

SECTION 4-5: DESIGN-BUILD

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4-5-00 POLICY

This section establishes Design-Build (D-B) as the procurement methodology that receives first consideration for all design and construction projects of federally-owned real property assets throughout the Department of Health and Human Services.

Implementation of Design-Build as the preferred project delivery system will ensure that facilities development within the Department honors the Department's value of fiscal responsibility and prioritization of mission critical functions over administrative bureaucracy. The acquisition of design and construction services for federal facilities using Design-Build shall follow the policies and procedures in FAR 36.3. Design-Build is the preferred method for design and construction of facilities owned and operated by HHS.

The Office for Facilities Management and Policy, Assistant Secretary for Administration and Management (OFMP/ASAM) will review any exceptions to this policy as part of the project approval process. (See Section 2-3 HHS Facility Project Approval Agreements.) Exceptions will be granted for projects contracted under P.L.93-638, Indian Self-Determination and Education Act, with tribal entities.

4-5-10 PROCEDURES

ACQUISITION PLANNING.

During planning of project delivery and contract strategy for all projects, OPDIVs shall analyze the appropriateness of the Design-Build methodology. The OPDIV Contracting Officer, in close collaboration with appropriate design and construction professionals, determines during the budgeting and planning stage whether it is feasible and effective to use the Design-Build process. The OPDIVs should base their analyses on a best practice such as the Construction Industry Institute's Project Delivery and Contract Strategy. The OPDIVs shall include the acquisition analysis documentation with the Facility Project Approval Agreement provided to OFMP/ASAM. While D-B procurement can save time once the project is awarded, the D-B process requires more extensive "front-loading" of the project – that is, a more thorough and rigorous programming effort and a more thorough definition of requirements. In the planning stages of the project, the D-B process can be significantly more labor intensive for in-house personnel than the more traditional project delivery methods (e.g. design-bid-build process). Key elements in the success of a D-B project include:

- A. Development and continual update of a thorough acquisition plan.
- B. Developing comprehensive planning and programming documents based on preliminary studies and documents.
- C. Developing a request for proposal with a balance between performance specifications and specific technical requirements, where needed, for the type of facility being built. The level of technical detail

included in the request for proposal will depend upon the complexity of the project and specific OPDIV requirements for construction.

- D. Preparing accurate and necessary planning documents that will become integral to the request for proposal. The project team must secure OPDIV and high-level buy-in of the programming documents ahead of time, rather than making changes after award of the D-B contract.
- E. Preparing realistic budgets to reduce the likelihood of scope reductions once the RFP is advertised.
- F. Developing procedures and project controls to minimize owner-generated changes. Owner generated changes can be particularly problematic during a D-B project.
- G. Assignment of a multi-disciplined technical review board that can ensure during D-B selection evaluations that the proposers have met the requirements of the RFP with sound design and the D-B firm is qualified for the level of work. The Government has the best opportunity for success by securing a D-B contractor with a demonstrated track record and collaborative experience in the type of project being proposed.

Prior to advertising design-build services the OPDIV must ensure that adequate funds are available to complete the design of the project; that the Planning and Programming Documents and HHS Facility Project Approval Agreement documents and statement of work are complete; evaluation criteria is established and the government estimate is complete.

4-5-20 GUIDANCE AND INFORMATION

A. GUIDANCE ON DESIGN-BUILD CONTRACT FORMULATION & PROCUREMENT

FAR 36.3 prescribes only the acquisition method for two-phase Design-Build selection procedures and there is no guidance on the required clauses or contract administration. Design-Build does not waive Federal law or regulations. For example, the 6 percent fee limitation for basic design services applies and the Miller Act requiring bonding applies. Refer to the FAR Matrix for the appropriate provisions and clause under both A/E and construction contracts. It is recommended that the provisions and clauses be written in full text.

Design-Build can be accomplished through various procurement methods. This is not intended to be an all-inclusive list, nor does HHS endorse a preference, but provides the following information on the most common methods.

