

AMENDED IN ASSEMBLY APRIL 3, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

**ASSEMBLY BILL**

**No. 401**

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**Introduced by Assembly Member Daly**

February 15, 2013

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An act to add and repeal Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code, relating to highways, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 401, as amended, Daly. *Public contracts: design-build: State Highway Route 405.*

*Existing law, until January 1, 2014, authorizes certain state and local transportation entities, if authorized by the California Transportation Commission, to use a design-build process for contracts on transportation projects, as specified. Existing law establishes a procedure for submitting bids that includes a requirement that design-build entities provide a statement of qualifications submitted to the transportation entity that is verified under oath, subject to penalty of perjury.*

*This bill would authorize the Orange County Transportation Authority to utilize design-build procurement for the Interstate 405 Improvement Project on the state highway system, subject to commission approval. The bill would require the Department of Transportation to perform construction inspection services for the project, as specified. The bill would require a transportation entity, as defined, awarding a contract for a public works project pursuant to these provisions, to reimburse the Department of Industrial Relations for costs of performing prevailing wage monitoring and enforcement of the public works project and would*

require moneys collected to be deposited into the State Public Works Enforcement Fund, a continuously appropriated fund. By depositing money in a continuously appropriated fund, the bill would make an appropriation.

The bill would make findings and declarations as to the necessity of a special statute for Orange County.

Because the bill would extend the use of design-build procurement to the authority, subject to existing procedures, the bill would, by extension, impose the statement of qualifications requirement upon the authority, subject to penalty of perjury, thereby creating a new crime and imposing a state-mandated local program.

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.

~~Existing law provides that the Department of Transportation has full possession and control of the state highway system. Existing law includes State Highway Route 405 (Interstate 405) among the authorized routes in the state highway system.~~

~~This bill would state the intent of the Legislature to enact legislation that would facilitate the construction of the Interstate 405 Improvement Project in the County of Orange.~~

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

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

- 1     SECTION 1. Chapter 6.5 (commencing with Section 6820) is
- 2     added to Part 1 of Division 2 of the Public Contract Code, to read:
- 3
- 4     CHAPTER 6.5. ORANGE COUNTY TRANSPORTATION AUTHORITY
- 5                     DESIGN-BUILD PROGRAM
- 6
- 7     6820. For purposes of this chapter, the following definitions
- 8     apply:
- 9     (a) "Best value" means a value determined by objective criteria,
- 10  including, but not limited to, price, features, functions, life cycle

1 costs, and other criteria deemed appropriate by the transportation  
2 entity.

3 (b) “Commission” means the California Transportation  
4 Commission.

5 (c) “Design-build” means a procurement process in which both  
6 the design and construction of a project are procured from a single  
7 entity.

8 (d) “Design-build entity” means a partnership, corporation, or  
9 other legal entity that is able to provide appropriately licensed  
10 contracting, architectural, and engineering services as needed  
11 pursuant to a design-build contract.

12 (e) “Design-build team” means the design-build entity itself  
13 and the individuals and other entities identified by the design-build  
14 entity as members of its team.

15 (f) “Department” means the Department of Transportation as  
16 established under Part 5 (commencing with Section 14000) of  
17 Division 3 of Title 2 of the Government Code.

18 (g) “Transportation entity” means the department or the Orange  
19 County Transportation Authority.

20 6821. (a) The Orange County Transportation Authority, if  
21 authorized by the commission, may utilize design-build  
22 procurement for the Interstate 405 Improvement Project on the  
23 state highway system.

24 (b) Notwithstanding any other provision of this chapter, the  
25 department shall perform construction inspection services for the  
26 project authorized pursuant to this subdivision. Department  
27 construction inspection services for the project authorized pursuant  
28 to this subdivision include, but are not limited to, surveying,  
29 material source testing, certification testing, monitoring of  
30 environmental compliance, independent quality control testing  
31 and inspection, and quality assurance audits. The department  
32 construction inspection duties and responsibilities shall include  
33 a direct reporting relationship between the inspectors and senior  
34 department engineers responsible for all inspectors and  
35 construction inspection services. The senior department engineer  
36 responsible for construction inspection services shall be  
37 responsible for the acceptance or rejection of the work.

38 (c) Notwithstanding any other law, the department shall retain  
39 the authority to stop the contractor’s operation wholly or in part  
40 and take appropriate action when public safety is jeopardized.

