

AMENDED IN ASSEMBLY APRIL 22, 2013

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, *until January 1, 2018*, 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.

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. 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  
11 costs, and other criteria deemed appropriate by the transportation  
12 entity.

13 (b) "Commission" means the California Transportation  
14 Commission.

15 (c) "Design-build" means a procurement process in which both  
16 the design and construction of a project are procured from a single  
17 entity.

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

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

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

11 (g) “Transportation entity” means ~~the department or the Orange~~  
12 ~~County Transportation Authority.~~

13 6821. (a) The Orange County Transportation Authority, if  
14 authorized by the commission, may utilize design-build  
15 procurement for the Interstate 405 Improvement Project on the  
16 state highway system.

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

31 (c) Notwithstanding any other law, the department shall retain  
32 the authority to stop the contractor’s operation wholly or in part  
33 and take appropriate action when public safety is jeopardized. The  
34 department shall ensure that public safety and convenience is  
35 maintained whenever work is performed under an encroachment  
36 permit within the state highway right-of-way, including, but not  
37 limited to, work performed that includes lane closures, signing,  
38 work performed at night, detours, dust control, temporary pavement  
39 quality, crash cushions, temporary railings, pavement transitions,  
40 falsework, shoring, and delineation. The department shall regularly

1 inspect the job sites for safety compliance and any possible  
2 deficiencies. If any deficiency is observed, a written notice shall  
3 be sent by the department to the Orange County Transportation  
4 Authority's designated resident engineer to correct the deficiency.  
5 Once the deficiency is corrected, a written notice describing the  
6 resolution of the deficiency shall be sent to the department and  
7 documented.

8 (d) The department shall use department employees or  
9 consultants under contract with the department to perform the  
10 services described in subdivisions ~~(a) and (b)~~, *(b) and (c)*,  
11 consistent with Article XXII of the California Constitution.  
12 Department employee and consultant resources necessary for the  
13 performance of those services, including personnel requirements,  
14 shall be included in the department's capital outlay support  
15 program for workload purposes in the annual Budget Act.

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

22 (2) The requirement of submitting a report imposed under  
23 paragraph (1) is inoperative on the first day of July four years after  
24 the first report was submitted, pursuant to Section 10231.5 of the  
25 Government Code.

26 (3) A report to be submitted pursuant to paragraph (1) shall be  
27 submitted in compliance with Section 9795 of the Government  
28 Code.

29 6822. The commission shall develop guidelines for a standard  
30 organizational conflict-of-interest policy, consistent with applicable  
31 law, regarding the ability of a person or entity, that performs  
32 services for the transportation entity relating to the solicitation of  
33 a design-build project, to submit a proposal as a design-build entity,  
34 or to join a design-build team. This conflict-of-interest policy shall  
35 apply to each transportation entity entering into design-build  
36 contracts authorized under this chapter.

37 6823. (a) For contracts for public works projects awarded prior  
38 to the effective date of the regulations adopted by the Department  
39 of Industrial Relations pursuant to subdivision (g) of Section 1771.5  
40 of the Labor Code, a transportation entity authorized to use the

1 design-build method of procurement shall establish and enforce a  
2 labor compliance program containing the requirements outlined  
3 in Section 1771.5 of the Labor Code or shall contract with a third  
4 party to operate a labor compliance program containing the  
5 requirements outlined in Section 1771.5 of the Labor Code. This  
6 requirement shall not apply to projects where the transportation  
7 entity or design-build entity has entered into any collective  
8 bargaining agreement that binds all of the contractors performing  
9 work on the projects.

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

23 (c) In lieu of reimbursing the Department of Industrial Relations  
24 for its reasonable and directly related costs of performing  
25 monitoring and enforcement on public works projects, the  
26 transportation entity may elect to continue operating an existing  
27 previously approved labor compliance program to monitor and  
28 enforce prevailing wage requirements on the project if it has either  
29 not contracted with a third party to conduct its labor compliance  
30 program and requests and receives approval from the department  
31 to continue its existing program or it enters into a collective  
32 bargaining agreement that binds all of the contractors performing  
33 work on the project and that includes a mechanism for resolving  
34 disputes about the payment of wages.