1. “Best Value” is a selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations. Qualitative can be further subdivided as to technical design and/or management plan. A qualification based selection process can be used in Phase One to determine the competitive range. Those firms who are the most qualified are invited to submit a proposal in response to the Phase Two RFP.
2. “Equivalent Design/Low Bid” is a form of best value selection in which qualitative proposals are followed by a critique rather than scoring. Price envelopes remained sealed. Each offeror receives the critique of its proposal and makes design changes and corresponding price amendment. Revised designs are evaluated for compliance, and then price envelopes, both original and amended, are opened. Award is based on lowest price because the proposal creates relative equivalency of designs.
3. “Fixed Price/Best Design” is a form best value selection in which the contract price is established by the Government and stated in the RFP. Design proposals and management plans are evaluated and scored, with award going to the team offering the best qualitative proposal for the established price.

Exhibit X4-5-A provides additional guidance to the OPDIVS in developing a Two-Phase Design-Build Selection.

B. REQUIREMENT TO USE DESIGN FIRMS LISTED IN DESIGN-BUILDER'S PROPOSAL

One of the significant qualitative considerations when evaluating a Design-Builder's proposal (in response to the government's RFP) is the quality of proposed design professionals on the team. The RFP should specify that the Design-Builder must retain all of the design professional firms listed in its proposal, for the entire period of the contract, for the duties and responsibilities assigned in the same document, unless specifically authorized otherwise by the Government. See exhibit X4-5-B for a Sample Design-Build Qualifications Questionnaire and X4-5-C for Sample Selection Criteria.

C. DESIGN BUILD CONTRACT ORDER OF PRECEDENCE AND CLAUSES

Do not use the standard clause "Order of Precedence-Uniform Contract Format" (FAR 52.215-8). This standard clause puts the order of precedence of the proposal above the scope of work when there are inconsistencies or conflicts between the two. In design-build construction, the RFP is the minimum standard except when the offeror's best value proposal exceeds the minimum RFP requirements, known as betterment. In this case, the betterment becomes the new minimum standard. The recommended language for this clause is:

Design-Build Contract – Order of Precedence

- (a) The contract includes the standard contract clauses and schedules current at the time of the award. It also entails: (1) the solicitation in its entirety, including all drawings, cuts and illustrations, and any amendments during proposal evaluation and selection, and (2) the successful Offeror's accepted proposal. The contract constitutes and defines the entire agreement between the Contractor and the Government. No documentation shall be omitted which in any way bears upon the terms of that agreement.*
- (b) In the event of conflict or inconsistency between any of the provisions of the various portions of this contract, precedence shall be given in the following order:*
 - (1) Betterments: Any portions of the Offeror's proposal, which both meet and exceed the provisions of the solicitation.*
 - (2) The provisions of the solicitations.*
 - (3) All other provisions of the accepted proposal.*
 - (4) Any design products, including but not limited to plans, specifications, engineering studies and analyses, shop drawings, equipment installation drawings, etc. These are deliverables under the contract and are not part of the contract itself. Design products must conform to all provisions of the contract, in order of precedence herein.*

(End of Clause)

4-5-30 REPORTING REQUIREMENTS

BID REPORT FOR CONSTRUCTION CONTRACTS

The OPDIV shall submit a bid report to the Office for Facilities Management and Policy (OFMP) at the completion of the selection and evaluation process. A bid report is required only on those projects requiring HQ approval per the FPAA policy. The report is for OFMP information only. The Bid Report may be a copy of the selection report or summary of the significant technical and cost information

contained therein. A format similar to the sample bid report form provided in Section 4-6, as Exhibit X4-6-D is acceptable.

