

ASSEMBLY BILL

No. 195

Introduced by Assembly Member Hall

January 28, 2013

An act to amend Section 20133 of the Public Contract Code, relating to public contracts, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 195, as introduced, Hall. Counties: construction projects: design-build.

Existing law, until July 1, 2014, authorizes counties to use alternative procedures, known as design-build, for bidding on specified types of construction projects in the county in excess of \$2,500,000, in accordance with specified procedures. These procedures include a requirement for contracts awarded after a certain date that a county board of supervisors pay a fee into the State Public Works Enforcement Fund, which funds are continuously appropriated for the Department of Industrial Relations' enforcement of prevailing wage requirements on public works projects. These procedures also require specified information to be verified under oath.

This bill would extend these provisions until July 1, 2020. Because the additionally authorized projects would require payment of fees into the State Public Works Enforcement Fund, a continuously appropriated fund, it would make an appropriation. Also, because the bill would authorize additional contracts to be awarded under these provisions, which would be subject to the requirement that certain information be verified under oath, it would impose 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.

Vote: majority. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

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

1 SECTION 1. Section 20133 of the Public Contract Code is
2 amended to read:

3 20133. (a) A county, with approval of the board of supervisors,
4 may utilize an alternative procedure for bidding on construction
5 projects in the county in excess of two million five hundred
6 thousand dollars (\$2,500,000) and may award the project using
7 either the lowest responsible bidder or by best value.

8 (b) (1) It is the intent of the Legislature to enable counties to
9 utilize design-build for buildings and county sanitation wastewater
10 treatment facilities. It is not the intent of the Legislature to
11 authorize this procedure for other infrastructure, including, but not
12 limited to, streets and highways, public rail transit, or water
13 resources facilities and infrastructures.

14 (2) The Legislature also finds and declares that utilizing a
15 design-build contract requires a clear understanding of the roles
16 and responsibilities of each participant in the design-build process.

17 (3) (A) For contracts for public works projects awarded prior
18 to the effective date of regulations adopted by the Department of
19 Industrial Relations pursuant to subdivision (g) of Section 1771.5
20 of the Labor Code, if the board of supervisors elects to proceed
21 under this section, the board of supervisors shall establish and
22 enforce a labor compliance program containing the requirements
23 outlined in Section 1771.5 of the Labor Code, or it shall contract
24 with a third party to operate a labor compliance program containing
25 the requirements outlined in Section 1771.5 of the Labor Code.
26 This requirement shall not apply to any projects where the county
27 or the design-build entity has entered into a collective bargaining
28 agreement that binds all of the contractors performing work on the
29 projects.

1 (B) For contracts for public works projects awarded on or after
2 the effective date of regulations adopted by the Department of
3 Industrial Relations pursuant to subdivision (g) of Section 1771.5
4 of the Labor Code, the board of supervisors shall reimburse the
5 department for its reasonable and directly related costs of
6 performing prevailing wage monitoring and enforcement on public
7 works projects pursuant to rates established by the department as
8 set forth in subdivision (h) of Section 1771.5 of the Labor Code.
9 All moneys collected pursuant to this paragraph shall be deposited
10 in the State Public Works Enforcement Fund created by Section
11 1771.3 of the Labor Code, and shall be used only for enforcement
12 of prevailing wage requirements on those projects.

13 (C) In lieu of reimbursing the Department of Industrial Relations
14 for its reasonable and directly related costs of performing
15 monitoring and enforcement on public works projects, the board
16 of supervisors may elect to continue operating an existing
17 previously approved labor compliance program to monitor and
18 enforce prevailing wage requirements on the project if it has either
19 not contracted with a third party to conduct its labor compliance
20 program and requests and receives approval from the department
21 to continue its existing program or it enters into a collective
22 bargaining agreement that binds all of the contractors performing
23 work on the project and that includes a mechanism for resolving
24 disputes about the payment of wages.

25 (c) As used in this section:

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

28 (2) “Design-build” means a procurement process in which both
29 the design and construction of a project are procured from a single
30 entity.

