

California Public Contracting Laws: Design-Build Authority for Transportation Projects

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1. INTRODUCTION

Design-build is now widely accepted as a viable project delivery method for public works projects in the United States. Many public agencies in California are considering using design-build to deliver new transportation projects to their constituents. These agencies are drawn to the potential benefits of design-build, which include the opportunity for innovation in project design and construction, accelerated project delivery schedules and greater certainty regarding price due to limitations on a contractor's ability to make claims against the agencies based on defective design. The design-build method also allows the designer and builder to work together concurrently to achieve construction cost savings, at least some of which presumably flow to the procuring agency in the form of a lower contract price.

Historically, California agencies that wished to use design-build faced an uphill battle. Most commentators agree the best method for procuring a design-build contract is through a competitive negotiation or best value selection process.¹ Both processes, however, conflict with California's traditional public contracting laws, which generally require public agencies to use a qualifications-based selection process to award a design contract² and a separate low bid selection process to award a construction contract.³

In the past decade, California lawmakers have made tremendous strides in providing express design-build authority to California agencies. This authority, however, does not apply evenly across all project types, and certain agencies are still precluded from using a best value or competitive negotiation procurement methodology. As matters stand in 2011, much broader authority exists for public buildings or "vertical" projects than for transportation or "horizontal" projects.⁴ And within the realm of horizontal projects, projects on the state highway system are subject to a number of constraints that do not apply to other types of projects.

This article provides a summary of California's recently enacted transportation-specific design-build laws, and describes other options available to agencies that do not have express legislative design-build authority but may nonetheless wish to combine design and construction services under a single contract for a transportation project.

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¹ See JEFFREY L. BEARD ET AL., DESIGN-BUILD: PLANNING THROUGH DEVELOPMENT 175-76 (McGraw-Hill 2001).

² Under California's "Little Brooks Act" (codified in GOV'T CODE § 4525 *et seq.*), public agencies must select private architectural, engineering and related professional services based on demonstrated competence and professional qualifications.

³ In general, California law requires public works construction contracts to be awarded to the "lowest responsible bidder." See 10 MILLER & STARR, CAL. REAL EST. § 27:33 (3d ed. 2010).

⁴ For example, California's Local Agency Public Construction Act gives general law cities and counties design-build authority for construction of buildings and related projects, but expressly prohibits using this authority for transportation projects. See *generally*, PUB. CONT. CODE §§ 20175.2, 20133.

2. CALIFORNIA'S TRANSPORTATION-SPECIFIC DESIGN-BUILD LAWS

A. Design-Build Transit Law

General Authority. California's Design-Build Transit Law (codified in Pub. Cont. Code § 20209.5 *et seq.*) authorizes transit operators to enter into design-build contracts for transit projects. However, as a condition for receiving this authorization, the procuring agency must (1) evaluate the design-build process against the traditional design-bid-build process in a public meeting, and (2) find in writing that utilizing the design-build methodology will reduce the cost of the project, expedite the project's completion or provide design features that cannot otherwise be achieved through a traditional design-bid-build procurement.⁵ This transit-only design-build authority has been extended twice since it was originally passed in 2000, and currently sunsets on January 1, 2015.⁶

The Design-Build Transit Law imposes minimum cost thresholds of \$25 million for "capital maintenance or capital enhancing" rail projects⁷ and \$2.5 million for non-rail projects,⁸ but imposes no minimum threshold for projects for the acquisition or installation of certain technologies or equipment.⁹

Pre-qualification Process. The Design-Build Transit Law contains two flaws with respect to its mandatory pre-qualification process. First, the law requires the procuring transit operator to prequalify prospective design-builders using a standard form questionnaire developed by the Department of Industrial Relations ("DIR").¹⁰ To the extent that the legislature intended to standardize and thereby simplify the pre-qualification process, the experiment failed. The questionnaire developed for transit projects is complex, asks questions that are not necessarily relevant for all projects, and does not ask all of the questions that need to be answered for individual projects.