GENERAL DESIGN-BUILD GUIDANCE AND CONSIDERATIONS

The Contracting Officer will determine if two-phase design-build selection procedures are appropriate to use in accordance with FAR 36.301

A. PHASE ONE SELECTION PROCEDURES

Proposals or qualifications will be evaluated in Phase One to determine which offerors will be invited to submit proposals for Phase Two. The Phase One request for qualifications RFQ is a formal request for the necessary and desirable qualifications from potential Design-Build contractors wishing to be considered for the competitive proposal preparation phase of the selection process (See Facilities Program Manual Exhibit X4-5-B, Sample Design-Build Qualifications Questionnaire.). The Design-Builders who intend to submit qualification statements in response to the Government's RFQ shall be informed in advance of the requirements of request for proposal (RFP). Alternatively, the Government may publish both the RFQ and the RFP as a single, comprehensive document. Phase One evaluation factors shall be in accordance with FAR 36.301-1(a)(2). In addition the following evaluation factors are recommended:

1. Minimum level of bonding capacity and proof thereof,
2. Minimum insurance requirements,
3. Required license, registration and/or tax status of Design-Builder and team members, and
4. Financial strength and organizational resources.

After evaluating phase-one proposals, the Evaluation Board shall recommend to the Contracting Officer the most highly qualified offerors (not to exceed the maximum number specified in the solicitation). Only those offerors will be invited to submit phase-two proposals. Due to the cost involved in preparing a design-build proposal, the Evaluation Board should be certain that any firm on the short-list is considered competitive for selection in that they would be capable of completing the project successfully.

B. PHASE TWO REQUESTS FOR PROPOSAL EVALUATION PROCEDURES

Phase Two of the solicitation shall require submission of technical and price proposals, which shall be evaluated separately, in accordance with FAR Part 15. Beyond the mandatory requirements of the program and performance specifications, the proposal selection criteria are arguably the most critically examined section in the RFP. The selection criteria should be derived from and support the Government's stated objectives for the project. The criteria are the basis for determining which contractor proposals are responsive. Therefore, it is very important for the Government to do a good job of defining the essential criteria and to communicate it clearly in the RFP. (See Facilities Program Manual Exhibit X4-5-C, Sample Phase Two Design-Build Proposal Selection Criteria.) The clarity with which the government understands and communicates the project requirements will be significant in the quality of proposals received and ultimately in the quality of the product delivered.

1. Communications: It is in the Government's best interest to maintain a high level of competition between the offerors. To accomplish this, the offerors must know that they have an equal opportunity to prepare a winning Design-Build proposal. Critical to maintaining equal opportunity for all offerors is the establishment of an unbiased method of communication between the offerors and the Government. Techniques and procedures that improve Government/Offeror communication and create an atmosphere of impartiality should be implemented.
2. Design-Build Planning and Technical Requirements: Development of a comprehensive program of facility requirements and performance specifications that anticipates and answers the offerors

questions is imperative. In-person briefings for Design-Build teams can be held. The Government's technical and contracting staff and others that are familiar with the project should be utilized for this purpose. The Government must document and distribute the outcomes of these meetings. The Contracting Officer should allow only written questions outside the Q&A sessions, and provide written answers to all offerors simultaneously. If necessary, the Contracting Officer may issue addenda to the RFP as a result of the questions throughout the process. Contact between the proposers and the Government should carefully follow the process outlined in the RFP. The Contracting Officer should set a cutoff date for questions and a deadline for last addenda to the RFP, typically no less than two weeks prior to the submission deadline.

