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**DESIGN-BUILD**

**By**

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## ***I. INTRODUCTION***

The alternative of constructing school facilities on the basis of a negotiated contract including design and construction has been under consideration by the Legislature for the past several years. AB No. 1402 passed in the 2001 Legislative Session makes the “Design-Build” project delivery process available to school districts when the contract amount exceeds \$10,000,000. While the procedures seem cumbersome, they provide protection for a school district that might have limited staff and that may be at a disadvantage in negotiating an arms length, multi-million dollar, construction contract.

Such legislation was previously enacted subject to adoption of implementing regulations by the State Allocation Board (“SAB”). The proposed SAB Regulations were drafted by a Subcommittee of the SAB Implementation Committee, of which I was a participant. These were recommended for approval by the SAB Implementation Committee but never adopted by the SAB. Subsequent legislative proposals were passed but vetoed. In the 2001 Legislative Session, two bills were passed and will presumably become law. AB 1543 pertains to pilot projects in the Los Angeles Unified School District. AB 1402 is of general applicability as to projects of \$10,000,000 as herein discussed.

Design-Build, by way of summary, is a negotiated, fixed price contract executed without existing plans and drawings (“Contract Documents”). The contractor subsequently causes a design to be completed and the Contract Documents to be prepared subject to an agreed fixed price. Today, Design-Build is being marketed to school districts as a way to deliver projects quickly and for a represented reasonable price. This may be the case. In one recent instance, however, the project was not implemented and partially prepared plans were abandoned.

The Design-Build industry in the year 2001, has been marketing the Design-Build process to school districts pending enactment of AB 1402. After satisfying all the requirements of AB 1402, a single contract is awarded to a “Design-Build” entity to conduct both design and construction. Prior to enactment of AB 1402, school districts implemented procedures similar to Design-Build on a limited number of projects. This was done on a “Lease/Lease Back” basis in which our Firm has participated. The marketing at this time on the use of Design-Build suggests it can

produce savings to school districts. On a quality to quality basis, no results to that effect are known. However, earlier delivery from the start of design to completion has occurred. Design-Build may or may not eliminate project delays and the need for more change orders than in a Design-Bid-Build project, but early use of an experienced Construction Manager on a multi-prime basis may produce the same results with more protection for the economic interests of the school district.<sup>1</sup>

A great deal of construction in the private sector is accomplished on a Design-Build basis. In the private sector, the potential for revenue and profit attributable to early completion, and use, may justify a greater degree of risk or extra cost and uncertainty, if any, arising from utilization of the Design-Build concept. The private sector, in most instances has the staff and ability to evaluate these relative benefits and risks. Moreover, a private company may make a determination whether to risk private capital to generate early or greater profit, to proceed with construction on a Design-Build basis, and to supervise the construction to insure compliance with the contract documents, which are prepared as the project is constructed.

AB 1402 suggests that Design-Build limits the risk to the school district. This may or may not be true in all instances. This would depend on the agreement reached and the adequacy of all documentation. AB 1402 appears to be structured to require the school district to publicly identify, quantify, and consider such benefits and risks, and to retain competent design professional services which should include an attorney that does not represent contractors, architects or Construction Managers. The difference from the private sector's profit interests is the school district's fiduciary relationship to local parents and taxpayers relative to prudent expenditure of public funds. An experienced school district staff with adequate public exposure to the process, professional representation, including competent independent legal and architectural services is a necessity. In the past, in most instances, utilizing the Design-Build process has meant foregoing State Funding or future reimbursement. We do not believe that to be true provided care is taken to meet specified legal requirements. Also, in some such instances, the fixed Design-Build price has been

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<sup>1</sup>The current law requires that school districts award contracts over fifteen thousand dollars (\$15,000.00) to the lowest responsible bidder. Moreover, current law also allows contracts for architectural services to be awarded on the basis of demonstrated competence and professional qualifications to be performed at a fair and reasonable price after competitive proposals are obtained.

exceeded due to misunderstandings arising from a lack of specificity in the Contract Documents. Differences in construction quality and other expectations have also resulted in some instances. Assuming AB 1402 becomes law, school board members may soon be experiencing aggressive marketing of the Design-Build process. What is important is how the Design-Build process is implemented and that the requirements of AB 1402 are satisfied.

