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Progressive Design-Build: Structure, Rationale, and Legal Pitfalls

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I. Introduction

Progressive design-build ("PDB") has rapidly emerged as a popular project delivery method for complex construction projects in the United States. While traditional design-build ("DB") remains widely used, PDB's collaborative, phased approach offers unique advantages, and distinct legal risks, that are increasingly relevant to owners, contractors, design professionals and their counsel. This article provides a comprehensive overview of PDB, explains the rationale for its use, and analyzes key legal and practical pitfalls.

II. What Is Progressive Design-Build?

A. Definition and Structure

Progressive design-build is a variation of the traditional design-build model in which the design-builder is selected at a very early stage—often before the project design is developed—and the selection is based primarily, if not exclusively, on qualifications rather than price. The "progressive" aspect refers to the process by which the owner and design-builder collaboratively develop the project's design and contract price, typically in two distinct phases.[1]

Phase 1 involves preliminary design and preconstruction services, during which the owner and design-builder work together to define the project scope, develop the design, and establish the basis for pricing. The parties negotiate a guaranteed maximum price ("GMP") or lump sum for Phase 2 only after sufficient design development and cost estimation have occurred.[2]

Phase 2 commences once the parties agree on commercial terms, including the GMP or lump sum. At this time, the parties negotiate and execute an amendment memorializing the price and other key commercial points. The design-builder then completes the final design, constructs the project, and commissions the facility.[3]

This two-phase structure is reflected in the latest ConsensusDocs 411 Standard Progressive Design-Build Agreement, which provides a contractual framework for PDB projects, including "off-ramps" that allow either party to exit the contract if agreement on price or scope cannot be reached at the end of Phase 1.[4]

B. Comparison to Traditional Design-Build

In traditional design-build ("TDB"), the owner typically develops a baseline design and technical specifications, then selects a design-builder through a best-value procurement process that emphasizes price and technical merit. The design-builder is responsible for both design and construction, but the contract price is set much earlier—often before significant design development has occurred.[5]

By contrast, PDB defers price setting until the design is more fully developed, allowing for greater owner input, risk identification, and cost certainty.[6] The Design-Build Institute of America (DBIA) notes that PDB "enables the owner to select the design-builder based on qualifications and then work collaboratively to develop the project's design and price, with the flexibility to address evolving needs."[7]

III. Reasons for Using Progressive Design-Build

A. Enhanced Collaboration and Owner Involvement

One of the principal advantages of PDB is the high degree of collaboration between the owner and the design-builder during the early stages of the project. Owners are actively involved in design decisions, cost estimation, and risk allocation, which helps ensure that the project aligns with their goals and constraints.[8] This collaborative environment also facilitates stakeholder buy-in and can lead to more innovative and effective project solutions.[9]

B. Flexibility and Risk Management

PDB's phased approach provides flexibility to address evolving project requirements and unforeseen conditions. By advancing the design before finalizing the price, the parties can identify and mitigate risks early, reducing the likelihood of costly change orders and disputes during construction.[10] The owner and design-builder can also negotiate the allocation of contingencies, escalation clauses, and other risk-sharing mechanisms with greater precision.[11] Risk registers are commonly used.

C. Schedule and Cost Advantages

PDB can offer schedule compression and cost containment compared to traditional delivery methods. Early contractor involvement allows for phased permitting, early procurement of long-lead items, and the potential for fast-tracking certain construction activities.[12] Open-book pricing and competitive procurement of subcontractors during Phase 2 enhance transparency and can result in more accurate budgets.[13]

D. Qualifications-Based Selection

PDB typically employs a qualifications-based selection ("QBS") process, allowing owners to choose the most qualified team rather than the lowest bidder. This is particularly advantageous for complex or high-risk projects where experience, technical expertise, and a track record of collaboration are critical to success.[14] The DBIA and other industry groups have advocated for QBS as a best practice for public and private owners alike.[15] The advantage of this approach for contractors is that it can reduce their costs of proposing on projects as they do not have to undertake preliminary design or extensive cost estimating exercises.

