Progressive Design-Build: What It Is and How It Works for Community Colleges

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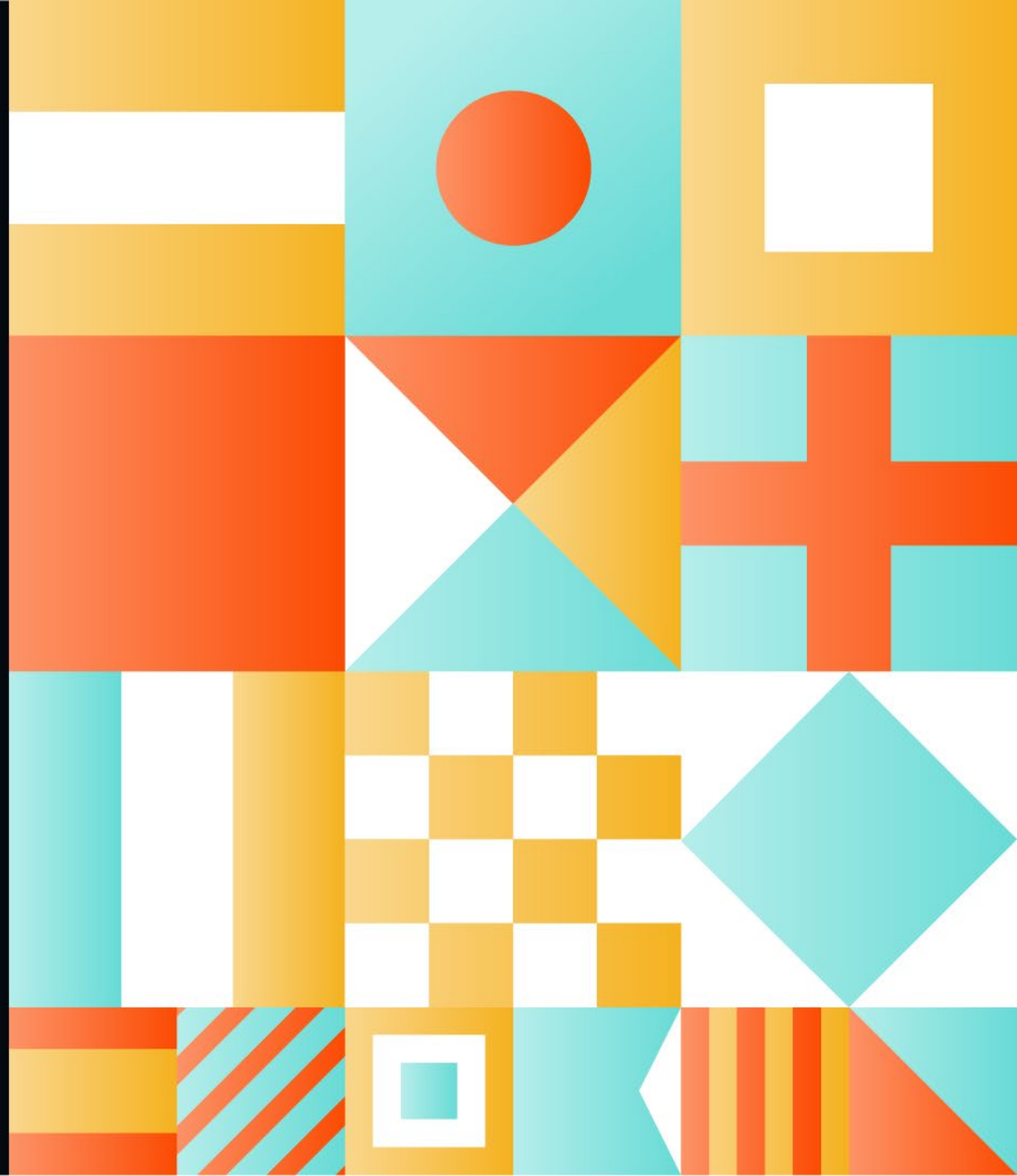

Original Design-Build Statutes For CCDs Were Enacted in 2003

- California Community Colleges were authorized to use Design-Build (DB) as an alternative to competitive bid for public works construction in 2003 (AB 1000)
  - Enacted as a pilot program for 3 CCDs
    - Los Angeles CCD
    - San Jose-Evergreen CCD
    - San Mateo CCD
  - Required $10,000,000 project value threshold
  - Education Code sections 81700-81709
- In 2008, the threshold was lowered to $2,500,000 (SB 614)
- The CCD DB statutes will sunset in 2030 unless extended

What is Design-Bid-Build?

