

Date of Hearing: September 14, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT  
Cecilia Aguiar-Curry, Chair  
AB 851 (Caballero and Gloria) – As Amended September 7, 2017

**SUBJECT:** Local agency contracts.

**SUMMARY:** Extends the sunset date on the authority of counties to use construction manager at-risk (CM at-risk) contracting, extends CM at-risk contracting authority to the City of San Diego (San Diego) for specified projects, and allows the Santa Clara Valley Water District (District) to use the design-build procurement method for specified types of projects.

**The Senate amendments:**

- 1) Extend, until January 1, 2023, the sunset date on the authority of counties to use CM at-risk contracting for projects in excess of \$1 million.
- 2) Prohibit a CM at-risk entity from being prequalified or shortlisted or awarded a contract unless the entity provides an enforceable commitment to the county that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance specified existing law governing skilled and trained workforce requirements for public contracts.
- 3) Provide that 2), above, shall not apply if any of the following conditions are met:
  - a) The county has entered into a project labor agreement (PLA), as defined, that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce, and the entity agrees to be bound by that PLA;
  - b) The project or contract is being performed under the extension or renewal of a PLA that was entered into by the county before January 1, 2018; or,
  - c) The entity has entered into a PLA that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.
- 4) Authorize, until January 1, 2023, San Diego to use CM at-risk contracting for specified projects in excess of \$25 million, as specified.
- 5) Add findings and declarations regarding the necessity of a special statute allowing the District to use the design-build procurement method and allowing San Diego to use CM at-risk contracting.

**FISCAL EFFECT:** According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

**COMMENTS:**

- 1) **Bill Summary.** This bill extends the sunset date on the authority of counties to use CM at-risk contracting. The existing sunset date of January 1, 2018, would be extended until January 1, 2023.

This bill also adds skilled and trained workforce requirements to counties' authority to use CM at-risk. It prohibits a CM at-risk entity from being prequalified, shortlisted, or awarded a contract unless the entity provides an enforceable commitment to the county that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance specified existing law governing skilled and trained workforce requirements for public contracts. However, this prohibition would not apply if:

- a) The county has entered into a PLA that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce, and the entity agrees to be bound by that PLA;
- b) The project or contract is being performed under the extension or renewal of a PLA that was entered into by the county before January 1, 2018; or,
- c) The entity has entered into a PLA that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.

This bill also allows San Diego to use CM at-risk contracting for the erection, construction, alteration, repair, or improvement of any building owned or leased by San Diego provided the project exceeds \$25 million. Contracts can be awarded on a low-bid or best value basis, and the CM at-risk entity must follow specified procedures in advertising and awarding subcontracts. San Diego must meet specified skilled and trained workforce requirements if it elects to use this authority (with specified exceptions), may award separate or combined contracts for preconstruction and construction services, and must post its CM at-risk contracts on its website and notify the Legislature of those postings, as specified. This authority sunsets January 1, 2023.

This bill also allows the District to use the design-build procurement method that is authorized for specified local agencies when contracting for improvements directly related to the construction of a building or buildings, and updates a cross-reference in the Public Contract Code that governs the District's ability to use design-build for building construction contracts. The District may use design-build for flood protection improvements; habitat restorations or enhancements; groundwater recharge or storage facilities; water treatment facilities; and, the retrofit, repair, or expansion of existing surface water storage facilities. This bill is sponsored by the District.

- 2) **Author's Statement.** According to the author, "By authorizing key water supply, habitat, and flood protection projects for design-build procurement, AB 851 will facilitate faster and more efficient project delivery by the District, while also demonstrating that design-build is an effective delivery method for innovative project types. By extending the sunset date for CM at-risk contracting and authorization to the City of San Diego, AB 851 will enable California counties and the City of San Diego to continue prudently managing public funds through efficient construction management for buildings."

- 3) **Background.** The Local Agency Public Construction 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.

In the early 1990s, public works agencies grew frustrated with some of the disadvantages of 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 established by the public agency.