E. Off-Ramps and Termination Rights

A key feature of PDB contracts is the inclusion of "off-ramps"—contractual provisions that allow the owner (and sometimes the design-builder) to terminate the agreement for convenience if the parties cannot agree on price or scope at the end of Phase 1. This provides a safety valve for both parties and incentivizes good-faith negotiations.[16]

IV. Legal and Practical Pitfalls of Progressive Design-Build

While PDB offers significant benefits, it also presents unique legal and practical challenges that the parties and their counsel must carefully consider.

A. Uncertainty of Final Price

A fundamental risk of PDB is that the final project cost is not known at the time the contract is awarded. If the owner and design-builder cannot agree on a GMP or lump sum at the end of Phase 1, the owner may face significant delays and additional costs associated with re-procurement or project redesign.[17] Moreover, the design-builder may have invested substantial resources in preliminary design without actually getting the award for the more lucrative construction phase.[18]

B. Lack of Price Competition

Because the design-builder is selected early and often on qualifications alone, there is limited price competition for the overall project. This can lead to concerns about cost escalation, especially if the owner lacks the resources or experience to negotiate effectively during Phase 2.[19] Supervising agencies and public owners may face public criticism of QBS processes that do not include open competitive bidding.[20] Owners often look to solve this issue by integrating independent cost estimators (ICE) into the process. It is important to be clear about the role of ICE in the contract documents.

C. Owner's Sole-Source Negotiation Risk

Owners are effectively "locked in" with the design-builder at an early stage, negotiating both design and construction terms with a single entity. This sole-source negotiation can create leverage imbalances and may expose the owner to "bait and switch" tactics, such as staff substitutions or changes in key personnel.[21]

D. Staff Continuity and Key Personnel

Staff turnover on the design-builder or designer teams can undermine project continuity and owner confidence. Owners should consider key personnel contractual commitments to team continuity and consider including liquidated damages for unauthorized staff changes among key personnel.[22]

E. Off-Ramp Execution and Use of Work Product

While off-ramps provide flexibility, their execution can be fraught with challenges. Contractors can be concerned about capricious terminations. If the owner terminates after Phase 1, questions may arise regarding the use of preliminary design documents, intellectual property rights, and the appropriate compensation for work performed. Owners should ensure that contracts provide for the right to use and adapt the design in subsequent procurements, subject to appropriate indemnities and insurance.[23] Design-builders should ensure that they receive fair compensation for their work and any such use of intellectual property in the event of a termination that is not caused by fault.

F. Design-Builder's Reliance on Owner-Furnished Information

Design-builders may be reluctant to rely on owner-furnished information, especially when required to validate site conditions, program requirements, or other critical data. If the contract requires the design-builder to assume responsibility for such information, disputes may arise over risk allocation and entitlement to equitable adjustments.[24] Owners need to consider carefully what information should be classified as reliance information versus background information.

G. Underpricing and Deferred Profit

Design-builders may underprice Phase 1 services, allocating anticipated profit to Phase 2. If the project is terminated before Phase 2, the design-builder may not recover its expected profit, leading to claims for termination fees or equitable adjustments.[25] This is an important consideration for design-builders in pricing, considering the off-ramp structure.