Second, by using the term "pre-qualification," the Design-Build Transit Law appears to preclude the use of a "shortlisting" process whereby the competition is limited to the most highly qualified firms. The use of shortlisting is considered best practice for design-build procurements for a number of reasons, including the fact that a long list of competitors is likely to discourage the most highly qualified firms from participating in the competition, thus limiting the potential "value" added by use of design-build. For mega-projects, the list of prequalified firms is likely to be relatively short due to marketplace limitations, but the inability to shortlist could present a significant concern for smaller projects.

The legislature would be well-advised to amend the statute to fix both of these flaws, allowing each procuring transit operator to develop its own procedure for shortlisting design-build teams.

Selection Process. The Design-Build Transit Law requires the procuring transit operator to select a design-build contractor based on proposals submitted by pre-qualified firms, and permits the operator to make the selection determination using either a best value or low bid process.¹¹ In making a best value determination, the transit operator may consider both price and non-price evaluation factors; however, price, technical expertise, life cycle costs, skilled labor availability and safety records must

⁵ PUB. CONT. CODE § 20209.6.

⁶ PUB. CONT. CODE § 20209.14.

⁷ This amount was reduced from the original threshold of \$50 million for rail transit projects.

⁸ This amount was reduced from the original threshold of \$10 million for non-rail transit projects.

⁹ PUB. CONT. CODE § 20209.7(f).

¹⁰ PUB. CONT. CODE § 20209.7(e)(1).

¹¹ *See* PUB. CONT. CODE § 20209.7(f).

account for no less than 50 percent of the total weight or consideration given to each proposal.¹² Of these factors, price and technical expertise are generally considered highly important for all design-build projects. Life cycle costs are of major importance for procurements that allow the proposer significant design flexibility, but to date have not been differentiating factors in selecting design-builders for California transit projects. Skilled labor availability and safety records appear more appropriate for pass/fail criteria and it is not clear why the legislature required them to be included in the weighted factors. Additional factors (notably the quality of the technical proposals) are also significant. If in the future the legislature considers modifications to the existing design-build laws, it would appear appropriate for the statute to allow the procuring agency the ability to determine what selection criteria to include in its request for proposals, and whether to incorporate them as pass/fail or weighted criteria.

Projects Under Design-Build Transit Law. The first project developed under the Design-Build Transit Law was the Orange County Transportation Authority's Garden Grove Freeway ("SR-22") HOV Lane Design-Build Project, awarded in 2004. The law has since been amended to preclude its use for highway projects. Although the law has not been widely used for major rail projects in the past, a number of transit operators have design-build procurements underway under this law, including the San Francisco Bay Area Rapid Transit District, the Santa Clara Valley Transportation Authority and the Sonoma-Marín Area Rail Transit District.

B. Design-Build Demonstration Program for Transportation Projects

General Authority. California's Design-Build Demonstration Program (codified as Pub. Cont. Code § 6800 et seq., referred to herein as "Section 6800") authorizes the California Department of Transportation ("Caltrans") and certain statutorily defined "local transportation entities" to enter into design-build contracts for certain state or local transportation projects.¹³ It should be noted that previous statutes granting general design-build authority to various agencies specifically excluded highway projects from such authorization.¹⁴ Section 6800 therefore represents a major step forward for design-build in California.

Section 6800 allows Caltrans to enter into a maximum of 10 design-build contracts for state highway, bridge or tunnel projects, and local transportation entities may enter into a maximum of five contracts for local street or road, bridge, tunnel or public transit projects.¹⁵ Section 6800 does not impose a minimum cost threshold on eligible projects, but all 15 projects must be authorized (i.e., approved) by the California Transportation Commission ("CTC"), and must be slated to receive funding from state transportation funding programs.¹⁶ The design-build authority under Section 6800 sunsets on January 1, 2014.¹⁷

Pre-qualification Process. Similar to the Design-Build Transit Law, Section 6800 requires pre-qualification instead of allowing shortlisting.¹⁸ Section 6800, however, permits each procuring agency to develop its own request for qualifications instead of requiring the agency to use the questionnaire developed by the DIR.¹⁹

¹² PUB. CONT. CODE § 20209.8(d).

