



The Future of Progressive Design Build

The Panelists



Barbara Wagner

Executive Vice President |
Clark Construction
(Former President of DBIA
Western Pacific Region)



Reggie Jones

Partner | Chair of Federal Government Contracts
Fox Rothschild LLP



Carole Bionda

President | CL Bionda Consulting LLC
(Former Vice President & General Counsel,
Nova Group Inc. – Retired)

Progressive Design-Build Defined

"PDB is a project delivery method in which design-builders are selected based on qualifications and work with the owner in an exclusive contractual arrangement to subsequently agree on guaranteed DB pricing after the team develops an adequate design."

Single Phase Structure based on qualifications and demonstrated capabilities without submission of a detailed construction cost or price proposal at the time of award; **or**

Two-Phase Structure



Key Characteristics of PDB

1

Qualifications-Focused Selection

Design-builders selected on qualifications, not lowest price

2

Delayed Price Commitment

Price commitment after parties agree on scope, schedule, design & commercial terms

3

Off-Ramp Provision

If parties cannot agree on price, either party can walk away

4

Full Cost & Schedule Transparency

Open-book approach during preconstruction phase

5

Collaborative Validation Period

Team works together to identify and mitigate risks before pricing

"Applicable to any project type, any size, any sector" — DBIA

Acquisition
Decisions
made Early in
the Process
Directly
Impact Post-
Award
Execution

"Golden Rule" of Construction: A project's fate is sealed before the first shovel hits the dirt.

The "Influence vs. Cost" Reality

***Maximum Leverage** : 80% of project costs and risks are "locked in" during the Acquisition Planning and Procurement phases.*

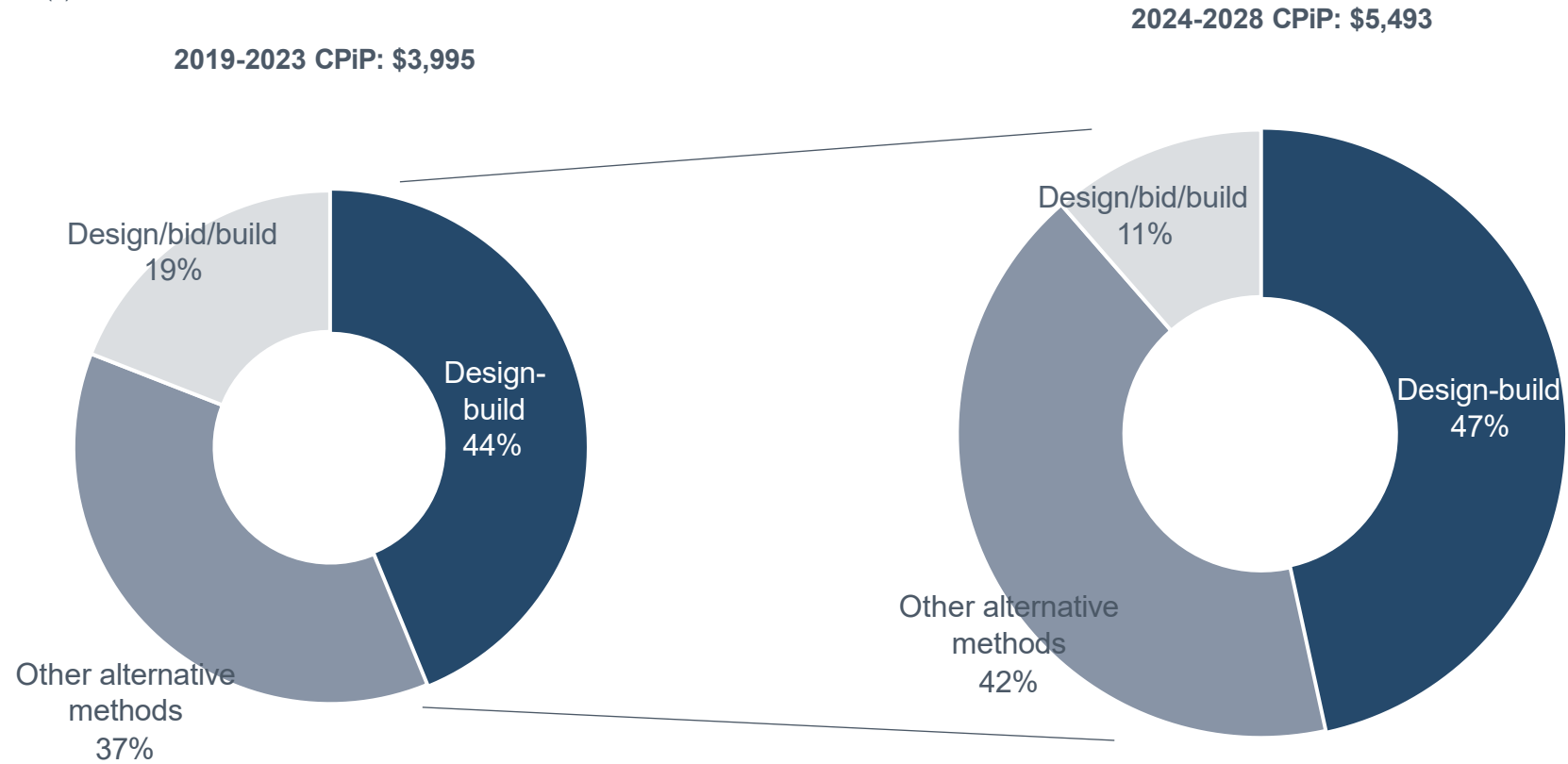
***The Cost of Change:** A design change during the Planning Phase costs pennies; the same change during Construction costs thousands and triggers schedule delays (claims/modifications).*

