

Date of Hearing: May 13, 2015

ASSEMBLY COMMITTEE ON EDUCATION
Patrick O'Donnell, Chair
AB 1185 (Ridley-Thomas) – As Amended May 6, 2015

SUBJECT: Los Angeles Unified School District: best value procurement: pilot program

SUMMARY: Authorizes the Los Angeles Unified School District (LAUSD) to utilize a best value procurement process as a pilot project until December 31, 2020 for construction projects over \$1 million. Specifically, **this bill:**

- 1) Expresses the intent of the Legislature to enable school districts to use cost-effective options for building and modernizing school facilities. Finds and declares that the Legislature has recognized the merits of best value procurement through its authorization of the method by the University of California (UC). Through UC's report, best value procurement method has been found to reduce contract delays, change orders, and claims, thereby producing savings in both contract costs and administration.
- 2) Establishes the following definitions:
 - a) "Apprenticeable Occupation" means an occupation for which the Chief of the Division of Apprenticeship Standards (DAS) had approved an apprenticeship program pursuant to Section 3075 of the Labor Code prior to January 1, 2015.
 - b) "Best value" means a procurement process whereby the selected bidder may be selected on the basis of objective criteria for evaluating the qualifications of bidders with the resulting selection representing the best combination of price and qualifications.
 - c) "Best value contract" means a contract entered into pursuant to this bill.
 - d) "Best value contractor" means a properly licensed person, firm, or corporation that submits a bid for, or is awarded, a best value contract.
 - e) "Best Value Score" means the resulting score when the school district divides the bidder's price by the bidder's qualification score.
 - f) "Demonstrated management competency" means the experience, competency, capability, and capacity of the proposed management staffing to complete projects of similar size, scope, or complexity.
 - g) "Financial condition" means the financial resources needed to perform the contract. The criteria used to evaluate a bidder's financial condition shall include, at a minimum, capacity to obtain all required payment bonds, and required insurance.
 - h) "Governing board" or "governing board of the school district" means the governing board of the LAUSD.

- i) "Labor compliance" means the ability to comply with, and past performance with, contract and statutory requirements for the payment of wages and qualifications of the workforce. The criteria used to evaluate a bidder's labor compliance shall include, at a minimum, the bidder's ability to comply with the apprenticeship requirements of the California Apprenticeship Council and the Department of Industrial Relations, its past conformance with such requirements, and its past conformance with requirements to pay prevailing wages on public works projects.
- j) "Project" has the same meaning as "public project" is defined in subdivision (c) of Section 22002 of the Public Contract Code (PCC).
- k) "Qualifications" means financial condition, relevant experience, demonstrated management competency, labor compliance, the safety record of the bidder, and, to the extent relevant, the preceding qualifications as they pertain to all subcontractors proposed to be used by the bidder for designated portions of the work.
- l) "Relevant experience" means the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity.
- m) "Safety record" shall be deemed "acceptable" as determined by the school district. In its determination, the school district shall consider, but is not required to find, a contractor's safety record as 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 or illness rate and average lost work rate for the most recent three-year period do 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.
- n) "School district" means the LAUSD.
- o) "Skilled and trained workforce" means a workforce that meets of the following conditions:
 - i) All workers are either skilled journeypersons or apprentices registered in an apprenticeship program approved by the Chief of the Division of Apprenticeship Standards.
 - ii) Individuals employed to perform work on the contract or project are comprised of skilled journeypersons and subcontractors at every tier that are graduates of an apprenticeship program approved by the chief or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor, meeting the specified percentages and timeline:
 - (1) At least 30% by January 1, 2016.
 - (2) At least 40% by January 1, 2017.
 - (3) At least 50% by January 1, 2018.
 - (4) At least 60% by January 1, 2019.

