



## California Special Districts Association

*Districts Stronger Together*

### **THE EVOLVING LANDSCAPE OF DESIGN-BUILD DELIVERY FOR PUBLIC WORKS PROJECTS**

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#### **Introduction**

The traditional method of soliciting and contracting, design-bid-build, has been the mainstay of government construction contracting for well over 60 years. However, in the past two decades, California has made tremendous strides towards expanding the use of alternative delivery methods to the public sector, including design-build, construction manager at risk (GC/CM or CM/GC), public private partnerships (P3), and job order contracting.

The traditional design-bid-build approach to construction procurement splits a project into two phases: design and construction. The owner prepares a detailed set of plans and specifications either using its own staff or by hiring outside architects and engineers. Once the design is complete, the owner invites bids from the construction community and awards the contract to the lowest responsible, responsive bidder. Conversely, under a design-build approach, the owner contracts with a single entity - which can be a single firm, a consortium or a joint venture - to design and construct a project. Before inviting bids, the owner prepares documents that describe the basic concept of the project, as opposed to a complete set of plans and specifications of the final product. Implemented correctly, the design-build approach provides a number of efficiencies over design-bid-build, including the ability to award contracts based on factors other than price, higher quality work, greater cost certainty, and, ultimately, fewer claims.

Although design-build has been a common delivery method in private sector construction for decades, it is relatively new in the public sector. The Legislature first approved design-build for public agencies in 2001 with the passage of AB 598, which authorized “transit operators” to award design-build contracts for transit projects of at least \$10 million. A patchwork of other statutes followed, in which the Legislature authorized various categories of public agencies — or, in some cases, specific public agencies — to utilize design-build. As a result of this hodgepodge of design-build statutes, many California agencies had at least some design-build authority, but were subject to a variety of inconsistent restrictions on their ability to exercise

that authority. Some agencies were prohibited from using a best value selection process for design-build, and each design-build statute used different language, creating inconsistencies and inefficiencies for agencies attempting to effectively utilize the delivery method.

This all changed with the adoption of SB 785, which went into effect on January 1, 2015. SB 785 repealed most of the design-build statutes in effect at the time,<sup>1</sup> and replaced them with a single, consolidated statute governing design-build procurement for state and local public agencies in California. This paper will examine the current landscape for design-build contracting on public works projects, including the requirements of SB 785 and how they differ from the previous design-build statutes applicable to special districts. We also offer practical guidance and observations regarding the design-build process and recommendations for achieving successful outcomes on your design-build projects.

### **Pros and Cons of Design-Build**

Alternative methods of contracting for construction projects are not the best methods for every project. It takes acumen and the discerning experience of a professional contracting/procurement officer to know the right type of construction delivery strategy because there are some fundamental differences. In traditional design-bid-build, for example, the risk of adequacy of design is on the owner. The specifications and drawings provided by the owner to the contractor are “design specifications.” Under construction law, the owner warrants their adequacy, meaning the contractor is responsible only for building to the design and does not guarantee that any particular outcome will be achieved. This legal concept, the Spearin doctrine, is named after the 1919 United State Supreme Court case that spawned it. The Spearin doctrine protects the contractor from incomplete or impractical specifications issued by the owner or the owner’s architect/engineer.

In design-build, on the other hand, the statement of work typically uses more performance-based language (even though practically the specifications are often mixed between performance and design-type specifications). Because the design-build entity delivers not only construction, but also the design, that company is responsible for achieving the objectives in the statement of work. While at first blush a design-build approach seems preferable by centralizing design and construction responsibility in a single company, there are both advantages and disadvantages to use of the delivery method.

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<sup>1</sup> The following design-build statutes were repealed by SB 785: Public Contract Code §§ 20209.5-20209.14 (transit operators), 20193 (wastewater, solid waste, recycled water), 20133 (counties), 20175.2 (cities), 20688.6 (redevelopment agencies), and 20301.5 (Santa Clara Valley Transportation Authority); Government Code §§ 14661 (California Department of General Services), and 14661.1 (California Department of Corrections); and Health and Safety Code § 32132.5 (Sonoma Valley and Marin Health Care Districts).

