

Date of Hearing: March 24, 2021

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 271 (Robert Rivas) – As Amended March 9, 2021

**SUBJECT:** Santa Clara Valley Water District: contracts: best value procurement.

**SUMMARY:** Allows the Santa Clara Valley Water District (Valley Water) to award contracts on a best value basis for any construction work to improve the safety of the Leroy Anderson Dam and Reservoir. Specifically, **this bill:**

- 1) Allows Valley Water, upon approval of its board of directors (board), to award contracts on a best value basis for any work for the Anderson Dam project.
- 2) Requires, if the board elects to award a best value contract as authorized by this bill, Valley Water to comply with all of the following:
  - a) The district shall prepare a set of documents setting forth the scope and estimated price of the project. The documents may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering the quality of materials, equipment, workmanship, preliminary plans or layouts, or any other information deemed necessary to adequately describe the district's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California;
  - b) The district shall prepare and issue a request for qualifications (RFQ) in order to prequalify or short-list the entities, including subcontractors and suppliers, whose bids shall be evaluated for final selection. The RFQ shall include, but need not be limited to, all of the following elements:
    - i) Identification of the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the district to evaluate bids, the procedure for final selection of the bidder, and any other information deemed necessary by the district to inform interested parties of the contracting opportunity;
    - ii) Significant factors that the district reasonably expects to consider in evaluating qualifications, including technical design-related expertise, construction expertise, acceptable safety records, and all other non-price-related factors;
    - iii) A standard template request for statements of qualifications prepared by the district. In preparing the standard template, the district may consult with the construction industry, the building trades and surety industry, and other local agencies with experience awarding a contract on a best value basis. The template shall require all of the following information:
      - (1) If the bidder is a privately held corporation, limited liability company, partnership, or joint venture, composed of privately held entities, a listing of all of

the shareholders, partners, or members known at the time of statement of qualification submission who will perform work on the project;

- (2) Evidence that the members of the contracting team have completed, or demonstrated the experience, competency, capability, and capacity to complete, projects of similar size, scope, or complexity and that proposed key personnel have sufficient experience and training to competently manage and complete the project, and a financial statement that ensures that the bidder has the capacity to complete the project;
  - (3) The licenses, registration, and credentials required for the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration;
  - (4) Evidence that establishes that the bidder has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance;
  - (5) Information concerning workers' compensation experience history and a worker safety program;
  - (6) An acceptable safety record. "Safety record" means the prior history concerning the safe performance of construction contracts. The criteria used to evaluate a bidder's safety record shall include, at a minimum, its experience modification rate for the most recent three-year period, and its average total recordable injury or illness rate and average lost work rate for the most recent three-year period.
  - (7) The information required by the standard template request for statements of qualifications shall be certified under penalty of perjury by the bidder and its general partners or joint venture members; and,
- c) Bids shall be evaluated by using only the criteria and selection procedures specifically identified in the procurement process documents, including the RFQ, as specified in a) and b), above, and the price.
- 3) Prohibits a best value contractor from being prequalified, shortlisted, or awarded a contract, regardless of whether the best value process is used, unless the contractor provides an enforceable commitment to the district that the contractor 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 with existing law governing a public entity's use of a skilled and trained workforce, as specified. However, this provision shall not apply if either of the following requirements are met:
- a) The district has entered into a project labor agreement (PLA) that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce, and the contractor agrees to be bound by that PLA; or,

