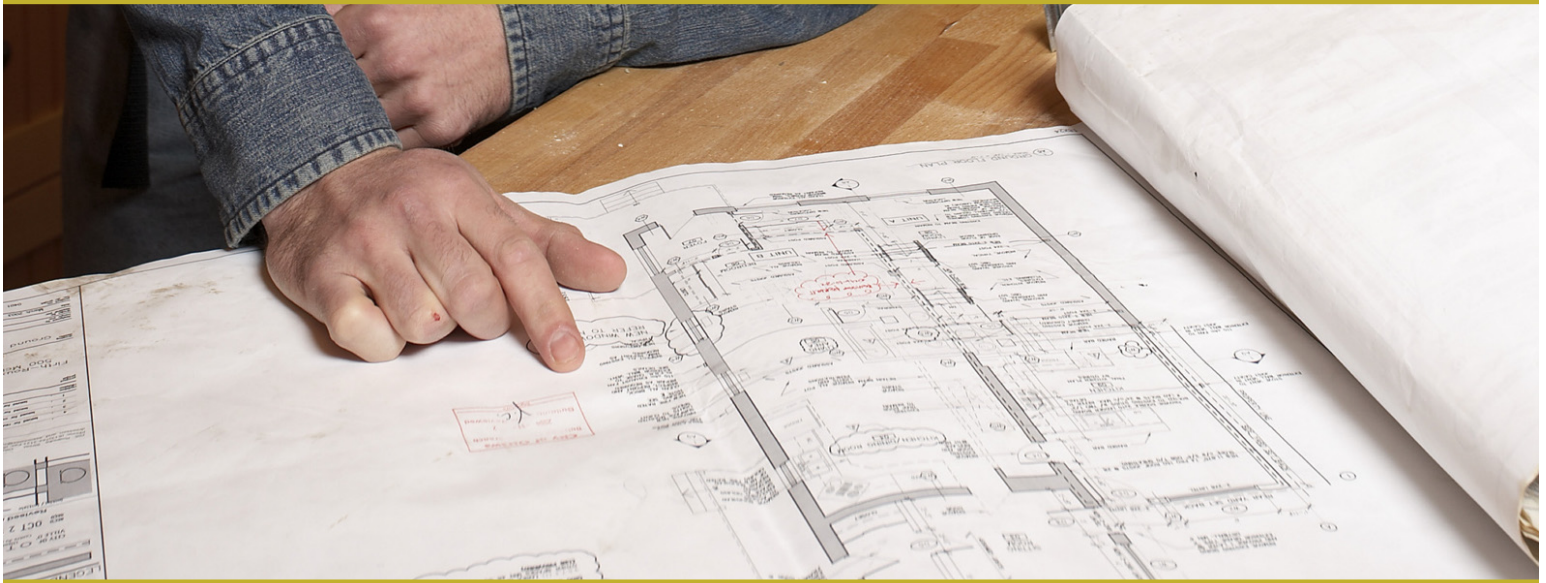


BAKER & DANIELS LLP



PUBLIC DESIGN-BUILD IN INDIANA:

A Common Sense Guide To Procurement Under Indiana's Public Design-Build Statute

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ABOUT THE AUTHOR



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Mr. Miller also serves as general counsel to the Design-Build Institute of America – Great Lakes Region, which is the regional division of the DBIA serving Indiana, Illinois, Michigan and Wisconsin. Mr. Miller is licensed to practice law three of these states, and he has represented clients in complex construction and commercial litigation throughout Indiana and Illinois. Mr. Miller is a frequent author and lecturer on legal topics affecting construction owners and professionals.

Mr. Miller is also heavily involved with the sections of the American Bar Association dedicated to improving legal services for the construction industry. He is a member of the ABA's Forum on the Construction Industry, and he serves as the Indiana Case Note Editor for the American Bar Association Section of Litigation's Construction Litigation Committee. He is also a member of the Construction and Surety Law section of the Indiana State Bar Association.