When appropriately implemented, design-build contracting can offer a variety of benefits over the traditional design-bid-build approach. These advantages include:

- Greater flexibility in the contract award process since contractor is selected based on qualifications, experience and price, thus avoiding some of the pitfalls from contract awards solely based on low price.
- Single point of accountability eliminating finger-pointing between the designer and contractor.
- Fewer change orders during construction.
- More complete and reliable drawings, plans and specifications which collectively contain fewer conflicts, errors and constructability issues.
- More reliable, achievable and coordinated project schedule.
- Greater cost certainty and cost savings derived from early, and continuous, collaborative value engineering.
- Higher quality construction work.
- Faster delivery of the completed project.
- More opportunity for innovation.
- Significant shift of risk from owner to design-builder reducing potential for claims, litigation and legal costs.

These benefits flow largely from the integrated nature the design-build team, in which the contractor, architect and engineers are, ideally, involved in the project from inception and collaborate continuously regarding the design, schedule, and cost issues.

However, one cannot overlook the fact that there are disadvantages of a design-build delivery as well:

- Loss of control and reduced owner involvement in the design process.
- Cost of tendering (to all parties).
- Difficulty/time comparing different designs.
- Cost of risks and contingencies.
- Danger of design-build becoming build-design.
- Environmental/regulatory processes.
- Limited pool of qualified design-builders resulting in less competition.
- Owner may not have the security (and comfort) of having an architect/engineer acting as its representative during the project.
- QA/QC largely in contractor's hands and quality may be compromised to meet contractor's budgetary goals.
- Management of long term risks.

- Lack of accuracy of preliminary engineering/design criteria prior to contract award.
- Consequences of default are more drastic than for design-bid-build delivery.
- For those agencies new to design-build, there is a ramp-up required in terms of educating internal staff and management as to how process works.

Recent research by the Construction Industry Institute (CII) and Charles Pankow Foundation has found that design-build outperforms other common delivery methods in terms of schedule growth, delivery speed, and construction speed. Design-build projects showed 3.9% less schedule growth than a comparable project using the Construction Manager at Risk method, and 1.7% less schedule growth than a comparable design-bid-build project. On average, design-build projects are delivered 13% faster during construction and 61% faster from design through final completion when compared to Construction Manager at Risk projects, and, when compared with design-bid-build projects, are delivered 36% faster during construction and 102% faster over the entire project duration.

Similarly, design-build projects showed 2.4% less cost growth than a comparable project using Construction Manager at Risk, and 3.8% less cost growth than a comparable project using the traditional design-bid-build approach. CII and Pankow attributed these cost savings to several key features of the design-build approach, including greater team chemistry among the owner, designer, and builder, open book contracting terms such as a Guaranteed Maximum Price, and earlier involvement of the contractor in design-build projects.<sup>2</sup>

Like any alternative delivery method, however, the success of a design-build project depends substantially on communication and chemistry among the project participants, as well as their experience and familiarity with the design-build approach. CII and Pankow found that the two recurring themes in the best-performing design-build projects were the owner's emphasis on a relational project culture and repeated use of the same designer and builder across multiple projects (the latter being indicative of good chemistry among the owner, designer, and builder). Because of these prior working relationships, CII and Pankow explain that the owner, designer, and builder on the best-performing projects were more comfortable communicating and were more willing to share challenges or problems encountered on the jobsite with other team members. Conversely, poor performing design-build projects tended to result from a lack of experience with design-build delivery, poor communication, or understaffing and turnover issues.<sup>3</sup> These factors result in increased animosity among the owner and design-builder, leading to claims, delays, and ultimately litigation.

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<sup>2</sup> Messner & Leicht, et al., "Revisiting Project Delivery Performance 1998-2018," November 2018, at pp. 4-5, commissioned by the Construction Industry Institute and the Charles Pankow Foundation, *available at* [https://dbia.org/wp-content/uploads/2018/11/Cost\\_Performance\\_Research-CII\\_Pankow2018.pdf](https://dbia.org/wp-content/uploads/2018/11/Cost_Performance_Research-CII_Pankow2018.pdf).

<sup>3</sup> Messner & Leicht, *et al.*, *supra*, at p. 6.

As discussed below, the Legislature has been increasingly open to allowing its use in the public sector since 2001. Further, market research by FMI Corporation and the Design-Build Institute of America predicts an 18% growth in design-build projects, which are expected to represent up to 44% of total construction spending by 2021.<sup>4</sup> Given the expected growth of design-build projects and the benefits offered by the delivery method when properly implemented, districts would be wise to consider design-build as a project delivery method for high-dollar projects.

