

Assembly Bill No. 401

Passed the Assembly September 12, 2013

Chief Clerk of the Assembly

Passed the Senate September 10, 2013

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2013, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to add and repeal Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code, and to add and repeal Section 91.2 of the Streets and Highways Code, relating to transportation, and making an appropriation therefor.

LEGISLATIVE COUNSEL’S DIGEST

AB 401, Daly. Transportation: design-build: highways.

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 Department of Transportation to utilize design-build procurement for up to 10 projects on the state highway system, based on either best value or lowest responsible bid. The bill would authorize regional transportation agencies, as defined, to utilize design-build procurement for projects on or adjacent to the state highway system. The bill would also authorize those regional transportation agencies to utilize design-build procurement for projects on expressways that are not on the state highway system, as specified. The bill would repeal these provisions on January 1, 2024, or one year from the date that the Department of Transportation posts on its Internet Web site that the provisions related to the construction inspection services of these projects are invalid. The bill would provide that these design-build authorizations do not include construction inspection services for projects on or interfacing with the state highway system. The bill would require the Department of Transportation to perform construction inspection services for projects on or interfacing with the state highway system, 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 extend the use of design-build procurement to regional transportation agencies, as defined, and extend the period of time for which the Department of Transportation may use design-build procurement, subject to existing procedures. The bill would, by extension, impose the statement of qualifications requirement upon regional transportation agencies and the department, 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.

Appropriation: yes.

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

SECTION 1. The Legislature finds and declares the following:

(a) The Department of Transportation has statutory authority over the state highway system, including possession, control, and responsibility for improvements to and maintenance of that system.

(b) The Department of Transportation is authorized to construct and maintain detours as may be necessary to facilitate movement of traffic where state highways are closed or obstructed by construction or otherwise.

(c) The Department of Transportation and any county, city, or public entity are authorized to enter into a contract with respect to the sharing of the expense of the acquisition, construction, improvement, or maintenance of any state highway.

(d) When an improvement to a portion of a state highway is completed by a local entity, the control of that portion of the state highway reverts to the state and the state is liable for its future maintenance and care.

SEC. 2. It is the intent of the Legislature to do the following:

(a) Authorize the Department of Transportation and regional transportation agencies to undertake improvements on highways and expressways using design-build procurement.

(b) Reserve for the Department of Transportation the authority to perform construction inspection services.

(c) Require the Department of Transportation to be responsible for ensuring that uniform safety standards are met on public works of improvement on the state highway system.

SEC. 3. Chapter 6.5 (commencing with Section 6820) is added to Part 1 of Division 2 of the Public Contract Code, to read:

CHAPTER 6.5. TRANSPORTATION DESIGN-BUILD PROGRAM

6820. For purposes of this chapter, the following definitions apply:

(a) “Best value” means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the transportation entity.

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

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

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

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

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

(g) “Expressway” means expressway as defined in Section 257 of the Streets and Highways Code.

(h) “Interfacing with the state highway system” means work performed within the state highway right-of-way, including airspace over or under that property, or work performed upon

property acquired by the department for construction of a state highway, including airspace over or under that property.

(i) “Regional transportation agency” means any of the following:

(1) A transportation planning agency described in Section 29532 or 29532.1 of the Government Code.

(2) A county transportation commission established under Section 130050, 130050.1, or 130050.2 of the Public Utilities Code.

(3) Any other local or regional transportation entity that is designated by statute as a regional transportation agency.

(4) A joint exercise of powers authority established pursuant to Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, with the consent of a transportation planning agency or a county transportation commission for the jurisdiction in which the transportation project will be developed.

(5) A local transportation authority designated pursuant to Division 12.5 (commencing with Section 131000) or Division 19 (commencing with Section 180000) of the Public Utilities Code.

(6) The Santa Clara Valley Transportation Authority established pursuant to Part 12 (commencing with Section 100000) of Division 10 of the Public Utilities Code.

(j) “Transportation entity” means the department or a regional transportation agency.

6821. (a) The department may utilize the design-build method of procurement for up to 10 projects on the state highway system, based on either best value or lowest responsible bid.

(b) A regional transportation agency may utilize the design-build method of procurement to design and construct projects on or adjacent to the state highway system, including related nonhighway portions of the project, based on either best value or lowest responsible bid. A regional transportation agency and the department shall enter into a cooperative agreement reflecting the roles and responsibilities assigned by law for a project on or interfacing with the state highway system authorized under this subdivision. The cooperative agreement shall also include the requirement to develop a mutually agreed upon issue resolution process with a primary objective to ensure the project stays on schedule and issues between the parties are resolved in a timely manner.

(c) (1) A regional transportation agency may utilize the design-build method of procurement, based on either best value or lowest responsible bid, to design and construct projects on expressways that are not on the state highway system if the projects are developed in accordance with an expenditure plan approved by voters as of January 1, 2014.

(2) The entity responsible for the maintenance of the local streets and roads within the jurisdiction of the expressway shall be responsible for the maintenance of the expressway.

