

Date of Hearing: April 26, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 1523 (Oberholte) – As Amended March 28, 2017

SUBJECT: Local agencies: contracts: design-build projects.

SUMMARY: Expands the use of the design-build procurement method that is authorized for specified local agencies to include transportation agencies, and expands the use of design-build by transportation agencies, transit agencies, cities and counties to include projects on local streets and roads. Specifically, **this bill:**

- 1) Allows any local or regional agency responsible for the construction of transportation projects to use the design-build procurement method that is authorized for transit agencies.
- 2) Allows transportation agencies, transit agencies, cities and counties to use this design-build authorization for projects on local streets and roads.
- 3) Provides that no reimbursement is required by this bill pursuant to the California Constitution because the only costs that may be incurred by a local agency will be incurred because this bill creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, as specified.

EXISTING LAW:

- 1) Requires, pursuant to the Local Agency Public Construction Act (LAPC Act), local officials to invite bids for construction projects and then award contracts to the lowest responsible bidder under the traditional design-bid-build project delivery system.
- 2) Authorizes, until January 1, 2025, cities, counties, and specified special districts and transit agencies to use design-build for specified public works contracts in excess of \$1 million using either a low bid or best value process.
- 3) Provides the following parameters for cities and counties that use design-build pursuant to 2), above:
 - a) Allows design-build for the construction of a building or buildings and improvements directly related to the construction of a building or buildings, county sanitation wastewater treatment facilities, and park and recreational facilities;
 - b) Allow cities and counties that operate wastewater facilities, solid waste management facilities, or water recycling facilities to use design-build for the construction of such facilities, both local and regional; and,
 - c) Prohibits cities and counties from using design-build for the construction of other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructure [with the exception of b), above].

- 4) Generally limits the types of special districts that may use design-build pursuant to 2), above, to transit districts, and special districts that operate wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities.
- 5) Limits the types of projects that special districts can construct using design-build pursuant to 2), above, to the following:
 - a) Transit capital projects that begin project solicitation on or after January 1, 2015, excluding state highway construction or local street and road projects (for transit districts); and,
 - b) Regional and local wastewater treatment facilities, regional and local solid waste facilities, regional and local water recycling facilities, or fire protection facilities (for special districts that operate those types of facilities).

FISCAL EFFECT: This bill is keyed fiscal and contains a state-mandated local program.

COMMENTS:

- 1) **Bill Summary.** This bill expands the design-build authorization in existing law for specified local agencies to include any local or regional agency responsible for the construction of transportation projects. This bill further expands this authorization to allow transportation agencies, transit agencies, and cities and counties to use design-build for projects on local streets and roads.

This bill is sponsored by the San Bernardino Transportation Authority.

- 2) **Author's Statement.** According to the author, "The current prohibition on using the design-build procurement process for local streets and roads unnecessarily limits the project delivery tools needed by local governments to meet current and future transportation needs. Local street and road projects are the only transportation infrastructure projects in which local transportation agencies are unable to use the design-build procurement process."
- 3) **Background.** The LAPC Act generally requires local officials to invite bids for construction projects and then award contracts to the lowest responsible bidder. This design-bid-build method is the traditional approach to public works construction. The design-bid-build process was developed to protect taxpayers from extravagance, corruption, and other improper practices by public officials as well as to secure a fair and reasonable price for public works construction by injecting competition amongst bidders into the process.

Although design-bid-build generally results in the lowest cost construction contract, it is not without its drawbacks, including:

- a) Projects generally take longer to complete because designs must be entirely completed, permits obtained, and right-of-way acquired before the construction contract can be bid and awarded;
- b) Designs prepared for a competitive low-bid procurement are developed to allow for a broad range of construction approaches. As a result, low-bid designs do not always

equate to the most efficient design possible, depending on a particular contractor's particular strengths or capabilities;

- c) Because the project designer does not have the benefit of consulting with the entity that will ultimately be responsible for construction of the project, there may be significant issues that the designer does not anticipate, particularly constructability issues. This can result in change orders that ultimately drive up the price of the contract; and,
- d) Low-bid is not always the least expensive option, once change orders and contractor claims are factored into the overall project costs.

In the early 1990s, public works agencies grew frustrated with design-bid-build and began experimenting with other project delivery methods, including design-build. Under the design-build method, a single contract covers the design and construction of a project with a single company or consortium that acts as both the project designer and builder. The design-build entity arranges all architectural, engineering, and construction services, and is responsible for delivering the project at a guaranteed price and schedule based upon performance criteria set by the public agency.

Design-build differs from design-bid-build in some key areas, including:

- a) Shorter overall elapsed project delivery time because construction can begin before final design is complete;
- b) Project costs and schedule risks are more heavily borne by the design-build contractor;
- c) Construction claims and change orders are minimized;
- d) Designs can be developed to take advantage of particular contractor's strengths and abilities, thereby reducing the need to "over-design" for generic use as in design-bid-build;
- e) Project specifications are typically based on definitive performance criteria (which may or may not be well established by the project owner) rather than established specifications; and,
- f) Contracts are awarded based on best-value analyses rather than low-bid.

Design-build contracts are not without their drawbacks as well. For example, with a design-build project, the project owner must give up a good deal of control over the details of the project design. Additionally, design-build contractors are typically selected using qualifications-based selection criteria or best value analysis. These approaches are more subjective than a low-bid approach, potentially subjecting the public works owner to greater contract challenges and higher costs.