### **Overview of SB 785**

Subject to specified limitations, the design-build authority granted by SB 785 is generally available for all projects developed by covered state and local agencies, other than projects on the state highway system. At the state level, the statute grants general authority to the Department of General Services and the Department of Corrections and Rehabilitation to utilize design-build for public works in excess of \$1 million, and repeals their existing design-build authorizations.<sup>5</sup> In addition, the following local agencies will now have general authority to use design-build for public works in excess of \$1 million:

- Cities and counties.
- Special districts that operate wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities.
- Transit districts, municipal operators, consolidated agencies, joint powers authorities formed to provide transit service, county transportation commissions, and other local or regional agencies responsible for the construction of transit projects.<sup>6</sup>
- Sonoma Valley and Marin Healthcare Districts, for hospital or health facility buildings and related improvements.<sup>7</sup>
- San Diego Unified Port District.<sup>8</sup>
- Surface storage projects by the CALFED Bay-Delta Program.<sup>9</sup>

There is no cost threshold for transit operators for certain safety and security-related technology. SB 785 expressly provides that it does not affect, expand, alter, or limit any rights or remedies otherwise available; therefore, design-build statutes not repealed by SB 785 are

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<sup>4</sup> FMI Corporation, "Design-Build Utilization: Combined Market Study," June 2018, at p. 6, commissioned by the Design-Build Institute of America, *available at* <https://dbia.org/wp-content/uploads/2018/06/Design-Build-Market-Research-FMI-2018.pdf>.

<sup>5</sup> Public Contract Code §§ 10187.5, 10188.

<sup>6</sup> Public Contract Code §§ 22161(f), 22162.

<sup>7</sup> Public Contract Code § 32132.5.

<sup>8</sup> San Diego Unified Port District Act (Ch. 67 of the First Extraordinary Session of Statutes of 1962), § 37.2.

<sup>9</sup> Public Contract Code § 20928.

not affected by its passage, and agencies using design-build based on such statutes may continue to do so.<sup>10</sup>

The authority granted by SB 785 does not extend to projects on the state highway system. Cities and counties may not use design-build authority under this law for “streets and highways, public rail transit, or water resources facilities and infrastructure,” and transit operators may not use it for “local street and road projects.” These projects will continue to be governed by their own design-build statutes.<sup>11</sup>

If the Legislature wishes to expand the list of agencies authorized to use design-build in the future, the process will involve a simple amendment either to the definition of “department” in Section 10187.5(c) of the Public Contract Code or the definition of “local agency” in Section 22160(f). Thus, the new statute will hopefully eliminate the inefficiencies and inconsistencies created by the previous regime of piecemeal design-build authorization laws.

SB 785 also eliminated many of the obstacles state and local agencies previously faced when awarding design-build contracts. Subject to the minimum cost threshold and limitations on school and road projects, there are no special findings required before a state or local agency may use design-build. Retention withholding provisions are also made consistent with other legislation regulating retention, and there is no limitation on retention based on the type of services rendered. Unlike existing law, which prohibits firms and individuals who assisted in the procurement from participating on a design-build team, each agency will develop its own conflict of interest guidelines for design-build projects.<sup>12</sup>

Although authority for design-build procurement is greatly expanded, SB 785 also includes new or clarified restrictions. While prior law generally did not address design-build-operate contracts, SB 785 expressly prohibits the award of a contract for design-build-operate services, except for operations during a training or transition period.<sup>13</sup> However, contracts under the new legislation may include operations during a training or transition period and, if design-build-operate procurement is specifically authorized by a statute not repealed by SB 785, agencies covered by that statute may continue to utilize it for design-build-operate procurement.

In addition, SB 785 includes a new requirement for design-build contractors to provide an “enforceable commitment” to use a “skilled and trained workforce” at the Statement of

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<sup>10</sup> The following design-build statutes were left in place by SB 785: Education Code §§ 17250.10-17250.50 (school districts) and 81700-81708 (community college districts); and Public Contract Code § 10708 (California State University).

<sup>11</sup> Public Contract Code §§ 22160(a), 22161(g)(3), 22162(a).

<sup>12</sup> Public Contract Code § 22162.

<sup>13</sup> Public Contract Code § 22164(a)(2).

Qualifications stage.<sup>14</sup> SB 785 also requires that the payment bond furnished by the design-builder must be in an amount not “less than the performance bond.”<sup>15</sup> Finally, the agency must issue a written statement in conjunction with the contract award indicating the basis of award.<sup>16</sup>

SB 785 will sunset in 2025 unless re-authorized by the Legislature and the Governor. The enactment of SB 785 has now given public owners the freedom to utilize a best value procurement methodology, with anticipated benefits including reduced project costs, expedited project completion and design features that are not achievable through the traditional design-bid-build method.

