IACC Annual Conference

Planning the Procurement of a Facility Project: Defining Scope, Procurement Method, and Financing

December 1, 2021

bakertilly

DLZ
ARCHITECTURE • ENGINEERING • PLANNING
SURVEYING • CONSTRUCTION SERVICES

Since 1923
GARMONG
Construction Services

BARNES & THORNBURG LLP

Eric Ratts, AIA Principal Architect
DLZ Architects & Engineers

Rick Hall, Partner
Barnes & Thornburg, LLP

Jason Semler, CPA, Partner
Baker Tilly

Paul Okeson, Executive Vice President
Garmong Construction Services

Overview

Design-Bid-Build (Indiana Code 36-1-12)

Construction Manager as Constructor (Indiana Code 5-32)

Design-Build (Indiana Code 5-30)

Build Operate Transfer (BOT)

Overview of Local Government Financing Options

Design-Bid-Build Method

Highlights of the process

- The governmental entity must hire an architect or engineer to prepare detailed plans and specifications
- The governmental entity may not have plans and specifications that "unduly limit competition" which may make it difficult to pre-qualify bidders
- The governmental entity may also hire a construction manager, an owner's representative/clerk of the works or the architect/engineer to supervise the construction

Design-Bid-Build Method (cont'd.)

Highlights of the process (cont'd.)

- The governmental entity publicly bids the construction project and awards the construction contract to the lowest responsive and responsible bidder
- Minimum 15-day response period required, but may be longer
- Payment and performance bonds and retainage are required
- The timeline from the beginning of design to award of the construction contract for a $1,000,000-10,000,000 project is normally 4-7 months

Design-Bid-Build Method (cont'd.)

Primary Positives

- This method has been used most often by local and state governmental entities and has a long history
- The public bidding ensures the governmental entity is getting the lowest bid by the bidding market on the day bids are received
- The architect, engineer, construction manager or owner's representative/clerk of the works provides the governmental entity an objective third party to review the work being performed by the contractor
- The governmental entity gets the benefit of any unused contingency

Design-Bid-Build Method (cont'd.)

Primary Negatives

- The governmental entity may not be able to avoid using a problem contractor if the contractor submits the lowest responsive bid
- The governmental entity will incur the design fees earlier
- Change orders are common
- If there is a defect in the project, everyone is blaming everyone else for the defect
- No measurable way to incentivize good performance or punish bad performance

Construction Manager as Constructor Method

Highlights of the process

- The governmental entity must hire an architect or engineer to prepare detailed plans and specifications like it would for the Design-Bid- Build Method
- The governmental entity hires the Construction Manager using a Request for Proposals process pursuant to a public notice
- Minimum 15-day response period required, but may be longer
- The Construction Manager is selected by an evaluation committee subject to governing body approval

Construction Manager as Constructor Method (cont'd.)

Highlights of the process (cont'd.)

- Unlike the design-build method, there is no specific requirement regarding the composition of the evaluation committee
- After the Construction Manager is selected, the public bidding of the construction contracts occurs by the Construction Manager
- The construction contracts are awarded by the Construction Manager to the lowest responsive and responsible bidder for each trade
- The Construction Manager, not the governmental entity, enters into the contracts with the contractors

Construction Manager as Constructor Method (cont'd.)

Highlights of the process (cont'd.)

- The potential bidders may be pre-qualified if the pre-qualifications are in writing and approved and published by the governmental entity
- A guaranteed maximum price may be used, but not required
- Payment and performance bonds are required in the amount of the Construction Manager's contract
- No retainage required
- The governmental entity may also hire an owner's representative/clerk of the works or an architect/engineer to supervise the construction on behalf of the owner

Construction Manager as Constructor Method (cont'd.)

Highlights of the process (cont'd.)

- The Construction Manager may perform construction work on the project if it is approved by the governmental entity, the work equals less than 20% of the total value of the project and the Construction Manager can provide evidence to the governmental entity that it is charging less for that work than the lowest responsive and responsible bidder for such work
- The timeline from the beginning of design to award of the construction contracts for a $1,000,000-10,000,000 project is normally 4-7 months

Construction Manager as Constructor Method (cont'd.)

Primary Positives

- The governmental entity maintains control of the design of the project
- The public bidding of the construction contracts ensures the governmental entity is getting the lowest bid by the bidding market on the day bids are received; however, this is only economical beneficial to the governmental entity in a cost-plus contract
- The governmental entity may pre-qualify and limit the bidders for the construction work

Construction Manager as Constructor Method (cont'd.)

Primary Positives (cont'd.)

- The architect, engineer or owner's representative/clerk of the works provides the governmental entity an objective third party to review the work being performed by the contractor
- The governmental entity may get the benefit of any unused contingency
- Penalties and incentives may be included in the contract with the Construction Manager and the contractors

Construction Manager as Constructor Method (cont'd.)