- (5) At least 70% by January 1, 2020.
- iii) Specifies that for an apprenticeable occupation in which no apprenticeship program had been approved by the Chief of DAS before January 1, 1995, up to one-half of the graduation percentage requirements may be satisfied by skilled journeypersons who commenced working in the apprenticeable occupation prior to the chief's approval of an apprenticeship program for that occupation in the county in which the project is located.
- iv) "Skilled journeyperson" means a worker who either: 1) graduated from an apprenticeship program for the applicable occupation that was approved by the chief or located outside California and approved for federal purposes pursuant to apprenticeship regulations adopted by the Secretary of Labor, or 2) has at least as many hours of on-the-job experience in an applicable occupation as would be required to graduate from an apprenticeship program for the applicable occupation that is approved by the chief.
- 3) Specifies that the governing board of the school district shall let any contract for a project pursuant to this bill to the selected bidder that represents the best value or else reject all bids.
- 4) Specifies that the bidder may be selected on the basis of the best value to the governing board of the school district. Requires the governing board of the school district to adopt and publish procedures and required guidelines for evaluating the qualifications of the bidders that ensure the best value selections by the school district are conducted in a fair and impartial manner. Requires the procedures and guidelines to conform to this bill and to be mandatory for the school district when using best value selection.
- 5) Specifies that if the governing board of the school district deems it to be for the best interest of the school district, the governing board of the school district, on the refusal or failure of the selected bidder for a project to execute a tendered contract, may award it to the bidder with the second lowest best value score. If the second bidder fails or refuses to execute the contract, the governing board of the school district may likewise award it to the third lowest best value score.
- 6) Specifies that if the school district elects to award a project pursuant to this bill, retention proceeds withheld by the district from the selected best value contractor shall not exceed 5% if a performance and payment bond, issued by an admitted surety insurer, is required in the solicitation of bids.
- 7) Specifies that in a contract between the selected best value contractor and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld shall not exceed the percentage specified in the contract between the district and the selected best value contractor. If the selected best value contractor provides written notice to a subcontractor that, prior to or at the time the bid is requested, a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the selected best value contractor, then the selected best value contractor may withhold retention proceeds in excess of the percentage specified in the contract

between the district and the selected best value contractor from any payment made by the selected best value contractor to the subcontractor.

- 8) Provides that all subcontractors that are identified in the proposal shall be afforded protections under the Subletting and Subcontracting Fair Practices Act.
- 9) Requires the governing board of a school district to use the following procedure when awarding best value contracts:
 - a) The governing board of the school district shall prepare a solicitation for bids and give notice pursuant to PCC Section 20112.
 - b) The governing board of the school district shall establish a procedure to prequalify bidders. Specifies that information submitted by the bidder as part of the evaluation process shall not be open to public inspection to the extent that information is exempt from disclosure under the California Public Records Act.
 - i) Specifies that a best value entity shall not be prequalified or shortlisted unless the entity provides an enforceable commitment to the governing board that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades.
 - ii) Provides that an entity's commitment that a skilled and trained workforce will be used to perform the project or contract may be established by any of the following:
 - (1) The entity's agreement with the governing board of the school district that the entity and its subcontractors at every tier will comply with the requirements specified in this bill and that the entity will provide the director with evidence, on a monthly basis while the project or contract is being performed, that the entity and its subcontractors are complying with the requirements of this bill.
 - (2) If the governing board has entered into a project labor agreement that will bind all contractors and subcontractors performing work on the project or contract and that includes the requirements of this bill, the entity's agreement that it will become a party to that project labor agreement.
 - (3) Evidence that the entity has entered into a project labor agreement that includes the requirements of this bill and that will bind the entity and all its subcontractors at every tier performing the project or contract.
 - c) Each solicitation for bids shall do all of the following:
 - i) Invite prequalified bidders to submit sealed bids in the manner prescribed by this bill.
 - ii) Include a section identifying and describing the following:
 - (1) Criteria that the governing board of the school district will consider in evaluating the qualifications of the bidders.
 - (2) The methodology and rating or weighting system that will be used by the governing board of the school district in evaluating bids and specifically whether proposals will be rated according to numeric or qualitative values.
 - (3) The relative importance or weight assigned to the criteria for evaluating the qualifications of bidders identified in the request for bids.
 - d) Final evaluation of the bidders shall be done in a manner that prevents the identity of the bidders and the cost or price information from being revealed in evaluating the qualifications of the bidders prior to completion of qualification scoring.
- 10) Requires the selection of the best value contractor to be made as follows:

