Alternative Delivery Models in Public Construction and Operation: Legislative Mechanisms for Design Build and Design Build Operate

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I. Introduction

Municipalities continue to be handcuffed in many states and districts around the United States from fully taking advantage of alternative project delivery models and competitive service delivery models. Both of these alternative models for design and construction, or design, construction and operation, offer viable, cost effective and beneficial options for municipalities. Limiting municipalities to continued reliance on the traditional design-bid-build model inhibits innovation in public construction and public utility and service operation of new and/or expanded public facilities. It is inconceivable that in the age where government has been encouraged to act more like a business, that the construction and operation options available in the private sector continue to be denied to municipalities through a "stonewall" of archaic procurement laws. This paper will discuss and outline the necessary changes to those laws.

II. Design-Build and Design-Build-Operate

Design-build and design-build-operate alternative delivery models provide public owners with alternative project delivery models that can save project time and money and streamline an otherwise complex and multifaceted process. Public sector owners who favor the DB/DBO alternatives recognize the advantages such as a teaming approach between the owner, contractor and designer, single point of contact for a project manager, early involvement of the builder in process design, the ability to accelerate project completion through phased coordination and the reduction of claims and cross claims or liability/responsibility among an owner, architect and general contractor. The advantages of design-build over traditional design-bid-build "include early involvement of the contractor for input on construction methods and cost control, speed of construction and most importantly for the owner, single-point responsibility as compared to finger-point responsibility."[i] In fact, it has been recognized that "almost all of design-build's benefits can be attributed to the one attribute that differentiates it from every other delivery system-it is a truly integrated project delivery system where the designer and contractor have contracts directly with each other, not separately with the owner."[ii]

Understanding the design build model most simply begins by distinguishing it from the model of public construction that most municipal practitioners are familiar with, the traditional design-bid-build model. In traditional design-bid-build, an owner has an initial contract with a design professional, traditionally an engineer in horizontal and utility construction or an architect in vertical, (building), construction or a combination if the two professionals. That contract is for the

project design and for the purposes of drafting the bid specifications for the general contractors who will bid on and subsequently contract with the owner to build the facility. In contrast, design-build is "the type of construction contracting where one entity provides the owner with both the design services and the construction needed to meet the owner's program. The owner gets both the design and construction under one contract from a single source rather than the traditional method of separate contracts with the architect/engineer and with a general contractor."[iii] An additional, substantive distinction is that with the traditional design-bid-build construction delivery model the selection of the general contractor, (GC), is based entirely on the lowest priced bid for the work. In a design-build contract, the award is normally based on factors other than price alone and normally referred to as "best-value" contracts.

III. Legislative Models to Take us There

Absent introduction of specific legislative models into the non-design-build states, public sector owners will continue to be deprived of the benefit of alternative project delivery models. As the trend continues and more states begin to adopt either special legislation for specific municipalities or legislation of general application, model statutes and statutory provisions will be developed, tested, revised and improved. Each of those models will be developed with some very common provisions, including purpose and definitions, enabling authority, procurement processes and jurisdictional guidance. Provisions unique to public procurement and construction will vary among individual statutory models and will include such process specific items as risk assignment, bonding and surety provisions, labor protections and bid-protest and or appeal provisions. Below, an outline of suggested statutory components and model language will be discussed.

A. Model Legislation: Essential Components

This section will outline the essential components necessary for effective legislation to enable cities, towns and districts t utilize the design-build or design-build-operate delivery models.

Purpose The first question asked by a legislator when considering a bill is what is the purpose, what is the law intended to achieve. Effective legislation and legislation that will obtain a lawmaker's "buy-in" is legislation that begins with a succinct, explanatory statement of public benefit or purpose. A review of those contained in several laws may be helpful.

