

AMENDED IN SENATE APRIL 9, 2007

SENATE BILL

No. 442

Introduced by Senator Ackerman
(Coauthors: Senators Harman and Wyland)
(Coauthors: Assembly Members DeVore, Duvall, Huff, Silva, and Spitzer)

February 21, 2007

An act to ~~amend Section 20209.13 of~~ *add Section 20243 to* the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 442, as amended, Ackerman. Public contracts: transit projects: ~~design-build~~ *design-build* contracting.

Existing law authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures. Existing law repeals these provisions January 1, 2011. Existing law also specifies that these provisions apply only to transit projects, and that transit projects do not include highway construction or local street and road projects.

This bill would authorize the Orange County Transit District, with the approval of its governing body, to enter into design-build contracts, as defined, for transit projects, as defined, in accordance with specified provisions. The bill also would make legislative findings and declarations as to the necessity of a special statute for the Orange County Transit District.

The bill would require specified information to be verified under oath, thus imposing a state-mandated local program by expanding the scope of an existing crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

~~This bill would additionally specify that transit projects include, but are not limited to, a high-occupancy vehicle lane connecting State Route 22 to Interstate 405 and Interstate 605.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes. State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 20243 is added to the Public Contract
 2 Code, to read:
 3 20243. (a) (1) This section provides for an alternative
 4 procedure for bidding on transit projects applicable only in the
 5 Orange County Transit District, upon approval of the governing
 6 body.
 7 (2) The transit district may award the project using either the
 8 lowest responsible bidder or by best value.
 9 (b) (1) It is the intent of the Legislature to enable the Orange
 10 County Transit District to utilize cost-effective options for building
 11 and modernizing public facilities. The Legislature also recognizes
 12 the national trend, including authorization in California, to allow
 13 public entities to utilize design-build contracts as a project delivery
 14 method. It is not the intent of the Legislature to authorize this
 15 procedure for transportation facilities, including, but not limited
 16 to, roads and bridges.
 17 (2) The Legislature also finds and declares that utilizing a
 18 design-build contract requires a clear understanding of the roles
 19 and responsibilities of each participant in the design-build process.
 20 The Legislature also finds that the cost-effective benefits to transit
 21 districts are achieved by shifting the liability and risk for cost
 22 containment and project completion to the design-build entity.
 23 (3) It is the intent of the Legislature to provide an alternative
 24 and optional procedure for bidding and building construction
 25 projects for the Orange County Transit District.

1 (4) *The design-build approach may be used, but is not limited*
2 *to use, when it is anticipated that it will reduce project cost,*
3 *expedite project completion, or provide design features not*
4 *achievable through the design-bid-build method.*

5 (c) *As used in this section:*

6 (1) *“Best value” means a value determined by objective criteria*
7 *related to price, features, functions, and life-cycle costs.*

8 (2) *“Design-build” means a procurement process in which both*
9 *the design and construction of a project are procured from a single*
10 *entity.*

11 (3) *“Design-build entity” means a partnership, corporation, or*
12 *other legal entity that is able to provide appropriately licensed*
13 *contracting, architectural, and engineering services as needed*
14 *pursuant to a design-build contract.*

15 (4) *“Project” means the construction of a high-occupancy*
16 *vehicle lane connecting State Route 22 to Interstate 405 and*
17 *Interstate 605.*

18 (d) *Design-build projects shall progress in a four-step process,*
19 *as follows:*

20 (1) (A) *The transit district shall prepare a set of documents*
21 *setting forth the scope of the project. The documents may include,*
22 *but are not limited to, the size, type, and desired design character*
23 *of the buildings and site, performance specifications covering the*
24 *quality of materials, equipment, and workmanship, preliminary*
25 *plans or building layouts, or any other information deemed*
26 *necessary to describe adequately the transit district’s needs. The*
27 *performance specifications and any plans shall be prepared by a*
28 *design professional who is duly licensed and registered in*
29 *California.*

30 (B) *Any architect or engineer retained by the transit district to*
31 *assist in the development of the project specific documents shall*
32 *not be eligible to participate in the preparation of a bid with any*
33 *design-build entity for that project.*

34 (2) (A) *Based on the documents prepared in paragraph (1), the*
35 *transit district shall prepare a request for proposals that invites*
36 *interested parties to submit competitive sealed proposals in the*
37 *manner prescribed by the transit district. The request for proposals*
38 *shall include, but is not limited to, the following elements:*

39 (i) *Identification of the basic scope and needs of the project or*
40 *contract, the expected cost range, and other information deemed*

1 necessary by the transit district to inform interested parties of the
2 contracting opportunity, to include the methodology that will be
3 used by the transit district to evaluate proposals and specifically
4 if the contract will be awarded to the lowest responsible bidder.