### **Prequalifying or Shortlisting Proposers Under SB 785**

SB 785 also authorizes local agencies to either prequalify or shortlist proposers. This provides local agencies with useful flexibility in determining how many proposers will be allowed to participate, as local agencies have the discretion to create a large or small shortlist depending on the quality of the qualification statements submitted.<sup>17</sup> This differs from a true prequalification process, in which an objective qualification standard is established in the initial Request for Proposals, which must then be applied to advance all proposers that have met that standard. Under SB 785, the Request for Proposals must include, but need not be limited to, the following information:

- Basic scope and needs of the project.
- The project’s expected cost range.
- The methodology that will be used by the public agency to evaluate proposals.
- The procedure for final selection of the design-build entity.
- Significant factors that the local agency reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, safety record, and other nonprice-related factors.
- A standard template request for statements of qualifications prepared by the local agency.
- Any other information deemed necessary to inform interested parties of the contracting opportunity.<sup>18</sup>

In preparing the standard template request for statements of qualifications to be included with the Request for Proposals, the local agency may consult with the construction industry, the

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<sup>14</sup> Public Contract Code § 22164(c).

<sup>15</sup> Public Contract Code § 22165(a).

<sup>16</sup> Public Contract Code § 22164(f)(5).

<sup>17</sup> Public Contract Code § 22164.

<sup>18</sup> Public Contract Code § 22164(b).

building trades and surety industry, and other local agencies interested in using the authorization provided by this article. The template must require the following information, at a minimum:

- If the design-build entity is a privately held corporation, limited liability company, partnership, or joint venture, a listing of all of the shareholders, partners, or members known at the time of statement of qualification submission who will perform work on the project.
- Evidence that the members of the design-build team have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the design-build entity has the capacity to complete the project.
- The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.
- Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.
- Information concerning workers' compensation experience history and a worker safety program.
- If the proposed design-build entity is a corporation, limited liability company, partnership, joint venture, or other legal entity, a copy of the organizational documents or agreement committing to form the organization.
- An "acceptable" safety record. A proposer's safety record is "acceptable" if its experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury or illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category or if the proposer is a party to an alternative dispute resolution system as provided for in Section 3201.5 of the Labor Code.<sup>19</sup>

The above information must be certified by the proposer and its principals under penalty of perjury.

In addition to authorizing a low-bid award, SB 785 grants covered state and local agencies authority to use a best value selection process for design-build procurement, and grants them broad discretion to set the factors that will be considered and the weight each factor will be given in making the award. More specifically, SB 785 only requires that the following three

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<sup>19</sup> Public Contract Code § 22164(b)(3).

specific evaluation criteria be considered by an agency in evaluating proposals: (1) price, unless a stipulated sum is specified; (2) technical design and construction expertise; and (3) life-cycle costs over 15 or more years. These three criteria “shall be weighted as deemed appropriate by the local agency” and are not exclusive, but agencies must identify all significant factors and their relative importance or weights in the Request for Proposal. If selection is based on low bid, the price must be a lump sum.<sup>20</sup>

### **Differences Between SB 785 and Prior Design-Build Statutes**

As noted above, design-build authority prior to the enactment of SB 785 was conferred on local agencies by a patchwork of enabling statutes that were specific to a particular agency or category of agencies. Each predecessor statute imposed its own restrictions on the ability of a local agency to exercise design-build authority. For instance:

- Former Public Contract Code § 20193 granted design-build authority to special districts that operate waste and recycling agencies, but provided that “[o]nly 20 design-build projects shall be authorized under this article” and further restricted the class of projects for which design-build was authorized to those priced in excess of \$2.5 million.
- Former Public Contract Code § 20209.6 allowed transit operators to enter into design-build contracts, but required the transit operator to evaluate the design-bid-build approach versus the design-build approach in a public meeting and make written findings that design-build would accomplish one of several objectives enumerated in the statute.
- Former Public Contract Code § 20688.6 permitted redevelopment agencies to utilize design-build for projects in excess of \$1 million, but provided that only 10 such projects were authorized under that section. The statute also required redevelopment agencies to establish and enforce a labor compliance program for projects awarded after January 1, 2012.