- b) The contractor has entered into a PLA that will bind the contractor and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.
- 4) Provides the following definitions:
- a) “Anderson Dam project” or “project” means any activity or work of construction to retrofit, repair, replace, or improve the safety of the Leroy Anderson Dam and Reservoir, owned by the Santa Clara Valley Water District and located in the County of Santa Clara, including any upstream or downstream construction, improvements, changes in operational activities, and flood protection measures that may be required to implement that activity or work;
  - b) The “Anderson Dam project” or “project” includes any avoidance, minimization, or mitigation measures, including the Coyote Creek-related Phase 1 measures of the Fish and Aquatic Habitat Collaborative Effort, as described in the settlement agreement, determined to be appropriate by the district, in consultation with state and federal agencies identified as “responsible agencies” or “trustee agencies” pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code;
  - c) “Best value” means a procurement process whereby the selected bidder may be selected on the basis of objective criteria for evaluating the qualifications of bidders with the resulting selection representing the best combination of price and qualifications;
  - d) “Best value contract” means a competitively bid contract entered into pursuant to this section;
  - e) “Best value contractor” means a properly licensed person, firm, or corporation that submits a bid for, or is awarded, a best value contract;
  - f) “District” means the Santa Clara Valley Water District;
  - g) “Project labor agreement” means a prehire collective bargaining agreement that establishes terms and conditions of employment for a specific construction project or projects and is an agreement described in Section 158(f) of Title 29 of the United States Code; and,
  - h) “Settlement agreement” means the agreement entitled “Settlement Agreement Regarding Water Rights of the Santa Clara Valley Water District on Coyote, Guadalupe, and Stevens Creeks” initialed on May 27, 2003, by the district, the United States Department of the Interior, United States Fish and Wildlife Service, the United States Department of Commerce, National Marine Fisheries Service, the California Department of Fish and Game, the Guadalupe-Coyote Resource Conservation District, Trout Unlimited, the Pacific Coast Federation of Fishermen’s Associations, and California Trout, Incorporated.
- 5) Makes a number of findings and declarations regarding the necessity of the Anderson Dam project.

- 6) 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 findings set forth in this bill.
- 7) Provides that no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act 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) Establishes, pursuant to the Local Agency Public Construction (LAPC) Act within the Public Contract Code, the procedures local agencies must use when soliciting and evaluating bids or proposals for the construction of a public work or improvement, which generally require contracts to be awarded to the lowest responsible bidder after a competitive bidding process.
- 2) Generally requires Valley Water to put out to bid works in excess of \$50,000 and to award contracts to the lowest responsible bidder.
- 3) Authorizes certain local entities to select a bidder for a contract on the basis of best value.

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

**COMMENTS:**

- 1) **Leroy Anderson Dam and Reservoir.** Anderson Dam is a 235 feet (72 m) high earthen dam located near Morgan Hill, California, that impounds Santa Clara County's largest surface water reservoir – Anderson Reservoir. The dam measures 1,430 feet (440 m) long by 900 feet (270 m) wide and sits along the Coyote Creek Fault on Coyote Road. The dam and reservoir are owned and operated by Valley Water, and the reservoir stores local rainwater runoff and imported water from the Central Valley Project. With a capacity of nearly 90,000 acre-feet – enough water to supply almost a million people for a year – the reservoir is a part of the region's water supply system for drinking water and a water source for groundwater recharge projects.
- 2) **Seismic Concerns.** Experts estimate that a magnitude 7.25 earthquake on the Calaveras Fault centered less than 2 km (1.25 miles) from the dam, or a magnitude 6.6 earthquake on the Coyote Creek Fault centered beneath the dam, could significantly damage the dam embankment and lead to dam failure and the uncontrolled release of water. A catastrophic failure of the dam would impact thousands of people and property in Santa Clara, San Benito, Monterey, and Santa Cruz counties, with effects impacting the immediate vicinity, Silicon Valley, and the San Francisco Bay and Monterey Bay areas.

The Department of Water Resources Division of Safety of Dams rates Anderson Dam as having extremely high downstream hazard due to the seismic risk. Anderson Dam is currently operated at a restricted level due to these seismic concerns. However, because the dam outlet is too small, the seismic restriction to keep the reservoir at reduced capacity

cannot always be met. During winter storms, more water can flow into the reservoir than the dam outlet can release, resulting in the filling of the reservoir above the capacity restriction. In 2017, a series of atmospheric river storms filled Anderson Reservoir and resulted in water flowing over the spillway and into the creek below. While the spillway was designed to release water during high precipitation events, flooding along Coyote Creek caused an estimated \$73 million in property damage to San Jose homes and businesses and prompted 14,000 residents to evacuate.

On February 20, 2020, the Federal Energy Regulatory Commission (FERC) ordered Valley Water to begin draining the reservoir by October 1, 2020 to deadpool – the level at which water in the reservoir cannot be drained by gravity through the dam's outlet – and to construct a low level outlet tunnel as soon as possible. FERC ordered this due to new information that showed the Anderson Dam is more vulnerable in a 100-year earthquake than previously understood. In addition, there is still uncertainty about when the dam will be reconstructed.