## ***II. AB 1402 DESIGN-BUILD PROVISIONS***

### **A. General.**

1. AB 1402 may be utilized by school districts only when the design and construction of the contract for the proposed school facility exceeds \$10,000,000.
2. The intent of AB 1402 is expressed to shift the risk of cost containment and project completion to the “Design-Build entity.” What risk, if any, is shifted depends on the specificity of all documentation in any such transaction.
3. The expressed intent of AB 1402 purports to be to allow State Funding to occur early on in a pre-emptive “one shot” basis for design, construction and equipment to the school district concurrent with the preparation of performance criteria and concept drawing. This would contrast with non-“Financial Hardship” school districts not being able to obtain funding until plans have been prepared and approved by the Division of the State Architect, California Department of Education (“CDE”) as well as the Department of Toxic Substances Control (“DTSC”). How SAB Regulations will deal with this issue, even if permissible under Senate Bill 50, is a significant question. Hence, full funding of the “Grant Amount” for land as well as construction could possibly occur without knowing whether toxic substances exist on the school site or not.

This proviso appears to conflict with Education Code provisions which provide that no State Funding can be provided unless the DTSC, and presumably CDE, requirements are satisfied.

4. The Superintendent of Public Instruction (“SPI”) is required to development guidelines (“SPI Guidelines”) for Design-Build projects on or before July 1, 2002. Possibly, the SPI Guidelines will address only conflict with DTSC and CDE approval being necessary before State Funding can be provided including the public review as well as CEQA requirements previously existing and which are being amended by AB 972 enacted in the 2001 Legislation Session.

B. Preliminary Procedures. Prior to deciding to implement the Design-Build process pursuant to the provisions of AB 1402, a school district must follow the procedure specified in AB 1402 to determine if pursuing a Design-Build delivery process of a proposed school facility is in the best interests of the school district. These requirements are as follows:

1. The governing board shall consider using Design-Build vs. Design Competitive Bidding-Build at a public meeting. No specific publication notice is required other than “Brown Act” requirements for posting of an agenda including a description of the subject matter to be considered.
2. At such meeting, the governing board shall consider the SPI Guidelines referred to above regarding Design-Build construction of a school facility. Hence, no such proceeding may be accomplished to consider implementing the Design-Build process until the SPI Guidelines exist. At least four (4) to six (6) months is a reasonable estimate of such period of time.
3. The governing board, as part of such deliberations, must evaluate the proposed project on a Design-Bid-Build basis as well as on a general contractor or multi-prime contract basis.

4. The governing board, prior to deciding to pursue the Design-Build process, must determine that such a decision is in the “Best Interests” of the school district. “Best Interests” is not a defining term but presumably will be defined in the SPI Guidelines.
5. In addition to a determination of “Best Interests” of the school district being served by pursuing the Design-Build process, the governing board must make findings that the use of the Design-Build process will accomplish one of the following:
  - A. Reduce comparable project costs;
  - B. Expedite completion; and
  - C. Provide features not achievable through the Design-Bid-Build process, either on the basis of using a single contractor or with several multi-prime contracts with a Construction Manager.

These findings must be based on facts submitted to and considered by the governing board.

C. Implementation of Design-Build Process.

1. If the school district makes such determination, it must engage a design professional licensed or registered in the State of California relative to formulating an adequate description of the project relative to requesting proposals from “Design-Build” entities. The description of what is necessary for school districts to prepare relative to a request for proposals (“RFP”) from Design-Build entities seems to be somewhat inconsistent but includes:
  - a. Scope of project that may include, but is not limited to:
    1. Size of building;

2. Type of buildings; and
    3. Describe design character of buildings and site
  - b. Performance specifications covering the:
    1. Quality of buildings;
    2. Quality of equipment;
    3. Quality of workmanship;
    4. Preliminary plans;
    5. Building layouts; and
    6. Other information to describe adequately the school needs.
2. It may be that AB 1402 statutorily requires only the performance specifications and any preliminary plans to be prepared by a licensed and registered design professional. It would seem desirable, required or not, to have all of the foregoing prepared by a licensed and registered design professional.
3. Each RFP shall do all the following:
- a. Identity as to the proposed project:
    1. Basic scope and needs;
    2. Expected cost range; and
    3. Other information deemed necessary to inform interested parties.
  - b. Invite interested parties to submit competitive sealed bids.
  - c. Identify and describe the following:
    1. Significant factors that school district expects to reasonably consider in evaluating proposals including cost or price and all non-price related factors.