5 (ii) Significant factors that the transit district reasonably expects
6 to consider in evaluating proposals, including cost or price and
7 all nonprice-related factors.

8 (iii) The relative importance of weight assigned to each of the
9 factors identified in the request for proposals.

10 (B) With respect to clause (iii) of subparagraph (A), if a
11 nonweighted system is used, the agency shall specifically disclose
12 whether all evaluation factors other than cost or price when
13 combined are:

14 (i) Significantly more important than cost or price.

15 (ii) Approximately equal in importance to cost or price.

16 (iii) Significantly less important than cost or price.

17 (C) If the transit district chooses to reserve the right to hold
18 discussions or negotiations with responsive bidders, it shall so
19 specify in the request for proposal and shall publish separately or
20 incorporate into the request for proposal applicable rules and
21 procedures to be observed by the transit district to ensure that any
22 discussions or negotiations are conducted in good faith.

23 (3) (A) The transit district shall establish a procedure to
24 prequalify design-build entities using a standard questionnaire
25 developed by the transit district. In preparing the questionnaire,
26 the transit district shall consult with the construction industry,
27 including representatives of the building trades and surety industry.
28 This questionnaire shall require information, including, but not
29 limited to, all of the following:

30 (i) If the design-build entity is a partnership, limited partnership,
31 or other association, a listing of all of the partners, general
32 partners, or association members known at the time of bid
33 submission who will participate in the design-build contract,
34 including, but not limited to, mechanical subcontractors.

35 (ii) Evidence that the members of the design-build entity have
36 completed, or demonstrated the experience, competency, capability,
37 and capacity to complete, projects of similar size, scope, or
38 complexity, and that proposed key personnel have sufficient
39 experience and training to competently manage and complete the
40 design and construction of the project, as well as a financial

1 *statement that assures the transit district that the design-build*
2 *entity has the capacity to complete the project.*

3 (iii) *The licenses, registration, and credentials required to design*
4 *and construct the project, including information on the revocation*
5 *or suspension of any license, credential, or registration.*

6 (iv) *Evidence that establishes that the design-build entity has*
7 *the capacity to obtain all required payment and performance*
8 *bonding, liability insurance, and errors and omissions insurance.*

9 (v) *Any prior serious or willful violation of the California*
10 *Occupational Safety and Health Act of 1973, contained in Part 1*
11 *(commencing with Section 6300) of Division 5 of the Labor Code,*
12 *or the federal Occupational Safety and Health Act of 1970 (Public*
13 *Law 91-596), settled against any member of the design-build entity,*
14 *and information concerning workers' compensation experience*
15 *history and worker safety program.*

16 (vi) *Information concerning any debarment, disqualification,*
17 *or removal from a federal, state, or local government public works*
18 *project. Any instance in which an entity, its owners, officers, or*
19 *managing employees submitted a bid on a public works project*
20 *and were found to be nonresponsive, or were found by an awarding*
21 *body not to be a responsible bidder.*

22 (vii) *Any instance in which the entity, or its owners, officers, or*
23 *managing employees, defaulted on a construction contract.*

24 (viii) *Any violations of the Contractors' State License Law*
25 *(Chapter 9 (commencing with Section 7000) of Division 3 of the*
26 *Business and Professions Code), excluding alleged violations of*
27 *federal or state law including the payment of wages, benefits,*
28 *apprenticeship requirements, or personal income tax withholding,*
29 *or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec.*
30 *3101 et seq.) withholding requirements settled against any member*
31 *of the design-build entity.*

32 (ix) *Information concerning the bankruptcy or receivership of*
33 *any member of the design-build entity, including information*
34 *concerning any work completed by a surety.*

35 (x) *Information concerning all settled adverse claims, disputes,*
36 *or lawsuits between the owner of a public works project and any*
37 *member of the design-build entity during the five years preceding*
38 *submission of a bid pursuant to this section, in which the claim,*
39 *settlement, or judgment exceeds fifty thousand dollars (\$50,000).*

1 *Information shall also be provided concerning any work completed*
2 *by a surety during this period.*

3 *(xi) In the case of a partnership or other association, that is not*
4 *a legal entity, a copy of the agreement creating the partnership or*
5 *association and specifying that all partners or association members*
6 *agree to be fully liable for the performance under the design-build*
7 *contract.*