(d) A city, county, or city and county shall not utilize the design-build method of procurement under this chapter. A regional transportation agency shall not utilize the design-build method of procurement on behalf of a city, county, or city and county.

(e) The design-build authorization in subdivisions (a) and (b) shall not include the authority to perform construction inspection services for projects on or interfacing with the state highway system, which shall be performed by the department consistent with Section 91.2 of the Streets and Highway Code.

(f) (1) Not later than the first day of July that occurs two years after a design-build contract is awarded, and each July 1 thereafter until a project is completed, the department or the regional transportation agency shall submit a report on the progress of the project and compliance with this section to the legislative policy committees having jurisdiction over transportation matters.

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

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

6822. The commission shall use the guidelines developed pursuant to subdivision (e) of Section 6803, as it read on December 31, 2013, to provide a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity, that performs services for the transportation entity relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team. This conflict-of-interest policy shall apply to the transportation

entity entering into design-build contracts authorized under this chapter.

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

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

(c) In lieu of reimbursing the Department of Industrial Relations for its reasonable and directly related costs of performing monitoring and enforcement on public works projects, the transportation entity may either (1) elect to continue operating an existing previously approved labor compliance program to monitor and enforce prevailing wage requirements on the project if it has not contracted with a third party to conduct its labor compliance program and requests and receives approval from the department to continue its existing program or (2) enter into a collective bargaining agreement that binds all of the contractors performing work on the project and that includes a mechanism for resolving disputes about the payment of wages.

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

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

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

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

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

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

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

(c) Based on the documents prepared under subdivision (a), the transportation entity shall prepare and issue a request for

qualifications in order to prequalify or short-list the design-build entities whose proposals shall be evaluated for final selection. The request for qualifications shall include, but need not be limited to, the following elements:

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

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

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

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

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

(B) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient

experience and training to competently manage and complete the design and construction of the project, and a financial statement that assures the transportation entity that the design-build entity has the capacity to complete the project.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (A) Price.
- (B) Technical design and construction expertise.
- (C) Life-cycle costs over 15 years or more.

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

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

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

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

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

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

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

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

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

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

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

(3) Establish reasonable qualification criteria and standards.

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

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

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

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

6829. (a) This chapter shall remain in effect only until January 1, 2024, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2024, deletes or extends that date.

(b) Notwithstanding subdivision (a), if any provision or application of Section 91.2 of the Streets and Highways Code is held invalid by a court of competent jurisdiction, this chapter shall be repealed one year from the date in which the department posts on its Internet Web site that Section 91.2 of the Streets and Highways Code has been held invalid.

(c) The repeal of this chapter shall not affect an executed design-build contract or cooperative agreement entered into pursuant to this chapter prior to the date of its repeal, regardless of the stage of the project at the time of repeal.

SEC. 4. Section 91.2 is added to the Streets and Highways Code, to read:

91.2. (a) The department shall perform construction inspection services for projects on or interfacing with the state highway system authorized pursuant to Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code. The department shall use department employees or consultants under contract with the department to perform the services described in this subdivision and subdivision (b), consistent with Article XXII of the California Constitution. Construction inspection services performed by the department for those projects include, but are not limited to, material source testing, certification testing, surveying, monitoring of environmental compliance, independent quality control testing and inspection, and quality assurance audits. The construction inspection duties and responsibilities of the department shall include a direct reporting relationship between the inspectors and senior department engineers responsible for all inspectors and construction inspection services. The senior department engineer responsible for construction inspection services shall be responsible for the acceptance or rejection of the work.

(b) Notwithstanding any other law, the department shall retain the authority to stop the contractor's operation wholly or in part and take appropriate action when public safety is jeopardized on a project on or interfacing with the state highway system authorized pursuant to Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code. The department shall ensure that public safety and convenience is maintained whenever work is performed under an encroachment permit within the state highway right-of-way, including, but not limited to, work performed that includes lane closures, signing, work performed at night, detours, dust control, temporary pavement quality, crash cushions, temporary railings, pavement transitions, falsework, shoring, and delineation. The department shall regularly inspect the job sites for safety compliance and any possible deficiencies. If any deficiency is observed, a written notice shall be sent by the department to the regional transportation agency's designated resident engineer to correct the deficiency. Once the deficiency is corrected, a written notice describing the resolution of the deficiency shall be sent to the department and documented.

(c) The department shall use department employees or consultants under contract with the department to perform the

services described in subdivisions (a) and (b), consistent with Article XXII of the California Constitution. Department employee and consultant resources necessary for the performance of those services, including personnel requirements, shall be included in the department's capital outlay support program for workload purposes in the annual Budget Act.

(d) "Construction inspection services" shall not include surveying work performed as part of a design-build contract.

(e) This section shall remain in effect only until January 1, 2024, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2024, deletes or extends that date.

(f) If any provision or application of this section is held invalid by a court of competent jurisdiction, the department shall post on its Internet Web site within 10 business days of the decision of invalidity that this section has been held invalid.

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

Approved _____, 2013

Governor