PUBLIC-PRIVATE PARTNERSHIP (P3) PROJECT DELIVERY FOR THE JUSTICE COMPLEX

Eric S. Petersen
Partner
Hawkins Delafield & Wood LLP
New York, NY
DESIGN-BID-BUILD (DBB)
TRADITIONAL DELIVERY

Design-Bid-Build (DBB)
Two Contracts
Design Completed Before Bidding
Full Owner Control
Intense Construction Price Competition
Legally Mandated To Avoid Favoritism In Contractor Selection
Deep Market, Prevalent Method
Well Understood, Proven Over Time
DBB STRUCTURE

- Architect and Engineer
- Construction Contract
- City
- City Maintenance
- Bondholders
DBB DRAWBACKS

Not Qualifications Based
Forced Marriage of Designer, Builder
Construction Price Is Only Selection Factor
Slower Delivery
Higher Cost
Can Be Dispute Prone
CONSTRUCTION-MANAGER-AT-RISK (CMAR)
CMAR DESCRIPTION

Separate Contracts for Design and Construction
Select Both on Qualifications Basis
Specialized CM Firms or General Contractors with CM Experience
Price Not Involved Unless GMP Offered Later
CM is Construction Contractor
CM Prepares Bid Packages and Supervises Construction Performance
CMAR STRUCTURE

Architect and Engineer

City

Construction Management Contract

All Construction Work Separately Bid

City Maintenance

Bondholders
CMAR BENEFITS

Professional Selection of Construction Interface
Higher Confidence in Cost Estimates
Guaranteed Maximum Price Possible
Design Phase Assistance
Complete Control of Design
Less Need for Contingencies for Uncompleted Design Work
CMAR CHALLENGES

Designer and Builder Are Teamed By Owner, Not Voluntarily
Multiple Points of Responsibility
Owner Retention of Design Liability
No Design Competition
No Constructability Competition
Limited Life Cycle Cost Considerations
Degree of Design Conservatism
DESIGN-BUILD
(DB)
DESIGN-BUILD DESCRIPTION

Single Entity Contracts For Both Design and Construction: One Contract
Competitive Proposal Process
Multiple Evaluation Factors (other than Price or Design)
Fixed Design-Build Price or Guaranteed Maximum Price Negotiated After Selection
Design Requirements
Performance Standards
Acceptance Test
DB STRUCTURE

City

Design-Build Contract

Design Subcontract

City Maintenance

Bondholders
DESIGN-BUILD BENEFITS

- Prequalification
- Shortens Project Delivery Time
- Increases Collaboration
- Competition on Non-Price Factors
- Cuts Capital Costs
- Transfers Performance Risk
- Promotes Innovation
- One Point of Responsibility
- Minimization of Change Orders
DB CHALLENGES

Less Control Over Design Details
Less Familiarity
Possibility of Smaller Number of Competitors
More Complex Selection
More Involved Negotiations
DISPUTES AND MONITORING

DBB
- Bid protests can be common
- Higher Construction Monitoring Costs
- Change orders are prevalent
- Litigation often results (BB-L)

DB
- Bid protests are uncommon
- Lower Construction monitoring costs
- Change orders are rare
- Litigation is rare
PUBLIC-PRIVATE PARTNERSHIP (P3)
INTEGRATED DELIVERY

Public-Private Partnership (P3)
Also Called Design-Build-Finance-Operate-Maintain (DBFOM)
One Contract, Multiple Services
Conceptual Design Before Proposals
Substantial Owner Control
Intense “Best Value” Competition
(Price and Non-Price Factors)
P3 – INTERNATIONAL NORM

Australia, UK, Canada
Partnerships BC, Infrastructure Ontario
Dozens of Projects
DBFOM Consistently Chosen Over the Traditional Delivery Method
Disciplined Analysis of Risk Transfer
Small Difference Internationally in Cost of Capital (All Debt is Taxable)
P3 ADVANTAGES

Qualifications Based Selection (QBS)
Expedites Project Delivery
Creates Lifecycle Focus
Cuts Design and Construction Costs
Cuts Facility Management Costs
Transfers Performance Risk
Promotes Innovation
SOURCE OF COMPARATIVE ADVANTAGES

Integrated Asset Development and Delivery
Participants Self-Select
Business Interests Aligned in Selection,
Execution
Collaboration Among Designer, Builder and
Facilities Manager
Competition On Design, Constructability
and Operation, Not Just Construction
Price
Negotiated Transaction
RISKS TRANSFERRED (1)

Design and Construction Risks

- Design Liability (Spearin Doctrine)
- Completion Risk (Delay and Efficacy)
- Construction Cost Overruns
- Disputes Between Designer, Builder and Facilities Manager
RISKS TRANSFERRED (2)

Operation and Maintenance Risks

- O&M Cost Overruns
- Regulatory Compliance
- Capital Maintenance
- Technological Obsolescence
- Excess Electricity Consumption
- Labor Relations
RISKS RETAINED

Owner’s Risk Under Any Delivery Method

- Changes In Law
- Uninsurable Force Majeure Events
- Pre-existing Site and Environmental Conditions
- Such Uncontrollable Circumstances Are “Relief Events”
- Inflation (Service Fee Is Partially “Index Linked”)
HOW THE FINANCING WORKS

“Project Finance” For Public Infrastructure
DBFOM Contractor Forms Special Purpose Entity
Entity Issues Debt For Construction
Debt Is Non-Recourse To Owner, Project Company
Owner Makes No Construction Payments
Service Fee Payable Only Upon Completion
Deductions Imposed For Unavailability
Equity and Debt At Risk For Performance Failure
"Project Agreement" is pledged to secure debt.

"Service Fee" contains debt component and O+M component.

Project company invests 10-20% equity (with 10-15% return).

Equity is cushion against subcontractor non-performance and government non-payment.

Project debt rating (BBB) is generally lower than municipal or corporate "recourse debt" (AA).

Dual financing (some owner debt) possible.
P3 DBFOM STRUCTURE

City

Equity Investors

DBFOM Contract (Project Agreement)

Design-Build Contract

Bondholders

Facility Management Maintenance Contract
THE DOWNSIDE

Higher Interest Rate Debt Due To Taxable Project Financing (A U.S. Tax Code Amendment is Being Pursued)

Less Familiar to the Owner

Possible Narrower Debt Market

Greater Transactional Complexity
PROCUREMENT PROCESS (1)

GC 2267 – Comprehensive P3 Procurement Authority
Public Buildings and Other Infrastructure
Extensive TXDOT Experience with Similar P3 Legal Authority

Statutory Objectives
- Increased Procurement Flexibility
- Leveraging Private Investment
PROCUREMENT PROCESS (2)

City Resolution Required to Use GC 2267
City Must Also Adopt and Publicize General Procurement Guidelines
Competitive Proposal (RFP) Process
Prequalification Expected to be Authorized Under Procurement Guidelines
“Best Value” Selection
Price and Non-Price Factors
(Qualifications, Design, Timeline, Public Comments and Local Benefits)
Accepted Proposal Made Publicly Available Within 10 Days
Negotiations With Selected Proposer
PROCUREMENT PROCESS (4)

P3 Comprehensive Agreement Includes Design, Construction, Financing and Facilities Maintenance Services

Public Notice of Tentative P3 Comprehensive Agreement Within 10 Days

Public Hearing at Least 30 Days Prior to Entering into P3 Comprehensive Agreement
THANK YOU

Eric S. Petersen
Hawkins Delafield & Wood LLP
One Chase Manhattan Plaza
New York, NY 10005
(212) 820-9401
epetersen@hawkins.com
www.hawkins.com