notice that includes a project statement that describes the space needs and design goals for the project, detailed submission requirements, selection procedures, the composition of the selection panel and whether the local governmental unit will offer a stipend to unsuccessful design-build teams and, if so, the amount of the stipend.

Following receipt of the bids, the local governmental unit must select 3 to 5 design-build teams to participate in the second stage of the selection process. The selection of the finalist teams in the first stage of the process ~~shall~~ be based on factors that include the background, experience and qualifications of the members of the teams.

*In* The second stage of the selection *process, the local governmental unit must choose* from among the 3 to 5 finalist teams *three* *five* *must* *must* if the unit determines that at least one of the finalists will be able to construct the public work in a way that is *three* *five* *must* satisfactory to the unit. The local governmental unit must conduct interviews of each team, and each team *must* make a presentation. The criteria to be used in making a final selection may include the quality of the proposed design, the extent to which a proposal demonstrates compliance with the project statement, the estimated cost of the project and a guaranteed maximum price for the project. If the local governmental unit enters into a contract with one of the teams, that design-build team must obtain bonding to guarantee completion of the project.

INSERT 3-8

~~SECTION 1. 59.52 (29) (d) of the statutes is created to read:~~

~~59.52 (29) (d)~~ If a county wishes to construct a public work using the design-build construction process, the county shall use a selection process that contains the following procedures:

1. The county shall issue a request for proposals from design-build teams by publishing a class 1 notice under ch. 985. The notice shall include a project statement that describes the space needs and design goals for the project, detailed submission requirements, selection procedures, site information, an outline of specifications for the project, a budget for the project, *a* project schedule, the composition of the selection



panel, the approximate amount of the bond that the county will require under par. (c) and whether the county will offer a stipend to unsuccessful design-build teams and, if so, the amount of the stipend.

2. Following receipt of the bids, the county shall select approximately 3 to 5 design-build teams to participate in the final stage of the selection process. The selection of teams under this subdivision shall be based on factors that include the background, experience and qualifications of the members of the teams; the financial strength and surety capacity of the teams; and the past performance and current workload of the teams. The county selection panel that selects the teams under this subdivision for the final selection process under ~~subdivision 3.~~<sup>subd.</sup> may include design and construction professionals who work for the county or are hired by the county to assist in the selection, members of the county board and representatives from the county entity that will use the facility that is to be constructed under the selection process described in this paragraph.

3. ~~The~~<sup>The county shall make a</sup> final selection from among the teams selected under subd. 2. if the county determines that at least one of the teams selected as a finalist under subd. 2. will be able to construct the public work in a way that is ~~is~~<sup>is</sup> satisfactory to the county. The final selection shall be made following interviews and presentations from the finalists, based on criteria that are published as a class 1 notice under ~~chapter~~<sup>ch.</sup> 985. The notice shall state the weight that is given to each criterion. The criteria to be used in making a final selection under this subdivision may include the quality of the proposed design, the construction approach to be used to complete the project, the extent to which a proposal demonstrates compliance with the project statement described under subd. 1., the proposed management plan for the project, the estimated cost of the project and a guaranteed maximum price for the project.

(e) If the county selects a design-build team under par. (d) 3. and enters into a contract for the construction of the project, the design-build team shall obtain bonding, in an amount specified by the county, to guarantee completion of the project according to the terms of the contract.

INSERT 6-18

SECTION 2. 281.01 (3e) of the statutes is created to read:

281.01 (3e) "Design-build construction process" has the meaning given in s.

