

Date of Hearing: June 5, 2024

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Juan Carrillo, Chair

SB 739 (Ashby) – As Amended February 20, 2024

SENATE VOTE: 28-0

SUBJECT: Construction manager at-risk construction contracts: City of Elk Grove: zoo project.

SUMMARY: Allows the City of Elk Grove (city) to utilize construction manager at-risk (CMAR) construction contracts for the city's zoo project. Specifically, **this bill:**

- 1) Allows the city, with approval of the city council, to utilize CMAR construction contracts for the city's zoo project.
- 2) Allows a CMAR construction contract specified above to be awarded using either the lowest responsible bidder or best value method to a CMAR entity that possesses or that obtains sufficient bonding to cover the contract amount for construction services and risk and liability insurance as may be required by the city. Any payment or performance bond written for the purposes of this bill shall be written using a bond form developed by the city.
- 3) Provides that a CMAR entity shall not be prequalified or shortlisted or awarded a contract unless the entity provides an enforceable commitment to the city that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the zoo project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance with specified existing law governing skilled and trained workforce requirements for public agencies. This requirement shall not apply if any of the following conditions are met:
 - a) The city has entered into a project labor agreement (PLA), community workforce training agreement, or similar document that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce and specifies minimum training or experience qualifications for employment, and the entity agrees to be bound by that project labor agreement, community workforce training agreement, or similar document.
 - b) The project or contract is being performed under the extension or renewal of a PLA, community workforce training agreement, or similar document that was entered into by the city.
 - c) The entity has entered into a PLA, community workforce training agreement, or similar document that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce and will specify minimum training or experience qualifications for employment.
- 4) Requires subcontractors that were not listed by a CMAR entity as partners, general partners, or association members in a partnership, limited partnership, or association in the entity's

CMAR bid submission to be awarded by the CMAR entity in accordance with the process set forth by the city.

- 5) Requires all subcontractors bidding on contracts pursuant to this bill to be afforded the protections contained in the Subletting and Subcontracting Fair Practices Act, and requires the CMAR entity to do both of the following:
 - a) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the city.
 - b) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established pursuant to this section.
- 6) Requires the city, if it elects to proceed under this bill and uses a CMAR contract for a construction project, to make a copy of the contract available for public inspection on its internet website.
- 7) Provides, if the city elects to award a project pursuant to this bill, retention proceeds withheld by the city from the CMAR entity shall not exceed 5% if a performance and payment bond issued by an admitted surety insurer is required in the solicitation of bids.
- 8) Provides, in a contract between the CMAR entity and any subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld shall not exceed the percentage specified in the contract between the city and the CMAR entity. If the CMAR entity provides written notice to any subcontractor that is not a member of the CMAR entity, before or at the time the bid is requested, that a bond may be required, and the subcontractor subsequently is unable or refuses to furnish a bond to the CMAR entity, then the CMAR entity may withhold retention proceeds in excess of the percentage specified in the contract between the city and the CMAR entity from any payment made by the CMAR entity to the subcontractor.
- 9) Provides the following definitions:
 - a) “Best value” means a value determined by objective criteria related to the experience of the entity and project personnel, project plan, financial strength of the entity, safety record of the entity, and price.
 - b) “City” means the City of Elk Grove.
 - c) “Construction manager at-risk contract” means one or a successive combination of competitively procured contracts entered into by the city with an individual, partnership, joint venture, corporation, or other recognized legal entity, that is appropriately licensed in this state, including holding a contractor’s license issued by the Contractors State License Board, and that guarantees the cost of a project and furnishes construction management services, including, but not limited to, preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction services, and construction administration.