1 *The department shall ensure that public safety and convenience*  
2 *is maintained whenever work is performed under an encroachment*  
3 *permit within the state highway right-of-way, including, but not*  
4 *limited to, work performed that includes lane closures, signing,*  
5 *work performed at night, detours, dust control, temporary*  
6 *pavement quality, crash cushions, temporary railings, pavement*  
7 *transitions, falsework, shoring, and delineation. The department*  
8 *shall regularly inspect the job sites for safety compliance and any*  
9 *possible deficiencies. If any deficiency is observed, a written notice*  
10 *shall be sent by the department to the Orange County*  
11 *Transportation Authority's designated resident engineer to correct*  
12 *the deficiency. Once the deficiency is corrected, a written notice*  
13 *describing the resolution of the deficiency shall be sent to the*  
14 *department and documented.*

15 *(d) The department shall use department employees or*  
16 *consultants under contract with the department to perform the*  
17 *services described in subdivisions (a) and (b), consistent with*  
18 *Article XXII of the California Constitution. Department employee*  
19 *and consultant resources necessary for the performance of those*  
20 *services, including personnel requirements, shall be included in*  
21 *the department's capital outlay support program for workload*  
22 *purposes in the annual Budget Act.*

23 *(e) (1) Not later than the first day of July that occurs two years*  
24 *after a design-build contract is awarded, and each July 1 thereafter*  
25 *until the project is completed, the Orange County Transportation*  
26 *Authority shall submit a report on the progress of the project and*  
27 *compliance with this section to the legislative policy committees*  
28 *having jurisdiction over transportation matters.*

29 *(2) The requirement of submitting a report imposed under*  
30 *paragraph (1) is inoperative on the first day of July four years*  
31 *after the first report was submitted, pursuant to Section 10231.5*  
32 *of the Government Code.*

33 *(3) A report to be submitted pursuant to paragraph (1) shall be*  
34 *submitted in compliance with Section 9795 of the Government*  
35 *Code.*

36 *6822. The commission shall develop guidelines for a standard*  
37 *organizational conflict-of-interest policy, consistent with applicable*  
38 *law, regarding the ability of a person or entity, that performs*  
39 *services for the transportation entity relating to the solicitation of*  
40 *a design-build project, to submit a proposal as a design-build*

1 *entity, or to join a design-build team. This conflict-of-interest*  
2 *policy shall apply to each transportation entity entering into*  
3 *design-build contracts authorized under this chapter.*

4 6823. (a) *For contracts for public works projects awarded*  
5 *prior to the effective date of the regulations adopted by the*  
6 *Department of Industrial Relations pursuant to subdivision (g) of*  
7 *Section 1771.5 of the Labor Code, a transportation entity*  
8 *authorized to use the design-build method of procurement shall*  
9 *establish and enforce a labor compliance program containing the*  
10 *requirements outlined in Section 1771.5 of the Labor Code or shall*  
11 *contract with a third party to operate a labor compliance program*  
12 *containing the requirements outlined in Section 1771.5 of the Labor*  
13 *Code. This requirement shall not apply to projects where the*  
14 *transportation entity or design-build entity has entered into any*  
15 *collective bargaining agreement that binds all of the contractors*  
16 *performing work on the projects.*

17 (b) *For contracts for public works projects awarded on or after*  
18 *the effective date of the regulations adopted by the Department of*  
19 *Industrial Relations pursuant to subdivision (g) of Section 1771.5*  
20 *of the Labor Code, the transportation entity shall reimburse the*  
21 *Department of Industrial Relations for its reasonable and directly*  
22 *related costs of performing prevailing wage monitoring and*  
23 *enforcement on public works projects pursuant to rates established*  
24 *by the Department of Industrial Relations as set forth in subdivision*  
25 *(h) of Section 1771.5 of the Labor Code. All moneys collected*  
26 *pursuant to this subdivision shall be deposited in the State Public*  
27 *Works Enforcement Fund, created by Section 1771.3 of the Labor*  
28 *Code, and shall be used only for enforcement of prevailing wage*  
29 *requirements on those projects.*

30 (c) *In lieu of reimbursing the Department of Industrial Relations*  
31 *for its reasonable and directly related costs of performing*  
32 *monitoring and enforcement on public works projects, the*  
33 *transportation entity may elect to continue operating an existing*  
34 *previously approved labor compliance program to monitor and*  
35 *enforce prevailing wage requirements on the project if it has either*  
36 *not contracted with a third party to conduct its labor compliance*  
37 *program and requests and receives approval from the department*  
38 *to continue its existing program or it enters into a collective*  
39 *bargaining agreement that binds all of the contractors performing*

1 work on the project and that includes a mechanism for resolving  
2 disputes about the payment of wages.