~~59.52~~ (c) 1. 59.52 (29)

SECTION 3. 281.41 (1) of the statutes is amended to read:

281.41 (1) Except as provided under sub. (2), every owner within the time prescribed by the department, shall file with the department a certified copy of complete plans of a proposed system or plant or extension thereof, in scope and detail satisfactory to the department, and, if required, of existing systems or plants, and such other information concerning maintenance, operation and other details as the department requires, including the information specified under s. 281.35 (5) (a), if applicable. Owners contracting for a system, plant or extension under the design-build construction process may include in the plans that are submitted to the department performance objectives and preliminary designs in a form that is satisfactory to the department. Material changes with a statement of the reasons shall be likewise submitted. Before plans are drawn a statement concerning the improvement may be made to the department and the department may, if requested, outline generally what it will require. Upon receipt of such plans for approval, the department or its duly authorized representative shall notify the owner of the date of receipt. Within 90 days from the time of receipt of complete plans or within the time specified in s. 281.35 (5) (c), if applicable, the department or its authorized

2

representative shall examine and take action to approve, approve conditionally or reject the plans and shall state in writing any conditions of approval or reasons for rejection. Approval or disapproval of such plans and specifications shall not be contingent upon eligibility of such project for federal aid. The time period for review may be extended by agreement with the owner if the plans and specifications cannot be reviewed within the specified time limitation due to circumstances beyond the control of the department or in the case of extensive installation involving expenditures of \$350,000 or more. The extension shall not exceed 6 months. Failure of the department or its authorized representative to act before the expiration of the time period allowed for review shall constitute an approval of the plans, and upon demand a written certificate of approval shall be issued. Approval may be subject to modification by the department upon due notice. Construction or material change shall be according to approved plans only. The department may disapprove plans which are not in conformance with any existing approved areawide waste treatment management plan prepared pursuant to the federal water pollution control act, P.L. 92-500, as amended, and shall disapprove plans that do not meet the grounds for approval specified under s. 281.35 (5) (d), if applicable. The department shall require each person whose plans are approved under this section to report that person's volume and rate of water withdrawal, as defined under s. 281.35 (1) (m), and that person's volume and rate of water loss, as defined under s. 281.35 (1) (L), if any, in the form and at the times specified by the department.

DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0347/4dn  
MES:kg:jj

Please review this draft carefully to ensure that it meets your intent. I based <sup>newly</sup> created s. 59.52 (29) (d) on the materials that you submitted to me, but I did not include all of the details. For example, I did not require that the design and price proposals be submitted in separate sealed envelopes and that the design proposals be reviewed first. If the selection committee is going to review all of the materials anyway, I didn't understand why this precise process must be specified in the statutes. Also, I'm not sure what some of the terms mean that you wanted included. For example, what is meant by "the proposed management plan for the project" in created s. 59.52 (29) (d) 3.? Is the bonding language in s. 59.52 (29) (e) consistent with your intent?

Finally, please review s. 281.41 (1), which is based on the materials submitted by Barbara Boxer. I'm confused by her use of "may"; I'm not sure why it is necessary to specify the permissive language that she wants added to that statute if an owner is not required to provide the information to the department of natural resources (DNR). In other words, if nothing prohibits an owner from providing performance objectives and preliminary plans to DNR if the owner wishes to do so, there is no reason for the requested language to appear in the statute. If the intent of the language is to exempt a design-build project from the requirements contained in the first sentence of s. 281.41 (1), the language does not do that. As drafted, the amendment of s. 281.41 (1) doesn't seem to do anything; if you intend for the language to have some substantive effect, please let me know what your intent is.

Although "approximately" renders the limitation meaningless,

Marc E. Shovers  
Senior Legislative Attorney  
Phone: (608) 266-0129  
E-mail: Marc.Shovers@legis.state.wi.us

<sup>(29)</sup>  
I'm s. 59.52 (d) 2. I stated that following the receipt of bid<sup>s</sup> the county shall select "approximately" 3 to 5 design-build teams... I was concerned that if a county (or municipality) received only 2 bids it couldn't proceed to the final stage of the selection process if the statute required the selection of 3 to 5 teams. — even if the 2 bids that were received are excellent. Is this OK or do you really want to revise the selection of "3 to 5" finalists?

CONVERSATION w/ Mike McCabe <sup>instructions for</sup> - 8/31/15  
line 19 job needs more additions

Intent of s. 281.41 (1) language:

• All of less than a complete set of plans  
could be submitted to DNR

re D-NOTE;

Mike McCabe says "the proposed  
management plan for the project" in #1  
is a term of art. He also says the  
bonding lang is OK -

all other changes in the /5  
reflect Mike McCabe's intent, and  
I cleared them w/ Dan Rossmiller.