31 (3) “Design-build entity” means a partnership, corporation, or
32 other legal entity that is able to provide appropriately licensed
33 contracting, architectural, and engineering services as needed
34 pursuant to a design-build contract.

35 (4) “Project” means the construction of a building and
36 improvements directly related to the construction of a building,
37 and county sanitation wastewater treatment facilities, but does not
38 include the construction of other infrastructure, including, but not
39 limited to, streets and highways, public rail transit, or water
40 resources facilities and infrastructure.

1 (d) Design-build projects shall progress in a four-step process,
2 as follows:

3 (1) (A) The county shall prepare a set of documents setting
4 forth the scope of the project. The documents may include, but are
5 not limited to, the size, type, and desired design character of the
6 public improvement, performance specifications covering the
7 quality of materials, equipment, and workmanship, preliminary
8 plans or building layouts, or any other information deemed
9 necessary to describe adequately the county's needs. The
10 performance specifications and any plans shall be prepared by a
11 design professional who is duly licensed and registered in
12 California.

13 (B) Any architect or engineer retained by the county to assist
14 in the development of the project specific documents shall not be
15 eligible to participate in the preparation of a bid with any
16 design-build entity for that project.

17 (2) (A) Based on the documents prepared in paragraph (1), the
18 county shall prepare a request for proposals that invites interested
19 parties to submit competitive sealed proposals in the manner
20 prescribed by the county. The request for proposals shall include,
21 but is not limited to, the following elements:

22 (i) Identification of the basic scope and needs of the project or
23 contract, the expected cost range, and other information deemed
24 necessary by the county to inform interested parties of the
25 contracting opportunity, to include the methodology that will be
26 used by the county to evaluate proposals and specifically if the
27 contract will be awarded to the lowest responsible bidder.

28 (ii) Significant objective factors that the county reasonably
29 expects to consider in evaluating proposals, including cost or price
30 and all nonprice related factors.

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

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

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

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

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

1 (C) If the county chooses to reserve the right to hold discussions
2 or negotiations with responsive bidders, it shall so specify in the
3 request for proposal and shall publish separately or incorporate
4 into the request for proposal applicable rules and procedures to be
5 observed by the county to ensure that any discussions or
6 negotiations are conducted in good faith.

7 (3) (A) The county shall establish a procedure to prequalify
8 design-build entities using a standard questionnaire developed by
9 the county. In preparing the questionnaire, the county shall consult
10 with the construction industry, including representatives of the
11 building trades and surety industry. This questionnaire shall require
12 information including, but not limited to, all of the following:

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

18 (ii) Evidence that the members of the design-build entity have
19 completed, or demonstrated the experience, competency, capability,
20 and capacity to complete, projects of similar size, scope, or
21 complexity, and that proposed key personnel have sufficient
22 experience and training to competently manage and complete the
23 design and construction of the project, as well as a financial
24 statement that assures the county that the design-build entity has
25 the capacity to complete the project.

26 (iii) The licenses, registration, and credentials required to design
27 and construct the project, including information on the revocation
28 or suspension of any license, credential, or registration.

29 (iv) Evidence that establishes that the design-build entity has
30 the capacity to obtain all required payment and performance
31 bonding, liability insurance, and errors and omissions insurance.

32 (v) Any prior serious or willful violation of the California
33 Occupational Safety and Health Act of 1973, contained in Part 1
34 (commencing with Section 6300) of Division 5 of the Labor Code,
35 or the federal Occupational Safety and Health Act of 1970 (Public
36 Law 91-596), settled against any member of the design-build entity,
37 and information concerning workers' compensation experience
38 history and worker safety program.

39 (vi) Information concerning any debarment, disqualification,
40 or removal from a federal, state, or local government public works

1 project. Any instance in which an entity, its owners, officers, or
2 managing employees submitted a bid on a public works project
3 and were found to be nonresponsive, or were found by an awarding
4 body not to be a responsible bidder.