8 *(B) The information required pursuant to this subdivision shall*
9 *be verified under oath by the entity and its members in the manner*
10 *in which civil pleadings in civil actions are verified. Information*
11 *that is not a public record pursuant to the California Public*
12 *Records Act (Chapter 3.5 (commencing with Section 6250) of*
13 *Division 7 of Title 1 of the Government Code) shall not be open*
14 *to public inspection.*

15 *(4) The transit district shall establish a procedure for final*
16 *selection of the design-build entity. Selection shall be based on*
17 *either of the following criteria:*

18 *(A) A competitive bidding process resulting in lump-sum bids*
19 *by the prequalified design-build entities. Awards shall be made to*
20 *the lowest responsible bidder.*

21 *(B) A transit district may use a design-build competition based*
22 *upon best value and other criteria set forth in paragraph (2). The*
23 *design-build competition shall include the following elements:*

24 *(i) Competitive proposals shall be evaluated by using only the*
25 *criteria and selection procedures specifically identified in the*
26 *request for proposal. However, the following minimum factors*
27 *shall each represent at least 10 percent of the total weight of*
28 *consideration given to all criteria factors: price, technical design,*
29 *and construction expertise, life-cycle costs over 15 years or more,*
30 *skilled labor force availability, and acceptable safety record.*

31 *(ii) Once the evaluation is complete, the top three responsive*
32 *bidders shall be ranked sequentially from the most advantageous*
33 *to the least.*

34 *(iii) The award of the contract shall be made to the responsible*
35 *bidder whose proposal is determined, in writing, to be the most*
36 *advantageous.*

37 *(iv) Notwithstanding any provision of this code, upon issuance*
38 *of a contract award, the transit district shall publicly announce*
39 *its award, identifying the contractor to whom the award is made,*
40 *along with a written decision supporting its contract award and*

1 *stating the basis of the award. The notice of award shall also*
2 *include the transit district's second and third ranked design-build*
3 *entities.*

4 (v) *For the purposes of this paragraph, "skilled labor force*
5 *availability" means a commitment to training the future*
6 *construction workforce of this state through apprenticeship as*
7 *required by Section 1777.5 of the Labor Code. The design-build*
8 *entity shall provide the governing body with the name, address,*
9 *and telephone number of the apprenticeship program or programs*
10 *approved by the Division of Apprenticeship Standards from which*
11 *it intends to request the dispatch of apprentices for use on the*
12 *design-build contract.*

13 (vi) *For the purposes of this paragraph, a bidder's "safety*
14 *record" shall be deemed "acceptable" if the bidder's experience*
15 *modification rate for the most recent three-year period is an*
16 *average of 1.00 or less, and their average total recordable injury*
17 *or illness rate and average lost work rate for the most recent*
18 *three-year period does not exceed the applicable statistical*
19 *standards for its business category or if the bidder is a party to*
20 *an alternative dispute resolution system as provided for in Section*
21 *3201.5 of the Labor Code.*

22 (e) (1) *Any design-build entity that is selected to design and*
23 *build a project pursuant to this section shall possess or obtain*
24 *sufficient bonding to cover the contract amount for nondesign*
25 *services, and errors and omission insurance coverage sufficient*
26 *to cover all design and architectural services provided in the*
27 *contract. This section does not prohibit a general or engineering*
28 *contractor from being designated the lead entity on a design-build*
29 *entity for the purposes of purchasing necessary bonding to cover*
30 *the activities of the design-build entity.*

31 (2) *Any payment or performance bond written for the purposes*
32 *of this section shall be written using a bond form developed by the*
33 *transit district.*

34 (f) *All subcontractors that were not listed by the design-build*
35 *entity in accordance with clause (i) of subparagraph (A) of*
36 *paragraph (3) of subdivision (d) shall be awarded by the*
37 *design-build entity in accordance with the design-build process*
38 *set forth by the transit district in the design-build package. All*
39 *subcontractors bidding on contracts pursuant to this section shall*
40 *be afforded the protections contained in Chapter 4 (commencing*

1 with Section 4100) of Part 1. The design-build entity shall do both
2 of the following:

3 (1) Provide public notice of the availability of work to be
4 subcontracted in accordance with the publication requirements
5 applicable to the competitive bidding process of the transit district.

6 (2) Provide a fixed date and time on which the subcontracted
7 work will be awarded in accordance with the procedure established
8 pursuant to this section.

9 (g) The minimum performance criteria and design standards
10 established pursuant to paragraph (1) of subdivision (d) shall be
11 adhered to by the design-build entity. Any deviations from those
12 standards may only be allowed by written consent of the transit
13 district.