Primary Negatives

- The governmental entity will incur the design fees earlier
- The governmental entity may experience change orders related to design issues
- If there is a defect in the project, everyone is blaming everyone for the defect
- The governmental entity may lose all or a portion of the benefit of a project coming in under budget if the contract is a guaranteed maximum price contract
- The timeline for the project is very similar to the Design-Bid-Build Method

Design-Build Method

Highlights of the process

- The governmental entity must hire an architect or engineer to prepare and issue a Combined Request for Qualifications/Request for Proposals (for projects costing $5,000,000 or less) or a Request for Qualifications followed by a Request for Proposals (for projects costing more than $5,000,000) in accordance with a public notice
- Minimum 37-day response period (for projects costing $5,000,000 or less) or 15-day response period required (for projects costing more than $5,000,000), but can be longer

Design-Build Method (cont'd.)

Highlights of the process (cont'd.)

- The governmental entity creates a committee (containing a licensed architect and engineer along with others) that scores all aspects of the responses submitted except the sealed price proposals
- The governmental entity awards the design-build contract to the respondent that provides the best value based on the respondent's score relative to its price
- The design-builder selected is responsible for both the design and the construction of the project
- The contract can be either a guaranteed maximum price contract or a cost plus percentage contract
- The contract may identify a contingency and how

Design-Build Method (cont'd.)

Highlights of the process (cont'd.)

- Change orders permitted in only limited situations or if there is a change in scope
- Payment and performance bonds are required in the amount of the contract minus design service fees
- No retainage required
- The governmental entity may hire an owner's representative/clerk of the works to monitor performance of the design-builder

Design-Build Method (cont’d.)

Highlights of the process (cont’d.)

- The timeline from the creation of the Combined Request for Qualifications/Request for Proposals to approval of the design-build contract for a $1,000,000-5,000,000 project is normally 3-5 months
- The timeline from the creation of the Request for Qualifications to approval of the design-build contract for a $5,000,000-10,000,000 project is normally 5-7 months

Design-Build Method (cont'd.)

Primary Positives

- The scoring process, which involves an engineer and an architect, provides for transparency and allows for a best value award instead of a low bid award
- Limitations may be imposed on who may be an acceptable respondent
- The upfront (but not overall) professional costs incurred by the governmental entity are significantly less
- Usually few or no change orders

Design-Build Method (cont'd.)

Primary Positives (cont'd.)

- Incentives and penalties can be included in the contract
- If there is a defect in the project (with certain exceptions for latent defects such as soil defects), then the design-builder is solely responsible for correcting the problem at its cost

Design-Build Method (cont'd.)

Primary Negatives

- The timeline for the process and the preparation to be done by the respondents may reduce the pool of respondents depending on the size of the project
- Some, or much, of the control of the governmental entity over the design of the project may be lost
- The governmental entity may lose all or a portion the benefit of a project coming in under budget
- Unclear whether there are really cost savings
- The timeline for the selection of the design-builder is very similar to the Design-Bid-Build Method

Build-Operate-Transfer ("BOT") Method

- A governmental body may enter into a BOT Agreement for the acquisition, planning, design, development, reconstruction, repair, maintenance, operation, and/or financing of any public facility for use by the governmental body.
- BOT Agreement must identify which costs for which developer is responsible and costs for which governmental body responsible.
- Upon completion, developer/offeror must operate the facility for some period of time before transferring it back to governmental entity (30 days common, but could be much longer term).
- BOT Agreement may provide for the transfer of the public facility to the governmental body by means of a lease or an installment purchase contract. The lease payments or installment payments may be made from any source legally available to the governmental body for such purpose.

Build-Operate-Transfer ("BOT") Method (cont'd)

Highlights of the process

- The governmental entity adopts the provisions of the BOT Statute (I.C. 5-23)
- The governmental entity may issue a request for information (RFI) to gain information (1) on factors involved in, the feasibility of, or potential consequences of a proposed project, (2) to assist in preparing a request for proposals (RFP), or (3) to evaluate any aspect of an existing BOT Agreement or associated facility
- Responses to RFI confidential, unless waived by respondent
- No action required to be taken after receiving responses to RFI
- An RFI is not required as part of the BOT method, but may be helpful

Build-Operate-Transfer ("BOT") Method (cont'd)

Highlights of the process (cont'd)

- The governmental entity must solicit proposals through an RFP, which must include:
  - Factors/criteria to be used in evaluating proposals
  - Statement concerning relative importance of price and other factors
  - Statement concerning whether proposals must be accompanied by a certified check or other evidence of financial responsibility
  - Statement concerning whether discussions may be conducted with offerors for the purpose of clarification to assure full understanding of and responsiveness to the RFP
- Notice of the RFP published two times, 1 week apart, with second publication at least 7 days before proposals are due.