3 6824. The procurement process for the design-build project  
4 shall progress as follows:

5 (a) The transportation entity shall prepare a set of documents  
6 setting forth the scope and estimated price of the project. The  
7 documents may include, but need not be limited to, the size, type,  
8 and desired design character of the project, performance  
9 specifications covering the quality of materials, equipment,  
10 workmanship, preliminary plans, and any other information  
11 deemed necessary to describe adequately the transportation entity's  
12 needs. The performance specifications and any plans shall be  
13 prepared by a design professional who is duly licensed and  
14 registered in California.

15 (b) Based on the documents prepared as described in subdivision  
16 (a), the transportation entity shall prepare a request for proposals  
17 that invites interested parties to submit competitive sealed  
18 proposals in the manner prescribed by the transportation entity.  
19 The request for proposals shall include, but need not be limited  
20 to, the following elements:

21 (1) Identification of the basic scope and needs of the project or  
22 contract, the estimated cost of the project, the methodology that  
23 will be used by the transportation entity to evaluate proposals,  
24 whether the contract will be awarded on the basis of the lowest  
25 responsible bid or on best value, and any other information deemed  
26 necessary by the transportation entity to inform interested parties  
27 of the contracting opportunity.

28 (2) Significant factors that the transportation entity reasonably  
29 expects to consider in evaluating proposals, including, but not  
30 limited to, cost or price and all nonprice-related factors.

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

33 (4) For transportation entities authorized to utilize best value  
34 as a selection method, the transportation entity reserves the right  
35 to request proposal revisions and hold discussions and negotiations  
36 with responsive bidders and shall so specify in the request for  
37 proposals and shall publish separately or incorporate into the  
38 request for proposals applicable rules and procedures to be  
39 observed by the transportation entity to ensure that any discussions  
40 or negotiations are conducted in good faith.

1 (c) Based on the documents prepared under subdivision (a), the  
2 transportation entity shall prepare and issue a request for  
3 qualifications in order to prequalify the design-build entities whose  
4 proposals shall be evaluated for final selection. The request for  
5 qualifications shall include, but need not be limited to, the  
6 following elements:

7 (1) Identification of the basic scope and needs of the project or  
8 contract, the expected cost range, the methodology that will be  
9 used by the transportation entity to evaluate proposals, the  
10 procedure for final selection of the design-build entity, and any  
11 other information deemed necessary by the transportation entity  
12 to inform interested parties of the contracting opportunity.

13 (2) (A) Significant factors that the transportation entity  
14 reasonably expects to consider in evaluating qualifications,  
15 including technical design and construction expertise, skilled labor  
16 force availability, and all other nonprice-related factors.

17 (B) For purposes of subparagraph (A), skilled labor force  
18 availability shall be determined by the existence of an agreement  
19 with a registered apprenticeship program, approved by the  
20 California Apprenticeship Council, that has graduated at least  
21 one apprentice in each of the preceding five years. This graduation  
22 requirement shall not apply to programs providing apprenticeship  
23 training for any craft that was first deemed by the Department of  
24 Labor and the Department of Industrial Relations to be an  
25 apprenticeable craft within the five years prior to the effective date  
26 of this article.

27 (3) A standard form request for statements of qualifications  
28 prepared by the transportation entity. In preparing the standard  
29 form, the transportation entity may consult with the construction  
30 industry, the building trades and surety industry, and other public  
31 agencies interested in using the authorization provided by this  
32 chapter. The standard form shall require information including,  
33 but not limited to, all of the following:

34 (A) If the design-build entity is a partnership, limited  
35 partnership, joint venture, or other association, a listing of all of  
36 the partners, general partners, or association members known at  
37 the time of statement of qualification submission who will  
38 participate in the design-build contract.

