

Date of Hearing: July 15, 2015

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Brian Maienschein, Chair
SB 762 (Wolk) – As Amended July 7, 2015

SENATE VOTE: 24-12

SUBJECT: Competitive bidding: best value: pilot program: design-build.

SUMMARY: Allows counties to award construction contracts valued above \$1 million on the basis of best value, until January 1, 2020. Specifically, **this bill:**

- 1) Provides for a pilot program for counties for construction projects in excess of \$1 million.
- 2) Requires the board of supervisors (BOS) of any county to let any contract for a construction project pursuant to this bill to the lowest responsible bidder or else reject all bids.
- 3) Allows the lowest responsible bidder to be selected on the basis of the best value to a county. In order to implement this method of selection, the BOS shall adopt and publish procedures and required criteria that ensure that all selections are conducted in a fair and impartial manner. These procedures shall conform to 5) through 10), below, and shall be mandatory for counties who choose to participate in the pilot program.
- 4) Allows, if the BOS deems it to be in the best interest of the county, the BOS, on the refusal or failure of the successful bidder for a project to execute a tendered contract, to award it to the second lowest responsible bidder. If the second lowest responsible bidder fails or refuses to execute the contract, the BOS may likewise award it to the third lowest responsible bidder.
- 5) Requires a county to proceed in accordance with the following when awarding best value contracts under this bill:
 - a) A county shall not select a lowest responsible bidder on the basis of the best value to a county unless, after evaluating at a public meeting the alternative of awarding the contract on the basis of the lowest bid price, the county makes a written finding that awarding the contract on the basis of best value, for the specific project under consideration, will accomplish one or more of the following objectives: reducing project costs, expediting the completion of the project, or providing features not achievable through awarding the contract on the basis of the lowest bid price;
 - b) A county shall prepare a solicitation for bids and give notice pursuant to provisions of the Local Agency Public Construction Act (LAPCA) that govern counties' bid advertisement procedures. A county may identify specific types of subcontractors that are required to be included in the bids. A county shall comply with the Subletting and Subcontracting Fair Practices Act (Subcontracting Act) with regard to construction subcontractors identified in the bid;
 - c) A county shall establish a procedure to prequalify bidders pursuant to provisions of the LAPCA governing prequalification procedures. The information required pursuant to

this provision shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. Information submitted by the bidder as part of the evaluation process shall not be open to public inspection to the extent that information is exempt from disclosure under the California Public Records Act;

- d) Each solicitation for bids shall do all of the following:
 - i) Invite prequalified bidders to submit sealed bids in the manner prescribed by this bill;
 - ii) Include a section identifying and describing the following:
 - (1) Criteria that a county will consider in evaluating bids;
 - (2) The methodology and rating or weighting system that will be used by a county in evaluating bids; and,
 - (3) The relative importance or weight assigned to the criteria identified in the request for bids; and,
- e) Final evaluation of the best value contractor shall be done in a manner that prevents cost or price information from being revealed to the committee evaluating the qualifications of the bidders prior to completion and announcement of that committee's decision.
- 6) Prohibits a best value entity from being prequalified or shortlisted, unless the entity provides an enforceable commitment to the local agency that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades.
- 7) Allows an entity's commitment that a skilled and trained workforce will be used to perform the project or contract to be established by any of the following:
 - a) The entity's agreement with the county that the entity and its subcontractors at every tier will comply with the requirements of 6), above, and that the entity will provide the county with evidence, on a monthly basis while the project or contract is being performed, that the entity and its subcontractors are complying with the requirements of 6), above;
 - b) If the county has entered into a project labor agreement (PLA) that will bind all contractors and subcontractors performing work on the project or contract, and that includes the requirements of 6), above, the entity's agreement that it will become a party to that PLA; or,
 - c) Evidence that the entity has entered into a PLA that includes the requirements of 6), above, and that will bind the entity and all its subcontractors at every tier performing the project or contract.
- 8) Requires selection of the best value contractor to be made as follows:

- a) An evaluation committee appointed by the county shall evaluate the qualifications of the bidders based solely upon the criteria set forth in the solicitation documents, and shall assign a qualifications score to each bid. A county shall establish written policies and procedures, consistent with applicable law, to ensure that members of an evaluation committee are free from conflicts of interest, if the county has not already established applicable written policies and procedures;
 - b) A county shall not award a contract for a construction project pursuant to this bill if a solicitation for bids for that construction project results in the submission of fewer than three responsive bids to the county for evaluation;
 - c) The award of the contract shall be made to the bidder whose bid is determined by a county, in writing, to be the best value to a county. To determine the best value contractor, the county shall divide each bidder's price by its qualifications score. The lowest resulting cost per quality point will represent the best value bid;
 - d) A county shall issue a written decision of its contract award; and,
 - e) Upon issuance of a contract award, a county shall publicly announce its award identifying the best value contractor to which the award is made, the project, the project price, and the selected best value contractor's score based on the evaluation criteria listed in the request for bids. The notice of award shall be made public and include the score of the selected best value contractor in relation to all other responsive bidders and their respective prices. The contract file shall include documentation sufficient to support the decision to award.
- 9) Prohibits, if a county elects to award a project pursuant to this bill, retention proceeds from exceeding 5% if a performance and payment bond, issued by an admitted surety insurer, is required in the solicitation of bids, as specified.
- 10) Provides for allowable retention proceeds that contractors and subcontractors may withhold, as specified.
- 11) Requires, before January 1, 2020, the BOS of a participating county to submit a report to the appropriate policy committees of the Legislature and the Joint Legislative Budget Committee. The report shall include, but is not limited to, the following information:
- a) A description of the projects awarded using the best value procedures;
 - b) The contract award amounts;
 - c) The best value contractors awarded the projects;
 - d) A description of any written protests concerning any aspect of the solicitation, bid, or award of the best value contracts, including the resolution of the protests;
 - e) A description of the prequalification process;

- f) The criteria used to evaluate the bids, including the weighting of the criteria and an assessment of the effectiveness of the methodology; and,
 - g) If a project awarded under this bill has been completed, an assessment of the project performance, to include a summary of any delays or cost increases.
- 12) Requires the report described in 11), above, to be submitted in compliance with existing law governing the procedures for submitting required or requested reports to the Legislature.
- 13) Provides that, except as otherwise provided in this bill, this bill is not intended to change in any manner any guideline, criteria, procedure, or requirement of a county to let any contract for a project to the lowest responsible bidder or else reject all bids.
- 14) Provides the following definitions:
- a) "Best value" means a procurement process whereby the lowest responsible bidder may be selected on the basis of objective criteria with the resulting selection representing the best combination of price and qualifications;
 - b) "Best value contract" means a contract entered into pursuant to this article;
 - c) "Best value contractor" means a properly licensed person, firm, or corporation that submits a bid for, or is awarded, a best value contract;
 - d) "Demonstrated management competency" means the experience, competency, capability, and capacity of the proposed management staffing to complete projects of similar size, scope, or complexity;
 - e) "Financial condition" means the financial resources needed to perform the contract. The criteria used to evaluate a bidder's financial condition shall include, at a minimum, capacity to obtain all required payment bonds, performance bonds, and liability insurance;
 - f) "Labor compliance" means the ability to comply with, and past performance with, contract and statutory requirements for the payment of wages and qualifications of the workforce. The criteria used to evaluate a bidder's labor compliance shall include, as a minimum, the bidder's ability to comply with the apprenticeship requirements of the California Apprenticeship Council and the Department of Industrial Relations, its past conformance with those requirements, and its past conformance with requirements to pay prevailing wages on public works projects;
 - g) "Qualifications" means the financial condition, relevant experience, demonstrated management competency, labor compliance, and safety record of the bidder, and, if required by the bidding documents, some or all of the preceding qualifications as they pertain to subcontractors proposed to be used by the bidder for designated portions of the work. A county shall evaluate financial condition, relevant experience, demonstrated management competency, labor compliance, and safety record, using, to the extent possible, quantifiable measurements;

- h) "Relevant experience" means the experience of the bidder with projects of similar size, scope, or complexity;
- i) "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;
- j) "Apprenticeable occupation" means an occupation for which the Chief of the Division of Apprenticeship Standards had approved an apprenticeship program pursuant to existing law, as specified, prior to January 1, 2014;
- k) "Skilled and trained workforce" means a workforce that meets all of the following conditions:
 - i) All the workers are either skilled journeypersons or apprentices registered in an apprenticeship program, as specified;
 - ii) As of January 1, 2016, at least 20% of the skilled journeypersons employed to perform work on the contract or project by the entity and each of its subcontractors at every tier are graduates of an apprenticeship program, as specified;
 - iii) As of January 1, 2017, at least 30% of the skilled journeypersons employed to perform work on the contract or project by the entity and each of its subcontractors at every tier are graduates of an apprenticeship program, as specified;
 - iv) As of January 1, 2018, at least 40% of the skilled journeypersons employed to perform work on the contract or project by the entity and each of its subcontractors at every tier are graduates of an apprenticeship program, as specified;
 - v) As of January 1, 2019, at least 50% of the skilled journeypersons employed to perform work on the contract or project by the entity and each of its subcontractors at every tier are graduates of an apprenticeship program, as specified;
 - vi) As of January 1, 2020, at least 60% of the skilled journeypersons employed to perform work on the contract or project by the entity and each of its subcontractors at every tier are graduates of an apprenticeship program, as specified;
 - vii) For an apprenticeable occupation in which no apprenticeship program had been approved by the chief prior to January 1, 1995, up to one-half of the graduation percentage requirements specified above may be satisfied by skilled journeypersons who commenced working in the apprenticeable occupation prior to the chief's approval of an apprenticeship program for that occupation in the county in which the project is located.
- l) "Skilled journeyman" means a worker who either:

- i) Graduated from an apprenticeship program for the applicable occupation, as specified; or,
- ii) Has at least as many hours of on-the-job experience in the applicable occupation as would be required to graduate from an apprenticeship program for the applicable occupation, as specified.

15) 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.

16) Contains a repeal date of January 1, 2020.

EXISTING LAW:

- 1) Establishes, pursuant to the LAPCA within the Public Contract Code, the procedures counties are required to 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) Allows local agencies limited use of best value contracting when the design-build or the construction manager at risk methods are used, but not for traditional design-bid-build contracting.
- 3) Allows various government entities to use best value when purchasing goods or services, generally under specified dollar thresholds.
- 4) Allows, until January 1, 2017, the University of California (UC) to award contracts based on best value procedures.

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

COMMENTS:

- 1) **Bill Summary.** This bill establishes a pilot program until January 1, 2020, that allows counties to award construction contracts costing more than \$1 million on a best value basis. Counties would have to satisfy a number of requirements in order to use this authority, including:
 - a) Adopting and publishing procedures and required criteria that ensure all selections are conducted in a fair and impartial manner;
 - b) Evaluating at a public meeting the alternative of awarding the contract on the basis of the lowest bid price;

- c) Making a written finding that awarding a contract on the basis of best value will reduce project costs, expedite project completion, and/or provide features not achievable via the low-bid method;
- d) Preparing bid solicitations and providing notice as required by the LAPC Act, and complying with the Subcontracting Act regarding subcontractors identified in a bid;
- e) Establishing prequalification procedures in accordance with the LAPC Act;
- f) Including in bid solicitations the criteria and rating system a county will consider in evaluating bids;
- g) Appointing an evaluation committee, which must evaluate bidders solely upon the criteria in the bid solicitations and assign a qualifications score to each bid;
- h) Determining best value by dividing each bidder's price by its qualifications score, with the lowest cost per quality point representing the best value bid;
- i) Publicly announcing bid awards, including the score of the selected contractor in relation to all other bidders; and,
- j) Submitting a report to the Legislature, including information about the county's use of this bill's authority.

This bill is sponsored by the Solano County Board of Supervisors.

- 2) **Author's Statement.** According to the author, "Counties are currently permitted to award construction contracts using the 'best value' method of selection for the design-build project delivery method and for the construction management at risk project delivery method. However, counties are prohibited from awarding construction contracts based on Best Value for projects contracted through the traditional (design-bid-build) method of project delivery. Awarding public works contracts solely based on lowest responsible bid can result in firms underbidding the cost of work to receive the contract award, which can set up a contentious relationship between the county and general contractor.

"SB 762 will allow counties to consider other objective criteria such as relevant experience, demonstrated management competency, financial condition, labor compliance, safety record of the bidder, and other relevant factors for the general contractors (and if applicable, the subcontractors), in addition to cost during the contract award process."

- 3) **Background.** The LAPCA 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. However, during the past two decades, the Legislature has gradually expanded local governments' authority to procure construction projects using various alternatives to the design-bid-build project delivery method. These alternative methods include:

- a) Design-build contracting, which allows local officials to procure both design and construction services from a single company before the development of complete plans and specifications; and,
- b) Construction manager at-risk contracting, which allows local officials to retain a construction manager, who provides pre-construction services during the design period, becomes the general contractor during the construction process, and is responsible for delivering the project within an agreed upon price, thereby assuming the risk for cost-overruns.

These alternative procurement methods allow local governments to evaluate bids on a best-value basis. Best value contracting has generally been recognized as a viable alternative for construction projects. Traditionally, construction projects have been bid out and awarded based upon a lowest-cost approach. 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 design-build teams 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 design-build team with the best value.

Best value contracting is also allowed on a limited basis for goods and services, and for procuring technology, telecommunications and related equipment.