- a) The school district shall evaluate the qualifications of the bidders based solely upon the criteria set forth in the solicitation documents, and shall assign a qualification score to each bid.
 - b) Qualification scores shall be determined by using only the criteria and selection procedures specifically identified in the request for proposals. The following minimum factors, however, shall be weighed as deemed appropriate by the school districts:
 - i) Relevant experience.
 - ii) Safety record.
 - iii) Other factors identified in the request for proposal.
 - c) To determine the best value contractor, the governing board of the school district shall divide each bidder's price by its qualifications score. A preference of up to 5% shall be applied to the price of a bid submitted by a small business, as defined by the school district, before dividing the bidder's price by its qualification score. The lowest resulting cost per quality point will represent the best value bid. The award of the contract shall be made to the bidder whose bid is determined, by the school district in writing, to be the best value to the school district.
 - d) The governing board of the school district shall issue a written decision of its contract award or else reject all bids.
 - e) Upon issuance of a contract award, the governing board of the school district shall publicly announce its award identifying the project, the project price, and the best value contractor, to which the award is made, as well as the prices, qualification scores, and resulting costs per qualification point for all responsive bidders. The contract file shall include documentation sufficient to support the decision to award.
- 11) Requires a school district that uses the best value procurement method pursuant to this bill to submit to the Legislative Analyst the following reports completed by an independent third party:
- a) An interim report on or before July 1, 2018.
 - b) A final report on or before January 1, 2020.
 - c) A report shall include, but is not limited to, the following information:
 - i) A description of the projects awarded using the best value procedures.
 - ii) The contract award amounts.
 - iii) The best value contractors awarded the projects.
 - iv) A description of any written protests concerning any aspect of the solicitation, bid, or award of the best value contracts, including the resolution of the protests.
 - v) A description of the prequalification process.
 - vi) The criteria used to evaluate the bids, including the weighting of the criteria and an assessment of the effectiveness of the methodology.
 - vii) If a project awarded under this article has been completed, an assessment of the project performance, to include a summary of any delays or cost increases.
- 12) Requires the Legislative Analyst to submit an interim report to the appropriate policy and fiscal committees of the Legislature on the use of the best value procurement method by school districts on or before January 1, 2019, and a final report on or before July 1, 2020. The report may include the information provided from the school district reports pursuant to this bill and any pertinent information that the Legislative Analyst deems instructive in evaluating whether the best value procurement method should be continued, expanded, or prohibited.

- 13) Specifies that the best value procurement method is not intended to change any guideline, criterion, procedure, or requirement of the governing board of the school district to let a contract for a project to the lowest responsible bidder or else reject all bids.
- 14) Sunsets on January 1, 2021, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2021, deletes or extends that date.
- 15) Finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the need to establish a pilot project for the LAUSD to determine the potential benefits and consequences of using best value procurement to facilitate infrastructure improvements and ease fiscal impacts.

EXISTING LAW:

- 1) Requires the governing board of a school district to competitively bid and award to the lowest bidder contracts involving the following:
 - a) An expenditure of \$50,000 or more for the purchase of equipment, materials, or supplies, services (except for construction services), and repairs.
 - b) An expenditure of \$15,000 or more for a public contract project defined as construction, reconstruction, erection, alteration, renovation, improvement, demolition, repair, painting or repainting of any publicly owned, leased, or operated facility. (PCC) Sections 20111 and 22002)
- 2) Establishes a process, until January 1, 2020, for school district and community college district governing boards to enter into a design-build contract for both the design and construction of education facility projects over \$2.5 million. (Education Code (EC) Section 17250.20)
- 3) Specifies the elements required to be included in a design-build request for proposal (including significant factors, subfactors, methodology, rating and weighting schemes for evaluating proposals) and establishes, among others, prequalification, bonding and labor compliance program requirements (EC Sections 17250.10 – 17250.50 and 81700-81708)
- 4) Requires, until January 1, 2019, a school district with an average daily attendance of more than 2,500 using state school facility bond funds for a public project with an expenditure of \$1 million or more to require prospective bidders, and if utilized, all electrical, mechanical, and plumbing subcontractors, to complete and submit a standardized prequalification questionnaire and financial statement. (PCC Section 20111.6)
- 5) Authorizes, until January 1, 2017, the UC to use the best value method to award contracts based on best value procedures. (PCC Section 10506.4)