***Acquisition Strategy as Foundation** : The choice between Two-Phase Best Value and Single Phase Progressive Design-Build dictates the level of collaboration, risk allocation, and speed of execution.*

Design-build is anticipated to continue to hold share over the forecast period and representing over 47% of spending in 2028.

Distribution of Delivery Method Utilization

Source(s): FMI



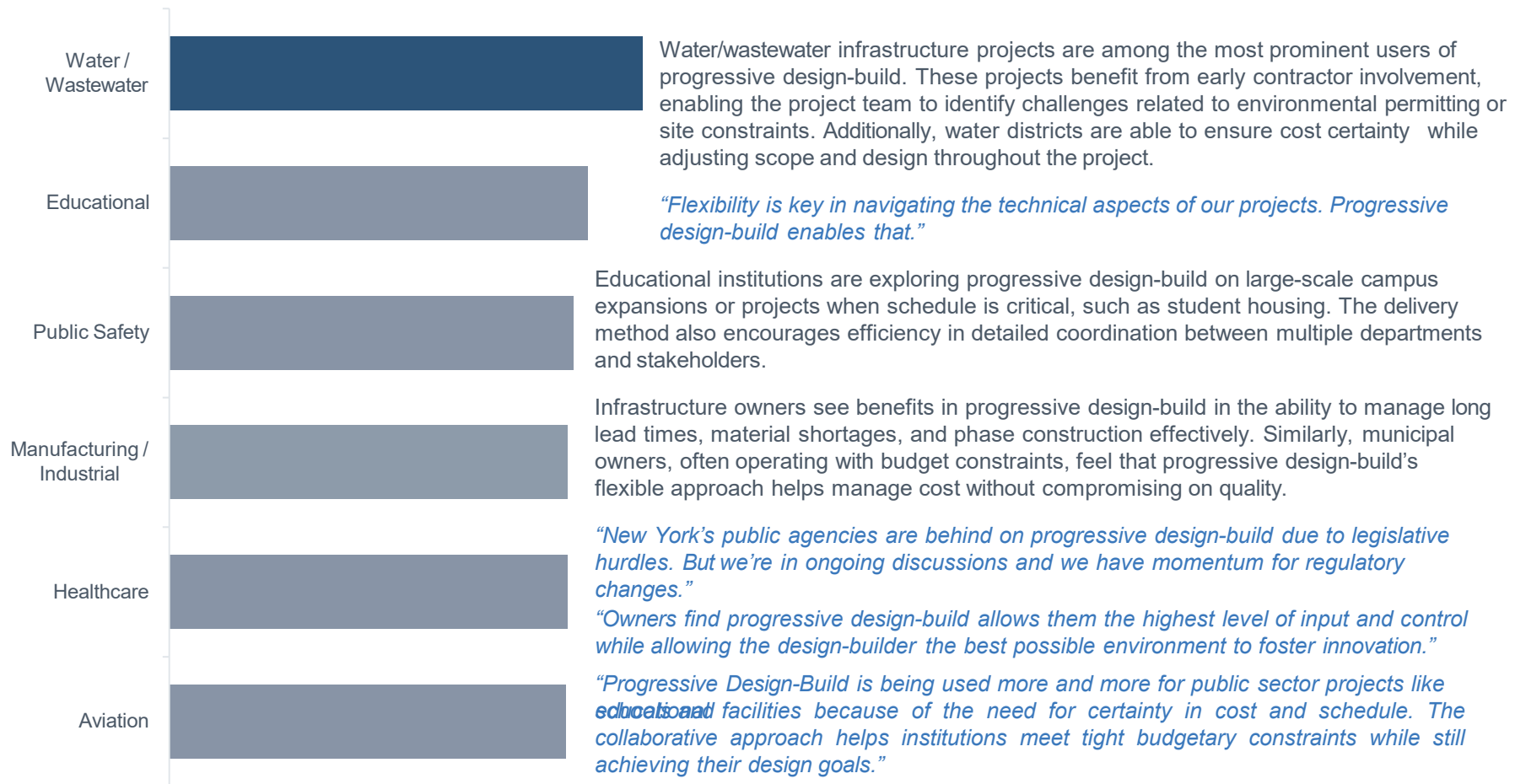
**Other alternative methods includes CM/GC, CMAR, EPC and IPD*

***Percentages are based on estimated utilization across construction spending.*

Water/wastewater, education, and public safety projects utilize progressive design-build when compared to other segments.