- Standard public works project delivery is “Design-Bid-Build”.
  - Design
    - CCD hires an architect to design a project
      - Plans are approved by the Division of State Architect (DSA)
      - May take a year or more to design a project and get DSA approval
    - Some CCDs hire a construction management firm to manage the construction and sometimes to assist in reviewing the design
  - Bid
    - CCD advertises and solicits bids from contractors, who submit “hard” bid amounts and identify in their bid all subcontractors that will perform work in excess of one-half of one percent of the total bid amount
    - CCD awards the contract to the lowest responsible bidder who submits a responsive bid
  - Build
    - Contractor and subcontractors construct the project for the bid amount, subject to change orders that increase the contract amount due to “extra work” or unforeseen conditions
    - Construction management firm and CCD facilities/purchasing staff manage the construction

What is Design-Build?

- Design-Build is an alternate to Design-Bid-Build
- Under Design-Build, the Contractor partners with an Architect as a single entity to design and build the project
  - Can be a joint venture, but usually the Architect is a subconsultant to the contractor
- Traditional Design-Build
  - Owner hires an architect to develop criteria “bridging” documents which describe the scope and performance criteria of the project, but the project is not fully designed by this architect – the full design will be done by the design-build entity
  - Owner issues a Request for Qualifications/Proposals from Design-Build entities (DBEs)
  - DB project can be hard bid (not usually done) or awarded based on “best value” criteria developed by the Owner
- Progressive Design-Build
  - Owner develops performance criteria (which are not detailed “bridging” documents) for the DBE to design and build using a target value for design and a guaranteed maximum price for both design and construction
    - This will be discussed in more detail later in this presentation

Legal Requirements for Design-Build for CCDs: This Applies to DB and Progressive DB

- Education Code sections 81700-81709
  - https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=EDC&division=7.&title=3.&part=49.&chapter=3.5.&article=

  - CCD's Board must evaluate traditional Design-Bid-Build and DB to make written findings that the use of DB on a specific project will accomplish one of the following objectives:
    - Reduce comparable project costs
    - Expedite the project's completion
    - Provide features not achievable through the Design-Bid-Build process
  - Board must determine that it is in the "best interest" of the district to enter into a DB contract for the project
  - Project value must exceed $2,500,000

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Legal Requirements for Design-Build for CCDs: This Applies to DB and Progressive DB

- The CCD's Board must approve a request for proposals (RFP) setting forth the scope of the project that may include, but is not limited to, the size, type, and desired design character of the buildings and site, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the CCD's needs. The performance specifications and any plans must be prepared by a design professional licensed or registered in CA to perform the services required by the Field Act. The RFP cannot include a design-build-operate contract.
- The design professional who assists the CCD in planning the project, i.e., development of design criteria or preparation of the RFP, cannot participate in the competition with the DBE or perform work as a subcontractor.
- The Board may, and is strongly encouraged to, retain the services of an architect or structural engineer throughout the course of the project in order to ensure compliance with the DB statutes.

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Legal Requirements for Design-Build for CCDs: Qualifications

- CCD must prequalify DBEs, and may short-list prequalified DBEs
  - Must include basic scope and needs of the project, expected cost range, the methodology the CCD will use to evaluate proposals, the procedure for final selection of the DBE, and any other information deemed necessary to inform interested parties of the contracting opportunity
  - Significant factors the CCD reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, acceptable safety record and all other non-price related factors

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Legal Requirements for Design-Build for CCDs: Qualifications

- A standard template for Statement of Qualifications including:
  - Identification of all shareholders, partners or members of the DBE
  - Evidence that the members of the DBE have completed, or demonstrated the experience, competency, capability and capacity to complete projects of similar size, scope or complexity and that the proposed key personnel has sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the DBE has the capacity to complete the project.
  - The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

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Legal Requirements for Design-Build for CCDs: Qualifications

- Evidence that establishes that the DBE has the capacity to obtain all required payment and performance bonds, liability insurance, and errors and omissions insurance
- Information concerning workers' compensation experience history and a worker safety program
- If the DBE is a corporation, limited liability company, partnership, joint venture, or other legal entity, a copy of the organizational documents or agreement committing to form the organization
- An acceptable safety record, i.e., the DBE's experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury or illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category

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Legal Requirements for Design-Build for CCDs: Qualifications

- The information provided by the DBE must be certified under penalty of perjury by the DBE and its general partners or joint venture members.
- A DBE shall not be prequalified or short-listed unless the entity provides an enforceable commitment to the CCD that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades (PCC 2600) or agrees to be bound by the CCD's Project Labor Agreement (PCC 2500), if any.