¹³ PUB. CONT. CODE §§ 6802(a)-(b).

¹⁴ See, e.g., PUB. CON. CODE §20133, regarding County design-build projects.

¹⁵ PUB. CONT. CODE §§ 6802(a) and (b).

¹⁶ See *id.* §§ 6802(a)-(b), 6803(c).

¹⁷ PUB. CONT. CODE § 6813.

¹⁸ PUB. CONT. CODE § 6805(c).

¹⁹ See *id.*

Selection Process. Pursuant to Section 6800, the CTC determines whether the procuring agency may use a low bid or best value selection process to award the design-build contract, balancing across the 15 projects the number awarded using each selection process.²⁰ The CTC appears to have decided that the right balance is one-fourth low bid and three-fourths best value. So far, the CTC has authorized six best value selections (for one local and five state projects) and two low bid selections (both for state projects).²¹

For procurements using the low bid selection process, prequalified firms must submit lump sum bids, and the procuring agency must award the design-build contract (if at all) to the “lowest responsible bidder.”²² Although Section 6800 does not use the word “responsive,” presumably a procuring agency using a low bid selection process would have the ability to undertake a “pass/fail” review of technical proposals and reject any bid that does not meet the technical requirements.

For best value selections, the procuring agency must, at a minimum, consider price, technical design and construction experience, and life cycle cost over 15 years in making its best value determination.²³ The procuring agency has discretion to determine the relative weight or importance of each evaluation factor.²⁴

The “Project Development Services” Issue. One important issue to consider in proceeding with a Section 6800 procurement is the role of Caltrans in connection with certain “project development services.” For projects on the state highway system, Section 6800 requires Caltrans to be the “responsible agency for the performance of project development services, including performance specifications, preliminary engineering, prebid services, the preparation of project reports and environmental documents, and construction inspection services.”²⁵ Section 6800 provides that Caltrans *may* use Caltrans employees or consultants to perform these services.²⁶

Although Section 6800 has not yet been reviewed by the courts, a recent Superior Court case involved interpretation of identical language in another statute. That case concerned, among other things, whether the responsible agency requirement in California’s public-private partnership legislation²⁷ requires Caltrans to perform project development services through its own employees or consultants under contract with Caltrans and, therefore, prohibits another public agency or its consultants from performing the services.²⁸

In this case, a public-employees union representing Caltrans engineers claimed that Caltrans had violated its “responsible agency” obligations on the Presidio Parkway Project because the project development services for that project were performed by consultants of the San Francisco County Transportation Authority (Caltrans’ partner on the Presidio Parkway Project) who were not under direct contract with Caltrans.²⁹ The court rejected the union’s claim, ruling that there is no necessary relationship between the ability of Caltrans to be the “responsible agency” for project development

²⁰ See PUB. CONT. CODE § 6803(a)-(b).

²¹ <http://www.catc.ca.gov/programs/DB.htm>.

²² See PUB. CONT. CODE § 6805(d).

²³ PUB. CONT. CODE § 6805(e).

²⁴ *Id.*

²⁵ PUB. CONT. CODE § 6808(a).

²⁶ PUB. CONT. CODE § 6808(b).

²⁷ See STS. & HIGH. CODE § 143(f)(1)(A).

²⁸ Professional Engineers in California Government v. California Department of Transportation (Sup.Ct. Alameda County, 2011, No. RG10-544672) (referred to herein as “*PECG v. Caltrans*”).