- 3) **Fisheries and Aquatic Habitat Collaborative Effort (FAHCE) Settlement Agreement.** In 2003, Valley Water initialed the FAHCE settlement agreement to resolve a water rights complaint that the Guadalupe-Coyote Resource Conservation District (RCD) filed with the State Water Resources Control Board (SWRCB) in 1996. Eight other parties joined the settlement agreement, including the Department of Fish and Wildlife, the U.S. Fish and Wildlife Service and National Marine Fisheries Service, and nongovernmental organizations, including Trout Unlimited, the Pacific Coast Federation of Fishermen's Associations, California Trout, the Urban Creeks Council, and the Northern California Council of Federation of Fly Fishers.

The FAHCE settlement includes provisions intended to improve aquatic spawning and rearing habitat and fish passage within the Stevens Creek, Coyote Creek and Guadalupe River watersheds. These provisions are to be achieved through modifications to reservoir operations to provide instream flows; restoration measures to improve habitat conditions and provide fish passage; and monitoring and adaptive management.

While agreed to seventeen years ago, the FAHCE is still in the planning phase. Recent data show that the number of Central California Coast steelhead, a fish species protected under the Federal Endangered Species Act, is in the single digits in Coyote Creek. The study attributes the population decline since 2014 to continued limited instream flows, high water temperatures, and fish passage restrictions.

Valley Water maintains that it has implemented numerous projects under Phase I of FAHCE while continuing the planning phase of the agreement. However, other parties to the settlement have expressed concerns that Valley Water has not adhered to the recommendations of the settlement parties and has failed to meet its obligations under the settlement terms. They believe that this has prevented implementation of streamflow adjustments and habitat restoration measures agreed to by the FAHCE parties as needed to protect steelhead and other aquatic life.

- 4) **Anderson Dam Reconstruction Plans.** The Anderson Dam Seismic Retrofit Project was initiated in 2012 and is estimated to cost \$576 million. The project will remove most of the existing earthen dam and replace it. The new dam will be constructed to modern seismic and

dam safety standards, including increased capacities for the spillway and outlet to allow a rapid, controlled draw down in an emergency. These features are intended to increase dam safety and incidental flood protection.

According to Valley Water, “the current contracting schedule includes plans to release prequalification documents to contractors in the fall of 2022, meaning Valley Water needs legislative approval of this authority by January 1, 2022, to provide the certainty necessary to draft the documents to advertise the contract. Any delay of the contracting process will increase the risk to public safety and should be avoided.” Valley Water provided the following timeline for the Anderson Dam project:

- Draft Environmental Impact Report Public Review Period Opens: 11/29/21
- Valley Water Certifies Final Environmental Impact Report: 06/29/22
- Drafting of Request for Qualifications and Request for Proposals: 08/01/22
- Final Bid Package Review -DSOD (DWR) and BOC (FERC): 02/24/23
- Final Project Approval from DSOD (DWR) and BOC (FERC): 04/10/23
- Valley Water Authorization to Advertise: 08/22/23
- Valley Water Board Awards Construction Contract: 01/09/24
- Construction Completed: 12/31/30

- 5) **Bill Summary.** This bill allows Valley Water to use best value contracting for the Anderson Dam project upon approval by its board. The bill requires Valley Water to prepare and issue an RFQ for such contracts in order to pre-qualify contractors, and specifies the contents of the RFQ. Valley Water must evaluate bids by using only the criteria and selection procedures identified in the procurement documents and the price. Contractors cannot be prequalified unless they provide an enforceable commitment to use a skilled and trained workforce. Alternatively, the district or the contractor may enter into a PLA that requires the use of a skilled and trained workforce.

The bill defines “Anderson Dam project” to mean any activity or work of construction to retrofit, repair, replace, or improve the safety of the Anderson Dam and Reservoir, including any upstream or downstream construction, improvements, changes in operational activities, and flood protection measures that may be required to implement that activity or work. “Anderson Dam project” also includes any avoidance, minimization, or mitigation measures, including the Coyote Creek-related Phase 1 measures of the Fish and Aquatic Habitat Collaborative Effort, as described in the settlement agreement.

This bill is sponsored by Valley Water.