Legal Requirements for Design-Build for CCDs: Request for Proposals

- The RFP must include:
  - The basic scope and needs of the project, the expected cost range, and other information deemed necessary by the CCD to inform interested parties of the contracting opportunity.
  - Invite interested (and prequalified) parties to submit competitive sealed proposals in the manner prescribed by the CCD.
  - Include a section identifying and describing the following:
    - All significant factors and subfactors that the CCD reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors and subfactors.
    - The methodology and rating or weighting scheme that will be used by the CCD in evaluating competitive proposals and specifically whether proposals will be rated according to numeric or qualitative values.
    - The relative importance or weight assigned to each of the factors identified in the RFP.
    - As an alternative to the above clause, the CCD must disclose whether all evaluation factors other than cost or price, when combined, are:
      - Significantly more important than cost or price; or
      - Approximately equal in importance to cost or price; or
      - Significantly less important than cost or price.
    - If the CCD wishes to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the RFP and shall publish separately or incorporate into the RFP applicable rules and procedures to ensure that any discussions or negotiations are conducted in a fair and impartial manner.

Legal Requirements for Design-Build for CCDs: Selection of the Design-Build Entity

- The RFP issued by the CCD must establish a procedure for final selection of the DBE from the prequalified or short-listed DBEs
  - Basis of award can be either lump sum bids or “best value”
    - “Best value” means “a value determined by objective criteria and may include, but need not be limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the community college district.”
    - Best value is usually the basis of award
  - The CCD may use a design-build competition from the prequalified or short-listed DBEs based upon performance and other criteria, including but not limited to:
    - Proposed design approach
    - Life-cycle costs
    - Project features
    - Project functions

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Legal Requirements for Design-Build for CCDs: Selection of the Design-Build Entity

- Proposals must be scored based on weighted factors and criteria set forth in the RFP
  - However, each of the following factors must be weighted at least 10%:
    - Price
    - Technical expertise
    - Life-cycle costs over 15 years or more
    - Acceptable safety record
    - Skilled labor force availability
  - DBEs are ranked based on most advantageous to least advantageous

Legal Requirements for Design-Build for CCDs: Award of the Contract

- The Board must issue a written decision supporting the award of the contract and stating in detail the basis of the award
- The Board must publicly announce the award identifying the DBE, its price proposal and its overall combined rating
- The notice of award must include the DBE's ranking in relation to the other ranked DBEs and their respective price proposals and a summary of the rationale for the award of the contract

Benefits of Progressive Design-Build

- Progressive DB typically includes the following elements, which are consistent with, but not required or set forth in, Education Code sections 81700-81709
  - No “bridging” plans and specifications (which are typically 30-50% of design); instead, CCD develops performance criteria
  - Selection of DBE based on qualifications (prequalified) and the objective evaluation criteria required by statute (price, technical expertise, life-cycle costs over 15 years or more, acceptable safety record, skilled labor force availability, etc.) (same as for DB)
  - So, no design competition (remember, this is permissive, not mandatory, under the DB statutes)
    - Owners typically pay a stipend to prequalified or short-listed DBEs, so there is a cost savings by not requiring a design competition
      - Presumably this also creates a larger pool of interested DBEs

Pros and Cons of DB and Progressive DB Over Design-Bid-Build

- Pros
  - Contractor input during the design phase
  - Elimination of the contractor selection phase
  - Selection of DBE based on qualifications and “best value” criteria
  - Early cost definition
  - Ability to start construction before 100% design completion
  - Reduces the majority of construction disputes
    - Contract interpretation
    - Design clarifications (Requests for Information/Clarification)
    - Coordination issues
    - Change orders

Pros and Cons of Design-Build Over Design-Bid-Build

- Cons
  - Owner must be experienced in DB and have technical expertise to implement
  - Owner has less control over the detailed design of the project
    - Progressive DB mitigates this by selecting the DBE based on qualifications and objective criteria, then the Owner has input in developing the design
  - Increased risk allocation typically results in contract contingencies that may result in a higher contract price than low bid contracts
  - Owner has more up-front work in developing a Request for Statement of Qualifications/Proposals process (i.e., qualifications and selection criteria) and making the findings required by law
    - Owner must prepare Performance Criteria
  - Potential disagreements between the Owner and the DBE over design interpretation
    - Progressive DB mitigates this by the Owner's developing the design in conjunction with the DBE

The Future of Progressive Design-Build

- The State has recently enacted (effective July 16, 2021) Progressive Design-Build as a pilot project for 3 State projects to be determined jointly by the Department of General Services and the Department of Finance.
  - Public Contract Code sections 10198-10198.8
  - Section 10198(i) defines “Progressive Design-Build” as “a project delivery process in which both the design and construction of a project are procured from a single entity that is selected through a qualifications-based selection at the earliest feasible stage of the project.”
- SB 991 introduced February 14, 2022 is currently pending which would authorize local agencies to build water projects in excess of $5,000,000 using Progressive Design-Build (new PCC 22170-22174)
  - Patterned after the State Progressive Design-Build statutes (PCC 10198 et seq.)

