

Date of Hearing: June 21, 2023

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Cecilia Aguiar-Curry, Chair
SB 617 (Newman) – As Amended March 30, 2023

SENATE VOTE: 37-0

SUBJECT: Public contracts: progressive design-build: local and regional agencies.

SUMMARY: Expands an existing authorization for local water agencies to use the progressive design-build method of project delivery for specified water projects to include transit and transportation agencies and any type of project. Specifically, **this bill:**

- 1) Adds to the list of local agencies authorized to use progressive design-build (which existing law limits to a city, county, city and county, or special district authorized by law to provide for the production, storage, supply, treatment, or distribution of any water from any source) to also include the following agencies:
 - a) A transit district, included transit district, municipal operator, included municipal operator, or a consolidated agency, as specified.
 - b) A joint powers authority (JPA) formed to provide transit service, or a county transportation commission, as specified.
 - c) A regional transportation agency, as specified.
 - d) A local or regional agency responsible for the construction of transit projects.
- 2) Alters the definition of “design-build project” to include any project using the progressive design-build construction procurement process (removing the limitation in existing law to a project that treats, pumps, stores, or conveys water, wastewater, recycled water, advanced treated water, or supporting facilities).
- 3) Provides that the progressive design-build authorization under existing law and this bill shall not include the authority to perform construction inspection services for projects on, or interfacing with, the state highway system, which shall be performed by the Department of Transportation, as specified.
- 4) Provides that no reimbursement is required by this bill 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 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. [Public Contract Code (PCC) §§ 20100 – 20929]

- 2) Authorizes, until January 1, 2025, cities, counties, and specified special districts and transit agencies to use design-build for specified public works contracts in excess of \$1 million using either a low bid or best value process, as specified. (PCC §§ 22160 – 22169)
- 3) Authorizes the Department of General Services (DGS) to use the progressive design-build procurement process for up to three public works projects, as specified. (PCC §§ 10198 – 10198.8)
- 4) Authorizes, until January 1, 2029, a city, county, city and county, or special district authorized to provide for the production, storage, supply, treatment, or distribution of water to use progressive design-build for up to 15 specified water projects each over \$5 million, and outlines the process and additional parameters for the use of this procurement method. (PCC §§ 22170 – 22174)
- 5) Requires local agencies that use the progressive design-build authority described in 4), above, to submit a report on its use to the Legislature by January 1, 2028, as specified. (PCC § 22172.5)

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

COMMENTS:

- 1) **Design-Build in California Law.** California’s 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 number 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 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 numerous additional local agencies or types of local agencies to use SB 785 design-build authority for additional projects or types of projects.

- 2) **Design-Build for Local Agencies.** 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. However, California law also allows local agencies to use the design-build method, in which 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.

Existing law generally limits the use of design-build by counties and cities 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.
- 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 some limited exceptions).

- 3) **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.

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.

- 4) **Progressive Design-Build.** Progressive design-build is a more recent variant on traditional design-build contracting. While there is some variation, the progressive design-build model generally includes two phases. In the first phase, the awarding authority uses a best value process to select a design-build entity that completes preliminary plans and preconstruction services necessary to provide a cost estimate and final design proposal. The project then “progresses” to the second phase, where the awarding authority and the design-build entity agree to a final design, project cost, and schedule. If they cannot agree, there is an “off ramp” between the two phases when the awarding authority can pursue other options, but still benefit from having the first phase of work complete. This is different from traditional design-build, where the awarding entity contracts with a single entity to design and construct a project at a set price before design work begins, and without a similar off ramp.

AB 137 (Committee on Budget), Chapter 77, Statutes of 2021, authorized the DGS to use the progressive design-build procurement process for up to three public works projects, and outlined extensive parameters for the department’s use of this procurement method. AB 2551 (Gallagher), Chapter 760, Statutes of 2016, authorized local agencies to use a number of alternative procurement methods, including progressive design-build, for any surface storage project that receives specified funding for water storage projects. Some charter cities have

implemented their own progressive design-build process, relying on their Constitutional authority to control their own “municipal affairs.”

Last year, SB 991 (Newman), Chapter 243, Statutes of 2022, authorized a county, city, or special district that produces, stores, supplies, treats, or distributes water to use progressive design-build for up to 15 public works projects in excess of \$5 million each that treat, pump, store, or convey water, wastewater, recycled water, advanced treated water, or supporting facilities. SB 991 outlined extensive requirements for the procurement process that must be followed, including provisions for the use of a skilled and trained workforce, protections for subcontractors, and other requirements. SB 991 required, no later than January 1, 2028, a local agency that uses the progressive design-build process authorized by the bill to submit a report to the Legislature on the use of the progressive design-build process, and specified the contents of that report. SB 991 sunsets on January 1, 2029.

- 5) **Bill Summary and Author’s Statement.** This bill allows transit agencies and regional transportation planning agencies to use the progressive design-build authorization outlined in SB 991 by changing the definition of “local agency” in those statutes. This bill also changes the definition of “design-build project” in those statutes. It removes the existing limitation – projects that treat, pump, store, or convey water, wastewater, recycled water, advanced treated water, or supporting facilities – thereby allowing progressive design-build to be used for any type of project. This bill is sponsored by the Self-Help Counties Coalition.

According to the Author, “As the federal government prepares to disburse the largest federal infrastructure investment in over a generation under the Infrastructure Investment and Jobs Act, it is incumbent that California grant transportation agencies the necessary flexibility to utilize an alternative contracting method which reduces risk, stretches taxpayer dollars, and renders projects more competitive in qualifying for federal funding. The passage of SB 617 will grant transportation agencies the choice of using the (progressive design-build) contracting method on capital projects where agencies deem it most appropriate.”