State of Wisconsin  
1999 - 2000 LEGISLATURE

In Editing 5-26

LRB-034745

MES:kg:km

FMR

1999 SENATE BILL

SOON

rejm

1 **AN ACT to amend** 59.52 (29) (a), 60.47 (2) (a), 60.47 (2) (b), 60.47 (5), 61.55, 62.03  
2 (1), 62.15 (1), 66.904 (2) (a), 66.904 (2) (e) and 281.41 (1); and **to create** 59.52  
3 (29) (c) to (e), 60.47 (2m), 62.15 (1m), 66.24 (5) (e) and 281.01 (3e) of the statutes;  
4 **relating to:** authorizing cities, villages, towns, counties, metropolitan  
5 sewerage districts, technical colleges and federated public libraries to let public  
6 works contracts under the design-build construction process, changing the  
7 threshold amounts that require competitive bidding under public works  
8 contracts and providing an exemption from competitive bidding requirements.

**Analysis by the Legislative Reference Bureau**

In general, under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$20,000 may be let by a county, a class 1 notice of the proposed construction must be given by the county board. Also under current law, before a contract for public construction with a value that exceeds \$5,000 but does not exceed \$10,000 may be let by a municipality (2nd, 3rd or 4th class city, or a village or town), a class 1 notice of the proposed construction must be given by the municipality's governing body. Before a contract for public construction with a value that exceeds \$20,000 may be let by a county, or exceeds \$10,000 in the case of a municipality, certain other requirements, such as a lowest responsible bidder

**SENATE BILL**

*procurement process*

requirement, must be met. A county board, by a three-fourths vote of its membership, may also authorize the county itself to perform any class of public work if the estimated cost of the work exceeds \$20,000.

This bill authorizes municipalities, 1st class cities (presently only Milwaukee), counties, metropolitan sewerage districts, technical colleges and federated public library systems (local governmental units) to let a contract for public construction, the estimated cost of which exceeds \$1,000,000, using the design-build construction process, which is defined as a ~~method of construction~~ under which the engineering, design and construction services are provided by a single entity.

If a local governmental unit wishes to construct a public work using the design-build construction process, the local governmental unit must use a two stage selection process. Under the first stage, the local governmental unit must publish a notice that includes a project statement that describes the space needs and design goals for the project, detailed submission requirements, selection procedures, the composition of the selection panel and whether the local governmental unit will offer a stipend to unsuccessful design-build teams and, if so, the amount of the stipend.

*or less*  
Following receipt of the bids, the local governmental unit must select ~~approximately three to five~~ design-build teams to participate in the second stage of the selection process. The selection of the finalist teams in the first stage of the process must be based on factors that include the background, experience and qualifications of the members of the teams, *and the quality of the initial proposal*

*or less*  
In the second stage of the selection process, the local governmental unit must choose from among the ~~three to five~~ finalist teams if the unit determines that at least one of the finalists will be able to construct the public work in a way that is satisfactory to the unit. The local governmental unit must conduct interviews of each team, and each team must make a presentation. The criteria to be used in making a final selection may include the quality of the proposed design, the extent to which a proposal demonstrates compliance with the project statement, the estimated cost of the project and a guaranteed maximum price for the project. If the local governmental unit enters into a contract with one of the teams, that design-build team must obtain bonding to guarantee completion of the project.

The bill also increases the threshold amount that requires competitive bidding on public works contracts to \$20,000 for municipalities, *and* ~~exempts from~~ *for municipalities,* competitive bidding public works contracts in which the building materials or labor is donated.