FISCAL EFFECT: None. This bill is keyed non-fiscal by the Legislative Counsel.

COMMENTS: *Background.* Under current law, K-12 school districts are required to competitively bid any public works contract over \$15,000 and award the contract to the lowest responsible bidder. Under the traditional method for school facility construction, a school district would first hire an architect to design a school facility and then issue a bid for the construction phase, awarding the contract to the lowest bidder. This process is commonly called "design-bid-build".

Design Build. Existing law authorizes two other temporary methods for awarding public contracts that are not based solely on the lowest bidder. AB 1402 (Simitian), Chapter 421, Statutes of 2001, established a process called "design-build" that enables a school district to issue a bid for both the design and construction of projects over \$10 million and authorizes school districts to consider factors other than cost. Under a design-build process, a K-12, California Community College (CCC) district, or other public or private agency issues a bid for both design and construction of a facility. A general contractor may collaborate with an architect/engineer to submit a proposal, or a general contractor may submit the proposal and subcontract with an architect/engineer.

Prior to using a design-build process for a project, a school district must make written findings that using the design-build method for the project will meet at least one of the following objectives: reduce comparable project costs, expedite the project's completions, or provide features not achievable through the traditional design-bid-build process. The school district must also establish a process to prequalify design-build entities using a standard questionnaire developed by the Department of Industrial Relations. The questionnaire requires contractors to provide detailed information regarding the company and its financial status.

Rather than selecting the contractor based solely on the lowest offer, the K-12 or CCC district may use criteria in addition to cost, which may include qualification, experience, proposed design approach, life cycle costs, project features and project functions. Based on the criteria selected by a governing board, the proposals are scored and awarded to the bidder whose proposal is considered to be the best value to the school district¹. Design build contracting can expedite the construction of a project, avoid conflicts between architects/engineers and contractors, and according to experiences from school and CCC districts, reduce costs by reducing change orders once construction begins. The authorization for design build sunsets on January 1, 2020.

Best Value Pilot Program. SB 667 (Migden), Chapter 367, Statutes of 2006, established a pilot program for the UC. Initially authorized for five years, SB 667 allowed the UC San Francisco to award contracts based on the best value for the university. Under this process, UC prequalifies bidders, then evaluates the bid based on answers to a separate best value questionnaire and assigns a qualification score. UC then divides each bidder's price by its qualification score. The lowest resulting cost per quality point represents the best value bid.

In a report to the Legislature in January 2010, the UC reported that 23 contracts totaling \$158.3 million were issued under the best value pilot program. Of the 23 contracts, 12 contracts were low bid contracts. According to the report, the "University Representatives for all these projects

¹ "Best value" for the purposes of design build does not have the same definition as that proposed by this bill. For design build, "best value" is defined as "a value determined by objective criteria and may include, but need not be limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the school district."

[four completed and two almost completed projects] have been unanimous in their praise of this process that has already demonstrated numerous advantages such as decreased bid protests and communication problems, decreased the need for multiple inspections and re-work, decreased disputes, change order requests, claims and litigation and increased incentives for contractors to perform their work safely and to adhere to high labor and quality standards." UC concludes that the best value pilot program fosters better quality work, less labor and safety problems, better qualified persons/contractors, better on-time completion, and better on-budget performance. In 2011, SB 835 (Wolk), Chapter 636, Statutes of 2011, expanded the authority to all UC campuses and extended the sunset from January 1, 2012 to January 1, 2017.