3. Discussions with Offerors: Members of the Source Selection Board may, with approval of the Contracting Officer, submit written questions to each offeror, which are requests for clarification of that offeror's proposal. The offeror provides a written response to those questions.
4. Presentations: For Design-Build competitions in which design criteria are the predominant factor in selection, the offeror may be given an opportunity to present and defend their proposal before the Evaluation Board. The following procedures are recommended:
 - a. The Contracting Officer determines the order of presentation. The Government should determine the dates, duration, and venue well in advance.
 - b. Only members and employees of the offeror's team may participate in the presentation (no professional presenters).
 - c. Members of competing offeror's teams are excluded from the audience. The Government will determine in advance what presentation materials, if any may be used in the presentations. The offeror should not modify or add to their proposal during their in-person presentations. This restriction includes technical information not contained in their initial submittal, unless it is in response to a question from the Evaluation Board.
5. Other Information at the Option of the Offeror: It may be appropriate to allow the offerors to submit additional technical drawings, specifications, calculations and special reports. This additional procurement sensitive information typically has to be prepared by the Design-Build team in order to arrive at a price proposal. This additional information can serve to protect the interests of both parties in the Design-Build contract by more precisely describing what is offered in the response to the RFP. This additional procurement sensitive information should be provided only to the Evaluation Board, and kept separate from the specified design display materials.
6. Unsolicited Alternates: The Design-Build selection process is based strictly on the offeror's response to the RFP and its requirements. Therefore, the Evaluation Board should not consider unsolicited alternates.
7. Disqualification: If significant and intentional breaches of the RFP procedures occur, the Contracting Officer will investigate and make corrective actions, including offeror disqualification, if warranted. If unintentional or unlisted discrepancies appear in the proposal, the Contracting Officer will require the offeror to certify that the proposal will meet every requirement of the RFP, or disqualify the proposal. The basis of disqualification at each phase of the selection process should be described in the RFP.

C. DESIGN-BUILD MANAGEMENT PROCEDURES

1. Contract Award - After the proposals have been evaluated, an award will be made with reasonable promptness to the Offeror whose proposal is the "Best Value" and most advantageous to the Government, considering price and the price-related factors included in the RFP, as well as the other evaluation factors which may include past performance, safety history, available resources, schedule, etc.

2. Design-Build Contract Administration - Each OPDIV shall decide the appropriate key staff for any project team depending on complexity, cost, type of construction, etc. Key team members that may be involved in construction projects are: Contracting Officer, Project Officer (COTR), Commissioning Agent (if required see Section 3-11) and the Design-Build Contractor.
 - a. Monitoring Schedule, Scope, and Cost: In addition to visual inspections of the work and materials, it would be good practice for project officers to measure performance of design-build projects using management tools that evaluate progress with respect to schedule, scope and cost. By integrating the resultant data, useful information is derived which can be used to determine the percentage of work complete for payment purposes or to identify schedule problems that require corrective action on the part of the contractor.
 - b. Submittals: The need for submittals shall be determined by the OPDIVs, as required by the contract. Typically, submittals take one or more of the following forms: architectural and engineering plans, technical specifications, shop drawings, diagrams, catalog submittals, color charts, samples, mock-ups, safety plans, testing plans, test results, disposal plans, production plant visits, as-built drawings, and other associated information. Substitutions may be allowed only at the discretion of the Contracting Officer. The OPDIVs shall define the scope, process, elements, and documentation of the submittal approval activity.
 - c. Contractor Payments: Contractor progress, or partial, payments are usually made periodically (monthly) during the progress of the Project. The amount of payment is usually based upon the contract amount, an approved schedule of values, an approved progress schedule, project officer verification of the value of work-in-place and stored materials, satisfactory progress on the approved progress schedule, and project officer recommendation to the Contracting Officer for payment. From time to time, payments may be reduced for cause, as outlined in the FAR. Approval authority for progress payments rests with the Contracting Officer.
 - d. Final Payment: Contractor final payment is made at the end of the Project when all provisions and requirements of the contract have been satisfactorily accomplished by the contractor. The project officer addresses construction issues and reports any deficiencies to the Contracting Officer. Approval authority of final payment rests with the Contracting Officer.
3. Acceptance: The Contracting Officer has sole authority to grant final acceptance of any facility or portion thereof. Generally, acceptance infers approval of all work, including satisfactory correction of all the items on the deficiencies and omissions list. Acceptance of the contract work is final and conclusive, subject to certain contractual conditions such as warranties, guarantees, latent defects, etc. For this reason, a facility should not be accepted without a clear delineation in writing of any conditions or exceptions to the acceptance. Acceptance should not be granted unless all close-out items have been completed, such as O&M Manuals, as-built drawings, list of systems and equipment, attic stock, tools, maintenance parts, etc., and that all specified operator/maintenance personnel training has been provided.
 - a. Warranties: The OPDIVs responsible for the Project shall appoint appropriate staff to assist the Contracting Officer in the management of the technical portion of the warranty process for the completed Project. The OPDIVs shall determine the period of time that the project officer remains involved with warranty management, before transferring the responsibility to the organization providing operations and maintenance functions for the facility.