- 4) **Best Value Pilot at the UC.** SB 667 (Migden), Chapter 367, Statutes of 2006, established a pilot program for the UC. Initially authorized for five years, SB 667 allowed the UC San Francisco to award contracts based on the best value for the university. Under this process, UC prequalifies bidders, then evaluates the bid based on answers to a separate best value questionnaire and assigns a qualification score. UC then divides each bidder's price by its qualification score. The lowest resulting cost per quality point represents the best value bid.

In a report to the Legislature in January 2010, the UC reported that 23 contracts totaling \$158.3 million were issued under the best value pilot program. Of the 23 contracts, 12 contracts were low bid contracts. According to the report, the "University Representatives for all these projects [four completed and two almost completed projects] have been unanimous in their praise of this process that has already demonstrated numerous advantages such as decreased bid protests and communication problems, decreased the need for multiple inspections and re-work, decreased disputes, change order requests, claims and litigation and increased incentives for contractors to perform their work safely and to adhere to high labor and quality standards." UC concludes that the best value pilot program fosters better quality work, less labor and safety problems, better qualified persons/contractors, better on-time completion, and better on-budget performance. In 2011, SB 835 (Wolk), Chapter 636, Statutes of 2011, expanded the authority to all UC campuses and extended the sunset from January 1, 2012 to January 1, 2017.

- 5) **Related Legislation.** AB 1185 (Ridley-Thomas) authorizes a pilot program for the Los Angeles Unified School District to use best value procurement for projects over \$1 million and requires the Legislative Analyst's Office to report on the use of the best value

procurement method by school districts. AB 1185 is pending in the Senate Appropriations Committee.

- 6) **Previous Legislation.** AB 1971 (Bocanegra) of 2014 was substantially similar to AB 1185. AB 1971 was held on the Senate Floor.

SB 835 (Wolk), Chapter 636, Statutes of 2011, extended the sunset of the best value pilot program for the UC to January 1, 2017, and expanded the program to all UC campuses.

SB 667 (Migden), Chapter 367, Statutes of 2006, established the best value pilot program for the UC San Francisco campus for five years.

- 7) **Technical Amendments.** The Committee may wish to consider adopting the following technical amendments:
- a) On page 5, in line 29, strike out "chief" and insert "Chief of the Division of Apprenticeship Standards;
 - b) On page 6, in line 36, strike out "chief" and insert "Chief of the Division of Apprenticeship Standards;
 - c) On page 6, in line 38, strike out "subparagraph (B)" and insert "subparagraphs (A) through (E)";
 - d) On page 7, in line 5, strike out "chief" and insert "Chief of the Division of Apprenticeship Standards;
 - e) On page 7, in line 12, strike out "chief" and insert "Chief of the Division of Apprenticeship Standards;
 - f) On page 8, in line 25, strike out "subdivision" and insert "section";
 - g) On page 8, in line 28, strike out "subdivision" and insert "section";
 - h) On page 8, in line 32, strike out "subdivision" and insert "section";
 - i) On page 9, in line 30, strike out "district" and insert "county";
 - j) On page 9, in line 38, strike out "district" and insert "county"; and,
 - k) On page 10, in line 5, strike out "district" and insert "county"
- 8) **Arguments in Support.** The Solano County Board of Supervisors, sponsor of this measure, writes, "A 'best value' construction contract is one that allows counties to select the lowest responsible bidder on the basis of a number of measurable, verifiable criteria. These criteria include management competency, financial condition, labor compliance, qualifications, experience, and safety record. Factoring in these criteria will allow counties that participate in the pilot program to choose contractors that provide the best combination of price and quality."

- 9) **Arguments in Opposition.** The Southern California Contractors Association, in opposition, argues, "This (bill) will lead to protests from the second and third 'best value' contractors, leading to project delays and additional costs to the public agency... Additionally, the subjective criteria created by the county could lead to fraud in the awarding process. By making the awarding criteria subjective, public agencies could craft the solicitation of bids in such a way that it benefits one contractor. This equates to the public agency selecting, possibly by popularity, the contractor based on their *preference* rather than on the lowest responsible bid."

The Associated Builders and Contractors of California, also in opposition, note, "...ABC California continues to believe there should be an extended phase-in period to ensure enough skilled journey level workers will be available to meet the new skilled workforce mandate in SB 762...ABC requests the first year of SB 762's skilled workforce requirements be amended to take effect no sooner than January 1, 2018, and each of the tiered implementation dates following be pushed back by one year."

REGISTERED SUPPORT / OPPOSITION:

Support

Solano County Board of Supervisors [SPONSOR]
California State Association of Counties
Los Angeles County Board of Supervisors
San Bernardino County

Opposition

Associated Builders and Contractors of California (unless amended)
Southern California Contractors Association

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