²⁹ See generally, *PECG v. Caltrans*, 20-21.

services and a requirement for Caltrans and the consultants who perform these services to be directly in contract with one another.³⁰

While a court would not be bound by this ruling in interpreting Section 6800, unless the ruling is overturned on appeal this result provides comfort to local agencies that wish to use Section 6800 as the basis for a design-build procurement and that wish to use their own staff or consultants to provide project development services.

Projects Under Section 6800. To date, the CTC has authorized seven state projects and one local project under Section 6800. The seven state projects include the LA Metro Express Lanes Project, the Direct Connector Project and the Gerald Desmond Bridge Replacement Project, all three in Los Angeles County; the State Route 99 Rehabilitation Program in Madera County; the Interstate 101 Ramp Metering Project in San Mateo County; the Devore Interchange Project in San Bernardino County; and the Braided Ramps Project in Fresno County.

As of the date of this article, the only local project authorized under Section 6800 is the SR-91 Corridor Improvements Project in Riverside County, which is located on the State Highway System and would otherwise qualify as a state project. It is worth noting that the legislature passed a special law in late 2010 authorizing the Riverside County Transportation Commission to develop the project as a local project under Section 6800.³¹

3. OTHER OPTIONS FOR DESIGN-BUILD TRANSPORTATION PROJECTS

A. Alternative Procurement Authority

In addition to the general authority described above, California agencies may have the ability to use design-build through general alternative procurement authority or agency-specific authority available under various state laws.

Government Code Section 5956. In the past, a number of agencies have relied on Government Code section 5956 *et seq.* (“Section 5956”) as the basis for design-build projects that contain a privatization component. Provided the project will not use state funds, Section 5956 authorizes a local governmental agency to procure design, construction, financing and other development services from a single private entity for highway or bridge, tunnel, or airport and runway projects.³² Section 5956, however, is available only for the development of “fee-producing infrastructure projects or facilities,” which is defined by the statute as meaning that “the operation of the infrastructure project or facility will be paid for by the persons or entities benefited by or utilizing the project or facility.”³³ The statute does not state that the fees must be paid directly by users (for example through tolls or farebox), thus opening the door to projects for which some or all of the operating costs are funded by other types of revenues.

Section 5956 contemplates using a competitive negotiation process that allows the procuring agency to select a contractor for negotiations based either on a best value determination (with qualifications and competence as the primary selection criteria, but also taking price and other factors into account) or using a qualifications-based selection process (in which case the price could either be negotiated before or after contract award).³⁴

³⁰ *Id.* at 26.

³¹ Assemb. B. No. 2098, Reg. Sess. (Ca. 2009-2010) (codified in PUB. CONT. CODE § 6802(c)).

³² See GOV'T CODE § 5956.4.

³³ GOV'T CODE § 5956.3(c).

³⁴ See GOV'T CODE § 5956.5.

While Section 5956 has previously been used as the basis for design-build contracts without a private finance component, it is not clear how the courts would interpret the statute if asked to do so. In this regard, in 2006, a Superior Court judge considered whether Section 5956 could be used as the basis for a City of Stockton contract for the long-term operation and maintenance of the city's wastewater, water and storm water facilities.³⁵ The judge invalidated the contract, in effect holding that Section 5956 could be used only for projects that involve development of a facility with private funds. The decision in the Stockton case is not binding on other courts but it is possible that another court would follow the same line of reasoning.

Development Agreements. It may be possible for a procuring agency to structure transactions that combine design, construction and other professional services through the agency's development agreement authority. Government Code section 65864(c) specifically allows cities and counties to enter into development agreements that provide for design and construction of public facilities, and for the costs of such facilities to be reimbursed by the agency. Other agencies use development agreements based on authority inherent in their enabling legislation. Development agreements are often used for transit-oriented development, such as the public parking structure in Pasadena adjacent to the Del Mar Gold Line Station.

