

Progressive Design-Build Legislation Takes Effect July 2019

In a move likely to further accelerate the growing use of various types of design-build contracting across Washington's public sector, Governor Inslee has signed legislation that for the first time officially authorizes public bodies to award public works contracts on a "progressive design-build" basis. The legislation builds on a set of statutory amendments enacted in 2013 that began the process of making design-build contracting more accessible to a wider range of public bodies.

Prior to this legislation, certain public bodies across Washington had already begun to use progressive design-build. The impetus provided by the new legislation's official recognition of progressive design-build should spur further interest. The AGC of Washington Education Foundation is sponsoring a workshop on June 19-20, 2019 to address best practices associated with using this collaborative procurement process.

The legislation (SHB 1295) modifies the alternative public works contracting procedures contained in RCW 39.10 and takes effect July 28, 2019. Key features of the legislation are as follows:

- Public bodies are now expressly authorized to award contracts through a "progressive" design-build process. Noncertified bodies must still obtain CPARB/PRC approval upon application concerning specific projects.
- Design-build procurement allows for performance-based project criteria. The statute continues to state that when determining if a project is suitable for use of the process, owners are to consider whether construction activities will be highly specialized, whether the project will provide greater opportunity for innovation or efficiencies between the designer and builder than on traditionally procured projects, and whether significant savings in project delivery time would be achieved. These criteria have been in place since 2013 and are not modified by the 2019 amendments.
- The 2019 legislation does not define what is meant by the term "progressive" design-build contracting. That process is generally understood to mean a phased design-build procurement in which the owner retains a design-builder early in the life of a project (often before any design development) through a primarily qualifications-based RFP process. Progressive-design build projects are typically established as a two-phase process, with the first phase including budget-level design development, preconstruction services, and negotiation of a contract price (either lump sum or guaranteed maximum price; and the second phase including final design, construction and commissioning.¹ The process allows for selection of the design-builder prior to development of schematic design, and the contract documents can include opportunity for

¹ See generally Design Build Institute of America, Progressive Design-Build Procured with a Progressive Design & Price, <https://dbia.org/wp-content/uploads/2018/05/Primer-Progressive-Design-Build.pdf>.

abandonment of the process following completion of design if negotiations on construction pricing fail.

- The Design-Build Best Practices Guidelines issued by CPARB in 2018 outline some key differences between progressive, traditional and bridging design-build procurement.² According to these CPARB Guidelines: “The key difference between them is the point in the process that the contract scope and price are established. The owner must provide a target budget in the RFP. The selection process for all three methods requires competing teams to submit, at minimum: qualifications, a technical approach design concept and cost or price-related factors.” Under the “progressive” variation of design-build, the contract scope and price are developed after team selection through a series of steps taken jointly by the owner and the design-builder once the design is sufficiently advanced.
- Evaluation factors for selection of the design-builder now include submission of a management plan to “meet time and budget requirements and one or more price-related factors.” The phrase “price-related factors” is a new statutory term that means any factor that impacts cost, including overhead or profit. The new legislation decreases the minimum project value for design-build projects from \$10 million to \$2 million.
- Previous limitations on use of design-build (such as the statewide cap of 15 design-build projects for noncertified bodies) were eliminated.
- Any public body utilizing design-build must now provide contract documents that “require the design-builder to submit plans for inclusion of underutilized firms as subcontractors and suppliers including, but not limited to, the office of minority and women’s business enterprises certified business, veteran certified businesses, and small businesses as allowed by law.”
- The RFQ for design-build services must include the estimated design-build contract value and the intended use of the project.
- RFQ evaluation factors are modified. Among other things, the public body must assess proposers’ past performance in utilization of the office of minority and women’s business enterprises certified businesses and its ability to provide payment and performance bonds.
- Final proposals must include each finalist’s accident prevention program.
- Contract documents must require the firm awarded the contract to track and report actual utilization of office of minority and women’s certified business enterprises and veteran certified businesses.

The new legislation also made significant changes to Job Order Contracting in Washington State:

- All public bodies are now authorized to award Job Order Contracts, in contrast to the previous version of the statute which limited its availability to only certain authorized public bodies.
- Evaluation factors must include past performance on approved subcontractor inclusion plans.
- Unused capacity may be carried forward to the next year.

² See https://des.wa.gov/sites/default/files/public/documents/About/CPARB/AdminDocs/DBBP-Guidelines_Revised_5-2018.pdf?=04b85.

- Subcontractor bonding requirements must be reduced to the greatest extent possible.
- The maximum work order sum is raised to \$500,000 from \$350,000, exclusive of WSST.
- The square footage of any stand-alone permanent structure is increased from 2,000 SF to 3,000 SF.
- A state-registered apprenticeship program must be used for any work order over \$350,000 that includes over 600 single trade hours (this requirement can be waived in certain circumstances, e.g., demonstrated lack of availability of apprentices in the area).

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