California. "It is the intent of the Legislature to enable cities to utilize cost-effective options for building and modernizing public facilities. The Legislature also recognizes the national trend, including authorization in California, to allow public entities to utilize design-build contracts as a project delivery method." *Assembly Bill 642, approved Sept. 26, 2008*

Washington "The Legislature finds and declares that a contracting procedure that facilitates construction of transportation facilities in a more timely

manner may occasionally be necessary to ensure that construction can proceed simultaneously with the design of the facility. The Legislature further finds that the design-build process and other alternative delivery concepts achieve the goals of time savings and avoidance of costly change orders." RCW 47.20.780

As you can see, both the California and Washington Statements of purpose recognize and pronounce the specific advantages of adopting design build as a beneficial alternative to traditional public construction procurement provisions allowed under current statutes. Importantly, both recognize that it supplements, but does not replace the traditional public "low bid" procurement method that many law makers and public entities have both confidence in and comfort with as a matter of practice and preference. Introducing and gaining acceptance for design-build legislation will depend upon using it not as a replacement tool, but another tool in the public owner's cache of project and project/service delivery models.

Definitions

Effective statutory drafting requires clear, well thought out definitions that are tested in the drafting stages to avoid both latent and patent ambiguity. A two-fold technique for effectively drafting statutory, regulatory or policy definitions involves bench marking and research on decisional guidance from the courts or agencies tasked with administering a particular statute or regulation. At some point, these two processes, if properly conducted, overlap. Benchmarking involves researching other statutes or regulations where the term you need to define or a similar term is used. You may then use that definition unless in phase two of your drafting homework, you uncover problems in interpretations or applications of the selected term in court cases or agency rulings. If you elect to use, ("lift"), someone else's definition, once you chose that definition, you then need to research if that definition has been tested in court, policy or agency documents and refined, improved or modified. Refine, redraft or amend your definition accordingly. Modern electronic legal and general research has made this task much simpler.

Key definitions that would need to be included in a design-build statute include, *inter alia,*

Best value	Contract
Design-build	Design-builder or
Design Build Entity	Owner
Negotiate	
Procurement	Project

Sample definitions from the California Legislation include:

> Best Value – a value determined by objectives relative to price, features, functions and life-cycle costs
>
> Design-build – a procurement process in which both the design and construction of a project are procured from a single entity
>
> Design-build entity – a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural and engineering services, as needed, pursuant to a design build contract
>
> Project – the construction of a building and improvements directly related to the construction of a building, but does not include streets and highways, public rail or transit or water resource facilities or infrastructure

Additional definitions are provided in the Florida code. Florida is a leading state in the evolution of design-build in the public sector. This would explain the more extensive list of definitions contained in Florida Statutes in comparison to other legislative jurisdictions.

> Professional Services - means those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect or registered surveyor and mapper in connection with his or her professional employment practice.
>
> Design-build firm – means a partnership, corporation or other legal entity that:
>
> 1. Is certified under s. 489.119 to engage in contracting through a certified or registered general contractor or a certified or registered building contractor as the qualifying agent; or
> 2. Is certified under 471.023 to practice or to offer to practice engineering; certified under s. 481.219 to practice or to offer to practice architecture; or certified under s. 481.319 to practice or to offer practice landscape architecture
>
> Negotiate – or any form of that word means to conduct legitimate, arms length discussions and conferences to reach an agreement on a term or price. For purposes of this

section, the term does not include presentation of flat fee schedules with no alternatives or discussion.

As noted above, in the California Assembly Bill, transportation and utility construction and infrastructure are not included. In most states the design-build procurement statutes are similarly done piece-meal, separating the various forms of construction projects and allowing alternatively delivery models for some but not others. A second place we will notice this distinction being made, as discussed in the next section, is in the *Enabling* provisions contained in the various design-build statutes.

Enabling Provisions

The initial operative provision of any statute that empowers a municipality to act are know as the "enabling" provisions of the statute. When creating or expanding a municipal corporation's capacity to act in a particular matter, a legislature must clearly outline, using particular words and phrases that are either 1). Defined in the text of the act itself, or 2). Defined in reference to some other statute regulation or policy, or 3). Commonly known and understood within a particular trade or industry, the authority it is granting to the municipalities.

In addition, the enabling provisions should outline the particular steps necessary from an administratively authoritative standpoint to enter into the design-build or the design-build-operate delivery model. The enabling provisions may require approval of a Mayor, City Council, Board of Alderman, Assembly or other municipal legislative body. In additional, procedural protections or threshold requirements may also be contained in the enabling provisions to ensure the process is not misused and is of adequate significance in scope to warrant use of an alternative delivery model. An example of these requirements appears in many legislative models. Normally these provisions will require a threshold amount, particular written findings that the alternative delivery model is either necessary or more beneficial for the particular project, or a guarantee of particular procedural steps that are more thoroughly discussed in the *Procurement Requirements* section of this paper, below.