There are several important differences between SB 785 and its predecessor statutes. First, SB 785 applies more broadly to “local agencies,” which are defined in Public Contract Code section 22161(f) as any of the following: (1) a city, county, or city and county; (2) a special district that operates wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities; and (3) any transit district, included transit district,<sup>21</sup> municipal operator, included municipal operator,<sup>22</sup> any consolidated agency, as described in Section

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<sup>20</sup> Public Contract Code § 22164(f).

<sup>21</sup> Public Utilities Code § 99208 defines an “included transit district” as either of the following that have operated a public transportation system on or after January 1, 1971: following which has operated a public transportation system since at least January 1, 1971: (a) a transit district whose boundaries are contained entirely within those of a larger transit district; or (b) a district organized pursuant to Part 3, Division 16 of the Streets and Highways Code.

<sup>22</sup> “Included municipal operator” is defined in detail in Public Utilities Code § 99207.

132353.1 of the Public Utilities Code, any joint powers authority formed to provide transit service, any county transportation commission created pursuant to Section 130050 of the Public Utilities Code, or any other local or regional agency responsible for the construction of transit projects.

Thus, SB 785 applies to a broader range of public agencies than its predecessor statutes. This, in conjunction with the repeal of most previously adopted design-build statutes, serves to consolidate statutory design-build authority and eliminate inconsistencies that existed prior to the enactment of SB 785.

SB 785 also requires public agencies to develop guidelines for a “standard organizational conflict of interest policy...consistent with applicable law, regarding the ability of a person or entity, which performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team.”<sup>23</sup> Prior design-build statutes did not address organizational conflicts of interest, although California has long prohibited such conflicts through other statutes such as Government Code § 1090 and the Political Reform Act. Recent guidance regarding Section 1090 holds that California’s proscription against public “officials” being financially interested in contracts made in their official capacity can extend to independent contractors who participate in the making of public contracts or advise on public contracting.<sup>24</sup> Where, for example, a contractor furnishes preconstruction services to an owner, the contractor becomes involved in the “making” of the construction contract and cannot be awarded the construction work. In the design-build context, this rule would likely bar contractors who help develop bridging documents for a project from being awarded the design-build contract.

Thus, the organizational conflict of interest guidelines required by SB 785 should be drafted carefully, and should include a screening process to identify potential conflicts of interest as soon as possible in the process. Public agencies should consider notifying firms seeking to assist on bridging documents or other preconstruction services that they will not be allowed to participate in the design-build phase. To avoid the potential disqualification of qualified proposers who may prefer to compete for the more lucrative design-build work, public agencies can consider shifting some preconstruction services, such as bridging documents and permitting, to counsel and expert consultants.

Finally, unlike former Public Contract Code § 20688.6, SB 785 does not include a Labor Compliance Program (LCP) requirement. This is primarily due to the fact that the LCP enforcement scheme was also changed in 2014, pursuant to SB 854. SB 854 requires that all

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<sup>23</sup> Public Contract Code § 22162(c).

<sup>24</sup> *People v. Superior Court (Sahlolbei)*, 3 Cal.5th 230 (2017); *Davis v. Fresno Unified School District*, 237 Cal.App.4th 261 (2015).

public works contractors who perform work on projects subject to prevailing wage laws must submit electronic certified payroll records to the Department of Industrial Relations (“DIR”). Contractors are also obligated to register with the DIR on an annual basis in order to be eligible to bid on public works, and any contract entered into in violation of the new registration requirements is subject to cancellation by the awarding agency. The DIR reviews certified payroll records submitted pursuant to SB 854 to monitor for prevailing wage violations, eliminating the need for local agencies to impose their own LCPs as previously required under some design-build statutes.

### **Additional Sources of Design-Build Authority**

The legislature continues to expand opportunities for design-build contracting in the public sector. AB 2654, which became effective on January 1, 2019, now specifically authorizes the County of Orange to enter design-build contracts on flood protection improvements, beach and harbor improvements and bikeway improvements (limited to one design-build project exceeding \$5 million per year). The same bill authorizes Orange County Flood Control District to enter design-build contracts on up to 12 new flood protection improvement projects, each in excess of \$5 million, through January 1, 2025. These provisions are codified in Public Contract Code §§ 22162.6 and 22162.7.

Recent legislative efforts also forecast the expansion of authority and funding for design-build delivery in 2019-2020. AB 190 (Budget Act of 2019) would appropriate \$1.1 billion for design-build public works projects in California, specifically earmarked for the Department of the California Highway Patrol, the Department of Water Resources, the Department of General Services, and the Military Department. AB 190 is currently under consideration by the Assembly Budget Committee. Similarly, AB 695 will extend the authorization for community college districts to enter into design-build contracts through January 1, 2030. AB 695 was approved by the Governor on October 3, 2019 and will take effect on January 1, 2020.