For further information see the *local* fiscal estimate, which will be printed as an appendix to this bill. *and metropolitan sewerage districts*

*that contain a 1st class city*

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

1

**SECTION 1.** 59.52 (29) (a) of the statutes is amended to read:

**SENATE BILL**

1           59.52 (29) (a) ~~All~~ Except as provided in par. (c) 2., all public work, including any  
2 contract for the construction, repair, remodeling or improvement of any public work,  
3 building, or furnishing of supplies or material of any kind where the estimated cost  
4 of such work will exceed \$20,000 shall be let by contract to the lowest responsible  
5 bidder. Any public work, the estimated cost of which does not exceed \$20,000, shall  
6 be let as the board may direct. If the estimated cost of any public work is between  
7 \$5,000 and \$20,000, the board shall give a class 1 notice under ch. 985 before it  
8 contracts for the work or shall contract with a person qualified as a bidder under s.  
9 66.29 (2). A contract, the estimated cost of which exceeds \$20,000, shall be let and  
10 entered into under s. 66.29, except that the board may by a three-fourths vote of all  
11 the members entitled to a seat provide that any class of public work or any part  
12 thereof may be done directly by the county without submitting the same for bids.  
13 This subsection does not apply to highway contracts which the county highway  
14 committee or the county highway commissioner is authorized by law to let or make.

15           **SECTION 2.** 59.52 (29) (c) to (e) of the statutes are created to read:

16           59.52 (29) (c) 1. In this subsection, "design-build construction process" means  
17 *procurement process* a ~~method of construction~~ under which the engineering, design and construction  
18 services are provided by a single entity under a process described under par. (d).

19           2. Any public works contract described in par. (a), the estimated cost of which  
20 exceeds \$1,000,000, may be let using the design-build construction process.

21           (d) If a county wishes to construct a public work using the design-build  
22 construction process, the county shall use a selection process that contains the  
23 following procedures:

24           1. The county shall issue a request for proposals from design-build teams by  
25 publishing a class 1 notice under ch. 985. The notice shall include a project statement



**SENATE BILL**

1 that describes the space needs and design goals for the project, detailed submission  
2 requirements, selection procedures, site information, an outline of specifications for  
3 the project, a budget for the project, a project schedule, the composition of the  
4 selection panel, the approximate amount of the bond that the county will require  
5 under par. (e) and whether the county will offer a stipend to unsuccessful  
6 design-build teams and, if so, the amount of the stipend.

7 2. Following receipt of the <sup>proposals</sup> bids, the county shall select <sup>or less</sup> approximately 5  
8 design-build teams to participate in the final stage of the selection process. The  
9 selection of teams under this subdivision shall be based on factors that include the  
10 background, experience and qualifications of the members of the teams; the financial  
11 strength and surety capacity of the teams; <sup>the quality of the initial proposal,</sup> and the past performance and current  
12 workload of the teams. The county selection panel that selects the teams under this  
13 subdivision for the final selection process under subd. 3. may include design and  
14 construction professionals who work for the county or are hired by the county to  
15 assist in the selection, members of the county board and representatives from the  
16 county entity that will use the facility that is to be constructed under the selection  
17 process described in this paragraph.

18 3. The county shall make a final selection from among the teams selected under  
19 subd. 2. if the county determines that at least one of the teams selected as a finalist  
20 under subd. 2. will be able to construct the public work in a way that is satisfactory  
21 to the county. The final selection shall be made following interviews and  
22 presentations from the finalists, based on criteria that are published as a class 1  
23 notice under ch. 985. The notice shall state the weight that is given to each criterion.  
24 The criteria to be used in making a final selection under this subdivision may include  
25 the quality of the proposed design, the construction approach to be used to complete

**SENATE BILL**

1 the project, the extent to which a proposal demonstrates compliance with the project  
2 statement described under subd. 1., the proposed management plan for the project,  
3 the estimated cost of the project and a guaranteed maximum price for the project.

4 (e) If the county selects a design-build team under par. (d) 3. and enters into  
5 a contract for the construction of the project, the design-build team shall obtain  
6 bonding, in an amount specified by the county, to guarantee completion of the project  
7 according to the terms of the contract.

