

Design-Build For Missouri's Statutory Cities



For years, there has been debate about whether statutory (third class and fourth class) cities in Missouri were authorized to participate in design-build for their public works projects. However, legislation adopted by Missouri's General Assembly in 2016¹ appears to have granted authority for these projects. This article provides an introduction to design-build, a discussion of the debate, a summary of the procedures necessary to use design-build, and some suggestions for possible amendments to the statute.

What Is Design-Build? Why Would My City Want To Use It?

Design-build is a method by which a project owner (for our purposes, a city) may have a public works project designed and constructed through a single contract with a design-build team.² This is compared to the traditional process, known as design-bid-build, where the city first selects a design professional (architect or engineer) through a bidding process; then, through a second bidding process, the city selects a contractor to construct the project as designed. Under this scenario, there is no real connection between the designer and the builder until construction of the project begins.

With design-build, a city selects a team of professionals to carry the project through from conception to completion. This project delivery method has been growing in popularity over the past 15 years. As of 2013, it accounts for more than 40 percent of non-residential construction projects.³ Proponents of design-build claim that this project delivery method saves time due to reduced procedures; is more efficient since the owner deals with one contract instead of two; and saves money due to both reduced procedures and because the design professionals and construction contractors are paired together from the outset.⁴ Having the contractor's input during the design phase may reduce the number of change orders and incidence of "finger-pointing" if practical issues arising during construction went unidentified during the design phase.

This Wasn't An Option For Me Before?

Prior to 2016 HB No. 2376 and 2016 HB No. 1713 (now §§ 67.5060 and 67.5070, RSMo), third- and fourth-class cities in Missouri did not have express authority to undertake design-build projects. Missouri has four types of cities: charter, special charter, third class and fourth class. Charter and special charter cities take their “home rule” powers directly from the Missouri Constitution and Chapter 81, RSMo that preserved individual legislative actions that granted charters prior to 1875. Third- and fourth-class cities however, are “statutory” cities; that means they only have the authority granted to them by the legislature in express words, and those “necessarily implied” in those express words.

Before last August, no statutes expressly authorized statutory cities to use design-build for their public works projects. In fact, Chapter 8, RSMo required cities to select architects and engineers through a qualifications-based process. “Where the legislature has authorized a municipality to exercise a power and prescribed the manner of its exercise, the right to exercise the power in any other manner is necessarily denied⁵.” Therefore, it is at least arguable that third- and fourth-class cities previously were not authorized to enter into design-build contracts.

What Do I Need To Do To Use Design-Build?

Cities utilizing a statutory design-build procedure must first identify which statute to follow. This depends upon the type of project proposed. Section 67.5060, RSMo covers many projects through a three-phase bidding procedure, while § 67.5070, RSMo is limited to wastewater and water treatment projects. While § 67.5060, RSMo may be used for a wastewater or water treatment project, § 67.5070, RSMo is the better alternative because of its simplicity. Unfortunately, § 67.5060, RSMo is neither simple nor clear.

To start the § 67.5060, RSMo design-build process (design-build process), the city must appoint a design criteria consultant. The design criteria consultant can be any Missouri licensed architect⁶ or engineer, including a city staff member. If your city does not have an engineer or architect on staff, the design criteria consultant must be selected through the Chapter 8, RSMo process mentioned above. The design criteria consultant’s purpose is to assist in formulating the design criteria package and the request for proposals (RFP),

and to aid in the evaluation process. With the help of the design criteria consultant, the city should be certain it is satisfied with the design criteria package, the proposed RFP, and the project budget before proceeding any further.

Before publishing notice of the RFP, a city must publically disclose its intent to use the design-build process and the project design criteria at a regularly scheduled meeting. This disclosure does not require any specific legislative action, such as a resolution, but must occur within a minimum of one week prior to issuing the RFP.

Upon expiration of the one-week waiting period, the city may publish notice of an RFP to initiate the three-phase evaluation process. There is nothing standard about a design-build RFP; it is the most important step in the design-build process. Statutory requirements make design-build RFPs more complex than other RFPs issued by third- and fourth-class cities. The RFP establishes rules for three upcoming bidding phases that affect not only the bidders, but cities as well. Section 67.5060 establishes nine required elements of an RFP; however, these elements include the design criteria package and the criteria for evaluation, making the actual number of required elements greater than nine.

Once the RFP has been published for at least two weeks, a city may begin Phase I of the three-phase evaluation process. Phase I is alternatively referred to in the design-build statute as “prequalification.” Design-build applicants submitting qualified proposals to the RFP are evaluated in Phase I according to the criteria listed in the RFP. The Phase I criteria must include four statutorily-required criteria. Your city may include other qualification-based criteria, but cost may not be considered in Phase I. You may also choose to interview responsive applicants during the Phase I process.

Phase I’s purpose is to narrow the pool of design-build applicants that participate in Phases II and III. The design-build statute requires at least two participants to reach Phases II and III, but not more than five. After selecting the prequalified applicants for Phases II and III, the prequalified applicants are invited to participate in Phases II and III, and are given a specified time by which to complete their proposals. All accumulated Phase I points are disregarded at the end of Phase I.