Since the Legislature began granting design-build authority in the early 1990's, it 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 numerous statutes in various 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.

- 4) **Limits on Design-Build for Cities and Counties.** Existing law 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].

- 5) **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 special districts that operate wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities, their use of design-build is limited to regional and local wastewater treatment facilities; regional and local solid waste facilities; regional and local water recycling facilities; and, fire protection facilities.

- 6) **District Services and the Need for Design-Build.** The District provides wholesale water and groundwater management services to local municipalities and private water retailers who deliver drinking water directly to homes and businesses in Santa Clara County. The District manages an integrated water resources system that includes the supply of clean, safe water, flood protection and stewardship of streams on behalf of Santa Clara County's nearly 1.9 million residents. The District manages 10 dams and surface water reservoirs, three water treatment plants, an advanced recycled water purification center, a water quality laboratory, nearly 400 acres of groundwater recharge ponds and more than 275 miles of streams.

According to the author, "The increasing climate volatility is challenging the District to be more drought and flood resilient, and requires the delivery of public works projects that go beyond those authorized under current design-build law. After years of drought that have threatened regional and local water supplies, the District is seeking to expand ground water recharge, clean up contaminated water, improve water treatment, and to retrofit, repair, or expand existing water storage facilities.

"Warmer temperatures over time mean less precipitation is naturally stored in the Sierra snowpack and more falls as rainstorm events that stress the District's flood protection infrastructure. Sea level rise, already felt in Bay Area coastal communities during the confluence of high tides and intense storm events, requires a multi-faceted response involving significant public works projects to retreat from some locations, fortify levees and increase flood protection in others, and to create natural barriers such as wetlands and other habitat enhancing projects. These projects need the same design-build benefits of timely delivery and reduced costs afforded to other public works projects authorized in the California Public Contract Code."

- 7) **CM At-Risk.** According to the American Institute of Architects, "Construction management at-risk is a process that allows the client of a project to choose the CM before the design stage is complete. The CM is chosen based on qualifications, and then the entire operation is centralized under a single contract. The architect and CM work together in order to cultivate and assay the design. Then, the CM gives the client a guaranteed maximum price, and coordinates all subcontract work. The architect/engineer (A/E) is hired separately from the CM at-risk and the traditional client - A/E relationship is maintained. However, A/Es can generally perform the CM role, with various restrictions imposed based on state.

"Proponents have cited many advantages to construction management at-risk over traditional methods of procurement. These advantages are:

- a) Increases the speed of the project and can also strengthen coordination between the A/E and the CM;

- b) The client hires the CM based on qualifications, thus better ensuring a CM with a strong allegiance to the client, because their business relies on references and repeat work;
- c) CMs, A/Es, and the client all collaborate. This creates enhanced synergies throughout the process; and,
- d) Transparency is enhanced, because all costs and fees are in the open, which diminishes adversarial relationships between components working on the project, while at the same time eliminating bid shopping."

SB 328 (Knight), Chapter 517, Statutes of 2013, authorized counties to use CM at-risk contracts for projects exceeding \$1million, using low bid or best value to award these contracts. SB 328 contained a sunset date of January 1, 2018.

- 8) **San Diego and CM At-Risk Contracting.** The City of San Diego writes, "AB 851 recognizes the value of (CM at-risk contracting) for particularly large public works projects by establishing a \$25 million minimum which must be met in order for the city to use (CM at-risk contracting). In the coming years, San Diego looks forward to a number of these large public works projects which can benefit from this bill."

The California Constitution allows cities that adopt charters to control their own "municipal affairs." In all other matters, charter cities must follow the general, statewide laws. Because the Constitution doesn't define "municipal affairs," the courts determine whether a topic is a municipal affair or whether it is an issue of statewide concern. Courts have generally ruled that the method of contracting work in a city is a municipal affair. Accordingly, charter cities are not bound to follow the contracting procedures set forth in statute. (*Smith v. City of Riverside* (1973) 34 Cal.App.3d 529, 534; *Piledrivers' Local Union v. City of Santa Monica* (1984) 151 Cal.App.3d 509, 511-512; *Mountain View Sch. Dist of Santa Clara v. City Council* (1959) 168 Cal.App.2d 89, 92.).