- 6) **Author's Statement.** According to the author, “Anderson Dam and Reservoir is Santa Clara County’s largest surface water storage facility, capturing local rainfall-runoff and serving as a holding tank for imported water from the federal Central Valley Project. Built in 1950 to the safety standards of the day, Anderson Dam would not withstand a large earthquake on the nearby Calaveras and Coyote Creek faults. A breach of the dam at full capacity would have catastrophic consequences for life and property, inundating an area with 450,000 residents and thousands of job creating Silicon Valley businesses. The inundation zone extends more than 30 miles northwest to San Francisco Bay, including the cities of San José, Santa Clara, Sunnyvale, Milpitas, and more than 40 miles southeast to Monterey Bay, including the cities of Morgan Hill, Gilroy, and Watsonville.

“Assembly Bill 271 will authorize use of the ‘best value’ method to select the construction contractor for the Anderson Dam Seismic Retrofit Project (Anderson Project), instead of a mandated selection of the lowest bidder, and also require the use of a skilled and trained workforce. An independent Board of Consultants convened pursuant to the Federal Energy Regulatory Commission process, consisting of some of the nation’s foremost dam safety experts, have recommended the best value method of contractor selection for the Anderson Project due to its complex design, delivery, and installation. Using best value method for contractor selection will allow the safest and best overall value for the removal and replacement of Silicon Valley’s largest and most critical local water storage facility.”

- 7) **Local Contracting Methods.** Traditionally, construction projects have been bid out and awarded based upon a lowest-cost approach. Current law generally requires Valley Water to use lowest-cost bidding procedures for any improvement or unit of work over \$50,000. This bill would allow Valley Water to use best value contracting for the Anderson Dam project upon approval by its board of directors. The bill outlines a process that Valley Water must adhere to in order to use best value contracting, including issuing a RFQ with specified required information.

Best value contracting has generally been recognized as a viable alternative for construction projects. Best value, a competitive contracting process, allows projects to be awarded to the contractor offering the best combination of price and qualifications, instead of just the lowest bid. In addition to submitting bids for project cost, prospective contractors also submit technical proposals. The technical proposals are evaluated based on objective criteria, and scores are compiled. The scores are then used to weigh or adjust the submitted bid price. The contract is awarded to the contractor that represents the best value to the contracting agency.

AB 2551 (Gallagher), Chapter 760, Statutes of 2016, authorized local agencies to use alternative procurement methods for reservoirs funded by Proposition 1 bond funds. These methods included design-build (including conventional, progressive, and target price methods), design-bid-build, and construction manager at-risk alternative procurement methods, in addition to any methods already authorized for irrigation districts, county water districts, and other similar water districts. AB 2551 allowed these contracts to be awarded to the lowest responsible bidder or on a best-value basis. The best value provisions of this bill generally align with those contained in AB 2551.

While this bill generally applies similar parameters for the use of best value that exist in current law for other local agencies, the types and costs of the projects that this bill allows Valley Water to award using best value is comparatively broad. Best value offers awarding agencies greater flexibility than the low-bid method to select contractors that have demonstrated experience and expertise on specific types and sizes of projects. For this reason, selecting contractors for the Anderson Dam project using best value may be an appropriate and valuable option for Valley Water. On the other hand, given the breadth of work and the contract amounts involved, it might be advisable to consider narrowing this authority.

This bill prohibits a best value contractor from being prequalified or shortlisted unless the contractor provides an enforceable commitment to the district that the contractor and its subcontractors at every tier will use a skilled and trained workforce to perform all work on

the project, in accordance with certain criteria. This prohibition does not apply if Valley Water or the contractor have entered into a PLA.

A PLA is a pre-hire agreement establishing the terms and conditions of employment for a specific construction project. A PLA is completed before any workers are hired, to establish the wage rates and benefits of all employees working on the project and to prevent strikes, lockouts, or other work stoppages for the length of the project. The terms of the agreement apply to all contractors and subcontractors, whether union or non-union, who successfully bid on the project, and supersede any existing collective bargaining agreements. These provisions are generally consistent with existing law.

- 8) **Previous Legislation.** AB 3005 (R. Rivas) of 2020 would have expedited permitting and contracting requirements in order to facilitate the replacement of Anderson Dam, and contained numerous provisions that are not included in AB 271. AB 3005 was vetoed with the following message:

“This bill would modify contracting requirements and prescribe expedited California Environmental Quality Act (CEQA) review and regulatory processes for various state agencies to facilitate projects for the Leroy Anderson Dam and Reservoir.

“Notwithstanding the importance of completing projects at the Anderson Dam, the bill sets unrealistic timelines for state entities to expedite deliverables. This will require staff to be diverted away from other critical projects throughout the state that are going through the CEQA process. Although the Anderson Dam projects are a key element of dam safety, it is problematic to set a precedent for a special process and timeline for one project that may undermine the quality of review by departments.