ABOUT THE CONSTRUCTION PRACTICE OF BAKER & DANIELS LLP

Since 1863, Baker & Daniels has provided business and legal counsel to clients throughout the United States and around the world. Serving *Fortune 500* corporations, regional businesses, nonprofit organizations, local governments and individuals, Baker & Daniels has established a reputation for practical, results-oriented service.

With more than 370 lawyers and consulting professionals in six offices, Baker & Daniels offers services in more than 35 practices and industries to help clients achieve their goals. Our experience includes corporate finance, government affairs, health care, insurance, intellectual property, international, labor and employment, life sciences, litigation, mergers and acquisitions, nonprofits, real estate, venture capital and much more.

The construction lawyers of Baker & Daniels approach the wide-ranging set of legal problems that confront the construction industry in an integrated way. Many of the same lawyers who represent construction clients in disputes and litigation also are immersed in contracting and structuring projects to minimize risk – and avoid such disputes in the future. Baker & Daniels lawyers partner with clients from project inception – with involvement in important activities as varied as real estate acquisition and financing, choosing a project delivery method, creating an OCIP or CCIP program, drafting a project labor agreement, developing a bonding strategy, writing a safety manual or creating the many interconnected project documents and manuals.

The construction lawyers of Baker & Daniels also pride themselves in providing the most cost effective and thorough representation of construction clients in disputes relating to project performance, delays, safety issues, lien and bond claims, defective construction and labor issues.

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INTRODUCTION

In 2005, Indiana joined a vast majority of states and the federal government by enacting legislation allowing public agencies to procure design and construction services via the design-build project delivery method. Nearly every state in the country allows design-build procurement in at least some areas. As of April 2007, according to the Design-Build Institute of America (DBIA), only Michigan, Rhode Island and Alabama remain as states where the process is not authorized by statute. The DBIA classifies Indiana's Statute as "widely permitting" design-build by public agencies, which is one step below states classified as allowing design-build procurement by all public agencies. This is undoubtedly because Indiana's Design-Build Statute expressly precludes the Indiana Department of Transportation from its requirements.

There are only limited examples of public agencies undertaking projects via the Design-Build Statute since the time of its enactment. Indeed, at the time of this publication, this author knows of less than five completed projects. That being said, the popularity of the process continues to grow, and there are several projects currently in the early to mid stages of procurement.

This guide is intended to provide the reader with an easy-to-follow reference to Indiana's Design-Build Statute. While the requirements of the Statute are directed at public owners, this guide is intended for use by all project stakeholders on any point of the learning curve. Thus, not only can public agencies use this guide to become familiar with design-build procurement, but all owners, architects, engineers and construction professionals are encouraged to refer to this guide before and during a project in lieu of attempting to navigate the Statute itself. It must be noted, however, that this guide is intended neither as legal advice nor as a means of replacing the Statute. It is recommended that the reader consult with an attorney and experienced industry professionals before undertaking or participating in a project under Indiana's Design-Build Statute.

HOW TO USE THIS GUIDE

This guide is intended to provide both a big picture view of public design-build projects in Indiana, as well as, a more detailed explanation of each of the critical aspects of the processes set out by the Design-Build Statute.

The project checklist should be used as a “big picture” resource. It is not a complete recitation of each requirement of the Design-Build Statute, but rather a concise summary to be used for purposes of understanding and monitoring the procurement process as a whole. The project checklist can also be used when planning and conducting a public design-build project for purposes of understanding how the statutory requirements inter-relate.

Additionally, this guide provides a substantive section dealing with each of the major components of the Design-Build Statute. Each section is intended to provide a brief explanation of the particular issue along with a description of how the issue fits into the process and what is required when completing the particular aspect of procurement being discussed. So, for example, the section dealing with the Technical Review Committee describes:

1. the logistics of forming the committee
2. the portions of the project where the committee is involved
3. the responsibilities of the committee throughout the project

Finally, the Statute contains certain miscellaneous requirements that do not fit within any major component of the procurement process. These items, which include issues such as changes to the contract and intellectual property, are summarized in Section XII of this guide.