Streets & Highways Code Section 143. Based on an as-yet untested interpretation of Streets and Highways Code section 143 ("Section 143"), a procuring agency may be able to obtain design-build authority for a transportation project if it enters into a Comprehensive Development Lease Agreement ("CDLA") with Caltrans or a statutorily defined "regional transportation agency."³⁶ Section 143 authorizes Caltrans and regional transportation agencies to enter into CDLAs with either private or public entities to procure any combination of planning, design, development, finance, construction and other related services for highway, public street, rail and other "transportation projects." Section 143(e) provides:

Agreements between [Caltrans] or [a] regional transportation agency and the contracting entity or lessee shall authorize the contracting entity or lessee to use a design-build method of procurement for transportation projects, subject to the requirements for utilizing such a method contained in [Section 6800].

Since a private entity entering into a CDLA would not need design-build authorization, as a practical matter this provision seems to be relevant only with respect to "public-public" agreements. A "plain meaning" interpretation of this provision would appear to authorize a public-public partnership whereby a local agency—as the "contracting entity or lessee"—gains the ability to use design build through a qualifying CDLA with either Caltrans or a regional transportation agency. It should be noted, however, that Section 143 is a relatively new statute that is open to varying interpretations, and that neither the CTC nor Caltrans has adopted this interpretation. Any authorization to enter into a CDLA contemplated by Section 143 sunsets on January 1, 2017.

B. Charter Cities and Counties

In general, the mode in which a charter city or county chooses to contract is subject to the "home rule" which means that the procurement is governed by the agency's charter and implementing codes and ordinances instead of by state legislation.³⁷ Certain city charters expressly provide for design-

³⁵ Concerned Citizens Coalition of Stockton v. City of Stockton (Sup.Ct. San Joaquin County, 2006, No. CV 020397).

³⁶ See STS. & HIGH. CODE § 143(a)(4).

³⁷ See Smith v. City of Riverside, 34 Cal.App.3d 529, 536 (1973).

build authority or allow use of a procurement process that permits a best value selection methodology. For example, City of San José voters adopted a charter amendment in 2004 allowing use of a qualifications-based selection process for city design-build projects. The city used this authority as the basis for its 2006 design-build contract for the Norman Y. Mineta San José International Airport Terminal Area Improvement Program.

C. Agency-Specific Enabling Authority

A number of agencies have authority to use innovative delivery methodologies such as design-build based on their enabling authority. In some cases, the legislature has specifically authorized agencies to use design-build, and in others the legislature has provided agencies with broad authority that is compatible with design-build procurements. Examples of design-build projects developed based on agency-specific legislation include:

Los Angeles County Metropolitan Transportation Authority and Los Angeles Construction Authorities. The Los Angeles County Metropolitan Transportation Authority has undertaken several design-build projects under authority granted under Public Utilities Code section 130242, which allows low bid design-build. The Metro Gold Line Foothill Extension Construction Authority (originally known as the Los Angeles to Pasadena Metro Blue Line Construction Authority) and the Exposition Metro Line Construction Authority have also undertaken a number of transit design-build projects, relying on broad procurement authority contained in their enabling legislation.³⁸

Orange County Toll Roads. The San Joaquin Hills and Foothill/Eastern Transportation Corridor Agencies have built most of their 68-mile network of toll roads through design-build contracts—using a low bid selection process for the first project and best value for subsequent projects, relying on broad procurement authority contained in their enabling legislation.³⁹

4. CONCLUSION

Although a number of California agencies have express authority from the legislature to use design-build for transportation projects, and are using it effectively, many more agencies either do not have this authority or are subject to procurement requirements making it difficult to use design-build. Furthermore, the express design-build authority provided to agencies under the Design-Build Transit Law and Section 6800 is experimental and slated to expire within the next decade. To reap the full benefits of design-build, the legislature would be well-advised to adopt permanent, general legislation that allows public agencies to use design-build, leaving the details of the procurement to be determined by the agencies as appropriate for their needs.

³⁸ PUB. UTIL. CODE § 132400 et seq. and § 132600 et seq.

³⁹ GOV'T. CODE § 66484.3.