

RISK MITIGATION

The Design-Build “Bridging Period”

can early pursuit efforts mean project risk?

By William S. Thomas

In the design-build project delivery method, some of the most consequential project decisions are made before the team signs the contract everyone assumes will govern the work. The owner issues a “Request for Proposals” (RFP). The design-builder assembles its pursuit team. The lead architect or engineer develops concepts, narratives, and preliminary design materials. Specialty designers and trade partners shape early system decisions and pricing. The team races to develop a competitive response. And yet, during this critical stretch of time, the legal and operational relationships among the team are often only partially documented, loosely described, or left to assumption.

It is this “bridging period,” the span between the formal design-build RFP and the execution of the contracts, that ultimately defines the parties’ obligations yet remains one of the most under-managed risk points. Once a proposal is submitted, particularly on public projects, the team has often made decisions that shape scope, schedule, budget, and responsibility long before the final risk-allocation language is drafted. If the bridging period is treated as informal, when everyone is feeling good about things, the project may inherit ambiguities that become expensive to unwind later when tensions have inevitably arisen.

WHY THE DANGER?

The core problem is simple: Design-build teams often commit to numbers, concepts, and delivery strategies before the design is mature enough to support certainty, and before the internal team structure is mature enough to support accountability. The architect may believe it is only helping develop a pursuit concept. The design-builder may believe the concept is sufficiently developed to support pricing. A specialty designer may assume it is providing only preliminary criteria for budgeting. Estimators may build a number of narratives and assumptions rather than coordinated drawings. Meanwhile, the owner may treat the proposal as evidence of what the project will include, how it will perform, and what it will cost. That combination creates predictable friction.

This is not merely theoretical. Courts have seen disputes where pre-award design work became the basis for later claims. In the recent *AECOM Technical Services, Inc. v. Flatiron* litigation in Federal District Court in Colorado, part of the litigation involved a claim by the contractor that pre-award services performed under a contractor/designer teaming agreement for a Colorado DOT design-build pursuit were inadequate for bidding, and pointed to alleged pre-bid problems including an outdated drainage design, thousands of feet of missing drainage pipe, and missing concrete barriers. The court record reflects the contractor’s claim that it relied on those pre-award services in preparing its proposal and then entered the downstream subcontract in reliance on representations tied to that early work. The years-long litigation resulted in millions of dollars in damages and attorney’s fees awards. Part of the dispute was whether the initial “teaming agreement” applied or the latter executed “prime agreement.” That is exactly the point. The bridge period documents and decisions do not disappear once the prime contract is awarded. They often become the foundation of later claims.

One of the recurring mistakes in design-build pursuits is assuming that proposal-stage design and pricing are temporary artifacts. In *Gannett Fleming, Inc. v. Corman Construction*, the Maryland appellate court dealt with a dispute over allegedly faulty pre-bid estimates. The court described the teaming agreement as covering pre-bid services, noted that the later design subcontract treated certain preliminary design and bidding services as “not applicable” because they had already been performed during the proposal phase, and concluded that the pre-bid information was “intricately and inextricably related” to performance of the later subcontract. In the court’s words, the teaming agreement was “a foundational premise” on which the later design subcontract was crafted.

For the construction industry, the lesson is powerful: Proposal-phase services may be treated later not as disposable pursuit assistance, but as foundational project work. If the pursuit team does not clearly define the scope, assumptions, standards,

compensation, and reliance rights attached to that work, it may end up litigating those issues after award, when the money and exposure are much larger.

COMMON FAILURE PATTERNS

Problems in this bridging period usually show up in one of five ways. First, the team submits a number based on an immature design, but no one fixes the design basis for pricing. The estimate is really an estimate of a concept, not an estimate of a defined scope. Later, as the design develops, the price no longer fits the owner's expectations or the contractor's commitment.

Second, responsibility for design coordination drifts. The contractor assumes the lead designer is covering a particular code, utility, or system issue. The designer assumes that issue is delegated design, contractor means and methods, or somebody else's specialty scope.