PROJECT CHECKLIST

- Are you a public agency?
 - If your answer is “Yes” you must comply with the Design-Build Statute.
 - If your answer is “No” you are free to conduct your design-build project without complying with the statute.
- Plan and consider budgeting, finance and tax implications.
- Appoint a design criteria developer.
- Appoint a Technical Review Committee.
- Prepare contract forms and general conditions.
- Determine and file common construction wages with public agency (no less than two weeks before issuing Request For Qualification [RFQ]).
- Give notice of public meeting.
 - must include statement that meeting will consider resolution authorizing the use of design-build contracting
- Adopt a resolution (at public meeting) authorizing the use of design-build contracting.
 - resolution must identify Technical Review Committee
- Publish notice of RFQ.
 - must allow 30 days for response
- Obtain statements of qualifications from design-builders and submit to Technical Review Committee.
- Obtain report from Technical Review Committee.
 - The report should contain at least three (3) qualified design-builders.
 - If the report contains only two (2) design-builders, then the agency can proceed with issuing a Request for Proposal (RFP).
 - If the report contains only one (1) qualified design-builder, then a second resolution must be adopted authorizing the issuance of the RFP to the single design-builder.
- Issue RFP to selected design-builders.
 - must include: design criteria package
 - must be submitted in qualitative proposal and price proposal
- Obtain and analyze responses to RFP.
- Award the contract.
- Recommended: Provide a stipend for all design-builders selected after RFQ process.

PUBLIC AGENCY DEFINED

Like any state, Indiana has enacted an elaborate scheme of public works and procurement statutes. These statutes are not always easy to untangle; however, the Design-Build Statute does an effective job of clarifying which public agencies fall under its requirements. The general rule is that all public agencies can procure design-build services with the exception of the Indiana Department of Transportation. The following is a listing of the “public agencies” expressly authorized by the Statute to procure design-build contracts:

- State Agencies
 - A “state agency” is defined by separate statute as “an authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative, department of state government. The term ‘state agency’ does not include the judicial or legislative departments of state government, nor does that term include a state educational institution.”
- State Educational Institutions
 - The definition of a “state educational institution” formerly adopted from another statute under Title 20 of the Indiana Code was removed from the Design-Build Statute by amendment in 2007.
 - The Design-Build Statute does not clearly define a state educational institution although as a practical matter this section implicates public universities.
- A Unit
 - The “unit” is defined as a county, a township or a municipality.
- A Body Corporate and Politic Created by State Statute
 - This refers a public agency formed by a separate statute.
 - Common examples include boards of county commissioners, the Stadium Authority and other similar entities created by separate statute.
- School corporations
 - A “school corporation” is any public school corporation organized under Indiana law, including:
 - city schools;
 - town schools;
 - metropolitan school districts;
 - consolidated school corporations;
 - county school corporations;
 - community school corporations; and
 - united school corporations.

THE TECHNICAL REVIEW COMMITTEE

The Technical Review Committee is probably the most critical component for planning and completing a project under the Design-Build Statute. This is especially true if the design criteria developer is a member of the committee. The committee needs to be identified at the outset of the project, and thereafter, is responsible for administering the project by assisting with the RFQ, rating and scoring the design-builders who respond to the RFQ, performing the first cut of potential design-builders, recommending only those approved design-builders to the public agency for issuance of the RFP, and assisting with the RFP. Thus, it is quite obvious that the committee plays a central and instrumental role in the process. The public agency may have a separate representative who it consults during the project; however, the committee will be primarily responsible for driving the procurement process.

The committee is comprised of three individuals: one from the public agency and two industry professionals. The design criteria developer can (and probably should) be a member of the Technical Review Committee. The design criteria developer as the name implies is responsible for preparing the design criteria package that ultimately becomes the centerpiece of the RFP.