- b. Closeout Documents: All documents required by the contract including, but not limited to, Guarantees and Warranties, Commissioning Reports, Record Drawings, Operation and Maintenance Manuals, and Training Documents, shall be provided as specified prior to contract closeout. Each OPDIV shall prepare a format to assure that all contracts are closed out and all funds are disbursed or de-obligated from the project.
- c. Training: Training of Operations and Maintenance Staff to operate and maintain the new facility and sophisticated building systems and equipment is important to the activation of the facility. Provisions for adequate operation and maintenance training should be provided for in the specifications or in the general provision of the contract. The contract should require the contractor to provide a detailed training plan based on actual submitted manufacturer's recommendations for review and approval by the COTR. Provisions for training the operators/ users in the care and use of equipment should also be included in the contract. Training should occur prior to acceptance of the work by the Government.

D. RECOMMENDED CLAUSES

1. Proposed Betterments: This clause notes that all betterments offered in the proposal become a requirement of the awarded contract. Betterment is defined as any component, system, or any other material aspect of the proposal that exceeds the minimum requirements stated in the Request for Proposal. This includes all proposed betterments listed by the offeror in its proposal and all Government-identified betterments. The Government-identified betterments are provided in a list of accepted project betterments by the Evaluation Board and are made a part of the contract.
2. Key Personnel: Subcontractors, and Outside Associates of Consultants – Contract Clause 52.244-4 is modified by adding the term “Key Personnel” to the title. This prevents the contractor from switching key personnel and subcontractors after award. This can only be done with written permission from the Government’s Contracting Officer.
3. Responsibility of the Contractor for Design: This is modified from FAR Clause 52.236-0023 to fit the design-build process. Instead of using the term Architect-Engineer Contractor, the clause references “Contractor.” The clause also requires the contractor to correct construction errors resulting from faulty design.
4. Warranty of Construction Work: The Contracting Officer may want to delete references in the typical Warranty of Construction clause by deleting references to “design furnished.” This wording limits the warranty for design services to one year.
5. Sequence of Design/Construction: Include an appropriate clause that either allows or disallows fast track construction prior to design completion.
6. Constructor’s Role during Design: This clause is especially crucial in D-B contracts. It emphasizes that the contractor’s construction management key personnel must be actively involved during the design process to effectively integrate the design and construction requirements of the contract.
7. Government Oversight during Design and Construction: Government oversight of the design-build process is required for the success of the project. Treating the process as a turnkey operation may lead to the owner receiving a product unlike what they expect or require. The Government representatives must refrain from taking on any approval responsibility that is within the contractor’s jurisdiction including shop drawings, submittals, etc. However, the facility users and the technical and contractual representatives should stay abreast of these items and provide recommendations and review comments when warranted. The Government’s main function

during the design and construction is to ensure the D-B contractor meets the requirements of the request for proposal and the contractor's proposal, both of which are part of the formal contract.