- d) “Project labor agreement, community workforce training agreement, or similar document” means a prehire collective bargaining agreement covering employees in the building and construction industry that establishes terms and conditions of employment for the project or contract.
- e) “Zoo project” or “project” means the new zoo proposed to be relocated from the City of Sacramento and constructed over time, with buildings, including repair of structures, landscaping, habitat, site work, and flatwork, in the City of Elk Grove and its associated public infrastructure, including, but not limited to, roadway in the vicinity of the new zoo, excluding any roadway owned and maintained by the State of California through the Department of Transportation, and utility improvements in any way associated with the new zoo.

10) Finds and declares that a special statute is necessary and that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique conditions in the City of Elk Grove that make it necessary to grant the city the authority to utilize the contracting methods described in this bill.

EXISTING LAW:

- 1) Generally 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. [Public Contract Code (PCC) Sections 20100 - 20929]
- 2) Authorizes, until January 1, 2029, counties and dependent special districts of counties to use CMAR for infrastructure projects costing more than \$1 million (excluding roads) and to award CMAR contracts to the lowest responsible bidder or by the best value method, as specified. (PCC Section 20146)

FISCAL EFFECT: None

COMMENTS:

- 1) **Author’s Statement.** According to the author, “Under a typical delivery process (called Design Bid-Build), a city is required to complete all construction drawings and bid the work of an entire project as a comprehensive package, which lengthens the design time and construction duration, ultimately increasing the fiscal cost of the project. It also requires extensive staff oversight and coordination. However, the Construction Manager At-Risk (CMAR) model is a process where a city can hire a construction manager early in the process. This alternative process streamlines the delivery methodology, cost estimating, and quickly delivers construction-related recommendations.

“SB 739 simply seeks to allow the City of Elk Grove to utilize a CMAR model during the construction of the zoo project, estimating time and cost savings for the City. Full buildout of the Zoo will feature nearly 65 acres of animal habitat and visitor experiences, with an additional 35 acres of parking and other public infrastructure – making it the largest public capital project ever initiated in Elk Grove. SB 739 is a crucial step towards bringing this economic opportunity to Senate District 8.”

- 2) **Local Government Contracting.** The LAPC Act 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, and most widely-used, approach to public works construction. This approach splits construction projects into two distinct phases: design and construction. During the design phase, the local agency prepares detailed project plans and specifications using its own employees or by hiring outside architects and engineers. Once project designs are complete, local officials invite bids from the construction community and award the contract to the lowest responsible bidder. However, many local public agencies have grown frustrated with the traditional method of project delivery, design-bid-build, arguing that it is slower and more costly than other procurement methods. In response, the Legislature has adopted several bills over the years to give explicit authority to use alternative methods, such as CMAR.
- 3) **Construction Manager At-Risk (CMAR).** 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 (construction manager) 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.”

Because CMAR allows the project owner to establish separate contracts simultaneously, it facilitates collaboration between the design team and the construction manager. In addition, under CMAR, the construction manager is responsible for delivering the project within the agreed upon price, thereby assuming the risk for cost-overruns. Under the CMAR method, project delivery can occur in sequential or concurrent phases. Projects that have multiple components lend themselves to this method because the design and construction of different aspects of the project can occur at different times. In effect, the overall project can be broken into multiple components, which the construction manager then bids to subcontractors.

Existing law allows counties and dependent special districts of counties to use CMAR for infrastructure projects costing more than \$1 million (excluding roads) and to award CMAR contracts to the lowest responsible bidder or by the best value method, until January 1, 2029.

- 4) **Elk Grove Zoo Project.** The city council approved the zoo project on May 8, 2024. According to the staff report for this city council meeting, “The New Zoo at Elk Grove Project (SP0009) (the ‘Project’), involves the construction of a new zoological park and associated facilities and activities on an approximately 103-acre site at the northwest corner of Kammerer Road and Lotz Parkway. The zoological park would include various facilities and buildings to be developed in phases. The main facility would be on approximately 65 acres and would be designed to support an average annual attendance of between 1.1 and 1.6 million visitors at buildout...