> Sample of generally applicable enabling provisions:
>
> A City, with the approval of the appropriate city council, may utilize an alternative procedure for bidding on or building project in excess or one million dollars. State of California, Section 20175.2 of the Public Contracting Code.

The statute enabling the state Department of Transportation in Washington is an ideal example of enabling legislation that contains the type of prerequisite findings or "rationale" for selecting the alternative delivery model. That statute provides in relevant part:

> (1) The Department of transportation may use the design-build procedure for public works projects over ten million dollars where:
>
> a. The construction activities are highly specialized and a design-build approach is critical in developing the construction methodology; or
> b. The projects selected provide opportunity for greater innovation and efficiencies between the designer and the builder; or
> c. Significant savings in project delivery time would be realized.
>
> RCW 47.20.785 [State of Washington]

The immediately preceding example shows the types of prerequisites that might be an operative yet limiting part of a design-build statute's enabling authority. Additional limiting factors that may be contained in the statute relate to the application of a procurement procedure, outlined below, or review by a state agency or official to ensure compliance with the alternative procurement requirements and perquisite findings required for exercising the design-build option.

The City of Kansas City, [Missouri] has enacted a local ordinance that specifically outlines in a single section the criteria used as a prerequisite to employing the alternative delivery model. That language provides:

> (f) In selecting an alternative construction delivery method and awarding a contract pursuant to subsection (b), the city manager shall consider the following factors:
>
> i. The needs of the city;
> ii. Time requirements for the project and potential time savings strategies;
> iii. The complexity of the project;
> iv. Estimated project costs;
> v. Cost savings to the city;
> vi. Private investment and financial contributions that could be leveraged to complete the project;
> vii. The likelihood that the use of an alternative procurement method will diminish competition for city contracts; and
> viii. Any other factor the city manager deems to be in the city's best interest

The resounding theme throughout all of the statutes and ordinances that enable public owners to utilize design-build is the caution with which legislative bodies are slowly transitioning from traditional design-bid-build. That caution is grounded in the misconception that only "low-bid" contracts can ensure integrity in public contracting. As a result, legislatures go the extra mile to insert substantive and procedural protections into design-build legislation to give the public owners but more importantly the critics comfort that the method is procedurally fair, transparent, and only utilized in a limited array of public projects. As a result, inclusion of these prerequisites is the best way to ensure the path of least resistance in bringing design-build to your state or municipality.

Procedural Requirements and Procurement Steps

Even though alternative project delivery models offer a substitute for the traditional design-bid-build method of public construction, very rarely will they offer a *"carte blanche".* Much like traditional design-bid-build procurements laws, design-build statutes will also require some type of process or procedural protections to ensure the type of integrity and "equal footing" principals that led to the creation of state procurement laws and low-bidder construction in the public sector. Normally, these will involve a common array of elements. They include,

1. Particular written findings concerning advantages of utilizing an alternative delivery model;
2. Threshold amounts with respect to project size in monetary terms
3. Advertising, publication and public bidding, requests for proposal,
4. Sealed proposal, quite normally with separate evaluation of price and technical, (qualifications) proposals
5. Competitive evaluation criteria;
6. Review and approval by some independent or outside agency to ensure the procedural steps were followed but not interfering with the subjective evaluations by the awarding authority
7. Labor protections [where necessary]

From a strategy stand point, as discussed in the section below, it is important that each of these procedural or procurements steps be contained in the legislation. Where necessary, an example of each is provided here.

1.Particular written findings.
"An awarding authority may enter into a design-build procurement process only after the Agency responsible for

administering the procurement process and construction has made particular findings that utilizing an alternative delivery model is more beneficial to the municipality. An agency may list cost savings, project completion time, need for design and construction coordination to ensure adequate development of a facility and or operations, as well as a finding that use of the alternative delivery model would protect the integrity and fairness of the selection process."