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

7 (viii) Any violations of the Contractors' State License Law
8 (Chapter 9 (commencing with Section 7000) of Division 3 of the
9 Business and Professions Code), excluding alleged violations of
10 federal or state law including the payment of wages, benefits,
11 apprenticeship requirements, or personal income tax withholding,
12 or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec.
13 3101 et seq.) withholding requirements settled against any member
14 of the design-build entity.

15 (ix) Information concerning the bankruptcy or receivership of
16 any member of the design-build entity, including information
17 concerning any work completed by a surety.

18 (x) Information concerning all settled adverse claims, disputes,
19 or lawsuits between the owner of a public works project and any
20 member of the design-build entity during the five years preceding
21 submission of a bid pursuant to this section, in which the claim,
22 settlement, or judgment exceeds fifty thousand dollars (\$50,000).
23 Information shall also be provided concerning any work completed
24 by a surety during this period.

25 (xi) In the case of a partnership or an association that is not a
26 legal entity, a copy of the agreement creating the partnership or
27 association and specifying that all partners or association members
28 agree to be fully liable for the performance under the design-build
29 contract.

30 (xii) (I) Any instance in which the entity, or any of its members,
31 owners, officers, or managing employees was, during the five years
32 preceding submission of a bid pursuant to this section, determined
33 by a court of competent jurisdiction to have submitted, or legally
34 admitted for purposes of a criminal plea to have submitted either
35 of the following:

36 (ia) Any claim to any public agency or official in violation of
37 the federal False Claims Act (31 U.S.C. Sec. 3729 et seq.).

38 (ib) Any claim to any public official in violation of the
39 California False Claims Act (Article 9 (commencing with Section

1 12650) of Chapter 6 of Part 2 of Division 3 of the Government
2 Code).

3 (II) Information provided pursuant to this subdivision shall
4 include the name and number of any case filed, the court in which
5 it was filed, and the date on which it was filed. The entity may
6 also provide further information regarding any such instance,
7 including any mitigating or extenuating circumstances that the
8 entity wishes the county to consider.

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

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

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

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

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

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

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

38 (iv) Notwithstanding any provision of this code, upon issuance
39 of a contract award, the county shall publicly announce its award,
40 identifying the contractor to whom the award is made, along with

1 a written decision supporting its contract award and stating the
2 basis of the award. The notice of award shall also include the
3 county's second and third ranked design-build entities.

4 (v) For purposes of this paragraph, "skilled labor force
5 availability" shall be determined by the existence of an agreement
6 with a registered apprenticeship program, approved by the
7 California Apprenticeship Council, which has graduated
8 apprentices in each of the preceding five years. This graduation
9 requirement shall not apply to programs providing apprenticeship
10 training for any craft that has been deemed by the Department of
11 Labor and the Department of Industrial Relations to be an
12 apprenticeable craft in the five years prior to enactment of this act.

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

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

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

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

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) Lists of subcontractors, bidders, and bid awards relating to
10 the project shall be submitted by the design-build entity to the
11 awarding body within 14 days of the award. These documents are
12 deemed to be public records and shall be available for public
13 inspection pursuant to this chapter and Article 1 (commencing
14 with Section 6250) of Chapter 3.5 of Division 7 of the Government
15 Code.

16 (h) The minimum performance criteria and design standards
17 established pursuant to paragraph (1) of subdivision (d) shall be
18 adhered to by the design-build entity. Any deviations from those
19 standards may only be allowed by written consent of the county.

20 (i) The county may retain the services of a design professional
21 or construction project manager, or both, throughout the course of
22 the project in order to ensure compliance with this section.

23 (j) Contracts awarded pursuant to this section shall be valid until
24 the project is completed.

25 (k) Nothing in this section is intended to affect, expand, alter,
26 or limit any rights or remedies otherwise available at law.

27 (l) (1) If the county elects to award a project pursuant to this
28 section, retention proceeds withheld by the county from the
29 design-build entity shall not exceed 5 percent if a performance and
30 payment bond, issued by an admitted surety insurer, is required in
31 the solicitation of bids.