39 (B) Evidence that the members of the design-build entity have  
40 completed, or demonstrated the experience, competency, capability,

1 *and capacity to complete projects of similar size, scope, or*  
2 *complexity, and that proposed key personnel have sufficient*  
3 *experience and training to competently manage and complete the*  
4 *design and construction of the project, and a financial statement*  
5 *that assures the transportation entity that the design-build entity*  
6 *has the capacity to complete the project.*

7 (C) *The licenses, registration, and credentials required to design*  
8 *and construct the project, including, but not limited to, information*  
9 *on the revocation or suspension of any license, credential, or*  
10 *registration.*

11 (D) *Evidence that establishes that the design-build entity has*  
12 *the capacity to obtain all required payment and performance*  
13 *bonding, liability insurance, and errors and omissions insurance.*

14 (E) *Information concerning workers' compensation experience*  
15 *history and a worker safety program.*

16 (F) *A full disclosure regarding all of the following that are*  
17 *applicable:*

18 (i) *Any serious or willful violation of Part 1 (commencing with*  
19 *Section 6300) of Division 5 of the Labor Code or the federal*  
20 *Occupational Safety and Health Act of 1970 (Public Law 91-596),*  
21 *settled against any member of the design-build entity.*

22 (ii) *Any debarment, disqualification, or removal from a federal,*  
23 *state, or local government public works project.*

24 (iii) *Any instance where the design-build entity, or its owners,*  
25 *officers, or managing employees submitted a bid on a public works*  
26 *project and were found to be nonresponsive or were found by an*  
27 *awarding body not to be a responsible bidder.*

28 (iv) *Any instance where the design-build entity, or its owners,*  
29 *officers, or managing employees defaulted on a construction*  
30 *contract.*

31 (v) *Any violations of the Contractors' State License Law, as*  
32 *described in Chapter 9 (commencing with Section 7000) of Division*  
33 *3 of the Business and Professions Code, including alleged*  
34 *violations of federal or state law regarding the payment of wages,*  
35 *benefits, apprenticeship requirements, or personal income tax*  
36 *withholding, or Federal Insurance Contribution Act (FICA)*  
37 *withholding requirements settled against any member of the*  
38 *design-build entity.*

1 (vi) Any bankruptcy or receivership of any member of the  
2 design-build entity, including, but not limited to, information  
3 concerning any work completed by a surety.

4 (vii) Any settled adverse claims, disputes, or lawsuits between  
5 the owner of a public works project and any member of the  
6 design-build entity during the five years preceding submission of  
7 a bid under this article, in which the claim, settlement, or judgment  
8 exceeds fifty thousand dollars (\$50,000). Information shall also  
9 be provided concerning any work completed by a surety during  
10 this five-year period.

11 (G) If the proposed design-build entity is a partnership, limited  
12 partnership, joint-venture, or other association, a copy of the  
13 organizational documents or agreement committing to form the  
14 organization, and a statement that all general partners, joint  
15 venture members, or other association members agree to be fully  
16 liable for the performance under the design-build contract.

17 (H) An acceptable safety record. A bidder's safety record shall  
18 be deemed acceptable if its experience modification rate for the  
19 most recent three-year period is an average of 1.00 or less, and  
20 its average total recordable injury/illness rate and average lost  
21 work rate for the most recent three-year period does not exceed  
22 the applicable statistical standards for its business category or if  
23 the bidder is a party to an alternative dispute resolution system  
24 as provided for in Section 3201.5 of the Labor Code.

25 (4) The information required under this subdivision shall be  
26 verified under oath by the design-build entity and its members in  
27 the manner in which civil pleadings in civil actions are verified.  
28 Information required under this subdivision that is not a public  
29 record under the California Public Records Act, as described in  
30 Chapter 3.5 (commencing with Section 6250) of Division 7 of Title  
31 1 of the Government Code, shall not be open to public inspection.

32 (d) For those projects utilizing low bid as the final selection  
33 method, the competitive bidding process shall result in lump-sum  
34 bids by the prequalified design-build entities. Awards shall be  
35 made to the lowest responsible bidder.

36 (e) For those projects utilizing best value as a selection method,  
37 the design-build competition shall progress as follows:

38 (1) Competitive proposals shall be evaluated by using only the  
39 criteria and selection procedures specifically identified in the  
40 request for proposals. However, the following minimum factors

1 shall be weighted as deemed appropriate by the contracting  
2 transportation entity:

3 (A) Price.