2. Threshold amounts with respect to project size.
   A City, with the approval of the appropriate city council, may utilize an alternative procedure for bidding on or building project in excess or one million dollars. State of California, Section 20175.2 of the Public Contracting Code.

5. Competitive Evaluation Criteria
   (i) Competitive proposals shall be evaluated using only the criteria and selection procedures specifically identified in the request for proposal. However, the following minimum factors shall each represent at least 10 percent of the total weight of consideration given to all criteria factors, price, technical design and construction expertise, life cycle costs over 15 years or more, skilled labor force availability, and acceptable safety record. Each of these factors shall be weighted equally. Ch 314, Assembly Bill No. 642, California.

A similar example is provided in a pending Massachusetts Bill I drafted.

> Section 63. The chief procurement officer of a governmental body shall make a preliminary determination of the most advantageous proposal from a responsible and responsive offeror taking into consideration price, estimated life-cycle costs, allocation of risks and responsibilities and other evaluation criteria set forth in the request for proposal. Massachusetts Senate Bill S.1896, (2009).

The more effective the language require prerequisite findings and or written statements concerning the justification of selecting the alternative delivery model the more likely the legislature will be to pass a design-bid law.

Kansas City, Missouri, again provides an example of effective, complete drafting on a critical component of design-build legislation. The local ordinance outlines eight specific but non-weighted factors for selection of the design-build contractor. That language provides:

> (g) Except as otherwise provided by ordinance, in determining to whom to award a contract, the city manager may consider the factors listed below. If the contract is awarded by a party other than the city pursuant to a cooperative agreement between the party and the city, the party awarding the contract shall consider, at a minimum, the same factors listed in this subsection.
>
> (1) the cost submitted or proposed by the contractor;
> (2) the reputation of the contractor;
> (3) the quality of the contractor's goods or services;
> (4) previous relevant experience and technical capabilities of the contractor;
> (5) the extent to which the contractor's goods or services meet the city's needs;
> (6) the contractors [sic] past relationship with the city;
> (7) the contractors [sic] ability to comply with the procedures and requirements set forth in Chapter 38, Code of Ordinances
> (8) any private investment or contribution, financial or otherwise, proposed by the contractor to complete the project; and
> (9) any other relevant factor specifically listed in the solicitation for bids or request for proposals

The single change I would make to this language would be to replace the "may" with "shall" in the first sentence of the section. As we know, mandatory language in legislative or contract drafting will limit the actor's ability to side step the well-meaning provisions of the act. In addition, because the procedural protections are intended to ensure integrity and equal application in the procurement selection process, leaving them as discretionary would defeat the purpose of their inclusion in the language of the enabling legislation.

8.Labor protections

Some states where influence from labor unions or public employee labor organizations is significant will require language in the act providing assurance to organized labor that their interests are specifically protected. This will apply to trade unions in the design-build projects and public employee unions in design-build-operate projects. The most extreme example would be requirements that subcontractors on the jobs be “closed shop”. The minimum treatment may be simply reference to prevailing wage or apprenticeship programs, as provided by the example below. That language provides:

> Section 71. Notwithstanding any general or special law to the contrary, any contract issued pursuant to this section or pursuant to a contract previously awarded under this section that provides for the construction, reconstruction, alteration or modification of water treatment facilities, wastewater treatment facilities, septage treatment facilities, collection and distribution systems, sewers and pump stations shall include, as a minimum, the following language:
> (1) A private entity engaged in a construction, development, renovation, remodeling, reconstruction, rehabilitation or redevelopment project pursuant to a contract awarded under this act shall properly classify individuals employed on the project and shall comply with all laws relative to workers’ compensation, unemployment insurance, social security taxes and income taxes with respect to those employees.
>
> (2) All construction contractors or subcontractors engaged by any entity on any project which is performed pursuant to a contract awarded under this act shall have and maintain participation in a bona fide apprentice training program as defined by M.G.L. c.23, §11H and 11I for each category of work represented in their workforce that is approved by the Division of Apprentice Training of the Department of Labor and Workforce Development and abide by the apprentice to journeyman ratio for each trade.
> (3)All construction contractors engaged by any entity on any project that is performed pursuant to a contract awarded under this act shall furnish, to the awarding authority, documentation showing all employees are employed on the

project have hospitalization and medical benefits that meet the minimum requirements of the Connector Board established by Chapter 58 of the Acts of 2006. Senate Bill 1896, (2009).