8. Project Coordination: Includes provisions to submit design and construction documents for approval by the Government at various stages, and defines the stages and the level of documentation required. When accepted and approved by the Government for progress, design development and construction documents (plans and specifications) produced by the Design-Builder after award become part of the contract documents. However, the Government's concurrence with these documents does not relieve the Design-Builder of the obligation to meet the requirements of the RFP and its proposal, unless specifically indicated otherwise by the Government on an item-by-item basis.
9. Inspections and Interpretations: The Design-Builder's architect/engineer should inspect the work periodically and reject work that does not comply with the construction documents prepared by and/or approved by the A/E. The Design-Builder's architect/engineer should make interpretations of its construction documents when requested to do so by the Government, which interpretations should be reasonably inferred from those documents. The Design-Builder's architect/engineer should be reasonably available to the Government for such interpretations and other information related to the design and construction documents.
10. Review of Shop Drawings and Submittals: The Design-Builder's architect/engineer should review and approve all shop drawings, submittals, samples, etc. for compliance with the construction documents and the intent of the RFP, prior to their submission to the Government. (The Government does not approve, but acknowledges progress represented by the submissions.)

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9. Proposed Subcontracts for Special Professional Design Services			
Type of Service _____ Name of Firm _____ Address _____	Type of Service _____ Name of Firm _____ Address _____	Type of Service _____ Name of Firm _____ Address _____	Type of Service _____ Name of Firm _____ Address _____
Type of Service _____ Name of Firm _____ Address _____	Type of Service _____ Name of Firm _____ Address _____	Type of Service _____ Name of Firm _____ Address _____	Type of Service _____ Name of Firm _____ Address _____
10. Proposed Major Subcontractor Team Members for Construction			
Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____	Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____
Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____	Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____
Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____	Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____
Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____	Type of Work _____ Name of Firm _____ Address _____	Related Project Examples: _____ _____

11. Insert\Attach Organizational Chart

12. Brief Resume of Key Personnel, Specialist, and Individual Consultant for this Project	
a. Name & Title	
b. Project Assignment	
c. Name of Firm with which Associated	
d. Years Experience	
e. Education/Training	
f. Registration/License	
g. Experience and Qualifications Relevant to the Proposed Project	

13. Work by Firm or Joint Venture Members which best illustrate current qualifications relevant to this project. (List no more than 10 projects)

a. Project Name and Location	b. Nature of Firms Responsibility	c. Completion Date	d. Estimated Cost (in thousands)	e. Project Owners Name & Address and Contacts Name & Phone Number
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Project Description and Magnitude

14. All work by firm or joint-venture members currently being performed directly for federal agencies					
a. Project name and Location	b. Nature of Firm's Responsibility	c. Agency Name & Address	d. Percent Complete	e. Estimated cost (In Thousands)	
				Entire Project	Work for which firm is responsible

15. Narrative Response to Specialized Experience and Technical Competence

16. Narrative Response to: Capability to accomplish the work in the time required.

17. Narrative Response to: Location in the general geographical area of the project and knowledge of the locality of the project.

18. Narrative Response to: Quality of technical and managerial organization proposed.

19. Narrative Response to: Design approach or philosophy.

Empty response area for narrative response to design approach or philosophy.

20. Narrative Response to: Construction management plan, including time, cost and quality control.

21. Narrative Response to: Financial strength and stability of the offeror.

a. Name & Address of Bonding Company

b. Bonding Limit

c. Current Bonding Capacity

22. Narrative Response to: Past performance of the offeror's team (including the architect-engineer and construction members) Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules

23. Narrative Response to: Minority Participation.

24. Narrative Response to: Other appropriate factors (excluding cost or price related factors, which are not permitted in Phase One.

25. The Forgoing is a Statement of Facts:

Date: _____

Signature: _____

Typed Name and Title: _____

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SAMPLE PHASE TWO DESIGN-BUILD PROPOSAL SELECTION CRITERIA

A. Building Project

1. Architectural Image & Character
2. Functional Efficiency & Flexibility
3. Quality of Materials and Systems
4. Quantity of Usable Area
5. Access
6. Safety & Security
7. Energy Conservation
8. Operation & Maintenance Cost
9. Cost/Value Comparison
10. Completion Schedule

Alternate for Engineering Project: Technical Innovation and Environmental Acceptability of Engineered Solution. Criteria 2, 3, 5, 6, 7, 8, 9, and 10 above apply.