Percentage of Progressive Design-Build Procurements; Leading Segments

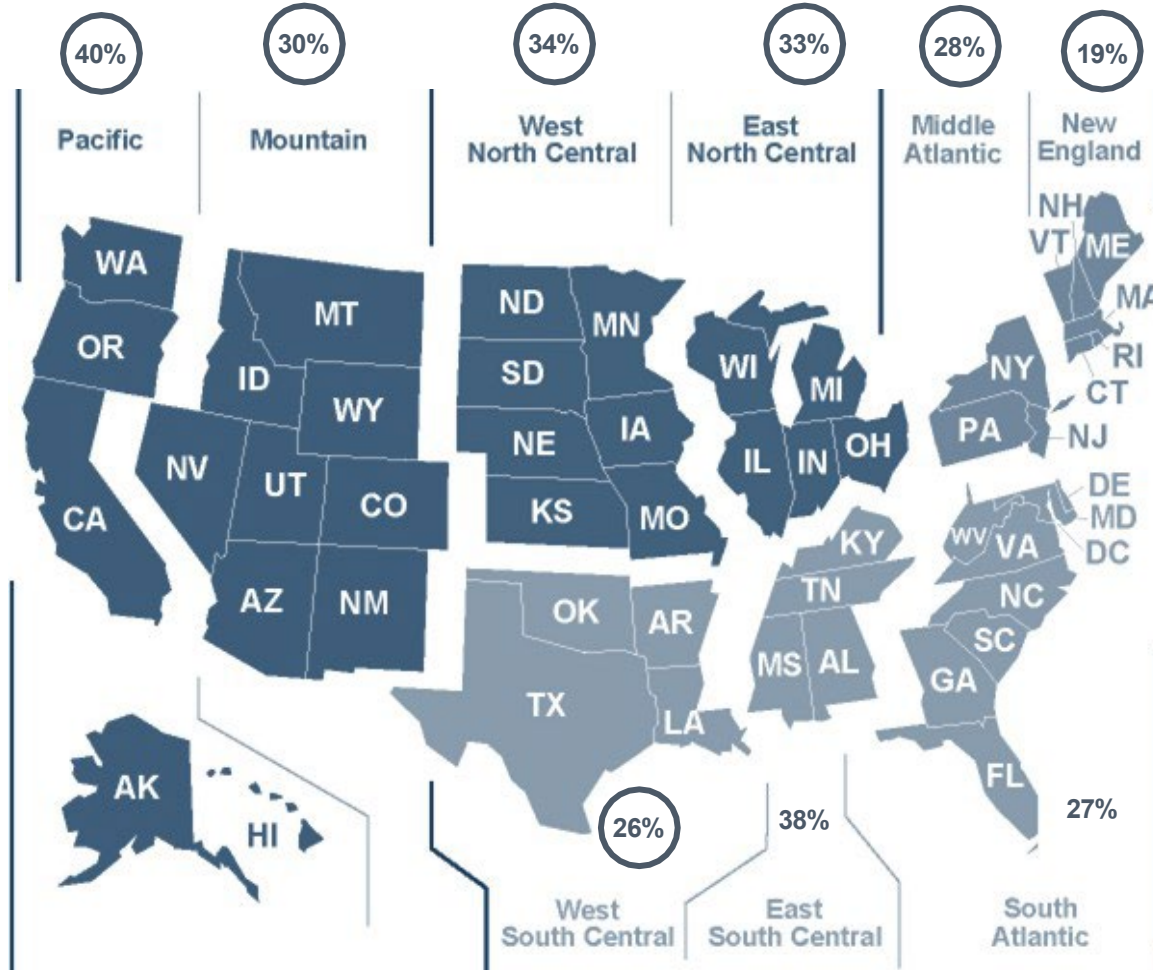
Source(s): FMI (Average)



Respondents in the Pacific Division indicate the highest percentage of utilization of progressive design-build.

Percentage of Progressive Design-Build Procurement by Survey Response; Geography

Source(s): FMI (Percent of total)



*Percentages represent survey responses, not FMI's construction forecasts.

Across geographies, survey respondents in the Pacific region indicated the highest percentage of projects that are being procured via a progressive design-build approach. Stakeholders operating in the region consistently noted that owners are employing progressive design-build at a continually increasing rate, especially in the public building space.

A potential hesitation in adopting progressive design-build was the lack of familiarity and trust in the process. One participant noted that in their state (MA), owners are “unwilling to give up control of the design,” and others pointed to a hesitancy to lock in a team before having more detailed designs. Some interviewees also pointed to concerns of fair risk allocation and complexity of managing the process.

“California is leading adoption of progressive design-build. The ability to adjust design based on market changes, like material lead times, makes it appealing.”