35 6824. The procurement process for the design-build project  
36 shall progress as follows:

37 (a) The transportation entity shall prepare a set of documents  
38 setting forth the scope and estimated price of the project. The  
39 documents may include, but need not be limited to, the size, type,  
40 and desired design character of the project, performance

1 specifications covering the quality of materials, equipment,  
2 workmanship, preliminary plans, and any other information deemed  
3 necessary to describe adequately the transportation entity's needs.  
4 The performance specifications and any plans shall be prepared  
5 by a design professional who is duly licensed and registered in  
6 California.

7 (b) Based on the documents prepared as described in subdivision  
8 (a), the transportation entity shall prepare a request for proposals  
9 that invites interested parties to submit competitive sealed proposals  
10 in the manner prescribed by the transportation entity. The request  
11 for proposals shall include, but need not be limited to, the following  
12 elements:

13 (1) Identification of the basic scope and needs of the project or  
14 contract, the estimated cost of the project, the methodology that  
15 will be used by the transportation entity to evaluate proposals,  
16 whether the contract will be awarded on the basis of the lowest  
17 responsible bid or on best value, and any other information deemed  
18 necessary by the transportation entity to inform interested parties  
19 of the contracting opportunity.

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

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

25 (4) For transportation entities authorized to utilize best value  
26 as a selection method, the transportation entity reserves the right  
27 to request proposal revisions and hold discussions and negotiations  
28 with responsive bidders and shall so specify in the request for  
29 proposals and shall publish separately or incorporate into the  
30 request for proposals applicable rules and procedures to be  
31 observed by the transportation entity to ensure that any discussions  
32 or negotiations are conducted in good faith.

33 (c) Based on the documents prepared under subdivision (a), the  
34 transportation entity shall prepare and issue a request for  
35 qualifications in order to prequalify the design-build entities whose  
36 proposals shall be evaluated for final selection. The request for  
37 qualifications shall include, but need not be limited to, the  
38 following elements:

39 (1) Identification of the basic scope and needs of the project or  
40 contract, the expected cost range, the methodology that will be

1 used by the transportation entity to evaluate proposals, the  
2 procedure for final selection of the design-build entity, and any  
3 other information deemed necessary by the transportation entity  
4 to inform interested parties of the contracting opportunity.

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

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

19 (3) A standard form request for statements of qualifications  
20 prepared by the transportation entity. In preparing the standard  
21 form, the transportation entity may consult with the construction  
22 industry, the building trades and surety industry, and other public  
23 agencies interested in using the authorization provided by this  
24 chapter. The standard form shall require information including,  
25 but not limited to, all of the following:

26 (A) If the design-build entity is a partnership, limited  
27 partnership, joint venture, or other association, a listing of all of  
28 the partners, general partners, or association members known at  
29 the time of statement of qualification submission who will  
30 participate in the design-build contract.

31 (B) Evidence that the members of the design-build entity have  
32 completed, or demonstrated the experience, competency, capability,  
33 and capacity to complete projects of similar size, scope, or  
34 complexity, and that proposed key personnel have sufficient  
35 experience and training to competently manage and complete the  
36 design and construction of the project, and a financial statement  
37 that assures the transportation entity that the design-build entity  
38 has the capacity to complete the project.

39 (C) The licenses, registration, and credentials required to design  
40 and construct the project, including, but not limited to, information

1 on the revocation or suspension of any license, credential, or  
2 registration.

3 (D) Evidence that establishes that the design-build entity has  
4 the capacity to obtain all required payment and performance  
5 bonding, liability insurance, and errors and omissions insurance.

6 (E) Information concerning workers' compensation experience  
7 history and a worker safety program.

8 (F) A full disclosure regarding all of the following that are  
9 applicable:

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

14 (ii) Any debarment, disqualification, or removal from a federal,  
15 state, or local government public works project.