“Furthermore, a public works project of this magnitude will have significant environmental impacts, and therefore, review through the full CEQA process is necessary.”

SB 128 (Beall), Chapter 501, Statutes of 2019, adds the County of Santa Clara and the County of Monterey to a pilot program that allows counties to utilize the best value method for construction projects in excess of \$1 million dollars and for job order contracting.

AB 1270 (Gallagher), Chapter 3, Statutes of 2018, requires the Department of Water Resources (DWR) to inspect dams, reservoirs, and appurtenant structures annually, with certain exemptions, and requires reporting and updates to dam safety regulations.

SB 92 (Committee on Budget), Chapter 26, Statutes of 2017, authorizes the DWR to impose reservoir restrictions and levy property liens on an owner of a dam who fails to comply with certain provisions relating to dam safety or any approval, order, rule, regulation, or requirement of the DWR, among other provisions.

AB 2551 (Gallagher), Chapter 760, Statutes of 2016, authorizes local agencies to use alternative procurement methods for reservoirs funded by Proposition 1 bond funds.

SB 922 (Steinberg), Chapter 431, Statutes of 2011, requires that all PLAs incorporate specified provisions, among other provisions.



- 9) **Arguments in Support.** Valley Water, sponsor of this measure, writes, “AB 271 smartly authorizes the Anderson Project to use the ‘best value’ method of contractor selection. The Federal Energy Regulatory Commission’s independent board of consultants has strongly recommended that this project, due to its size and importance, should be awarded to the most qualified contractors offering the best value, and not necessarily to the lowest bidder. In matters of public safety, expert construction is of critical importance.

“On February 20, 2020, the Federal Energy Regulatory Commission (FERC) ordered Valley Water to take several mitigating actions to address the potential for catastrophic loss of human life if Anderson Dam were to collapse during an earthquake while at full capacity. Valley Water began draining Anderson Reservoir on October 1, 2020, which now sits at 3 percent capacity, and is scheduled to begin construction of a new low-level outlet tunnel this spring to allow for better control of the water level in the reservoir until the dam can fully be replaced. The FERC order amplifies the need for AB 271 to allow Valley Water to move as quickly as possible with expert construction to reduce the dam safety risks to the region’s 2 million people. Best value contracting reduces the chances for delay by allowing Valley Water to contract with construction firms with the expertise and experience necessary for a project of this magnitude, thereby minimizing change orders, potential mistakes, and construction delays.”

- 10) **Arguments in Opposition.** The Western Electrical Contractors Association (WECA) and the Plumbing-Heating-Cooling Contractors Association of California (CAPHCC), opposed unless amended, write “WECA and PHCC are not opposed to using the best value procurement method for the Anderson Dam project. They object to provisions in AB 271 that eschew Fair and Open Competition and skew the general statutory requirement that contractors employ a skilled and trained workforce.

“Public Contract Code §2600 et. seq. establishes substantial financial penalties and possible debarment for failure to use a skilled and trained workforce. The language in §21163(d)(2) gives contractors ‘a pass’ under a PLA from these penalties. WECA and PHCC believe §2600 should apply irrespective of a PLA. WECA and PHCC are Merit Shop Employer Associations. Merit Shop is a way of doing business in which companies reward employees based on performance and encourage them to reach their highest level of achievement. Contracts are awarded based on safety, quality, and value, regardless of labor affiliation.”

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Santa Clara Valley Water District [SPONSOR]  
 Association of California Water Agencies  
 California Municipal Utilities Association  
 California Special Districts Association  
 City of Gilroy  
 City of Morgan Hill  
 County of Santa Clara  
 Employees Association, American Federation of State, County and Municipal Employees 101,  
 Council 57

Engineers Society Chapter, International Federation of Professional and Technical Engineers,  
Local 21, Afl-cio  
Milpitas Chamber of Commerce  
Professional Managers Association Chapter, International Federation of Professional and  
Technical Engineers, Local 21, Afl-cio  
San Jose/silicon Valley Branch of The NAACP  
Santa Clara Valley Open Space Authority  
The Bay Area Council  
Together Bay Area

**Opposition**

Plumbing-Heating-Cooling Contractors Association of California  
Western Electrical Contractors Association

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