Appeal, Public Access and Information Requirements

The nature of the selection process in design-build and design-build-operate statutes does not lend itself to the typical "bid-protest" appeals common with low-bid contract awards. This is due to the fact that other than price and minimum qualifications for firms or professionals on the design-build teams submitting proposals, most evaluation criteria are subjective in nature. Appeal provisions should be avoided in design-bid procurement since they would defeat a secondary purpose of the law, to expedite design, build and delivery of public construction projects. Accordingly, the only provisions of such a nature that should either be considered or contained in effective design-build or design-build-operate statutes should be limited to ensuring that the public owner met the statutory prerequisites to employing the alternative delivery method and complied with the mandatory procurement steps and/or procedure contained in the enabling legislation or promulgated in accordance with the enabling act.

Access to information applicable to the contract is another matter. To ensure the transparency in the alternative delivery model procurement process extraordinary efforts should be taken to ensure the statute contains a specific reference to the state's "freedom of information" act and mandates public agency compliance in creating and gathering information in the design-bid procurement.

The American Council of Engineering Companies has created some useful legislative models for design-build legislation that varies from the outlined contained in this paper. That model may also be helpful to municipal practitioners and legislative staff when drafting effective design-build statutes. The summary of those models is contained as Appendix B to this Paper.

B. Legislative Strategy: Taking the Model Legislation from Paper to Project

Changing law is a difficult challenge. Changing procurement law for public agencies is even more difficult. When the statutory scheme to be altered involves an area of public trust where billions of dollars of taxpayer monies are spend every year,

the task would seem formidable. With the right approach, it can be easier than it sounds.

As outlined in Section A, above, essential components of design-build legislation are geared around ensuring the integrity of the process, substantiating the advantage, if not the outright need for alternative delivery models, ensuring equal footing among competitive proposals and design-builders through minimum and standardized evaluative criteria and maintaining a transparent process. The first key to passing a bill of this nature is making sure all of these critical elements are contained in your statute and the language that you draft is operatively effective and not simply "boilerplate".

The public purpose, operative effect and implications in practice and project delivery need to be clearly and adequately explained in concise bill summaries attached to the legislation and used as a talking piece to explain the nature, purpose and benefits of the law to not only legislators but the state administrative agencies and interest groups that will weigh in on the legislative debate over the new design-build law. An example of a bill summary for a design-build-operate utilities bill is attached as Appendix A to this paper. Bill summaries should outline the operative sections of the bill, including the purpose, enabling authority, jurisdiction prerequisites and procurement safeguards. It is difficult to challenge legislation that provides significant public benefits in streamlining public construction, achieving project efficiency, cost and time savings and delivery of a quality project because selection is based on critical evaluative criteria other than simply price. In low-bid, design-bid-build, public agencies have quite often received exactly what they paid for. Alternative delivery models, such as design-build can deliver a better project, quicker, with cost savings and reduction in warranty claims, project disputes and owner headache.

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[i] Design Build for the Design Build Professional, Quatman, G. William at p.5.
[ii] Loulakis, Michael, Legal Aspects of Design Build: What the Cases Tell Us, appearing in Construction Business Owner.com
[iii] Quatman, *supra* at pp. 4.

APPENDIX A
SAMPLE BILL SUMMARY

SENATE BILL SUMMARIES
SENATE BILL NO. _____

AN ACT authorizing a governmental body to enter into contracts for the operation, maintenance, operation and maintenance, lease or sale and modification of water storage facilities, water treatment facilities and wastewater treatment facilities, collection and distribution systems, sewers and pump stations

General Overview and Introduction to Senate No._____

This bill provides a public procurement and contracting alternative for cities, towns and districts to secure long term asset management for drinking water storage facilities, (commonly referred to as "water tanks" or "water towers"), water treatment facilities, wastewater treatment facilities, collection and distribution systems, sewers, and pump stations, that are an integral part of the public drinking water supply or sewage treatment. This bill is particular to only municipally owned water and wastewater facilities and allows cities and towns to have a consolidated procurement model. It is substantially similar to laws previously approved by the Legislature for public water treatment and distribution facilities and wastewater treatment and collection systems, and the bill creates a combination procurement model for asset management services as well as capital repair and improvement. The present statutory scheme in the Commonwealth prevents and deters communities from transferring risk and responsibility for long term asset management for these facilities due to the separate bidding requirements for management, operations and inspection services, covered by Chapter 30B, and capital repair, modification and replacement, covered by the public construction statute Chapter 30 Section 39M. The MWRA is exempt from the provisions of this bill.