8 **SECTION 3.** 60.47 (2) (a) of the statutes is amended to read:

9 60.47 (2) (a) No town may enter into a public contract with an estimated cost  
10 of more than \$5,000 but not more than ~~\$10,000~~ \$20,000 unless the town board, or a  
11 town official or employe designated by the town board, gives a class 1 notice under  
12 ch. 985 before execution of that public contract.

13 **SECTION 4.** 60.47 (2) (b) of the statutes is amended to read:

14 60.47 (2) (b) No town may enter into a public contract with a value of more than  
15 ~~\$10,000~~ \$20,000 unless the town board, or a town official or employe designated by  
16 the town board, advertises for proposals to perform the terms of the public contract  
17 by publishing a class 2 notice under ch. 985. The town board may provide for  
18 additional means of advertising for bids.

19 **SECTION 5.** 60.47 (2m) of the statutes is created to read:

20 60.47 (2m) DESIGN-BUILD CONTRACTS. Any public contract under sub. (2), the  
21 estimated cost of which exceeds \$1,000,000, may be let using the design-build  
22 construction process, as defined in s. 59.52 (29) (c) 1. *Section 59.52(29) (d) and*  
*(e), as it applies to counties, applies to towns.*

23 **SECTION 6.** 60.47 (5) of the statutes is amended to read:

24 60.47 (5) EXCEPTION FOR EMERGENCIES AND DONATED MATERIALS AND LABOR. This  
25 section is optional with respect to public contracts for the repair and construction of

e

**SENATE BILL**

1 public facilities when damage or threatened damage to the facility creates an  
2 emergency, as declared by resolution of the town board, that endangers the public  
3 health or welfare of the town. This subsection no longer applies when the town board  
4 declares that the emergency no longer exists. This section is optional with respect  
5 to a public contract if the materials related to the contract are donated or if the labor  
6 that is necessary to execute the public contract is provided by volunteers.

7 **SECTION 7.** 61.55 of the statutes is amended to read:

8 **61.55 Contracts involving over \$10,000; how let; exception.** All contracts  
9 for public construction, in any such village, exceeding ~~\$10,000~~ \$20,000, shall be let  
10 by the village board to the lowest responsible bidder in accordance with s. 66.29  
11 insofar as said section may be applicable. If the estimated cost of any public  
12 construction exceeds \$5,000, but is not greater than ~~\$10,000~~ \$20,000, the village  
13 board shall give a class 1 notice, under ch. 985, of the proposed construction before  
14 the contract for the construction is executed. This provision does not apply to public  
15 construction if the materials for such a project are donated or if the labor for such a  
16 project is provided by volunteers, and this provision and s. 281.41 are not mandatory  
17 for the repair and reconstruction of public facilities when damage or threatened  
18 damage thereto creates an emergency, as determined by resolution of the village  
19 board, in which the public health or welfare of the village is endangered. Whenever  
20 the village board by majority vote at a regular or special meeting declares that an  
21 emergency no longer exists, this exemption no longer applies. Any contract for public  
22 construction under this section, the estimated cost of which exceeds \$1,000,000, may  
23 be let using the design-build construction process, as defined in s. 59.52 (29) (c) 1.

24 **SECTION 8.** 62.03 (1) of the statutes is amended to read:

Section 59.52(29)(d) and (e); as it applies to counties, applies to  
villages.

**SENATE BILL**

1           62.03 (1) This subchapter, except ss. 62.071, 62.08 (1), 62.09 (1) (e) and (11) (j)  
2           and (k), 62.15 (1m)(b), 62.175 and 62.23 (7) (em) and (he), does not apply to 1st class  
3           cities under special charter.

4           **SECTION 9.** 62.15 (1) of the statutes is amended to read:

5           **62.15 (1) CONTRACTS; HOW LET; EXCEPTION FOR DONATED MATERIALS AND LABOR.** All  
6           public construction, the estimated cost of which exceeds ~~\$10,000~~ \$20,000, shall be let  
7           by contract to the lowest responsible bidder; all other public construction shall be let  
8           as the council may direct. If the estimated cost of any public construction exceeds  
9           \$5,000 but is not greater than ~~\$10,000~~ \$20,000, the board of public works shall give  
10          a class 1 notice, under ch. 985, of the proposed construction before the contract for  
11          the construction is executed. This provision does not apply to public construction if  
12          the materials for such a project are donated or if the labor for such a project is  
13          provided by volunteers. The council may also by a vote of three-fourths of all the  
14          members-elect provide by ordinance that any class of public construction or any part  
15          thereof may be done directly by the city without submitting the same for bids.