What does this bill do? This bill establishes a best value procurement process as a pilot project for LAUSD, in addition to awarding contracts through the traditional design-bid-build process. "Best value" is defined as a procurement process whereby the selected bidder may be selected on the basis of objective criteria for evaluating the qualifications of bidders with the resulting selection representing the best combination of price and qualifications. The authority applies to projects over \$1 million and will enable LAUSD to consider other factors, in addition to cost, in awarding construction contracts.

Guidelines. The bill requires LAUSD to adopt procedures and required guidelines for evaluating the qualifications of bidders to ensure that the process is fair and impartial. A prequalification process based on a questionnaire and a rating scale is required, although LAUSD already uses a prequalification process. The solicitation for bids will invite prequalified bidders to submit sealed bids. The solicitation for bids must also include information on how the school district will be evaluating the qualification of bidders, including the criteria that will be used, the methodology and the rating or weighting system that will be used, and the weight that will be assigned to the criteria for evaluation.

Qualification score. Similar to UC's best value pilot program, this bill requires the LAUSD to evaluate the qualification of the bidders solely upon the criteria specified in the solicitation documents and assign a qualification score to each bid. A bidder's price is divided by the qualification score received by the bidder. The bidder with the lowest cost per quality point represents the best value bid. The factors required to be used by this bill are slightly different than the factors used in the UC pilot program. The factors used by the UC included the bidder's financial condition, relevant experience, demonstrated management competency, labor compliance, and safety record. This bill specifies the use of relevant experience, safety record, and other factors identified in the request for proposal in determining the qualification score. Relevant experience and safety record are factors commonly used in the questionnaire for prequalification. According to the sponsor, the LAUSD, whereas the prequalification questionnaire may determine minimum qualifications, the information solicited through the best value procurement method will enable a school district to evaluate a bidder's qualification and background based on more specific needs of a project.

Prior session. This bill was introduced last session as AB 1971 (Bocanegra). The author held the bill on the Senate floor. This bill modifies AB 1971 by deleting the specified weight that must be given to relevant expertise, skilled and trained workforce and acceptable safety record. The bill, instead, makes the use of a "skilled and trained" workforce as a requirement for participation rather than a factor in determining best value, and leaves the weight of the factors unspecified. "Skilled and trained workforce" is defined as a workforce where all of the workers working on the project are either skilled journeypersons or apprentices registered in an

apprenticeship program approved by the Chief of the Division of Apprenticeship Standards under the Division of Industrial Relations.

Arguments in support. The author states, "With billions of dollars in state and local funds being spent on school construction projects throughout the state it is imperative that school districts have the necessary tools to reduce risk and maximize efficiencies. The best value procurement process would create transparent and objective criteria that will result in the selection of a quality contractor and a good history at a competitive price."

Arguments in opposition. The Associated Builders and Contractors of California (ABC California) has an oppose unless amended position on the bill and states that the bill "will make it even more difficult for non-union contractors to participate in the best value pilot program proposed for the Los Angeles Unified School District (LAUSD)." ABC California further states, "The 'skilled workforce' requirement is proposed by building trade unions as a new way to block local, non-union, minority and women-owned construction employers and their employees from participation in the LAUSD best value contracting process." ABC California suggests changing the effective date of the bill to January 1, 2018.

Committee amendments:

- 1) Correct a spelling error on page 2, line 26, from "Aprenticeship" to "Apprenticeship."
- 2) Change "director" to "governing board of the school district" on page 8, line 4.
- 3) Strike subdivision (c) of Section 20119.2 and reinsert as a new subdivision after subdivision (e).

Prior legislation. AB 1971 (Bocanegra), introduced last session, is substantially similar to this bill. The bill was held in the Senate by the author.

SB 835 (Wolk), Chapter 636, Statutes of 2011, extended the sunset of the best value pilot program for the UC to January 1, 2017 and expanded the program to all UC campuses.

SB 667 (Migden), Chapter 367, Statutes of 2006, established the best value pilot program for the UC San Francisco campus for five years.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles Unified School District (sponsor)

Opposition

Associated Builders and Contractors of California (unless amended)

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