H. Designer Risks: Performance Guarantees and Liability

Designers face heightened risk in PDB projects, particularly with respect to performance guarantees and liability for preliminary design. Owners may expect "fit for purpose" designs based on limited criteria, increasing the risk of disputes over scope and performance. Designers should avoid broad performance guarantees, consider limitations of liability, clarify liability for use of preliminary design by others, and ensure appropriate professional liability insurance is in place.[26]

I. Legislative and Regulatory Constraints

Not all jurisdictions support PDB or QBS procurement. Counsel should verify that applicable statutes and regulations permit PDB, especially for public projects, and ensure compliance with bonding, insurance, governmental funding and procurement requirements.[27] For example, some states have only recently authorized PDB for public works, and requirements may vary widely.[28]

J. Evolving Case Law and Dispute Trends

As PDB becomes more prevalent, courts are beginning to address disputes unique to this delivery method, including the enforceability of off-ramp provisions, the allocation of design liability, and the interpretation of open-book pricing clauses. Counsel should monitor developments in case law and industry guidance to stay abreast of emerging risks.[29]

K. Insurance Considerations

Careful consideration must be given to how the contractual requirements of the PDB agreement affect the availability, scope, and cost of the insurance program of the project. Just a few of the insurance issues which must be answered on a bespoke basis for each PDB project include: When should the professional program be implemented? Who should be the named insureds of the project-specific professional policy? How should the parties handle completed operations coverage on the builders' risk program? Do the parties contemplate an owner-controlled casualty program, and when must it incept? Is a GL policy sufficient during the Early Works if a CCIP is contemplated? Do the contractual obligations facilitate the most

efficient and applicable surety program? And the complexity, costs, confusion, and likely gaps in coverage within the insurance program only increase in the event of an off-ramping event unless addressed specifically and thoughtfully within the PDB agreement. Utilizing a trusted insurance advisor throughout the contractual negotiations is key to development of a cost effective and responsive insurance program.

V. Best Practices for Mitigating Risk

To address these pitfalls, industry guidance and contract forms recommend several best practices:

- Require full transparency for all costs, including open-book pricing and independent cost estimation.[30] Be clear about the role of ICE – does the pricing need to be within a certain tolerance of ICE pricing?
- Mandate competitive bidding for subcontracts and key components, even within a QBS framework.[31]
- Protect the owner's off-ramp rights and ensure the ability to use work product upon termination.[32] Ensure the design-builder feels protected in the event the owner takes an off-ramp.
- Specify team continuity requirements and remedies for unauthorized staff changes.[33]
- Clarify risk allocation for owner-furnished information and site conditions.[34]
- Provide for appropriate termination fees or compensation for deferred profit if the project is terminated after Phase 1.[35] Address use of design in such a circumstance.
- Avoid broad performance guarantees and clarify designer liability and insurance requirements.[36]
- Stay current with state and local procurement laws and evolving case law.[37]

VI. Contract and Lean Project Delivery Best Practices

Significantly, ConsensusDocs has recently published a standard contract document that addresses the issues highlighted in this paper. The ConsensusDocs 411 Standard Progressive Design-Build Agreement and General Conditions Between Owner and Design-Builder (Cost of the Work Plus a Fee with a GMP). Information on this document and to request a copy can be found at www.ConsensusDocs.org and here. Because PDB is a collaborative project delivery method that emphasizes qualifications in procurement selection, it is particularly apt in incorporating Lean practices. The Lean Construction Institute has highlighted for implementing Lean on PDB projects here that includes:

- Daily Huddles
- Big Room
- Last Planner System
- Target Value Delivery
- 5S, and more.

VII. Conclusion

Progressive design-build offers a flexible, collaborative, and risk-managed approach to project delivery, particularly suited to complex or evolving projects. However, its unique structure and procurement process create legal and practical challenges that require careful contract drafting, risk allocation, and project management. By understanding the rationale for PDB and anticipating its pitfalls, lawyers can help clients realize the benefits of this innovative delivery method while minimizing exposure to disputes and claims.

References

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[14] ACEC New York, supra note 8.
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[21] Progressive Design Build – The Good, The Bad, and The Ugly, supra note 2.
[22] Id.
[23] Id.

[24] Id.
[25] Id.
[26] Id.
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[31] Id.
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[33] Progressive Design Build – The Good, The Bad, and The Ugly, supra note 2.
[34] Id.
[35] Id.
[36] Id.
[37] Moran, supra note 29.