

ASSEMBLY BILL

No. 1511

**Introduced by Assembly Member Evans
(Coauthor: Assembly Member Wolk)**

February 22, 2005

An act to amend Section 20133 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 1511, as introduced, Evans. Design–build contracting.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement.

Existing law, until January 1, 2006, authorizes certain counties, with the approval of the board of supervisors, to enter into design–build contracts, as defined, in accordance with specified provisions. These provisions require that contracts with a cost ranging from \$10,000,000 to \$20,000,000 be awarded to the lowest responsible bidder, and authorizes contracts costing more than \$20,000,000 to be awarded to the lowest responsible bidder or by best value.

This bill would extend that authorization to January 1, 2011, and also authorize the Counties of Butte, Del Norte, Fresno, Humboldt, Madera, Mariposa, Mendocino, Merced, Napa, Placer, San Joaquin, San Luis Obispo, Shasta, Siskiyou, Stanislaus, Yolo, and Yuba to use the design–build process. This bill would also make legislative findings and declarations as to the necessity of a special statute for these counties.

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

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

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

20133. (a) (1) This section provides for an alternative procedure on bidding on building construction projects in excess of ten million dollars (\$10,000,000) applicable only in the Counties of Alameda, *Butte*, Contra Costa, *Del Norte*, *Fresno*, *Humboldt*, *Madera*, *Mariposa*, *Mendocino*, *Merced*, *Napa*, *Placer*, Sacramento, *San Joaquin*, *San Luis Obispo*, Santa Clara, *Shasta*, *Siskiyou*, Solano, Sonoma, ~~and Stanislaus~~, Tulare, *Yolo*, and *Yuba*, upon approval of the appropriate board of supervisors.

(2) For projects with costs ranging from ten million dollars (\$10,000,000) to twenty million dollars (\$20,000,000), inclusive, the contract shall be awarded to the lowest responsible bidder. For projects costing over twenty million dollars (\$20,000,000), the county may award the project using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable these counties to utilize cost-effective options for building and modernizing public facilities. The Legislature also recognizes the national trend, including authorizations in California, to allow public entities to utilize design-build contracts as a project delivery method.

(2) The Legislature also finds and declares that utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process. The benefits of a design-build contract project delivery system include an accelerated completion of the projects, cost containment, reduction of construction complexity, and reduced exposure to risk for the county. The Legislature also finds that the cost-effective benefits to the counties are achieved by shifting the liability and risk for cost containment and project completion to the design-build entity.

(3) It is the intent of the Legislature to provide an alternative and optional procedure for bidding and building construction projects for these counties.

(4) The design-build approach may be used, but is not limited to use when it is anticipated that it will: reduce project cost,

1 expedite project completion, or provide design features not
2 achievable through the design-bid-build method.

3 (5) If the board of supervisors elects to proceed under this
4 section, the board of supervisors shall establish and enforce for
5 design-build projects a labor compliance program containing the
6 requirements outlined in Section 1771.5 of the Labor Code, or it
7 shall contract with a third party to operate a labor compliance
8 program containing the requirements outlined in Section 1771.5
9 of the Labor Code. This requirement shall not apply to any
10 project where the county or the design-build entity has entered
11 into any collective bargaining agreement or agreements that bind
12 all of the contractors performing work on the projects.

13 (c) As used in this section:

14 (1) “Best value” means a value determined by objective
15 criteria and may include, but is not limited to, price, features,
16 functions, life-cycle costs, and other criteria deemed appropriate
17 by the county.

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

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

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

27 (1) (A) The county shall prepare a set of documents setting
28 forth the scope of the project. The documents may include, but
29 are not limited to, the size, type and desired design character of
30 the buildings and site, performance specifications covering the
31 quality of materials, equipment, and workmanship, preliminary
32 plans or building layouts, or any other information deemed
33 necessary to describe adequately the county’s needs. The
34 performance specifications and any plans shall be prepared by a
35 design professional who is duly licensed and registered in
36 California.

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

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

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

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

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

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

(i) Significantly more important than cost or price.

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

(iii) Significantly less important than cost or price.

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

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

(i) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members known at the time of

1 bid submission who will participate in the design-build contract,
2 including, but not limited to, mechanical subcontractors.

3 (ii) Evidence that the members of the design-build entity have
4 completed, or demonstrated the experience, competency,
5 capability, and capacity to complete projects of similar size,
6 scope, or complexity, and that proposed key personnel have
7 sufficient experience and training to competently manage and
8 complete the design and construction of the project, as well as a
9 financial statement that assures the county that the design-build
10 entity has the capacity to complete the project.

11 (iii) The licenses, registration, and credentials required to
12 design and construct the project, including information on the
13 revocation or suspension of any license, credential, or
14 registration.

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

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

25 (vi) Information concerning any debarment, disqualification,
26 or removal from a federal, state, or local government public
27 works project. Any instance where an entity, its owners, officers,
28 or managing employees submitted a bid on a public works
29 project and were found to be nonresponsive, or were found by an
30 awarding body not to be a responsible bidder.

31 (vii) Any instance where the entity, its owner, officers, or
32 managing employees defaulted on a construction contract.

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

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

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

11 (xi) In the case of a partnership or other association, that is not
12 a legal entity, a copy of the agreement creating the partnership or
13 association and specifying that all partners or association
14 members agree to be fully liable for the performance under the
15 design-build contract.

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

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

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

28 (B) A county may use a design-build competition based upon
29 best value and other criteria set forth in paragraph (2) of
30 subdivision (d). The design-build competition shall include the
31 following elements:

32 (i) Competitive proposals shall be evaluated by using only the
33 criteria and selection procedures specifically identified in the
34 request for proposal. However, the following minimum factors
35 shall collectively represent at least 50 percent of the total weight
36 of consideration given to all criteria factors; price, technical
37 design and construction expertise, life cycle costs over 15 years
38 or more, skilled labor force availability, and acceptable safety
39 record.