In addition, San Diego voters approved a ballot measure in June of 2004 that amended San Diego's charter to allow San Diego to contract for public works through competitive negotiation with a construction manager, and to give the city council the power to adopt guidelines governing operation of such construction management contracts. The city council in March of 2010 used this authority to adopt an ordinance that expressly permits a construction manager to select contractors on a best value, rather than lowest responsible bid, basis. Despite these factors, San Diego indicates it is seeking this legislation to clarify that it has the authority to use CM at-risk contracting for projects in excess of \$25 million.

- 9) **Arguments in Support.** The Santa Clara Valley Water District, sponsor of this measure, writes, "The use of design-build project delivery has been growing in recent years, particularly for large projects. A 2014 study sponsored by the Design Build Institute of America found that over half of non-residential projects in the United States with a cost exceeding \$10 million are delivered using design-build. That study found that 59 percent of construction dollars spent in California in that same category are on design-build projects. The benefits of design-build for local agencies are realized by contracting with a single, unified team that is responsible for the successful completion of the project. Mistakes or miscommunications between the designer and the builder are avoided, and with only one contract to award and manage, the local agency may yield a faster project completion while reducing their liability for project failures."

10) **Arguments in Opposition.** The Western Electrical Contractors Association, Plumbing-Heating-Cooling Contractors Association of California, the San Diego, Southern California, and Central California chapters of the Associated Builders and Contractors, the California Chapters of American Fire Sprinkler Association, and Independent Roofing Contractors of California, Inc., in opposition, write, "(We) believe AB 851 creates a loophole for evading the Skilled and Trained Workforce (STWF) mandates of existing law. Under current law, a public entity could satisfy the STWF mandate by adopting a PLA that included a requirement to actually use a skilled and trained workforce. While my clients detest the discriminatory nature of PLAs, they recognized that with regard to STWF, all contractors would be on a level playing field.

"The language in Public Utilities Code 20146 (c)(2)(B) allows PLA projects to ignore STWF. If a PLA was entered into within the last year or two, it should have included the STWF requirements. Furthermore, if older PLAs are in place (prior to say 2014) – any extension or renewal of these PLAs should include the requirement to use STWF because, as the sponsors of STWF point out, 'The skilled and trained workforce requirements ensure the use of the most highly trained workforce available in order to deliver a project on time, on or under budget and to hire local workers that have graduated from regional apprenticeship programs on these projects.' In our opinion, the State should not exempt older agreements from a requirement to use 'the most highly trained workforce available.' My clients believe that if the use of a STWF (as defined in existing law) is truly a value to contracting then it should apply to all construction of a particular type – not a scenario where it applies to some projects – but not others, simply because of the existence of a project labor agreement."

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Santa Clara Valley Water District [SPONSOR]  
 American Council of Engineering Companies (prior version)  
 Association of California Water Agencies (prior version)  
 California Municipal Utilities Association (prior version)  
 California State Association of Counties (prior version)  
 California Special Districts Association (prior version)  
 City of San Diego  
 Desert Water Agency (prior version)  
 Design-Build Institute of America (prior version)  
 El Dorado Irrigation District (prior version)  
 Orange County (prior version)  
 Otay Water District (prior version)  
 Rural County Representatives of California (prior version)  
 Santa Clara County  
 Santa Clara Valley Open Space Authority (prior version)  
 State Building and Construction Trades Council (prior version)  
 Valley Ag Water Coalition (prior version)

**Opposition**

Associated Builders and Contractors – Central California Chapter (prior version)  
Associated Builders and Contractors – San Diego Chapter (prior version)  
Associated Builders and Contractors – Southern California Chapter (prior version)  
California Chapters of American Fire Sprinkler Association (prior version)  
Independent Roofing Contractors of California, Inc. (prior version)  
Plumbing-Heating-Cooling Contractors Association of California (prior version)  
Western Electrical Contractors Association (prior version)

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