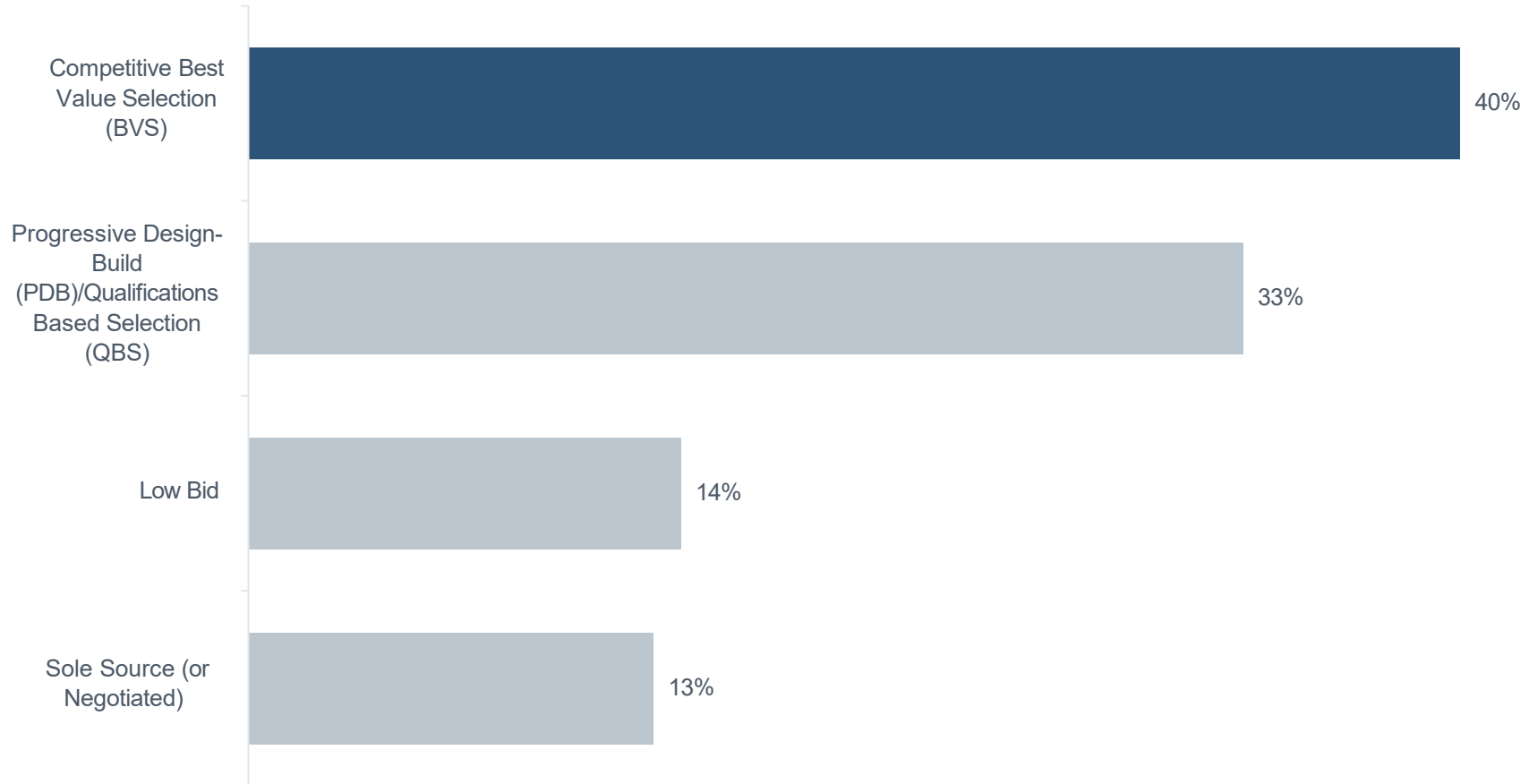
“We think progressive design-build will be a tough sell among our contracting community – they are weary of a perceived lack of competition.”

“Infrastructure owners in Virginia are moving away from lump sum contracts, and are either using progressive design-build or CMAR.”

Most design-build projects employ competitive best-value selection or Progressive Design-Build/Qualifications-Based Selection.

What percentage of your design-build projects utilize the following procurement approaches?