SUMMARIES OF SIGNIFICANT AND OPERATIVE SECTIONS OF Senate No._____
Section 60

This Section, allows cities, towns or water districts to enter into long-term operations, maintenance, inspection, repair and asset management agreements for sustainable asset management of water and wastewater facilities and appurtenances. It combines service contracts, covered by Chapter 30B, and the public works construction statute, General Laws Chapter 30 Section 39M.

The procurement process created by this bill still requires competitive, sealed proposals and application of evaluative technical criteria as well as consideration of life cycle costs and price. The references to exemption from Sections Thirteen and Sixteen of Chapter 30B refer to exemptions from the sections in the supplies and services statute, (Chapter 30B), that allow for an increase in contract value up to 25%, and the competitive bid process for conveying an interest in real property, respectively.

The second paragraph of Section 60 provides an alternative method and enumerated criteria for evaluating proposals and replaces similar language contained in subsection (g) of Chapter 30B Section 6. Both the existing statute and this proposed bill provide substantially similar competitive, uniform evaluation criteria for universal and consistent application to each responsive proposal.

In addition, the Bill requires that all necessary construction of modifications, new facilities, and installation of new equipment and systems, performed after the initial capital repairs, estimated to cost more than $250,000.00 be awarded in accordance with Chapter one hundred forty-nine, the competitive bidding statute for public building construction. Significantly, to further protect the public integrity of the procurement model created by this section, specifications for such work shall contain certification by an independent, qualified engineer that such capital improvements/modifications are necessary and that s/he has reviewed and approved the contractor's proposed plans and specifications prior to advertising.

Section 61Page: 1

Sub-section (a) of Section 61 has essentially two operative provisions. The first provision limits the time period to 30 years for a contract under this Bill. The second provision allows the contract value for

inspection and maintenance to be increased by the Owner's obligation to fund major capital repairs during the life of the project that were not included in the original contract scope. This section also provides that the City/town/district may finance, either through the contractor or privately, the amount necessary to fund the repair or capital improvement.
Subsection b. permits the contract to provide for all aspects of a Design-Build delivery model, including financing, construction, purchasing and any additional services for sustainable asset management.

Section 62
Section 62 requires that the Governmental Body uniformly solicit bids, identify the time and place for proposal submission and include a description of the project/service scope as well as the evaluation criteria to be used in ranking proposals. In addition, the RFP must include a listing of key contractual terms, identifying any non-negotiable items.

Section 63
Section 63 provides for the selection of a proposal based on a combination of technical, evaluative criteria and price proposals. The Governmental Body is not required to enter into a contract with the lowest priced proposer, but instead may award the contract by taking into consideration price, estimated life cycle costs, allocations of risks and responsibilities and other evaluation criteria set forth in the RFP.

Section 64
This section requires that any employee employed at the facility at the time of contract execution, be offered employment. The new employer shall adopt all terms and conditions of employment contained in the labor agreement in place immediately prior to the new contract. The operator must also recognize the collective bargaining unit representative in place at the time the asset management transfer takes place.

Section 65
This section provides that prior to the construction of modifications or installation of equipment and systems under this bill, a qualified water and wastewater engineer must independently review and approve plans and specifications for said modifications, equipment or systems.

Section 66
This section applies to the applicability of the state law provisions that provide funding through the State Revolving Fund, ("SRF"). It clarifies that projects pursuant to this bill remain eligible for the annually funded loans for selected wastewater and drinking water improvements.

Section 67
Section 67 permits the further capital improvements required as a component of the full asset management contracts for facilities to be procured without further application of the supplies and services statute, (Chapter 30B), provided that the contracts for further capital improvements conform with the Chapter 149 requirements providing for Veteran preference to trades workers and laborers on the project, mandating prevailing wage compliance and including certain bond and payment requirements of Section 29 designed to protect contractors and laborers from Owner default in payment for services provided.