14 (h) The transit district may retain the services of a design
15 professional or construction project manager, or both, throughout
16 the course of the project in order to ensure compliance with this
17 section.

18 (i) Contracts awarded pursuant to this section shall be valid
19 until the project is completed.

20 (j) Nothing in this section is intended to affect, expand, alter,
21 or limit any rights or remedies otherwise available at law.

22 (k) (1) If the transit district elects to award a project pursuant
23 to this section, retention proceeds withheld by the transit district
24 from the design-build entity shall not exceed 5 percent if a
25 performance and payment bond, issued by an admitted surety
26 insurer, is required in the solicitation of bids.

27 (2) In a contract between the design-build entity and the
28 subcontractor, and in a contract between a subcontractor and any
29 subcontractor thereunder, the percentage of the retention proceeds
30 withheld may not exceed the percentage specified in the contract
31 between the transit district and the design-build entity. If the
32 design-build entity provides written notice to any subcontractor
33 who is not a member of the design-build entity, prior to or at the
34 time the bid is requested, that a bond may be required and the
35 subcontractor subsequently is unable or refuses to furnish a bond
36 to the design-build entity, then the design-build entity may withhold
37 retention proceeds in excess of the percentage specified in the
38 contract between the transit district and the design-build entity
39 from any payment made by the design-build entity to the
40 subcontractor.

1 (l) If the transit district elects to proceed under this section and
2 uses the design-build method on a public works project, it shall
3 submit to the Legislative Analyst's Office before December 1,
4 2010, a report containing a description of each public works
5 project procured through the design-build process that is completed
6 after January 1, 2008, and before November 1, 2010. The report
7 shall include, but shall not be limited to, all of the following
8 information:

- 9 (1) The type of project.
- 10 (2) The gross square footage of the project.
- 11 (3) The design-build entity that was awarded the project.
- 12 (4) The estimated and actual project costs.
- 13 (5) A description of any written protests concerning any aspect
14 of the solicitation, bid, proposal, or award of the design-build
15 project, including the resolution of the protests.
- 16 (6) An assessment of the prequalification process and criteria.
- 17 (7) An assessment of the effect of retaining a 5-percent retention
18 on the project.
- 19 (8) A description of the method used to award the contract. If
20 the best value method was used, the report shall describe the
21 factors used to evaluate the bid, including the weighting of each
22 factor and an assessment of the effectiveness of the methodology.
- 23 (9) An assessment of the project impact of "skilled labor force
24 availability."
- 25 (10) An assessment of the most appropriate uses for the
26 design-build approach.
- 27 (m) If the transit district elects not to use the authority granted
28 by this section, it may submit a report to the Legislative Analyst's
29 Office explaining why the transit district elected not to use the
30 design-build method.
- 31 (n) On or before January 1, 2012, the Legislative Analyst's
32 Office shall report to the Legislature on the use of the design-build
33 method by the transit district pursuant to this section, including
34 the information listed in subdivision (l). The report may include
35 recommendations for modifying or extending this section.

36 SEC. 2. The Legislature finds and declares that a special law
37 is necessary and that a general law cannot be made applicable
38 within the meaning of Section 6 of Article XIII B of the California
39 Constitution because of the unique need to build public facilities
40 in a cost-effective manner in the Orange County Transit District.

1 *SEC. 3. No reimbursement is required by this act pursuant to*
 2 *Section 6 of Article XIII B of the California Constitution because*
 3 *the only costs that may be incurred by a local agency or school*
 4 *district will be incurred because this act creates a new crime or*
 5 *infraction, eliminates a crime or infraction, or changes the penalty*
 6 *for a crime or infraction, within the meaning of Section 17556 of*
 7 *the Government Code, or changes the definition of a crime within*
 8 *the meaning of Section 6 of Article XIII B of the California*
 9 *Constitution.*

10 ~~SECTION 1. Section 20209.13 of the Public Contract Code is~~
 11 ~~amended to read:~~

12 ~~20209.13. (a) Unless expressly set forth in this article, nothing~~
 13 ~~in this article is intended to affect, expand, alter, or limit any rights~~
 14 ~~or remedies otherwise available at law.~~

15 ~~(b) This article applies only to transit projects.~~

16 ~~(c) For purposes of this article, all of the following apply:~~

17 ~~(1) "Transit projects" do not include state highway construction~~
 18 ~~or local street and road projects.~~

19 ~~(2) "Transit projects" include, but are not limited to, a~~
 20 ~~high-occupancy vehicle lane connecting State Route 22 to Interstate~~
 21 ~~405 and Interstate 605.~~