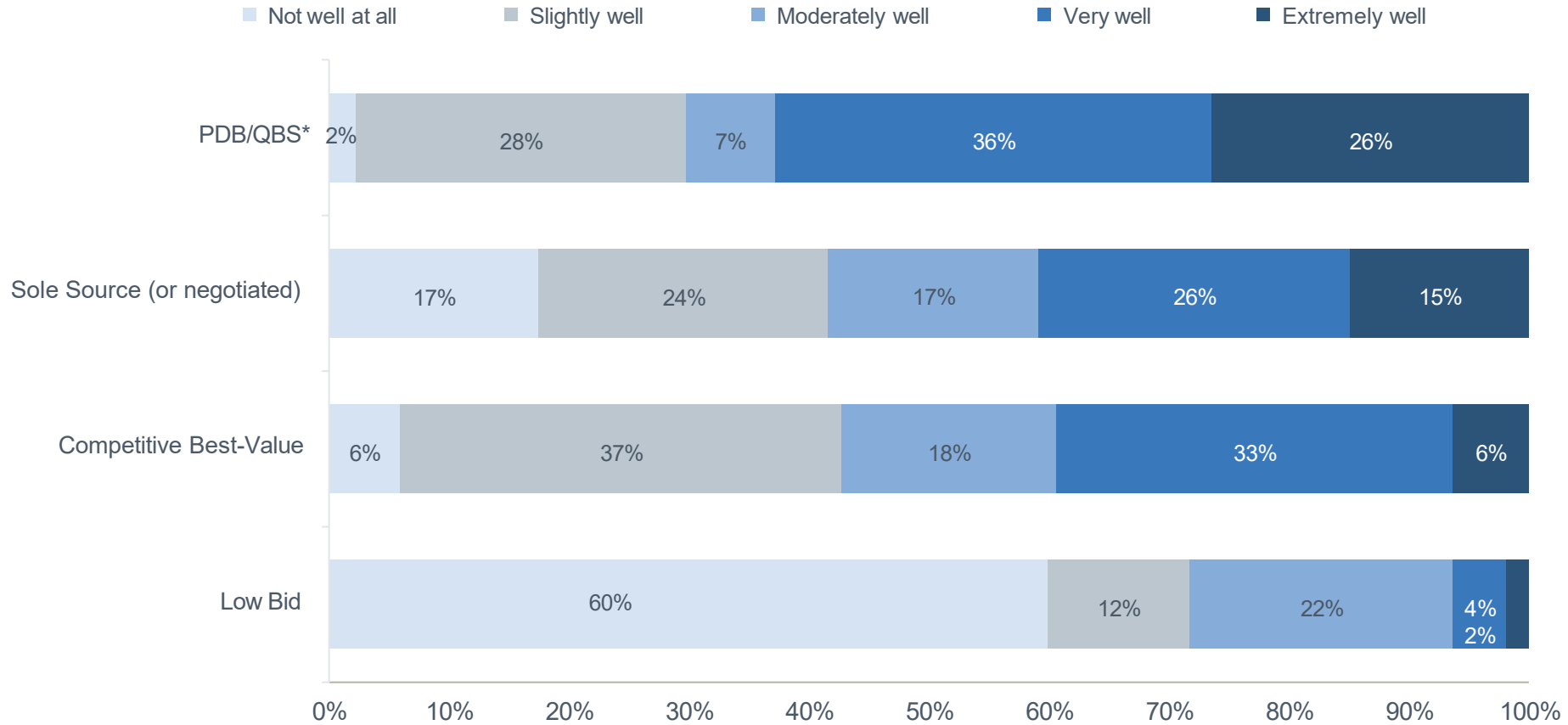
Source(s): FMI (Average Response)



Progressive design-build and qualification-based selection were identified as the most effective procurement methods for managing costs, while low bid was regarded as the least effective approach for cost control.

How do the following procurement approaches address the ability to manage cost certainty in a volatile market environment?

