

Date of Hearing: April 18, 2018

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 2654 (Quirk-Silva) – As Amended April 10, 2018

SUBJECT: Design-build: Orange County.

SUMMARY: Authorizes Orange County and the Orange County Flood Control District to use the design-build contracting process for specified projects. Specifically, **this bill:**

- 1) Allows Orange County, upon approval of its board of supervisors, to use the design-build contracting process authorized for local agencies to award a contract for flood protection improvements, harbor and beach improvements, and bikeway improvements.
- 2) Requires the following for a project authorized above:
 - a) Orange County shall be responsible for the performance of, and county employees in Orange County Public Works shall perform, project development services, including performance specifications, preliminary engineering, procurement services and the preparation of project reports, and construction inspection services, excluding specialty bridge inspectors; and,
 - b) Orange County shall also be the responsible agency for, and county employees in Orange County Public Works shall perform, the preparation of documents that may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering quality of materials, equipment, and workmanship, preliminary plans, and any other information deemed necessary to describe adequately the needs of the county.
- 3) Limits Orange County, for a project authorized in 1), above, to no more than an average of three projects per year in excess of \$5 million.
- 4) Allows the Orange County Flood Control District (District), upon approval of its governing body, to use the design-build contracting process authorized for local agencies to award a contract for flood protection improvements.
- 5) Requires the following for a project authorized in 4), above:
 - a) The District shall be responsible for the performance of, and county employees in Orange County Public Works shall perform, project development services, including performance specifications, preliminary engineering, procurement services and the preparation of project reports, and construction inspection services, excluding specialty bridge inspectors; and,
 - b) The District shall also be the responsible agency for, and county employees in Orange County Public Works shall perform, the preparation of documents that may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering quality of materials, equipment, and workmanship,

preliminary plans, and any other information deemed necessary to describe adequately the needs of the District.

- 6) Limits the District, for a project authorized in 4), above, to no more than an average of three projects per year in excess of \$5 million.
- 7) 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 Orange County that make it necessary to grant the County of Orange and the Orange County Flood Control District the authority to use the specific design-build procurement process described in this act.
- 8) Provides that no reimbursement is required by this bill because the only costs that may be incurred by a local agency or school district will be incurred because the bill creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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, transit and transportation agencies, and specified additional local agencies to use design-build for specified public works contracts in excess of \$1 million using either a low bid or best value process.

FISCAL EFFECT: This bill is keyed fiscal.

COMMENTS:

- 1) **Bill Summary.** This bill allows Orange County and the District to use the design-build contracting process authorized for local agencies for specified projects. For Orange County, the additional projects are limited to flood protection improvements, harbor and beach improvements, and bikeway improvements. For the District, the projects are limited to flood protection improvements only.

The bill requires each agency to be responsible for the performance of project development services, including performance specifications, preliminary engineering, procurement services and the preparation of project reports, and construction inspection services, excluding specialty bridge inspectors. It also requires each agency to be responsible for the preparation of documents that may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering quality of materials, equipment, and workmanship, preliminary plans, and any other information deemed necessary to describe adequately the needs of each agency. County employees in Orange County Public Works shall perform all of these services.

Each agency is limited to no more than an average of three projects per year in excess of \$5 million. This bill is sponsored by Orange County.

- 2) **Author's Statement.** According to the author, "The Design-Build method provided by AB 2654 will provide the County with expedited project delivery and cost savings, especially for a number of pending stormwater and flood control projects to better serve Orange County residents and businesses."
- 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.
 - 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.

Since SB 785 was enacted, the Legislature has authorized nearly a dozen additional local agencies or types of local agencies to use SB 785 design-build authority for additional projects or types of projects (see Previous Legislation, below).