- 6) **Policy Considerations and Committee Amendment.** The Committee may wish to consider the following: as summarized above, the Legislature approved SB 991 just last year. This Committee noted the following in its analysis of SB 991:

“Progressive design-build is a relatively new contracting method...the Legislature last year authorized DGS to use this method for up to three projects. This Committee also approved AB 1845 earlier this year, which allows the Metropolitan Water District of Southern California (MWD) to use the design-build, progressive design-build, and construction manager/general contractor (CM/GC) methods of project delivery for up to 15 regional water recycling projects or drought response projects.

“This bill does have some clearly-defined parameters. It limits the type of agency that may use progressive design-build (counties, cities and special districts that provide water service). It also specifies the kinds of projects that may be procured using progressive design-build (any public works project in excess of \$5 million that treats, pumps, stores, or conveys water, wastewater, recycled water, advanced treated water, or supporting facilities). The bill also contains a sunset date and reporting requirements to the Legislature.

“However, **this bill is the most expansive authorization of progressive design-build to date – according to the author’s statement, roughly 600 local water agencies could use the provisions of this bill.** In addition, unlike other authorizations to use progressive design-build, this bill does not limit the number of projects that these local agencies may procure using progressive design-build. The Committee may wish to consider if any additional safeguards should be added to this bill.” (*emphasis added*)

This Committee subsequently amended SB 991 to limit its use to a maximum of 15 projects per agency.

This bill and SB 706 (Caballero), which is also being heard by this Committee, expand the provisions of SB 991. As such, both bills represent even broader authorizations for the use of progressive design-build than the Legislature has previously approved. The Committee may wish to amend this bill (and SB 706) to apply a limit of 10 projects per agency to the expanded universe of agencies and projects that this bill and SB 706 propose to authorize, while retaining the 15-project limit in SB 991 for water projects undertaken by local water agencies. This would provide a greater restriction (10 projects per agency, instead of 15) on the expanded authorizations contained in this bill and SB 706, without clawing back the authorization the Legislature provided for water projects less than a year ago via SB 991. Amendments should also be drafted to address the chaptering issues between this bill and SB 706, which presently amend the same code section.

- 7) **Related Legislation.** AB 400 (Blanca Rubio) extends the sunset date, from January 1, 2025, to January 1, 2031, on provisions of law authorizing local agencies to use the design-build contracting method, and expands the type of JPAs that may use design-build. AB 400 is pending in the Senate Governance and Finance Committee.

SB 706 (Caballero) allows cities, counties, and special districts to use progressive design-build for any project, not just water projects, and extends the progressive design-build reporting requirement and sunset date by one year. SB 706 is pending in this Committee.

- 8) **Previous Legislation.** AB 1845 (Calderon), Chapter 275, Statutes of 2022, authorized MWD to use design-build, progressive design-build and CM/GC project delivery methods for up to 15 regional water recycling projects or drought response projects.

AB 2789 (Mullin), Chapter 214, Statutes of 2022, repealed the January 1, 2023, sunset date authorizing the Midpeninsula Regional Open Space District and the Santa Clara Valley Open-Space Authority to use the design-build process for the construction of facilities or other buildings, and authorized the East Bay Regional Park District to use the design-build process for the construction of facilities or other buildings.

SB 1354 (Jones), Chapter 900, Statutes of 2022, allowed counties and cities to use design-build contracting for projects that are necessary to comply with construction-related accessibility standards, as specified.

AB 137 (Committee on Budget), Chapter 77, Statutes of 2021, authorized DGS to use the progressive design-build procurement process for up to three public works projects, and outlined parameters for the department’s use of this procurement method.

SB 626 (Dodd), Chapter 247, Statutes of 2021, authorized the Department of Water Resources to use the design-build and CM/GC project delivery methods for facilities of the State Water Project, excluding through Delta conveyance, as specified.

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 (Oberholte 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.

- 9) **Arguments in Support.** The Self-Help Counties Coalition, sponsor of this measure, write, “SHCC member agencies are proud to sponsor SB 617 legislation that will clarify that local transportation and transit agencies may utilize progressive design build (PDB) as method of delivery. PDB is a project delivery method that would allow our agencies to assemble a team to perform design, construction engineering, project management, and construction according to design parameters, performance criteria, and other requirements established by the public agency owner.

“In large complex projects, PDB delivery benefits the public agency owner by providing the opportunity to add the design build team to the overall project team early in the design phase affording the public agency owner and the design build team more opportunities to collaborate during the project’s design phase. Early collaboration is key to reducing project risk, cost, and schedule.

“California's economy and citizens depend on our agencies to deliver and maintain critical infrastructure. SB 617 will provide ‘another tool in the toolbox’ that public agency owners can use to deliver these projects while saving time and money delivering them.”

- 10) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

Self-Help Counties Coalition [SPONSOR]
 Associated General Contractors of California
 California Association of Councils of Governments
 California Special Districts Association
 California Transit Association
 Foothill Transit
 Orange County Transportation Authority
 Riverside County Transportation Commission (RCTC)
 San Diego Metropolitan Transit System
 San Gabriel Valley Council of Governments (if amended)
 Southern California Regional Rail Authority (METROLINK)
 Transportation Agency for Monterey County (TAMC)
 Transportation California

Opposition

None on file

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