The Technical Review Committee's role and responsibilities are summarized as follows:

- Appointed by a public agency;
- Responsible for conducting meetings throughout procurement that are open to the public;
- The committee must consist of three (3) members as follows:
 - One representative from the public agency; and
 - Two of the following three:
 - One professional engineer;
 - One licensed architect; or
 - One qualified contractor.
 - Responsibilities of the Technical Review Committee:
 - Qualifying the design-builders
 - Creating a rating system for qualifying potential design-builders. The rating system must include consideration of the following factors:
 - * the design-builder's experience;
 - * the design-builder's financial and bonding capacity;
 - * the design-builder's managerial resources and management plan;
 - * the design-builder's safety record;
 - * the design-builder's past performance and capacity to perform;

- * the design-builder's ability to complete the work in a timely and satisfactory manner;
- * OTHER CRITERIA contained in the RFQ.
- Rating and scoring the qualitative proposals
- Optional: interviewing design-builders
- Selecting qualified and potential design-builders (should be at least 3, but 2 or 1 are OK)
- Reporting the selected design-builders to the public agency
- Conducting briefing and/or question and answers sessions with design-builders before responses to the RFP are submitted

THE REQUEST FOR QUALIFICATIONS (BY THE PUBLIC AGENCY)

The Request For Qualifications [RFQ] is the public agency's first opportunity to formally communicate with the construction community about its project. The Statute indicates that the public agency "shall publish a notice of a request for qualifications . . . [and] must allow at least thirty (30) days for potential design-builders to respond . . ." The Statute does not specify, however, who must develop the RFQ. Thus, the actual document may presumably be prepared by, or with the input of, the design criteria developer or the Technical Review Committee. Indeed, this may make the most practical sense.

The RFQ must be published such that the potential design-builders have thirty (30) days to respond. The following is a checklist regarding the required content for the RFQ:

- Size of facility
- Function of facility
- Project budget
- Project schedule
- Process for communication between public agency and design-builders
- Schedule for selection process
- Technical Review Committee procedures
- Description of submission requirements
- General requirements for prospective design-builders, including:
 - Experience with similar projects;
 - Team experience with design-build process;
 - Organizational resources and depth;
 - Licensing requirements;
 - Financial strength;
 - Bonding capacity;
 - WMBE history;
 - Litigation/dispute history;
 - Experience dealing with bonding authorities;
 - Team experience with the type of facility at issue;
 - Team performance record (quality, schedule and cost);
 - Team composition and history together;
 - Current capacity to manage project; and
 - Client references
- Description of the qualification statement evaluation process, including:

- an established rating system; and
- a briefing session or Q&A with potential design-builders before response to RFP

Based on the required content of the RFQ, it is clear that the public agency should be collaborating with the Technical Review Committee and/or the design criteria developer prior to issuing with RFQ. Indeed, the public agency may request the design criteria developer to actually draft the RFQ based on the previously agreed concept for the project. Similarly, budgeting and finance considerations should have been addressed prior to issuance of the RFQ.

THE STATEMENT OF QUALIFICATIONS (BY THE DESIGN-BUILDER)

To paraphrase an industry leader, the statement of qualifications amounts the design-builder's attempt to get "invited to the dance." This means that the statement of qualifications is the design-builder's chance to make a first impression and receive an invitation to submit a response to the RFP. For this reason, it is absolutely critical for the design-builder to assemble a team that will most effectively respond to the public agency's desired qualifications.

The Design-Build Statute does not (and clearly cannot) address the nuances required to assemble a high quality statement of qualifications with a likelihood for success. The Statute merely sets forth the minimum requirements for the design-builder's statement of qualifications. Namely, the statement of qualifications:

- Must be verified
- Must respond to the information requested in the RFQ
- Must include the following:
 - List of all qualified contractors, professional engineers, and licensed architects who are financially participating in the project
 - Statement including the following:
 - A listing of all prime contractors and architectural and engineering firms that participate financially as part of the team
 - A statement that:
 - * the design-builder or the team members have completed or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity; and
 - * proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project
 - A statement that the design-builder or team members have the licenses, registrations, and credentials required to design and construct the project, including information on the revocation or suspension of a license, credential, or registration
 - A statement that the design-builder has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance
 - The experience modifier rate, the United States Occupational Safety and Health Administration total recordable case incident rate (TCIR) and days away, restricted or transferred case incident rate (DART) for the design-builder and each design-build team member, and the average United States Occupational Safety and Health Administration TCIR and DART rates for the industrial classification of the design-builder and each design-