16          **SECTION 10.** 62.15 (1m) of the statutes is created to read:

17          **62.15 (1m) DESIGN-BUILD CONTRACTS.** (a) Any contract for public construction  
18          under sub. (1), the estimated cost of which exceeds \$1,000,000, may be let using the  
19          design-build construction process, as defined in s. 59.52 (29) (c) 1. <sup>to</sup> Section 59.52(29)  
20          (d) and (e), as it applies to counties, applies to cities,

21          (b) Any contract for public construction let by a 1st class city may be let using  
22          the design-build construction process, as defined in s. 59.52 (29) (c) 1. Section 59.52(29)  
23          (d) and (e), as it applies to counties, applies to 1st class cities,

22          **SECTION 11.** 66.24 (5) (e) of the statutes is created to read:

23          **66.24 (5) (e) Design-build contracts.** Any contract for public construction  
24          under this subsection may be let using the design-build construction process, as  
25          defined in s. 59.52 (29) (c) 1. Section 59.52(29) (d) and (e), as it applies  
                to counties, applies to districts.

INS  
7-21

SENATE BILL

1 SECTION 12. 66.904 (2) (a) of the statutes is amended to read:  
 2 66.904 (2) (a) Except <sup>for a contract awarded under par. (am) and except</sup> as provided in par. (b), all work done and all purchases  
 3 of supplies and materials by the commission shall be by contract awarded to the  
 4 lowest responsible bidder complying with the invitation to bid, if the work or  
 5 purchase involves an expenditure of \$7,500 <sup>\$20,000</sup> or more. If the commission decides to  
 6 proceed with construction of any sewer after plans and specifications for the sewer  
 7 are completed and approved by the commission and by the department of natural  
 8 resources under ch. 281, the commission shall advertise by a class 2 notice under ch.  
 9 985 for construction bids. All contracts and the awarding of contracts are subject to  
 10 s. 66.29, <sup>for a contract awarded under par. (am)</sup> except ~~that any contract for public construction under sub. (1) may be let~~  
 11 ~~using the design-build construction process, as defined in s. 59.52 (29) (c) 1.~~

12 SECTION 13. 66.904 (2) (e) of the statutes is amended to read: ①  
 13 66.904 (2) (e) Paragraphs (a) <sup>and (b) to</sup> (d) do not apply to contracts awarded under s.  
 14 66.905 <sup>plain</sup> ~~except that any contract for public construction under s. 66.905 may be let,~~  
 15 ~~using the design-build construction process, as defined in s. 59.52 (29) (c) 1.~~ <sup>Paragraph (am) does</sup>  
 16 SECTION 14. 281.01 (3e) of the statutes is created to read: <sup>ies</sup> ~~apply to contracts~~  
 17 281.01 (3e) "Design-build construction process" has the meaning given in s. <sup>awarded under 66.905.</sup>  
 18 59.52 (29) (c) 1. s.

19 SECTION 15. 281.41 (1) of the statutes is amended to read:  
 20 281.41 (1) Except as provided under sub. (2), every owner, within the time  
 21 prescribed by the department, shall file with the department a certified copy of  
 22 complete plans of a proposed system or plant or extension thereof, in scope and detail  
 23 satisfactory to the department, and, if required, of existing systems or plants, and let  
 24 such other information concerning maintenance, operation and other details as the  
 25 department requires, including the information specified under s. 281.35 (5) (a), if

Sec. #; CR; 66.904 (2) (am) & 66.904 (2) (am) Any contract for public construction under sub. (1), the estimated cost of which exceeds \$1,000,000, may be let using the design-build construction process, as defined in s. 59.52 (29) (c) 1. Section 59.52 (29) (d) and (e), as it applies to counties, applies to the district.