“In 1927, the City of Sacramento consolidated several public and private animal collections and established the Sacramento Zoo in Land Park. Over the following decades, the facility was expanded from an initial 4.2 acres to the current 14.7 acres. The existing facility hosts more than 500,000 visitors annually and, as of 2024, includes 380 animals across 94 species. In 1997, the City of Sacramento transferred operation of the facility to the non-profit Sacramento Zoological Society (the Society). The facilities (e.g., buildings) continue to be owned by the City of Sacramento; much of the animal collection is on loan from other zoos across the country or is owned by the Society, while a small number of animals are owned by the City of Sacramento. The Zoo operates as an accredited institution under the Association of Zoos & Aquariums (AZA). The Zoo is at risk of losing its AZA accreditation, as many of the animal habitats do not conform with modern design standards. Multiple species have been transferred out of the facility so that existing habitats can be merged or reconfigured...

“On multiple occasions, the City of Sacramento and the Society have studied expansion of the existing facility or relocation to other sites within the City of Sacramento. Expansion of the Land Park site has been deemed infeasible due to impacts to other facilities in the park, compatibility with the adjoining residential neighborhood, and availability of parking. No alternative site has been selected by the City of Sacramento. Without a viable relocation or expansion of the existing Zoo, the facility would most likely lose its accreditation or would be forced to continue relocating animals, thereby reducing the number of animal species, and impacting the visitor attraction and viability of the operation.

“Following relocation discussions with the City of Sacramento in 2020, the Society approached the City of Elk Grove (City) to discuss opportunities that may exist for the Zoo in Elk Grove. In September 2021, the City and the Society executed an Exclusive Negotiation Agreement (ENA), requiring the two parties to only work with each other relative to relocation of the Zoo. Additionally, the City began investigating approximately ±100-acres along the north side of Kammerer Road and west of Lotz Parkway as a potential Zoo site, with the City Council directing acquisition...of the site in February 2022. On April 8, 2022, the City acquired the property...

“In March 2022, the City Council received a Feasibility Study, along with a Financial Impact Analysis, for the development of a Zoo in Elk Grove, replacing the Land Park facility. The Study and Analysis concluded that development of a Zoo in Elk Grove was potentially viable, subject to the financial assumptions and site program considered in the reports. Based upon these results, the Council directed staff to continue working with the Society on the

Project. In May 2022, the City and the Society entered into...a Memorandum of Understanding, outlining the activities, responsibilities, and outcomes of the next phase of work: developing a design plan for the potential zoo, along with a financing plan and environmental impact report. At the conclusion of this phase, the City Council would consider approving the Project, allowing it to move forward to construction, pending the terms of the Financing Plan... City staff believes that the Financing Plan, as presented, is a realistic and viable approach to completing the Project...

“Should the City Council ultimately approve the Project, the following next steps would occur:

- A Financing/Cost Sharing Agreement between the City and Society would be brought back for approval consistent with the term sheet provided in Attachment 6.
- Master services agreements would be prepared and executed with the design teams and the City would take over management of the consultant activities for all design services. Task orders for the next round of design services would then be executed and construction design work would commence. The contracts would be brought back for Council consideration at a future Council Meeting.
- Upon adoption of pending State legislation (Senate Bill 739) the City would release a Request for Proposals for a Construction Manager At Risk (CMAR) firm to serve as the overall construction manager and general contractor for the Project.
- An agreement between the City and the Society would be prepared and brought back to the City Council for consideration, addressing long-term operation of the Project by the Society, including responsibilities for maintenance of the improvements, management of the collection, and other topics.

“As the design contracts are finalized and the community partnership funding becomes available, staff will be able to prepare a more concrete project schedule. Staff is working with the design team, and in the future will work with the CMAR firm, to identify opportunities for streamlining and accelerated delivery to the extent that it does not impact the Project costs or the integrity of the Project.”