32 (2) In a contract between the design-build entity and the
33 subcontractor, and in a contract between a subcontractor and any
34 subcontractor thereunder, the percentage of the retention proceeds
35 withheld may not exceed the percentage specified in the contract
36 between the county and the design-build entity. If the design-build
37 entity provides written notice to any subcontractor who is not a
38 member of the design-build entity, prior to or at the time the bid
39 is requested, that a bond may be required and the subcontractor
40 subsequently is unable or refuses to furnish a bond to the

1 design-build entity, then the design-build entity may withhold
2 retention proceeds in excess of the percentage specified in the
3 contract between the county and the design-build entity from any
4 payment made by the design-build entity to the subcontractor.

5 (m) Each county that elects to proceed under this section and
6 uses the design-build method on a public works project shall submit
7 to the Legislative Analyst's Office before September 1, 2013, a
8 report containing a description of each public works project
9 procured through the design-build process and completed after
10 November 1, 2009, and before August 1, 2013. The report shall
11 include, but shall not be limited to, all of the following information:

12 (1) The type of project.

13 (2) The gross square footage of the project.

14 (3) The design-build entity that was awarded the project.

15 (4) The estimated and actual length of time to complete the
16 project.

17 (5) The estimated and actual project costs.

18 (6) Whether the project was met or altered.

19 (7) The number and amount of project change orders.

20 (8) A description of any written protests concerning any aspect
21 of the solicitation, bid, proposal, or award of the design-build
22 project, including the resolution of the protests.

23 (9) An assessment of the prequalification process and criteria.

24 (10) An assessment of the effect of retaining 5 percent retention
25 on the project.

26 (11) A description of the Labor Force Compliance Program and
27 an assessment of the project impact, where required.

28 (12) A description of the method used to award the contract. If
29 best value was the method, the report shall describe the factors
30 used to evaluate the bid, including the weighting of each factor
31 and an assessment of the effectiveness of the methodology.

32 (13) An assessment of the project impact of "skilled labor force
33 availability."

34 (14) An assessment of the design-build dollar limits on county
35 projects. This assessment shall include projects where the county
36 wanted to use design-build and was precluded by the dollar
37 limitation. This assessment shall also include projects where the
38 best value method was not used due to dollar limitations.

39 (15) An assessment of the most appropriate uses for the
40 design-build approach.

1 (n) Any county that elects not to use the authority granted by
2 this section may submit a report to the Legislative Analyst’s Office
3 explaining why the county elected not to use the design-build
4 method.

5 (o) On or before January 1, 2014, the Legislative Analyst shall
6 report to the Legislature on the use of the design-build method by
7 counties pursuant to this section, including the information listed
8 in subdivision (m) and (p). The report may include
9 recommendations for modifying or extending this section.

10 (p) The Legislative Analyst shall complete a fact-based analysis
11 of the use of the design-build method by counties pursuant to this
12 section, utilizing the information provided pursuant to subdivision
13 (m) and any independent information provided by the public or
14 interested parties. The Legislative Analyst shall select a
15 representative sample of projects under this section and review
16 available public records and reports, media reports, and related
17 information in its analysis. The Legislative Analyst shall compile
18 the information required to be analyzed pursuant to this subdivision
19 into a report, which shall be provided to the Legislature. The report
20 shall include conclusions describing the actual cost of projects
21 procured pursuant to this section, whether the project schedule
22 was met or altered, and whether projects needed or used project
23 change orders.

24 (q) Except as provided in this section, this act shall not be
25 construed to affect the application of any other law.

26 (r) This section shall remain in effect only until July 1, ~~2014~~
27 2020, and as of that date is repealed, unless a later enacted statute,
28 that is enacted before July 1, ~~2014~~ 2020, deletes or extends that
29 date.

30 SEC. 2. No reimbursement is required by this act pursuant to
31 Section 6 of Article XIII B of the California Constitution because
32 the only costs that may be incurred by a local agency or school
33 district will be incurred because this act creates a new crime or
34 infraction, eliminates a crime or infraction, or changes the penalty
35 for a crime or infraction, within the meaning of Section 17556 of
36 the Government Code, or changes the definition of a crime within
37 the meaning of Section 6 of Article XIII B of the California
38 Constitution.

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