2. The methodology and rating or weighting scheme to be used in evaluating competitive proposals and whether proposals will be rated according to numeric or qualitative factors.
  3. The relative importance of weight assigned to each factor identified in the RFP.
  4. In addition to the above, the governing board shall specifically disclose whether all evaluation factors other than cost or price when combined on any of the following:
    - (i) significantly more importance than cost or price;
    - (ii) approximately equal in importance to cost or price; and
    - (iii) significantly less than important the cost or price.
- d. If the school district wishes to reserve the right to discuss or negotiate with responsive bidders, it shall so specify in the RFP. Also, in such instances, the school district is required to publish separately or incorporate in the RFP rules and procedures to be followed to ensure that any discussions or negotiations are conducted in a fair and impartial manner.
- e. An architect or engineer that is a party to a Design-Build entity and may perform the “Field Act” related to the DSA services described in Education Code Section 17302.

- f. A school district may establish a procedure to pre-qualify Design-Build entities utilizing a standard “Questionnaire” of the Department of Industrial Relations. The contents of the proposed “Questionnaire” is described at length in AB 1402.
- g. The school district shall establish a procedure for final selection.
- h. Selection shall be based on the following criteria:
  - 1. A Lump Sum Bid by a pre-qualified Design-Build entity which is the lowest responsible bid;
  - 2. Performance and other criteria set forth in the RFP including:
    - (i) Design approach
    - (ii) Life cycle costs
    - (iii) Project features
    - (iv) Project functions
  - 3. Once evaluation is completed all bidders shall be ranked from most advantages to least advantageous to the school district.

### ***III. MISCELLANEOUS PROVISIONS***

A. Any architectural or engineering firm or individual utilized by the school district in the development of criteria or preparation of the RFP shall not be a participant in a Design-Build entity on such project.

B. The award of the contract for a Design-Build project may be made to a responsible bidder that is determined to be the “Best Value” (see statutory definition of “Best Value”) to the school district.

C. Evaluation and responses to the RFP is to be accomplished and scored solely on the basis utilizing the factors found in the source selection procedures, which are identified in the RFP as issued at the outset by the school district.

D. As to the foregoing, the following minimum factors shall collectively represent at least fifty percent (50% ) of the total rate or consideration given to all criteria factors:

1. Technical Expertise
2. Life cycle costs over fifteen (15) years or more
3. Skilled labor force availability
4. Acceptable safety records

E. The governing board of the school district is requested to issue a written decision supporting its award of the contract for the Design-Build project. In essence, the documents states in detail the basis of its decision. In addition, the contract file must be sufficient to satisfy any external audit. This provision and requirement does not seem to be easily interpretable.

F. The school district must publicly announce its decision including:

1. Identify the successful Design-Build entity.
2. The winning price proposed.
3. Overall combined ranking of such Design-Build entity.
4. Rating of all proposals received for the criteria specified by the school district and the price proposed by each other's response received to the RFP issued by the school district.
5. Summary of the school district's rationale towards decision with regard to award of the contract to the successful Design-Build entity.

G. It appears that only specified subcontractors may be used and that the bids for subcontractors must be solicited with reasonable prior knowledge.

H. Substitution of subcontractors is permitted only pursuant to the provisions of Public Contract Code Section 4100.

I. As to retention of payments to subcontractors it may not be greater than the amount specified in the contract between the school district and the Design-Build entity.

J. There are provisions pursuant to existing law that securities may be substituted for any retention.

K. A school district utilizing the Design-Build process is encouraged by statute to utilize an architect or structural engineer throughout the course of accomplishing any Design-Build project. The source of such services must be licensed and registered in the State of California.

L. The Inspector of Record (“IOR”) must be independent of the Design-Build entity.

M. School districts utilizing the Design-Build process upon completion of the Design-Build project must file a report with the State setting forth the following:

1. Type of firm.
2. Gross square footage.
3. Design-Build entity that was awarded the contract.
4. Estimated and actual length of time to accomplish the Design-Build project.
5. Estimated and actual cost of Design-Build entity.
6. Review of the results regarding the use of the Design-Build process versus the Design-Bid-Build process for accomplishing the project.
7. Review of the findings made by the school district at the time it decided to utilize the Design-Build process versus a post-

completion review of whether or not such goals and objectives were accomplished.