According to information provided by the city, the estimated timeline for the project is as follows:

a) Off Site Infrastructure

- Design – June 2024 through late 2025
- Construction – Early 2026 through mid-2027

b) On Site Zoo Facilities

- Design – June 2024 through late 2026
- Construction – Early 2027 through early 2030

- 5) **Potential Economic Benefits.** A March 2024 economic and revenue impact analysis, which anticipates opening of Phase 1A and 1B of the zoo in 2029, states, “The operations of the Zoo in Elk Grove detailed in this analysis provide significant economic and educational benefits to the region. The assumptions regarding future zoo operations on which this economic impact is based were provided by the Sacramento Zoo and the city of Elk Grove.
- Based on projected annual attendance of more than 935,000 visitors per year in the opening year, and stabilized long-term attendance of 850,000 people per year, the new zoo could create a total economic impact of \$249 million in the city over the next five years.
 - Zoo employment at the new facility is estimated at 140 to 144 people with an annual payroll of \$11 million to \$12 million, which represents a 37% increase over current employment levels. In addition, there could be 75 to 80 third-party employees of food and retail concession operators with an annual payroll of \$3 million.
 - Through vendor purchases, employee spending, and visitor spending, the zoo could support 176 indirect and induced jobs and \$7.9 million in labor income each year at other businesses in Elk Grove, as well as 215 jobs and \$9.1 million in annual payroll in other parts of the metro area. Some of these impacts represent existing economic activity associated with the zoo that would simply shift to a new location, but a portion of the impacts would be new given the projected expansion of the zoo at the new site.
 - There could be one-time construction impacts associated with the zoo relocation that are estimated at \$425 million along with 2,405 total jobs and \$171 million in labor income in Elk Grove and throughout the metro area during the construction period.
 - Visitor and employee spending associated with the relocated zoo could generate an estimated \$4.0 million in city sales and transient lodging tax revenues, and \$9.4 million in county and state sales taxes over the next five years. Not all of the revenues to the county and state are net new, given the zoo’s existing operations in Sacramento, but all of the city tax revenue would be new to Elk Grove.
- 6) **Bill Summary.** This bill allows the city, with approval of the city council, to utilize CMAR construction contracts for the city’s zoo project and to award these contracts using either the lowest responsible bidder or best value method to a CMAR entity that possesses or obtains sufficient bonding to cover the contract amount for construction services and risk and liability insurance as may be required by the city.

This bill defines “zoo project” or “project” to mean the new zoo proposed to be relocated from the City of Sacramento and constructed over time, with buildings, including repair of structures, landscaping, habitat, site work, and flatwork, in the City of Elk Grove and its associated public infrastructure, including, but not limited to, roadway in the vicinity of the new zoo, excluding any roadway owned and maintained by the State of California through the Department of Transportation, and utility improvements in any way associated with the new zoo.

Any CMAR entity shall not be prequalified or shortlisted or awarded a contract unless the entity provides an enforceable commitment to the city that the entity and its subcontractors

will use a skilled and trained workforce to perform all work on the zoo project or contract that falls within an apprenticeable occupation in the building and construction trades. However, this requirement does not apply under any of the following conditions:

- a) The city has entered into a PLA, community workforce training agreement, or similar document that will bind all contractors and subcontractors to use a skilled and trained workforce and specifies minimum training or experience qualifications for employment, and the entity agrees to be bound by that PLA, community workforce training agreement, or similar document.
- b) The project or contract is being performed under the extension or renewal of a PLA, community workforce training agreement, or similar document that was entered into by the city.
- c) The entity has entered into a PLA, community workforce training agreement, or similar document that will bind the entity and all its subcontractors to use a skilled and trained workforce and will specify minimum training or experience qualifications for employment.

If the city chooses to use the provisions of this bill, it must make a copy of CMAR contracts available for public inspection on its internet website. The bill also provides a number of protections for subcontractors, including public noticing requirements, and sets forth details regarding retention proceeds.

This bill is sponsored by the City of Elk Grove.