- 5) **Limits on Design-Build for Cities and Counties.** Existing law generally 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 and Other Specified Agencies.** Existing law also generally limits the use of design-build for special districts and a handful of other specified agencies by both type of district or agency and type of project. The agencies include: special districts that operate wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities; specified transit and transportation agencies; the San Diego Association of Governments (SANDAG); a few water agencies; and, healthcare districts. Each of these agencies is limited to the types of projects for which they can use design-build, with the exception of two healthcare districts and two open space districts that may use design-build contracting for the construction of any buildings or other facilities.
- 7) **Orange County Flood Control District.** The District was established in 1927 under authorization of the Orange County Flood Control Act to provide control of flood and storm waters of the district (which is the boundary of Orange County) and of streams flowing into the district, such as the Santa Ana River or San Juan Creek. The District also mitigates the effects of tides and waves, and protects the harbors, waterways, public highways and property in the District from such waters. The District is a dependent special district governed by the Orange County Board of Supervisors and administered by county employees in the Orange County Public Works department. While the District has no employees, it owns land and assesses an annual benefit on all taxable real property in Orange County.
- 8) **Pending Projects.** The County reports the following flood control projects for which it would like to use design-build: Fullerton Creek Channel; Houston Storm Channel; Cypress Pump Station; Carbon Creek Channel; East Garden Grove-Wintersburg Channel; Santa Ana Delhi Channel; Trabuco Creek Channel; San Juan Creek Channel; and Ocean View Channel. These projects are needed to provide critical flood control protection, reducing the threat of billions of dollars in damages, while protecting more than three million residents and 100,000 acres in Orange County.

The County would also like design-build authority for these harbor and beach projects: Dana Point Harbor improvements; Mile Square Park improvements; Aliso Canyon Woods Park improvements; and Irvine Regional Park improvements. These projects will provide increased access and safety to facilities and expand recreational opportunities for County residents.

Finally, the County has several projects planned to improve bikeways that would benefit from design-build authority: Orange County Loop Bikepath through Coyote Creek and El Cajon; Paularino Channel bikeway; and, Peters Canyon bikeway. These projects will provide safe pedestrian and bike trails along a 66-mile bike path that encompasses the entire County.

- 9) **Previous Legislation.** AB 851 (Caballero and Gloria), Chapter 821, Statutes of 2017, allowed the Santa Clara Valley Water District to use the design-build procurement method for specified types of projects.

AB 994 (Muratsuchi), Chapter 321, Statutes of 2017, allowed the Beach Cities Health District to use the design-build procurement method to assign contracts for the construction of facilities or other buildings in the district.

AB 1523 (Obernolte and Reyes), Chapter 154, Statutes of 2017, authorized the San Bernardino County Transportation Authority to use design-build for the construction of the Mt. Vernon Avenue Viaduct project.

SB 373 (Cannella), Chapter 391, Statutes of 2017, allowed the Stanislaus Regional Water Authority to use design-build for its Regional Surface Water Supply Project.

SB 793 (Hill), Chapter 627, Statutes of 2017, allowed the Peninsula Health Care District, the Midpeninsula Regional Open Space District, and the Santa Clara Valley Open-Space Authority to use the design-build procurement method to assign contracts for the construction of facilities or other buildings in those districts.

SB 957 (Hueso), Chapter 212, Statutes of 2016, allowed health care districts that own or operate a hospital or clinic to use the design-build procedure to construct a building or improvements directly related to the construction of a hospital or health facility building.

AB 1290 (Dahle), Chapter 34, Statutes of 2015, allowed the Mayers Memorial Hospital District to use the design-build procedure to construct a building or improvements directly related to the construction of a hospital or health facility building in the district.

SB 374 (Hueso), Chapter 715, Statutes of 2015, allowed SANDAG to use the design-build procurement process for specified development projects related to transit facilities developed or jointly developed by SANDAG.

AB 155 (Alejo), Chapter 865, Statutes of 2014, allowed the Monterey County Water Resources Agency to use design-build contracting to construct a pipeline or tunnel that will connect two reservoirs that the agency owns and operates.

SB 268 (Gaines), Chapter 18, Statutes of 2014, allowed the Last Frontier Health Care District to use the design-build process when contracting for the construction of a building and improvements directly related to a hospital or health facility building at the Modoc Medical Center.

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.

10) **Arguments in Support.** Orange County, sponsor of this measure, writes, "AB 2654 will provide the County with expedited project delivery, cost savings, and superior results, especially for a number of pending complex stormwater/flood control, and other important public works infrastructure projects that serve Orange County residents and businesses."

11) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

Orange County [SPONSOR]

Building Industry Association of Southern California, Orange County Chapter

Orange County Business Council

Opposition

None on file

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