build team member

- A statement that the design-builder or the employees of the team performing construction services, including the employees of all subcontractors, have completed or are enrolled in an apprenticeship program certified by the United States Department of Labor Bureau of Apprenticeship and Training
- Information regarding any prior serious, repeat, willful, or criminal violation of the federal Occupational Safety and Health Act of 1970 and any equivalent violation under a state plan authorized under Section 18 of the federal act that has become a final order
- Information concerning the debarment, disqualification, or removal of the design-builder or a team member from a federal, state, or local government public works project
- Information concerning the bankruptcy or receivership of the design-builder or a team member

Thus, the statement of qualifications amounts to list of fairly extensive commitments by the design-builders. These requirements should not be “fudged” or overlooked by the design-builders because any misrepresentation in these statements could give the public agency a basis for claiming that the contract was breached, the contract should be voided or even that the design-builder defrauded the public agency.

THE DESIGN CRITERIA PACKAGE

If the Technical Review Committee is the most important aspect of the administration of a project under the Design-Build Statute, then the design criteria package is certainly the most important aspect of the actual design and construction component. This document represents the public agency's first and best chance to impact the design and construction process. Furthermore, most disputes and misunderstandings on design-build projects center around defining the scope of work for the design-builder, and as such, making this very clear in the design criteria package is critical.

Unlike design-bid-build procurement where the design is supposed to be clearly defined at the time of the bid letting, in design-build the public agency does not have a complete (or perhaps any) vision of the design at the time of requesting proposals from prospective design-builders. As such, the design criteria package is critical because it will become the basis for the design services that are performed by the design-builder once the contract is awarded.

One obvious caveat is also worth noting at this juncture. The range of projects potentially implicated by the Statute covers virtually any work other than highway construction projects. In this regard, there is obviously a significant variance between procuring design and construction services for the renovation of a wastewater facility versus the construction of a new school building. Such nuances in the construction market should also be considered before and during the development of the design criteria package to ensure that the most competent and effective design-builder is selected. Thus, public agencies are encouraged to research potential design criteria developers well in advance of planning a project for purposes of developing a design criteria package with a proven track record for success.

The Design-Build Statute requires that the design criteria package be included in the RFP. As such, the public agency should have received the design criteria package from the design criteria developer well in advance of issuing the RFP to ensure that all required information is present.

The Design-Build Statute suggests that the following items be included in the design criteria package:

- A legal description and survey of the site
- Interior space requirements
- Special material requirements
- Material quality standards
- Preliminary design criteria for the project
- Special equipment requirements

- Cost or budget estimates
- Quality assurance and quality control requirements
- Site development requirements
- Compliance with applicable codes and ordinances
- Permits and connections to utilities
- Requirements for storm water and roads
- Parking requirements
- Soil borings and geotechnical information
- Performance specifications
- Life cycle costing and energy consumption requirements
- Performance specifications, including warranties
- Project schedule
- Any other applicable requirements

THE REQUEST FOR PROPOSAL

The Request For Proposal [RFP] represents the culmination of the efforts of the public agency, the design criteria developer and the Technical Review Committee throughout the bulk of the procurement process. By the time the RFP is ready for “issuance” the project is as fully defined by the public agency as it can be (subject to post-award negotiations or the contract change mechanism in the general conditions). At this stage, the Technical Review Committee has already rated and reduced the number of potential design-builders to three or fewer, the design criteria package is complete, and the contract terms are largely defined.

According to the Statute, the RFP should contain the following information:

- The design criteria package
- Instructions
- Proposal forms and schedules
- General and special conditions
- The basis for evaluation of proposals, including a description of the selection criteria with the weight assigned to each criteria
- A determination of the common construction wage
- Any other instructions, documents, or information relevant to the project that the Public Agency considers relevant
- A requirement that the proposal be submitted in two (2) packages
 - Qualitative proposal; and
 - Price proposal

THE RESPONSE TO REQUEST FOR PROPOSAL

The response to the RFP will be the design-build team's one shot to deliver its vision of the project to the public agency. Thus, careful attention to detail and the public agency's desires is a must. If the public agency has provided a stipend to the potential design-builders, then the risk and cost associated with completed the process should be diminished. Either way, the design-builder must put forth maximum creative and practical effort when responding to the RFP for purposes of providing the best chance for receiving the contract award.