1 applicable. Owners contracting for a system, plant or extension under the  
2 design-build construction process may include in the plans that are submitted to the  
3 department performance objectives and preliminary designs in a form that is  
4 satisfactory to the department. *rather than complete plans*  
5 shall be likewise submitted. Before plans are drawn a statement concerning the  
6 improvement may be made to the department and the department may, if requested,  
7 outline generally what it will require. Upon receipt of such plans for approval, the  
8 department or its duly authorized representative shall notify the owner of the date  
9 of receipt. Within 90 days from the time of receipt of complete plans or within the  
10 time specified in s. 281.35 (5) (c), if applicable, the department or its authorized  
11 representative shall examine and take action to approve, approve conditionally or  
12 reject the plans and shall state in writing any conditions of approval or reasons for  
13 rejection. Approval or disapproval of such plans and specifications shall not be  
14 contingent upon eligibility of such project for federal aid. The time period for review  
15 may be extended by agreement with the owner if the plans and specifications cannot  
16 be reviewed within the specified time limitation due to circumstances beyond the  
17 control of the department or in the case of extensive installation involving  
18 expenditures of \$350,000 or more. The extension shall not exceed 6 months. Failure  
19 of the department or its authorized representative to act before the expiration of the  
20 time period allowed for review shall constitute an approval of the plans, and upon  
21 demand a written certificate of approval shall be issued. Approval may be subject  
22 to modification by the department upon due notice. Construction or material change  
23 shall be according to approved plans only. The department may disapprove plans  
24 which are not in conformance with any existing approved areawide waste treatment  
25 management plan prepared pursuant to the federal water pollution control act, P.L.

**SENATE BILL**

1 92-500, as amended, and shall disapprove plans that do not meet the grounds for  
2 approval specified under s. 281.35 (5) (d), if applicable. The department shall require  
3 each person whose plans are approved under this section to report that person's  
4 volume and rate of water withdrawal, as defined under s. 281.35 (1) (m), and that  
5 person's volume and rate of water loss, as defined under s. 281.35 (1) (L), if any, in  
6 the form and at the times specified by the department.

7

(END)

Section #. 66.24 (5) (d) of the statutes is amended to read:

INS  
7-21

awarded

except for contracts awarded under par. (e)

66.24 (5) (d) *Bids*. Whenever plans and specifications for any facilities have been completed and approved by the commission and by any other agency which must approve the plans and specifications, and the commission has determined to proceed with the work of the construction thereof, it shall advertise by a class 2 notice under ch. 985, for bids for the construction of the facilities. Contracts for the work shall be let to the lowest responsible bidder, ~~for the agency may reject any and all bids and if in its discretion the prices quoted are unreasonable, the bidders irresponsible or the bids informal, it may readvertise the work or any part of it.~~ All contracts shall be protected by such bonds, penalties and conditions as the district shall require. The commission may itself do any part of any of the works.

*History:* 1971 c. 276; Sup. Ct. Order, 67 W (2d) 585, 774 (1975); 1975 c. 425; 1977 c. 29 s. 1654 (8) (c); 1977 c. 379 s. 33; 1981 c. 282 s. 47; 1987 a. 399; 1995 a. 27 s. 9126 (19); 1995 a. 201.



**SUBMITTAL  
FORM**

**LEGISLATIVE REFERENCE BUREAU  
Legal Section Telephone: 266-3561  
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 2/9/99

To: Senator George

Relating to LRB drafting number: LRB-0347

**Topic**

Authorize Milwaukee County to let design and build public works contracts

**Subject(s)**

Counties

1. **JACKET** the draft for introduction Gay R. George  
in the **Senate**  or the **Assembly** \_\_\_\_\_ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached \_\_\_\_\_  
A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction  
If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Marc E. Shovers, Senior Legislative Attorney  
Telephone: (608) 266-0129

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**THE**

**END**