4 (B) Technical design and construction expertise.

5 (C) Life-cycle costs over 15 years or more.

6 (2) Pursuant to subdivision (b), the transportation entity may  
7 hold discussions or negotiations with responsive bidders using the  
8 process articulated in the transportation entity's request for  
9 proposals.

10 (3) When the evaluation is complete, the top three responsive  
11 bidders shall be ranked sequentially based on a determination of  
12 value provided.

13 (4) The award of the contract shall be made to the responsible  
14 bidder whose proposal is determined by the transportation entity  
15 to have offered the best value to the public.

16 (5) Notwithstanding any other provision of this code, upon  
17 issuance of a contract award, the transportation entity shall  
18 publicly announce its award, identifying the contractor to whom  
19 the award is made, along with a written decision supporting its  
20 contract award and stating the basis of the award. The notice of  
21 award shall also include the transportation entity's second- and  
22 third-ranked design-build entities.

23 (6) The written decision supporting the transportation entity's  
24 contract award, described in paragraph (5), and the contract file  
25 shall provide sufficient information to satisfy an external audit.

26 6825. (a) The design-build entity shall provide payment and  
27 performance bonds for the project in the form and in the amount  
28 required by the transportation entity, and issued by a California  
29 admitted surety. In no case shall the amount of the payment bond  
30 be less than the amount of the performance bond.

31 (b) The design-build contract shall require errors and omissions  
32 insurance coverage for the design elements of the project.

33 6826. (a) The transportation entity, in each design-build  
34 request for proposals, may identify specific types of subcontractors  
35 that must be included in the design-build entity statement of  
36 qualifications and proposal. All construction subcontractors that  
37 are identified in the proposal shall be afforded all the protections  
38 of Chapter 4 (commencing with Section 4100) of Part 1 of Division  
39 2.

1 (b) In awarding subcontracts not listed in the request for  
2 proposals, the design-build entity shall do all of the following:

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

7 (2) Provide a fixed date and time on which the subcontracted  
8 work will be awarded.

9 (3) Establish reasonable qualification criteria and standards.

10 (4) Provide that the subcontracted construction work shall be  
11 awarded either on a best value basis or to the lowest responsible  
12 bidder. For construction work awarded on a best value basis, the  
13 design-build entity shall evaluate all bids utilizing the factors  
14 described in paragraph (1) of subdivision (e) of Section 6824, and  
15 shall award the contract to the bidder determined by the  
16 design-build entity to have offered the best value.

17 (c) Subcontractors awarded subcontracts under this chapter  
18 shall be afforded all the protections of Chapter 4 (commencing  
19 with Section 4100) of Part 1 of Division 2.

20 6827. Nothing in this chapter affects, expands, alters, or limits  
21 any rights or remedies otherwise available at law.

22 6828. The provisions of this chapter are severable. If any  
23 provision of this chapter or its application is held invalid, that  
24 invalidity shall not affect other provisions or applications that can  
25 be given effect without the invalid provision or application.

26 6829. This chapter shall remain in effect only until January 1,  
27 2018, and as of that date is repealed, unless a later enacted statute,  
28 that is enacted before January 1, 2018, deletes or extends that  
29 date.

30 SEC. 2. The Legislature finds and declares that a special law  
31 is necessary and that a general law cannot be made applicable  
32 within the meaning of Section 16 of Article IV of the California  
33 Constitution because of the unique need to build and improve  
34 highways located in the County of Orange in a cost-effective  
35 manner.

36 SEC. 3. No reimbursement is required by this act pursuant to  
37 Section 6 of Article XIII B of the California Constitution because  
38 the only costs that may be incurred by a local agency or school  
39 district will be incurred because this act creates a new crime or  
40 infraction, eliminates a crime or infraction, or changes the penalty

1 *for a crime or infraction, within the meaning of Section 17556 of*  
2 *the Government Code, or changes the definition of a crime within*  
3 *the meaning of Section 6 of Article XIII B of the California*  
4 *Constitution.*

5 ~~SECTION 1. It is the intent of the Legislature to enact~~  
6 ~~legislation that would facilitate the construction of the State~~  
7 ~~Highway Route 405 (Interstate 405) Improvement Project in the~~  
8 ~~County of Orange.~~