Progressive Design-Build Summary

- Progressive Design-Build is intended to improve the existing traditional DB process by eliminating the need, cost, and time required for the Owner to prepare “bridging” documents and to include the Owner in the design process together with the DBE
  - Creates a more collaborative process in design
  - Single DBE design professional designs the project in conjunction with the Owner’s input thereby eliminating potential liability of a “bridging” architect
- State law is moving towards embracing Progressive Design-Build
- The existing DB statutes for CCDs do not expressly contemplate typical elements of Progressive DB, but are written broadly enough to implement those elements

Questions?

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Please note . . .

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Thank you!

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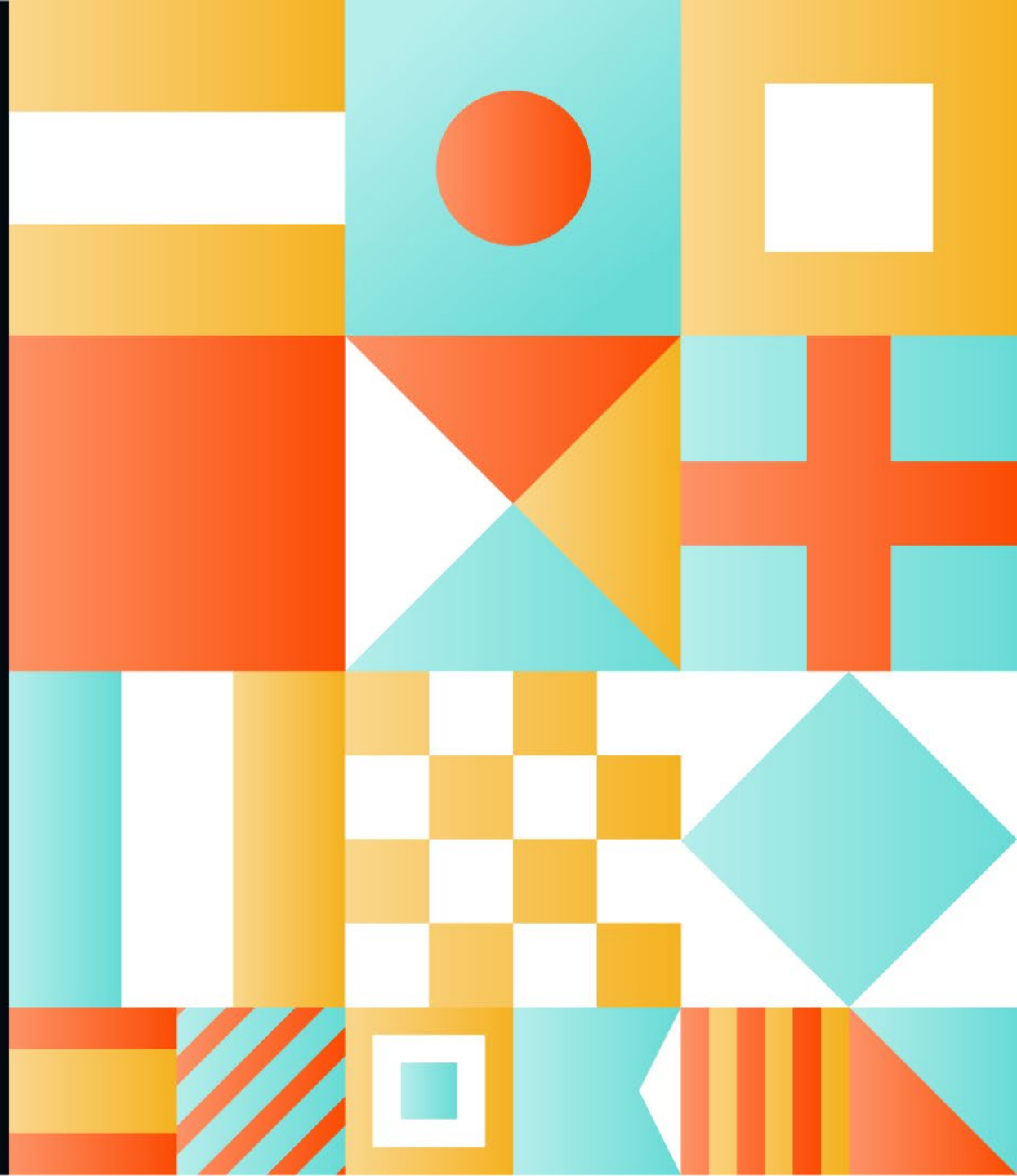
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