### **Maximizing the Proposal Evaluation Process**

As noted, SB 785 includes some minimum requirements with regard to the proposal evaluation process. Although local agencies may establish additional criteria, they must consider price, technical design and construction expertise, and life-cycle costs at a minimum, as discussed above. The Request for Proposals (RFP) must also include the basic scope and needs of the project, the estimated cost, the methodology that will be used to evaluate proposals — *i.e.*, best value or low bid, and, if the former, the significant factors considered in evaluating proposals, the relative weight of those factors, and any negotiation procedures after proposal

submission.<sup>25</sup> The RFP must also specify which subcontractor trades must be included in the proposals.<sup>26</sup>

These requirements allow for substantial flexibility in tailoring the evaluation process to the needs of a particular project. Local agencies have broad discretion to establish the criteria by which proposals will be evaluated and the weight those criteria will receive, as long as these matters are explained in the RFP. Under SB 785, a best value determination may involve “the selection of the lowest costs proposal meeting the interests of the local agency and meeting the objectives of the project, selection of the best proposal for a stipulated sum established by the procuring agency, or a tradeoff between price and other specified factors.”<sup>27</sup> Thus, for more technically complex projects, districts can assign greater weight to factors such as technical expertise, experience on comparable projects, and qualifications of key subcontractors and personnel. By contrast, for projects that are not particularly complicated, greater emphasis can be placed on price. Local agencies are free to create their own definition of “best value” for each particular project.

Public agencies also have significant discretion with regard to the procedure for submitting and evaluating proposals. For uncomplicated projects, a local agency might direct proposers to submit a single proposal that includes both price and technical information, which will be ranked immediately after submission. Alternatively, for technically complex projects, local agencies can establish a two-step procedure under which a price proposal is submitted separately from the technical proposal, and considered only after technical proposals have been ranked and short-listed. Each of these procedures can be permissibly employed under SB 785, depending on the needs of a particular project.

Finally, SB 785 allows for a competitive negotiation process after the submission of proposals, and affords local agencies substantial discretion as to whether and how such negotiations are utilized. Local agencies can enter into negotiations with the highest-ranked proposer only, or can request “best and final offers” from all short-listed proposers in order to induce additional competition on price. In either case, local agencies may negotiate with proposers on any aspect of the proposal (i.e., price, scope of work, key personnel, etc.) as long as the potential for such negotiations is specified in the RFP. In sum, SB 785 allows for significant flexibility in a best value selection, as long as the awarding agency follows the procedures that it has established in the RFP.

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<sup>25</sup> Public Contract Code § 22164(d).

<sup>26</sup> Public Contract Code § 22166.

<sup>27</sup> Public Contract Code § 22161(a).

## **Use of Stipends on Design-Build Projects**

With growing frequency, public owners pursuing design-build projects will pay a stipend (also known as an honorarium) to proposers. The stipend can be paid to each proposer that submits a fully responsive proposal or limited to just the short-listed proposers. The purpose behind the stipend is to help defray the costs of developing a proposal and to stimulate participation from a significant number of highly qualified design-build teams to enhance the competition. The payment of a stipend also signals the intent that the owner is serious about going forward with the project.

But what is the right amount to pay, if any? There is no legal prohibition in California against the payment of stipends on public works. In fact, the statutes are altogether silent on this subject. Thus, we turn for guidance to the Design-Build Institute of America (DBIA). The DBIA has issued a two page Position Statement on the use of stipends noting that "payment of a stipend is a best practice on most design-build projects," but that a stipend "rarely covers the cost of proposal preparation." Based on industry surveys, the DBIA reports that stipends "commonly range between 0.01 percent and 0.25 percent of the project budget." The Position Statement suggests that: "An owner should determine stipend amount based on the particular needs and complexities of a project, considering what is required to generate sufficient market interest from the most highly qualified design-build teams and the level of effort involved in proposal preparation." The calculation of the stipend should not be considered a "one-size fits all" process.

## **Conclusion**

The Legislature has made design-build increasingly available to the public sector since 2001 and its use is becoming more and more commonplace with time. Design-build can offer local agencies substantially greater flexibility, as well as faster and more innovative project delivery. However, design-build is not a panacea, and there can be significant disadvantages to the design-build approach when it is not properly implemented. Public agencies should carefully consider what delivery approach best meets the needs of a specific project.