- 4) **Design-Build in California Law.** As noted above, the Legislature began granting design-build authority in the early 1990's, and has typically done so with specified parameters, such as the duration of the authority, the types of agencies allowed to use it, the types of projects for which it can be used, cost thresholds, and specified procedures that must be followed in

preparing and awarding contracts. Over the years, this resulted in a plethora of statutes in a variety of code sections, which created confusion for public agencies and contractors alike.

In an effort to consolidate these statutes, SB 785 (Wolk), Chapter 931, Statutes of 2014, repealed existing law authorizing the Department of General Services (DGS), the Department of Corrections and Rehabilitation (CDCR), and local agencies to use the design-build procurement process, and enacted uniform provisions authorizing DGS, CDCR, and specified local agencies to utilize the design-build procurement process for specified public works projects (with some exceptions, notably design-build authority for CalTrans). SB 785 created one set of codes for DGS and CDCR, and a separate set for specified local agencies, but with similar parameters.

- 5) **Limits on Design-Build for Cities and Counties.** Existing law now limits the use of design-build by cities and counties to the following types of projects:
- a) The construction of a building or buildings and improvements directly related to the construction of a building or buildings, county sanitation wastewater treatment facilities, and park and recreational facilities; and,
 - b) Local and regional wastewater facilities, solid waste management facilities, or water recycling facilities (for cities and counties that operate such facilities).

Existing law expressly prohibits cities and counties from using design-build for the construction of other infrastructure, including, but not limited to, *streets and highways*, public rail transit, or water resources facilities and infrastructure [with the exception of b), above].

- 6) **Limits on Design-Build for Special Districts.** Existing law also limits the use of design-build for special districts by both type of district and type of project. The types of special districts that may use design-build include: transit districts; and, special districts that operate wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities.

For transit districts, their use of design-build is limited to transit capital projects that begin project solicitation on or after January 1, 2015, excluding state highway construction or *local street and road projects*.

- 7) **Policy Considerations.** The Committee may wish to consider the following:
- a) **Overly Broad Expansion?** The Legislature has historically granted design-build authority on a more limited and incremental basis than the proposal contained in this bill. The Committee may wish to consider the precedent of expanding design-build authority in such a broad manner contrary to express prohibitions in existing law.
 - b) **Stated Need.** As an example of the immediate need for this bill, the sponsor has pointed to the Mt. Vernon Avenue Viaduct project in the City of San Bernardino, which the sponsor has characterized as a major safety concern that could be rebuilt as much as one year faster using design-build. The Committee may wish to consider narrowing this bill to allow for the use of design-build for this project only.

- 8) **Committee Amendments.** The Committee may wish to adopt the following amendments to address the policy considerations outlined above: narrow the provisions of the bill to allow only the San Bernardino Transportation Authority to use design-build only for the Mt. Vernon Avenue Viaduct project.
- 9) **Related Legislation.** AB 851 (Caballero) allows additional types of special districts to use design-build and allows cities, counties and special districts to use design-build for additional types of projects. AB 851 is pending in this Committee.
- 10) **Previous Legislation.** SB 785 (Wolk), Chapter 931, Statutes of 2014, repealed existing law authorizing DGS, CDCR, and local agencies to use the design-build procurement process, and enacted uniform provisions authorizing DGS, CDCR, and specified local agencies to utilize the design-build procurement process for specified public works projects.
- 11) **Arguments in Support.** The San Bernardino Transportation Authority, sponsor of this bill, writes, "The design-build process is critical to communities like ours to expedite important infrastructure projects such as the Mt. Vernon Avenue Viaduct in the city of San Bernardino. The Mt. Vernon Viaduct is a 1,016 foot bridge, built in 1934, that spans over the Burlington Northern Santa Fe Railroad (BNSF) Railway Intermodal Yard in the City of San Bernardino. In 1997, Caltrans inspectors determined the bridge had a sufficiency rating of less than 50 out of a possible 100, which is considered structurally deficient and functionally obsolete. Since 2004, the bridge has been closed to traffic twice to shore up support columns to keep this important connection available to the public. Although it remains in service for passenger vehicles, as a precaution, commercial vehicles are prohibited from crossing the bridge. The use of the design-build procurement process on the Mt. Vernon Viaduct would accelerate the agency's ability eliminate a major safety concern as much as a year earlier than if done through a traditional process. This time savings is significant as our agency seeks to repair, rebuild, and restore a major north-south arterial within the City."
- 12) **Arguments in Opposition.** The Professional Engineers in California Government (PECG), in opposition, write, "PECG has worked on the issue of design-build for many years. The provisions of AB 1523 alter a legislative compromise that was reached between a variety of parties many years ago. PECG does not believe it is appropriate to allow design-build on local streets and roads, particularly without a requirement that the appropriate public agency inspect them."

The American Federation of State, County and Municipal Employees (AFSCME), also in opposition, states, "AB 1523...privatizes work currently performed by AFSCME members. AFSCME represents public works employees working as planners, senior planners, engineering technicians, engineers, streets division directors, and others whose jobs are at risk of being outsourced under design-build models."

REGISTERED SUPPORT / OPPOSITION:

Support

San Bernardino Transportation Authority

Opposition

American Federation of State, County and Municipal Employees
Professional Engineers in California Government

Analysis Prepared by: Angela Mapp / L. GOV. / (916) 319-3958