The Design-Build Statute sets forth various minimum requirements for the response to the RFP as follows:

- It must be submitted simultaneously in separately sealed and identified packages: one containing the price proposal and one containing the qualitative proposal. The price proposal must remain sealed until opened in public in accordance with the provisions of the Statute.
- A proposal must identify each subcontractor responsible for primary design services and primary construction services.
- The price proposal must:
 - contain one (1) lump sum cost of all design, construction engineering, inspection, and construction costs of the proposed project; or
 - establish a maximum cost of the design-build contract that will not be exceeded if the proposal is accepted without change.
- The qualitative proposal must include all documents, information, and data requested in the RFP.

AWARDING THE CONTRACT

Much like the competitive bidding statutes, the Design-Build Statute requires public agencies to following certain open and technical procedures when awarding the design-build contract. Unlike the competitive bidding statutes, the public agency has the freedom to base its selection on qualitative factors rather than simply selecting the “lowest responsible bidder” or the “lowest responsive bid.”

Upon receipt of the sealed packages from the potential design-builders, the public agency must submit the qualitative proposal to the Technical Review Committee. If necessary, the public agency may require the potential design-builder to clarify its proposal to ensure that it conforms with all design and administrative requirements. Also, it must be noted that the Technical Review Committee may not consider the qualitative proposal until the design criteria developer “provides its professional opinion that the proposal conforms with the design criteria.” This requirement may expose the design criteria developer to claims if a lack of conformance is discovered during the design or construction phases of the project. These risks should be addressed in the various contracts between the design criteria developer and the public agency and the design-builder and the public agency.

Next, the Technical Review Committee must score each qualitative proposal based on the factors, weighting, and processes identified in the RFP. The Technical Review Committee then gives its composite score to each qualitative proposal.

Once the scoring is complete, the public agency must provide the potential design-builders with seven (7) days notice of the date, time and location where it intends to open the price proposals. At this public meeting, the public agency must divide each design-builder’s price by the composite score received for the qualitative proposal. The resulting number is referred to as the “adjusted price.” At this stage, the Statute requires the public agency to “accept the proposal that provides the public agency with the lowest adjusted price providing the best value to the taxpayer.” Thus, the public agency is not required to accept the lowest price proposal.

The public agency and the design-builder with the lowest adjusted price are then able to negotiate the terms of their contract. The negotiations apply to any contract term that is not identified as non-negotiable in the RFP. If these negotiations fail, the public agency is allowed to negotiate a contract with the design-builder with the next lowest adjusted price. This process can be repeated until all negotiations fail or a design-builder is selected.

Finally, the public agency is allowed to reject any and all proposals so long as the rejection is not for the

purpose of “evading the provisions and policies of this article.” Additionally, the rejection must be in writing and must state the reason(s) for the rejection.

MISCELLANEOUS REQUIREMENTS

- Changes
 - Contract changes to the project scope and price are expressly authorized by the Statute.
- Subcontracts
 - No subcontractor with primary design or construction responsibilities may be replaced without:
 - Approval from the public agency; and
 - A written statement by the public agency that a legitimate reason exists for replacing the subcontractor.
 - Notes
 - Subcontractors with primary design and construction responsibilities are any subcontractors listed on the design-builder's response to the RFQ.
 - If the design-builder terminates or replaces a subcontractor without approval of the public agency, then the design-builder can be terminated.
- Bonds
 - Standard performance and payment bonds are required. Note that these will vary depending on the public agency procuring the work.
 - The public agency CANNOT require use of any particular surety or insurance company.
- Intellectual property
 - The Statute indicates that the design-builder owns its drawings and specifications until the proposal is accepted by the public agency. At that point, the ownership of the drawings and specifications can be determined by the parties. Thus, the contract between the public agency and the design-builder should clearly enunciate which party owns the design for the project.