Source(s): FMI (Percent of total)



*PDB- Progressive design-build, QBS – Qualifications Based Selection

The Federal Legal Framework We Have

Current PDB Authorization

- ✓ MILCON: Authorized via 2025 NDAA Sec. 2809 (10 U.S.C. § 3241(g))
- ✓ Coast Guard: Authorized by USCG Authorization Act (FY 2006)
- ✓ FAA: Authorized by statute
- ✗ Other civilian agencies: NOT expressly authorized (41 U.S.C. § 3309 requires two-phase process with price)

Current Workarounds

FPIS Contract Type (FAR 16.4)

Award before price fully known; fixed-price ceiling negotiated progressively.

- IBWC Example (FAR Deviation)
South Bay IWTP used FAR 52.216-7 deviation; *but* firm price not submitted until 90% design.

Other Transaction Authority (OTA)

10 U.S.C. § 4022; *e.g.*, USSPACECOM HQ via One Nation Innovation Exchange. DoD & 11 Other Civilian Agencies

The Brooks Act (1972) & The Competition in Contracting Act (1984)

- The Brooks Act (Public Law 92-582, 40 U.S.C. §§ 1101–1104) mandated **Qualifications-Based Selection (QBS)** process for purchasing architectural and engineering (A&E) services. Price is negotiated later to ensure a fair and reasonable cost.
- CICA mandates full and open competition for federal contracts.
- CICA's main goal is to increase number of competitors, drive down costs through competitive pricing and ensure transparency/accountability in fed procurement.
- **Design-Build and Progressive Design Build represent a deviation from CICA.**

Federal Design Build began with The Clinger-Cohen Act of 1996

- The Clinger-Cohen Act, 41 U.S.C. § 253m, codified a **two-step procurement process** for design-build projects.
- In the **first step**, the contractor's technical approach and qualifications (including its experience, technical competence, capabilities, and past performance) and other noncost/price factors are considered.
- In the **second step**, the selected proposers' technical and pricing submission for evaluation by the agency are considered. See FAR 36.303.

The Implementing Regulations

- **FAR Part 36, “Construction & Architect Engineer Contracts”** rewritten to add Subpart 36.3 to add “Two-Phase Design Build Selection Procedures.” Effective January 1997.
- **FAR Part 15, “Contracting by Negotiation”** rewritten to incorporate and streamline two-phased design-build selection procedures. Effective January 1998.

Section 2809 of the NDAA, Pub. Law 119-60, December 18, 2025

- Amended 10 U.S.C. § 3241 (Design-build selection procedures) to add (g) Authorization of Progressive Design-Build Contracts [for MILCON].
- Requires the contract:
 - **To be awarded in a single phase based on qualifications** and demonstrated capabilities without submission of a detailed construction cost or price proposal at the time of award.
 - To provide for collaboration between the Secretary and the contractor to develop and refine the project scope, design, and cost estimates.
 - **To mandate negotiate a GMP or other fixed price agreement for the construction phase.**
 - **To include an off-ramp for termination or renegotiation if negotiations fail.**
- Note: Civilian agencies use 41 U.S.C. 3309 (Design-build selection procedures).
 - **Still requires two phased selection process** – (1) Technical Qualifications & Approach; and (2) Detailed design with cost or price information.

Civilian Agencies Workaround FAR 16.4 (Incentive Contracts)(FPIS)

- This contract type is the "missing link" that allows the Government to award a contract before the price or scope is fully known, while maintaining a fixed-price ceiling.
- **Initial Target Phase (The "Progressive" Start):**
 - At award, the parties agree to an **Initial Target Cost**, **Initial Target Profit**, and a **Price Ceiling**.
Allows work to begin on the design and site investigation immediately without a final "Hard" price.
- **The "Successive" Pivot (The Reset):**
 - At a predetermined point (e.g., 60% Design), the parties review actual cost data and "Successive" targets are set.
Outcome A: If risks are low, it converts to a **Firm-Fixed-Price (FFP)**.
Outcome B: If risks remain, it converts to a **Fixed-Price Incentive (Firm Target)**.
- **Final Profit Adjustment:**
 - Profit is not a flat fee; it is adjusted by a **Share Ratio** (e.g., 80/20) based on whether the contractor delivers under or over the final target.