8. Labor Code violations.

It should be noted that AB 1402 has a “sunset date” of January 1, 2007. Based on the implementation thereof and reports filed as to the Design-Build project, presumably the provisions of AB 1402 will be extended.

#### ***IV. EXISTING STATUTORY AUTHORITY***

Lease/Lease Back - Education Code Section 17406. This provision, formerly Section 39305 of the Education Code, assumes that the school district owns the site, has prepared and approved the plans for the proposed project, and, on a negotiated basis, leases out its site and leases back a completed facility. In one prior instance, Section 17406 was used as authority for a project for which no plans had been prepared. In such proposal, the lease term was equal to the construction period, with rent based on value of work performed by the contractor. This proposed contract was rejected by the school district, and restructured. The revised lease term was based on the facility’s reasonable useful life. Also, semi-annual rental payments were specified, relating to estimated rental value. A school district utilizing the Lease/Lease Back concept should consider a validating action filed in the local Superior Court to protect the school district’s interests, particularly when lease-revenue financing is the source of construction funds. Interim financing can be provided if the contractor requires progress payments. Other financing alternatives may also be available.

#### ***IV. CONCLUSIONS AS TO AB 1402***

In many instances the difficulties experienced by a school district in regard to site acquisition, design and construction of school facilities relate to a number of factors. These include lack of involvement of the school district in conceptually establishing the project. Leaving such function largely to the architect does not always work out. The school district’s goals and objectives should first be established and made clearly known to the architect selected in accordance with

applicable legal requirements both under SB 50 as well as Proposition 35 enacted in November of 2000. The experience and expertise of current staff of the architectural firm involved is extremely important and staff availability throughout the project should be addressed in the contract between the school district and its architect. Moreover, involvement of the school district in the design process is an important factor. Outside, independent review of design as to construction alternatives, constructability, value, engineering and cost containment is also important.

The use of multi-prime contracts and an experienced Construction Manager is becoming more frequent, as now doubt will be there as to Lease/Lease Back projects and Design-Build projects. These alternatives, in some instances, have provided the benefits that may be generated by utilizing the Design-Build process without complying with the detailed procedures and documentation set forth in AB 1402. While the Construction Manager must be selected subsequent to receiving proposals by reason of the requirements enacted by Proposition 35, the selection and contract terms is at the discretion of the school district. This allows the school district to select whichever Construction Manager it desires and who in essence provides all the services of a general contractor. It appears clear from the provisions of AB 1402 that an architect or design professional is necessary in the beginning when soliciting proposals and throughout the entire Design-Build construction process. It may be that using an architect who has a fiduciary relationship to the school district in concert with outside independent review as to construction alternatives and cost containment together with multi-prime bids including a Construction Manager chosen and selected by the school district may provide the same benefits of the Design-Build process without the problems that appear to be a potential in regard to the selection process specified in AB 1402.

If the Design-Build process is utilized, but the selection of the Design-Build Entity is based on the lowest responsible competitive bid, which is an alternative under AB 1402, it seems that, in large part, the school district is in the same position as though it was using multi-prime contracts and a Construction Manager.

In the interim period, the SPI Guidelines will be formulated before July 1, 2002. Hence, there will be an adequate period of time to thoroughly review the process specified in AB 1402. It is a very detailed process that must be followed by the school districts. Presumably, this detailed process was a key to getting the

legislation passed and presumably signed by the Governor to become effective on January 1, 2002. As noted, these procedures appear to have been included to balance the possibly greater knowledge and expertise of the Design-Build entity and also to address the fiduciary obligation as to the expenditure of public funds, while still treating all who respond to any such RFP in a fair manner.

In closing, all means should be considered, including Design-Build, to accomplish construction of public schools at the least cost while seeking to assure the best possible design and quality of construction that will keep future operation costs to a minimum. The Design-Build concept set forth in AB 1402 appears to be an alternative to be considered as a means of seeking to accomplish those objectives.

Should you have any questions or comments in regard to any of the matters contained herein or would like any assistance in regard to the Design-Build process, please do not hesitate to contact Alex Bowie ([abowie@bawg.com](mailto:abowie@bawg.com)) at (800) 649-0997.

The applicability of the legal matters discussed may differ substantially in individual situations. The foregoing information has been prepared by Bowie, Arneson, Wiles & Giannone as an overview of the subjects discussed and should not be construed as individual legal advice.