Build-Operate-Transfer (“BOT”) Method (cont’d)

Highlights of the process (cont’d)

- Once proposals received, discussions may be conducted with offerors for the purpose of clarification if provided in the RFP
- The governmental entity can form an evaluation committee. There are no requirements regarding the composition of a committee
- Eligible offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals
- The governmental body must negotiate the best and final offers of responsible offerors who submit proposals that are determined to be reasonably susceptible of being selected for a BOT Agreement
- After best and final offers have been negotiated, the governmental body shall either make a recommendation to the board to award the BOT Agreement to an offeror or shall terminate the RFP process

Build-Operate-Transfer (“BOT”) Method (cont’d)

Highlights of the process (cont’d)

- Once preferred offer selected, must publish notice of public hearing (10-days in advance), hold public hearing on the preferred offer, and award BOT Agreement to the preferred offer.
- If term of BOT Agreement is greater than 5 years, must also be approved by the fiscal body of the political subdivision
- The BOT Agreement must provide for a payment bond in an amount not less than 100% of the cost to design and construct the facility
- The BOT Agreement must provide for a performance bond in an amount not less than 50% of the cost to design and construct the facility
- No retainage required
- The governmental entity may hire an owner’s representative/clerk of the works to monitor performance by the selected developer.

Build-Operate-Transfer ("BOT") Method (cont'd)

Primary Positives

- The governmental body has the ability to negotiate best and final offers with potential firms, and maintains control of selecting its preferred proposal
- The governmental body holds a single contract with a developer team
- Through RFP process, limitations may be imposed on who may be an acceptable respondent
- The upfront (but not overall) professional costs incurred by the governmental entity may be significantly less
- Penalties and incentives may be included in the BOT Agreement

Build-Operate-Transfer ("BOT") Method (cont'd)

Primary Positives (cont'd)

- If there is a defect in the project, the selected developer is solely responsible for correcting the problem at its cost
- Generally requires less involvement in the project by the governmental entity, compared to traditional design-bid-build method

Build-Operate-Transfer ("BOT") Method (cont'd)

Primary Negatives

- The timeline for the process and the preparation to be done by the respondents may reduce the pool of respondents depending on the size of the project and the time allowed for responses
- Some, or much, of the control of the governmental entity over the design of the project may be lost
- The governmental entity may not be able to provide satisfactory objective information regarding why one qualified offer was selected over the other proposals
- No public bidding required, so it's unclear whether there are really cost savings from delivery method

Build-Operate-Transfer ("BOT") Method (cont'd)

Primary Negatives (cont'd)

- The governmental entity may lose all or a portion of the benefit of a project coming in under budget if the contract is a guaranteed maximum price contract
- If developer team providing the financing,
  - Embedded interest rate may be at a taxable borrowing rate, rather than much lower tax-exempt interest rate at which governmental entity can borrow
  - Developer financing usually has a 5-10 year term, with a balloon payment due at maturity, which will need to be refinanced and creates interest rate risk
  - Need to follow statutory procedures for incurrence of debt
  - Might be subject to petition-remonstrance or referendum process
- Potential hidden costs in the form of developer fees, developer counsel fees, spread or mark-up on actual interest rate received from developer's lender

Overview of Local Government Financing Options

Financings

Finance project with developer using lease financing or fund through traditional financing method

Same analysis and considerations should be considered when evaluating each method

Pledged Revenues

Pledged Revenues

- ***Property Taxes***
- ***Local Income Taxes***
- ***Tax Increment***
- ***Other revenues***

Issues Affecting Financings

- ***Existing constraints***
- ***Sufficiency of revenue stream/capacity***
- ***Outstanding bonds***
- ***Existing bond covenants***
- ***Restrictions for future debt***
- ***Competitive vs negotiated***
- ***Cost***

Issues Affecting Structure

- ***Term of financing (balloon payments)***
- ***Fixed vs. variable interest rates***

Illustrative financing

	Local Bank	Competitive Sale
Bond Size	$14,665,000	$14,715,000
Available Proceeds	$14,565,000	$14,565,000
Cost of Issuance	$100,000	$150,000
Term	10 years	10 years
Interest Rate	1.75%	1.15%
Total Cost (Principal & Interest)	$16,140,000	$15,745,000

Project Delivery

Questions / Comments/ Discussion?

Eric Ratts, AIA Principal Architect
DLZ Architects & Engineers

Rick Hall, Partner
Barnes & Thornburg, LLP

Jason Semler, CPA, Partner
Baker Tilly

Paul Okeson, Executive Vice President
Garmong Construction Services