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

20 (iv) Any instance where the design-build entity, or its owners,  
21 officers, or managing employees defaulted on a construction  
22 contract.

23 (v) Any violations of the Contractors' State License Law, as  
24 described in Chapter 9 (commencing with Section 7000) of  
25 Division 3 of the Business and Professions Code, including alleged  
26 violations of federal or state law regarding the payment of wages,  
27 benefits, apprenticeship requirements, or personal income tax  
28 withholding, or Federal Insurance Contribution Act (FICA)  
29 withholding requirements settled against any member of the  
30 design-build entity.

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

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

1 (G) If the proposed design-build entity is a partnership, limited  
2 partnership, joint-venture, or other association, a copy of the  
3 organizational documents or agreement committing to form the  
4 organization, and a statement that all general partners, joint venture  
5 members, or other association members agree to be fully liable for  
6 the performance under the design-build contract.

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

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

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

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

29 (1) Competitive proposals shall be evaluated by using only the  
30 criteria and selection procedures specifically identified in the  
31 request for proposals. However, the following minimum factors  
32 shall be weighted as deemed appropriate by the contracting  
33 transportation entity:

34 (A) Price.

35 (B) Technical design and construction expertise.

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

37 (2) Pursuant to subdivision (b), the transportation entity may  
38 hold discussions or negotiations with responsive bidders using the  
39 process articulated in the transportation entity's request for  
40 proposals.

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

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

7 (5) Notwithstanding any other provision of this code, upon  
8 issuance of a contract award, the transportation entity shall publicly  
9 announce its award, identifying the contractor to whom the award  
10 is made, along with a written decision supporting its contract award  
11 and stating the basis of the award. The notice of award shall also  
12 include the transportation entity's second- and third-ranked  
13 design-build entities.

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

17 6825. (a) The design-build entity shall provide payment and  
18 performance bonds for the project in the form and in the amount  
19 required by the transportation entity, and issued by a California  
20 admitted surety. In no case shall the amount of the payment bond  
21 be less than the amount of the performance bond.

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

24 6826. (a) The transportation entity, in each design-build request  
25 for proposals, may identify specific types of subcontractors that  
26 must be included in the design-build entity statement of  
27 qualifications and proposal. All construction subcontractors that  
28 are identified in the proposal shall be afforded all the protections  
29 of Chapter 4 (commencing with Section 4100) of Part 1 of Division  
30 2.

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

33 (1) Provide public notice of availability of work to be  
34 subcontracted in accordance with the publication requirements  
35 applicable to the competitive bidding process of the transportation  
36 entity.

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

39 (3) Establish reasonable qualification criteria and standards.

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

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

11 6827. Nothing in this chapter affects, expands, alters, or limits  
12 any rights or remedies otherwise available at law.

13 6828. The provisions of this chapter are severable. If any  
14 provision of this chapter or its application is held invalid, that  
15 invalidity shall not affect other provisions or applications that can  
16 be given effect without the invalid provision or application.

17 6829. This chapter shall remain in effect only until January 1,  
18 2018, and as of that date is repealed, unless a later enacted statute,  
19 that is enacted before January 1, 2018, deletes or extends that date.

20 SEC. 2. The Legislature finds and declares that a special law  
21 is necessary and that a general law cannot be made applicable  
22 within the meaning of Section 16 of Article IV of the California  
23 Constitution because of the unique need to build and improve  
24 highways located in the County of Orange in a cost-effective  
25 manner.

26 SEC. 3. No reimbursement is required by this act pursuant to  
27 Section 6 of Article XIII B of the California Constitution because  
28 the only costs that may be incurred by a local agency or school  
29 district will be incurred because this act creates a new crime or  
30 infraction, eliminates a crime or infraction, or changes the penalty  
31 for a crime or infraction, within the meaning of Section 17556 of  
32 the Government Code, or changes the definition of a crime within  
33 the meaning of Section 6 of Article XIII B of the California  
34 Constitution.