Third, proposal qualifications and exclusions are not preserved. The assumptions log exists in email strings, markups, and meeting notes, but it does not make the trip into the prime contract, the design agreement, or the downstream specialty contracts.

Fourth, pursuit-phase compensation is vague. The architect or specialty consultant may do substantial front-end work with only a letter of intent, a loosely worded teaming agreement, or sometimes nothing more than a course of dealing. If the project is not awarded, or if the design-builder reshuffles the team after award, disputes arise over payment, reuse rights, and ownership of the proposal materials.

Finally, fifth, the team assumes a "teaming agreement" will solve everything when it may not solve much at all if it is too indefinite. A poorly drafted teaming agreement can create just enough comfort to induce reliance, but not enough precision to be enforceable when the relationship falls apart. Courts could find post-award obligations from a teaming agreement as an unenforceable "agreement to agree," or amounting to an agreement to negotiate open issues in good faith within a framework rather than a binding commitment. If the pursuit agreement leaves core issues open for later negotiation, such as scope, compensation, workshare, standards, transition terms, or what happens after award, the parties may discover they had a roadmap, not a contract. The design-build team does not want to leave it to the courts to sort through the evidence to determine the scope and terms of the agreement and whether it covered only design or both design and construction.

WHAT THE BRIDGING AGREEMENT SHOULD COVER

Since this period creates real project risk, it should be managed like real project risk. At a minimum, the pursuit-phase agreement among the design-builder, lead designer, and key specialty participants should address five things clearly. First, define the pursuit scope. What exactly is each participant being asked to do before award? Concept design? Preliminary engineering? Narrative development? Pricing support? Alternative system evaluations? Owner interview support? Proposal graphics? If the work matters enough to influence

the price or the award, it matters enough to define.

Second, fix the design basis for pricing. Every number should be tied to an identified level of design completion and a stated set of assumptions. If a structural system, envelope concept, MEP narrative, utility approach, or site development assumption is still in flux, that needs to be transparent inside the team before it is buried inside the price.

Third, assign ownership of critical tasks. Who is responsible for design coordination? Who owns code review at the proposal stage? Who is identifying long-lead procurement risk? Who is tracking owner clarifications and addenda? Who is confirming that proposal qualifications align with the estimate? Ambiguity here is the genesis for later claims.

Fourth, address reliance, compensation, and intellectual property. Can the design-builder rely on the designer's pursuit work for pricing? To what extent? What standard applies to pre-award services? What gets paid if the team loses? What happens if the project is won but a team member is replaced? Who owns the proposal documents, and on what terms may they be reused?

Finally, fifth, document the post-award transition. The bridge period should not end on a cliff. The agreement should explain how the pursuit team converts into the execution team, which proposal assumptions must carry into the final contracts, and what happens if the owner's final deal departs from the assumptions on which the proposal was built.

PRACTICAL LESSONS FOR DESIGN-BUILD LEADERS

The simplest solution is to insist on a real pursuit-phase agreement. Maintain a single "assumptions and exclusions register" that everyone sees. Tie the estimate to a specific design basis. Hold a pre-submission risk-allocation meeting with the full pursuit team. Identify unresolved design issues before the number is finalized. And most importantly, make sure the assumptions and qualifications that protected the proposal actually survive in the executed contracts. On public work, where the proposal process is often highly structured and price is frequently part of the selection calculus, that discipline becomes even more important.

The design-build bridging period is often treated as a temporary, fast-moving, loosely organized prelude to the "real" project. In truth, it is the first and sometimes most consequential risk-allocation phase of the job. ■

about the author

William Thomas is a principal at Gausnell, O'Keefe & Thomas, LLC in St. Louis, where he focuses his practice on construction claims and loss prevention. He is a member of the International Association of Defense Counsel (IADC), currently serving as chairperson of the IADC's Construction Law Committee; an AAA Panel Arbitrator; a Fellow with the Construction Lawyers Society of America; and a member of the ABA Forum on Construction, AIA, and ASCE. He can be reached at wthomas@gotlawstl.com.