FAR 52.216-17 - Incentive Price Revision-Successive Targets (Jan 2022) (DEVIATION) Design-Build (Progressive) – Construction

(d) Establishing the Final Cost of Work and Final Construction Price exercised as an Option.

(d)(3) If the total firm Final Construction Price represents a reasonable price for performing that part of the contract subject to price revision under this clause, the parties may agree on a firm fixed price, which shall be evidenced by a contract modification signed by the Contractor and the Contracting Officer.

(d)(4) Failure of the parties to agree to a firm fixed price shall not constitute a dispute under the Disputes clause. If agreement is not reached, or if establishment of a firm fixed price is inappropriate, the Contracting Officer will not exercise the optional construction bid item(s), and construction services may be subsequently competitively procured by the Government. The Contracting Officer will review the Contractor's and any subcontractor's involvement during the provision of pre-construction (design) consultation services for organizational conflicts of interests or unfair competitive advantages in accordance with FAR Subpart 9.5. The Contracting Officer may be required to exclude the Contractor, or subcontractors, from the subsequent competition as a result.

The Legal Framework We Need

1

Title 41 Authorization

Amend 41 U.S.C. § 3309 to authorize PDB for civilian agencies — single-phase, qualifications-based award without detailed construction price at award

2

Post-Award Pricing Mechanics

Codify pathway to negotiate GMP or fixed-price after preliminary design, with mandatory off-ramp if parties cannot agree

3

Safeguards & Oversight

Require documented determination of PDB appropriateness with implementation and oversight mechanisms

4

FAR Revisions

Update FAR Part 36 to recognize PDB; conform FAR 36.104 and Subpart 36.3 to support single-phase selection, post-award negotiation, and termination provisions

PDB under an OTA: USSPACECOM HQ C2F – PDB

- The Army Contracting Command - Rock Island, on behalf of the U.S. Space Command (USSPACECOM), hosted an informational Industry Day for the management, design and construction of the new USSPACECOM HQ C2F at Redstone Arsenal, Alabama.
- The Government intends to utilize a progressive design-build project delivery method following Design-Build Institute of America (DBIA) best practices.
- The acquisition for both the Owner's Representative and the design-build performance contractor will be executed using Other Transaction Authority (OTA) through the One Nation Innovation (ONI) Exchange GoColosseum Marketplace.

Three Types of Other Transactions

- **Research Other Transactions (OT)**

- Authorized under 10 U.S.C. § 4021 for basic, applied, and advanced research projects.
Intended to spur dual-use R&D.

- **Prototype OT**

- Authorized under 10 U.S.C. § 4022 to acquire prototype capabilities and allow for those prototypes to transition into Production OTs.

Successful Prototype OTs offer a streamlined method for transitioning into follow-on production without further competition.

- **Production OT**

- Authorized under 10 U.S.C. § 4022(f) as follow-on OTs to a Prototype OT agreement that was competitively awarded and successfully completed.

Allows for sole source agreement with successful Prototype OT vendor.

10 U.S.C. 4022(d) – Appropriate Use of Authority

•To use OTA, one of the following conditions must be met:

(A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.

(B) All significant participants are small businesses or nontraditional defense contractors.

(C) At least 1/3 of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.

(D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

What is a Nontraditional Defense Contractor (NTDC)?

- An entity that is not currently performing and has not performed, for at least one year preceding the issuance of a prototype project solicitation, any contract or subcontract for the DoD that is subject to full coverage under the FAR-based Cost Accounting Standards (CAS).
- Full CAS coverage is required typically for contracts > \$50M.
- Firm-fixed price contracts awarded based on adequate price competition and contracts with small businesses are exempt from all CAS requirements regardless of dollar value.

Thank you!