Phase II and Phase III are the evaluations of the technical proposals and cost proposals respectively. Both proposals are

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submitted at the same time, but must be evaluated and scored separately. Together, they encompass 100 percent of the final score for each bid. Each must account for at least 40 percent of that final score. The remaining 20 percent, or relative weight, is allocated as your city desires between Phases II and III. The relative weight must be stated in the RFP.

Each Phase II proposal is scored in accordance to the design criteria listed in the RFP. In addition to evaluations of the technical proposal in light of the design criteria from the RFP, the ability of the design-build applicant to meet the proposed schedule stated in the RFP may be considered during Phase II. Up to 20 percent of the points awarded in Phase II (not 20 percent of the overall score) may be based on an applicant's ability to design, contract and deliver the project on time and within the budget of the political subdivision. However, such consideration must be made without knowledge of the cost proposal. Applicants may also be interviewed during Phase II. Evaluations and scores for Phase II must be completed and made public prior to opening Phase III cost proposals.

Phase III proposals must provide a firm, fixed cost of design and construction and any bid security required by the RFP. The lowest responsive applicant receives maximum points for the Phase III evaluation. For other applicants, Phase III points are calculated by reducing the maximum Phase III points by at least 1 percent for each 1 percent the applicant's proposal exceeds the lowest bid. The percentage weight must be stated in the RFP.

Phase II and Phase III points are then added to determine a bid winner. If a city decides it is not in its best interest to

proceed with the project with the bid winner, it may reject all proposals.

Each Phase II and Phase III participant that submitted a responsive proposal and did not win is entitled to payment of a stipend. The amount of this stipend must be at least 0.5 percent of the total project budget and must be stated in the RFP. If the bid winner is not awarded a contract and all proposals are rejected, the bid winner is entitled to a double stipend payment. Consequently, a city must know its firm project budget prior to publishing the RFP, regardless of what the statute states elsewhere. Payment of the stipend entitles a city to non-exclusive use of the submitted design, but an applicant may forego payment in order to retain exclusive right to the design.

As previously noted, the design-build process may be utilized for a wastewater or water treatment project; however, § 67.5070, RSMo clearly allows any political subdivision to enter into a design-

build contract for wastewater or water treatment without the necessity of completing the above-described process. By contrast, the language of § 67.5060, RSMo is unclear as to whether or not a city employing its authority may circumvent the three-phase process. Unresolved ambiguities exist regarding wastewater or water contracts in § 67.5060, RSMo, making § 67.5070, RSMo attractive when applicable. Section 67.5070, RSMo also carries no requirement for a design criteria consultant; this would allow cities without an engineer on staff to save themselves the added expense of employing two engineers to complete a desired project.

How Could This Authority Be Improved?

The most glaring deficiency of § 67.5060, RSMo is its lack of an express grant of authority. As noted, cities may imply authority in certain instances. Given the comprehensive nature of § 67.5060, RSMo regulation of how to enter into a design-build contract, authority to enter into one can be implied. However, given the relative ease for the legislature to remedy this omission, an express grant should be added.

The technical and cumbersome nature of § 67.5060, RSMo makes using it risky due to the potential for procedural failures. The statute functions like a Rube Goldberg machine, where self-executing elements trigger the next element down the line until the process is completed. The RFP set-up phase that initiates the process seemingly requires a crystal ball to avoid a procedural miscue. The impact to cities that guess wrong is unlike traditional bidding, because the city may be liable for stipend payments if Phase II and III invitations were sent.

Unlike the standard design-build process, § 67.5070, RSMo clearly exempts wastewater and water projects from the three-phase evaluation process and grants express authority. However, it provides little guidance as to requirements placed on a city wishing to use the statute's authority. Section 67.5070, RSMo is silent on the applicability of Chapter 8, RSMo professional selection; therefore, decisions regarding the applicability of a Chapter 8, RSMo request for qualifications hinges on inference. Additionally, unlike the general design-build process, § 67.5070, RSMo fails to define a wastewater or water treatment project that allows use of the statute. Section 67.5060, RSMo provides a definition, but it does not apply to § 67.5070, RSMo. There may be ways to circumvent these "holes" in § 67.5070, RSMo. If your city is considering a project under § 67.5070, RSMo contact your city attorney prior to entering into a contract. 🍃

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Joe Lauber has dedicated his entire career to the practice of municipal law on behalf of public entities. In 2010, he established Lauber Municipal Law, LLC, after years of practice representing public entities at larger firms in the Kansas City area. Joe has experience representing municipalities statewide regarding a wide variety of economic development tools and is a regular speaker, author and contributor for MML. He can be reached at (816) 525-7881 or jlauber@laubermunicipal.com. To learn more visit the firm's website at www.laubermunicipallaw.com.

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(Endnotes)

1. 2016 MO Gen. Assembly H.B. No 2376 & H.B. No. 1713 (now §§ 67.5060 and 67.5070, RSMo)
2. See *What is Design-Build* by Design-Build Institute of America at <https://www.dbia.org/about/Pages/What-is-Design-Build.aspx> last visited March 25, 2017.
3. *Id.*
4. *Id.*
5. *City of Bellefontaine Neighbors v. J. J. Kelley Realty & Bldg. Co.*, 460 S.W.2d 298, 304 (Mo. App. 1970)
6. *But See* § 67.5060.16(5) (“A political subdivision planning a wastewater or water design-build project shall retain an engineer duly

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