- 7) **Amendment for Urgency Clause.** The author has requested the Committee accept an amendment to add an urgency clause to this bill.
- 8) **Previous Legislation.** AB 1932 (Daly), Chapter 435, Statutes of 2022, extended the sunset date on the authority of counties to enter into CMAR contracts until January 1, 2029.

SB 914 (Dodd), Chapter 108, Statutes of 2018, expanded county authority to use CMAR contracting for all infrastructure projects, except roads, and extended CMAR authority to dependent special districts where the county board of supervisors is the governing body of the district.

AB 851 (Caballero and Gloria), Chapter 821, Statutes of 2017, extended the sunset date on the authority of counties to use CMAR contracting until January 1, 2023, and extended CMAR contracting authority to the City of San Diego for specified projects in excess of \$25 million, until January 1, 2023.

SB 328 (Knight), Chapter 517, Statutes of 2013, authorized counties to use CMAR contracts for projects in excess of \$1 million on county-owned or leased buildings until January 1, 2018.

- 9) **Arguments in Support.** The City of Elk Grove, sponsor of this bill, writes, “Allowing the City of Elk Grove to utilize the Construction Manager At-Risk project delivery method is the best approach for such a complex and critical regional project. Construction Manager At-Risk (CMAR) is a process where the City could hire a construction manager early in the

process to review constructability, delivery methodology, cost estimating, and other construction-related recommendations.

“On May 8th 2024 the City of Elk Grove approved a world-class zoo project that will be a transformative opportunity for the City and the region. Under a normal delivery process (called Design-Bid-Build), the City would need to complete all construction drawings and bid the work as a comprehensive package. While this could be broken down into phases or packages of similar types of work, this approach presents several problems, including extended design and construction duration and requiring extensive City staff oversight and coordination across multiple construction contracts. SB 739 creates the following benefits:

- Project delivery within a guaranteed maximum price, thereby saving public funds.
- Hiring a construction manager early in the project’s design phase allows for streamlined project delivery, shorter construction timelines and fewer change orders and delays.
- Enhanced collaboration between the City and designer to provide cost estimating, constructability analysis and value engineering (preconstruction services).
- Increased cost and schedule control compared to traditional design-bid-build.
- Greater flexibility to accommodate changes.
- Significant reduction in potential claims and lawsuits.

“The construction of the New Zoo will generate not only a short-term economic impact from its construction but would also deliver ongoing economic benefits that would support the regional economy. This project is estimated to produce 2,400 jobs and have \$425 million total economic impact over the first 5 years. The City has a Community Workforce Training Agreement with local union trades; the New Zoo Project would be subject to the agreement. SB 739 would not create any burden for the State of California.”

10) **Arguments in Opposition.** The Western Electrical Contractors Association (WECA) writes, “WECA does not oppose alternative delivery mechanisms like CMAR. They do oppose language like that in SB 739 that exempts construction projects covered by a Project Labor Agreement (PLA) from requirements that a “skilled and trained workforce ... perform all work on the zoo project or contract that falls within an apprenticeable occupation in the building and construction trades.”

“Public Contract Code §2600 et. seq. is a crucial tool establishing substantial financial penalties and possible debarment for failure to use a skilled and trained workforce. However, the language in SB 739 gives contractors ‘a pass’ under a PLA from these penalties. WECA firmly believes that §2600 should apply irrespective of a PLA, as it is vital for maintaining industry standards and ensuring worker safety.

“WECA, as a Merit Shop Employer Association, espouses a fair and equal approach to contracting. WECA members believe in rewarding employees based on performance and encouraging them to reach their highest level of achievement. Contracts are awarded based on safety, quality, and value, regardless of labor affiliation. Please feel free to contact me for additional information on this bill and my client’s position.”

REGISTERED SUPPORT / OPPOSITION:

Support

City of Elk Grove [SPONSOR]
Cosumnes Community Services District
Gilbane Building Company
Sacramento Area Council of Governments
Sacramento Regional Transit District
Sacramento Transportation Authority
Sacramento Zoological Society

Opposition

Western Electrical Contractors Association

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