1 (ii) Once the evaluation is complete, the top three responsive
2 bidders shall be ranked sequentially from the most advantageous
3 to the least.

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

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

13 (v) For the purposes of this paragraph, "skilled labor force
14 availability" shall be determined by the existence of an
15 agreement with a registered apprenticeship program, approved by
16 the California Apprenticeship Council, which has graduated
17 apprentices in each of the preceding five years. This graduation
18 requirement shall not apply to programs providing apprenticeship
19 training for any craft that has been deemed by the Department of
20 Labor and the Department of Industrial Relations to be an
21 apprenticeable craft in the five years prior to enactment of this
22 act.

23 (vi) For the purposes of this paragraph, a bidder's "safety
24 record" shall be deemed "acceptable" if their experience
25 modification rate for the most recent three-year period is an
26 average of 1.00 or less, and their average Total Recordable
27 Injury/Illness rate and average lost work rate for the most recent
28 three-year period does not exceed the applicable statistical
29 standards for its business category or if the bidder is a party to an
30 alternative dispute resolution system as provided for in Section
31 3201.5 of the Labor Code.

32 (e) (1) Any design-build entity that is selected to design and
33 build a project pursuant to this section shall possess or obtain
34 sufficient bonding to cover the contract amount for nondesign
35 services, and errors and omission insurance coverage sufficient to
36 cover all design and architectural services provided in the
37 contract. This section does not prohibit a general or engineering
38 contractor from being designated the lead entity on a
39 design-build entity for the purposes of purchasing necessary
40 bonding to cover the activities of the design-build entity.

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

4 (f) All subcontractors that were not listed by the design-build
5 entity in accordance with clause (i) of subparagraph (A) of
6 paragraph (3) of subdivision (d) shall be awarded by the
7 design-build entity in accordance with the design-build process
8 set forth by the county in the design-build package. All
9 subcontractors bidding on contracts pursuant to this section shall
10 be afforded the protections contained in Chapter 4 (commencing
11 with Section 4100) of Part 1. The design-build entity shall do
12 both of the following:

13 (1) Provide public notice of the availability of work to be
14 subcontracted in accordance with the publication requirements
15 applicable to the competitive bidding process of the county.

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

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

23 (h) The county may retain the services of a design professional
24 or construction project manager, or both, throughout the course
25 of the project in order to ensure compliance with this section.

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

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

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

35 (2) In a contract between the design-build entity and the
36 subcontractor, and in a contract between a subcontractor and any
37 subcontractor thereunder, the percentage of the retention
38 proceeds withheld may not exceed the percentage specified in the
39 contract between the county and the design-build entity. If the
40 design-build entity provides written notice to any subcontractor

who is not a member of the design-build entity, prior to or at the time the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the design-build entity, then the design-build entity may withhold retention proceeds in excess of the percentage specified in the contract between the county and the design-build entity from any payment made by the design-build entity to the subcontractor.

(l) Each county that elects to proceed under this section and uses the design-build method on a public works project shall submit to the Legislative Analyst's office, the Senate Committee on Local Government, and the Assembly Committee on Local Government before December 1, 2004, a report containing a description of each public works project procured through the design-build process, and completed on or before November 1, 2004. The report shall include, but shall not be limited to, all of the following information:

- (1) The type of facility.
- (2) The gross square footage of the facility.
- (3) The design-build entity who was awarded the project.
- (4) The estimated and actual length of time to complete the project.
- (5) The estimated and actual project costs.
- (6) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protests.
- (7) An assessment of the prequalification process and criteria.
- (8) An assessment of the impact of retaining 5 percent retention on the project.
- (9) A description of the Labor Force Compliance program and an assessment of the project impact, where required.
- (10) A description of the method used to award the contract. If best value was the method, the factors used to evaluate the bid shall be described, including the weighting of each factor and an assessment of the effectiveness of the methodology.
- (11) An assessment of the project impact of "skilled labor force availability".
- (12) An assessment of the design-build dollar limits on county projects. This shall include projects where the county wanted to use design-build and was precluded by the dollar limitation. It

1 shall also include projects where the best value method of
2 awarding contracts was not used, due to dollar limitations.

3 (13) An assessment of the most appropriate uses for the
4 design-build approach.

5 (m) Any county named in this section that elects to not use the
6 authority granted herein may also submit a report to the entities
7 named and in accordance with the schedule in subdivision (l).
8 This report may include an analysis of why the authority granted
9 herein was not used by the county.

10 (n) On or before January 1, 2005, the Legislative Analyst shall
11 report to the Legislature on the use of the design-build method by
12 counties pursuant to this section, including the information listed
13 in subdivision (l). The report may include recommendations for
14 modifying or extending this section.

15 (o) This section shall remain in effect only until January 1,
16 ~~2006~~ 2011, and as of that date is repealed, unless a later enacted
17 statute, that is enacted before January 1, ~~2006~~ 2011, deletes or
18 extends that date.

19 SEC. 2. The Legislature finds and declares that a special law
20 is necessary and that a general law cannot be made applicable
21 within the meaning of Section 16 of Article IV of the California
22 Constitution because of the unique need to build and modernize
23 public facilities in a cost-effective manner in the Counties of
24 Butte, Del Norte, Fresno, Humboldt, Madera, Mariposa,
25 Mendocino, Merced, Napa, Placer, San Joaquin, San Luis
26 Obispo, Shasta, Siskiyou, Stanislaus, Yolo, and Yuba.