Section 68
Section 68 provides a 30-day statute of limitations for filing a civil action to challenge the award of a contract pursuant to this bill.

Section 69
This section provides an early retirement incentive program for employees employed at the facilities where long-term asset management is transferred. It allows the employee to have his/her creditable service at the time of his retirement increased by up to a combination of five additional years of age and service. The provisions of this section shall not apply unless one or more full-time public employees are displaced from employment as a result of the asset management contract entered into pursuant to Sections 60-71.

Section 70

Section 70 requires that any procurement process for asset management for tanks be advertised no later than 90 days in advance in the Central Register and that notification be provided to the Union.

Section 71
This section provides “Responsible Contractor Language” for construction of facilities.

ACEC
AMERICAN COUNCIL OF ENGINEERING COMPANIES

SUMMARY OF MODEL DESIGN-BUILD LANGUAGE

The following is a section-by-section summary of the model design-build legislation drafted by the American Council of Engineering Companies.

Section 1 – *Short Title*

This section simply names the bill the "Model Design-Build Procurement Act."

Section 2 – *Definitions*

In this section, we define a host of terms that will appear throughout the document. Most are terms of art that design professionals will recognize immediately.

Section 3 – *Public Policy*

In this section, we emphasize the importance of design-bid-build. The language specifically instructs an Agency to demonstrate, in writing, why a design-build delivery system better suits their needs than the traditional design-bid-build approach. The Agency must also demonstrate that it is in the public's best interest to proceed with a design-build delivery system.

Section 4 – *Procedures*

In this section, we outline the two-phase approach to design-build delivery systems that we would most like to see enacted.

- In phase-one, the Agency is required to retain a design professional to provide technical advice and oversight throughout the project. This design professional will help the Agency prepare a scope of work statement defining the project and the Agency's requirements. The scope of work statement shall include:

    - Criteria and preliminary designs
    - General budget parameters
    - General schedule or delivery requirements.

Phase one concludes when the Agency begins to solicit proposals.

- Phase two consists of a two-part selection process: In part one, the Agency evaluates and shortlists design builders based on their qualifications. Factors used in evaluating design builders include:

- Specialized experience/ technical competence
- Capability to perform
- Past performance of the design builder's team

Those design builders that have made the shortlist (the maximum number is 5) shall then be invited to submit part-two competitive proposals. Part-two proposals shall be evaluated based on the technical submission and other evaluation factors, including cost and price. **Agencies that offer stipends permitted under the legislation, will encourage greater participation from, and competition among firms.**

Section 5 – *Evaluation Factors*

This section requires the design professional retained by the Agency to develop the evaluation factors used in phases one and two. This design professional is prohibited from submitting a proposal for the design-build contract.

Section 6 – *Solicitation of Proposals*

This section identifies the information that must be included in a solicitation. At a minimum, a solicitation must include:

- The identity of the Agency
- Procedures to follow for admitting proposals
- The proposed terms for the design-build contract
- Evaluation factors
- A description of drawings/specifications to be submitted with a proposal
- The schedule for starting and completing the project
- Budget limits
- Affirmative action set-asides, if any
- Qualification requirements
- Requirements for contractors to have performance bonds
- Other information, if necessary

Section 7 – *Proposals*

This section includes several different requirements for the submission and treatment of proposals. It states that every design build team must include a design professional; requires phase-two, part-two proposals to be sealed and to remain unopened until the deadline for submissions has passed; requires cost estimates that may not be exceeded; and states that proposals shall remain the property of the design professional until they are accepted.

Section 8 – *Acceptance of Design Proposals*

The language requires an Agency to accept the proposal which it considers most advantageous to the Agency. Acceptance shall be by written notification. Other design builders must be notified, at the same, that their proposals were not accepted.

Section 9 – *Withdrawal of Proposals*

This section allows proposals to be withdrawn at any time.

Section 10 – *Public Access and Information Requirements*

This section allows a design builder who's proposal was not accepted to request a written explanation from the Agency. The section also requires the State to compile and make public all proceedings and documents related to procurement transactions each year.