

Date of Hearing: January 12, 2022

ASSEMBLY COMMITTEE ON EDUCATION
Patrick O'Donnell, Chair
AB 902 (O'Donnell) – As Amended January 3, 2022

SUBJECT: School facilities: design-build contracts

SUMMARY: Establishes an alternative design-build pilot project for the procurement of school construction contracts. Specifically, **this bill:**

- 1) Authorizes a school district with an average daily attendance (ADA) of 50,000 or more pupils, with approval of its governing board, to procure an alternative design-build contract for school construction projects in excess of \$10 million, and award the contract through the low bid or the best value method.
- 2) Sunsets the provisions of this bill on January 1, 2029.

Definitions

- 3) Establishes the following definitions:
 - a) “Alternative design-build” means a project delivery process in which both the design and construction of a project are procured from a single design-build entity based on its proposed design cost, general conditions, overhead, and project as a component of the project price.
 - b) “Best value” means a value determined by evaluation of objective criteria that may include, but are not limited to, price, features, functions, life-cycle costs, experience, and past performance. A best value determination may involve the selection of the lowest cost proposal meeting the interests of the school district and the objectives of the project, selection of the best proposal for a stipulated sum established by the procuring school district, or a tradeoff between price and other factors.
 - c) “Construction subcontract” means a subcontract awarded by the design-build entity to a subcontractor that will perform work or labor or will render service to the design-build entity in or about the construction of the work or improvement, or a subcontractor licensed by the state which, under subcontract to the design-build entity, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications produced by the design-build team.
 - d) “Design-build entity” means a corporation, limited liability company, partnership, joint venture, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services, as needed, pursuant to an alternative design-build contract.
 - e) “Design-build team” means the design-build entity and the individuals or other entities identified by the design-build entity as members of its team. Requires the members to include the general contractor and, if utilized in the design of the project, all electrical, mechanical, and plumbing contractors.

- f) “Project” means the construction of any school facility.

Guidelines and Documents

- 4) Requires the school district to develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the school district relating to the solicitation of an alternative design-build project, to submit a proposal as a design-build entity, or to join a design-build team. Requires the conflict-of-interest policy to apply to each school district entering into alternative design-build contracts.
- 5) Requires the school district to prepare a set of documents setting forth the scope and estimated price of the project. The documents may include, but are not limited to, the size, type, and desired design character of the project, performance specifications covering the quality of materials, equipment, workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the school district’s needs. The performance specifications and any plans must be prepared by a design professional who is duly licensed and registered in California.
- 6) Prohibits the documents referenced in (5) from including a design-build-operate contract for a project. The documents may include operations during a training or transition period, but shall not include long-term operations for a project.

Prequalification

- 7) Requires the school district to prepare and issue a request for qualifications in order to prequalify, or develop a short-list of, the design-build entities whose proposals shall be evaluated for final selection. Requires the request for qualifications to include, but not be limited to, the following:
- a) Identification of the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the school district to evaluate proposals, the procedure for final selection of the design-build entity, and any other information deemed necessary by the school district to inform interested parties of the contracting opportunity.
- b) Significant factors that the school district reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, acceptable safety record, and all other nonprice-related factors.
- c) A standard template request for statements of qualifications prepared by the school district. In preparing the standard template, the school district may consult with the construction industry, the building trades and surety industry, and other school districts interested in using the authorization provided by this bill. Requires the template to include the following information: 1) a listing of all shareholders, partners, including, a copy of the organizational documents or agreement committing to form the organization if the design-build entity is a privately held corporation; 2) evidence that the members of the design-build team have completed, or demonstrated the ability to complete the project of similar size, scope or complexity; 3) licenses, bonds and liability insurance; 4)

- information regarding workers' compensation history and worker safety program; and 5) an acceptable safety record, as specified.
- d) Requires all information to be verified under oath.
 - e) Specifies that information required that is not otherwise a public record under the California Public Records Act shall not be open to public inspection.
- 8) Prohibits a design-build entity from being prequalified or shortlisted unless the entity provides an enforceable commitment to the school district 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, as specified, except as follows:
- a) The school district has entered into a project labor agreement that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce, and the entity agrees to be bound by the project labor agreement;
 - b) The project or contract is being performed under the extension or renewal of a project labor agreement that was entered into by the school district before January 1, 2023; or
 - c) The entity has entered into a project labor agreement that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.
- 9) Provides that “project labor agreement” has the same meaning as Public Contract Code (PCC) 2500(b)(1).

Request for Proposals

- 10) Requires the school district to prepare a request for proposals that invites prequalified or short-listed entities to submit competitive sealed proposals in the manner prescribed by the school district. Requires the request for proposals to include, but need not be limited to, the following elements:
- a) 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 school district to evaluate proposals, whether the contract will be awarded on the basis of low bid or best value, and any other information deemed necessary by the school district to inform interested parties of the contracting opportunity.
 - b) Significant factors that the school district reasonably expects to consider in evaluating proposals, including, but not limited to, cost or price and all nonprice-related factors.
 - c) The relative importance or the weight assigned to each of the factors identified in the request for proposals.
 - d) Authorizes the school district to reserve the right to request proposal revisions and hold discussions and negotiations with responsive proposers if a best value selection method is used, and requires the school district to so specify in the request for proposals and publish separately or incorporate into the request for proposals applicable procedures to be

observed by the school district to ensure that any discussions or negotiations are conducted in good faith.

Awarding Contracts

- 11) Provides that for those projects utilizing low bid as the final selection method, requires the competitive bidding process to result in lump-sum bids by the prequalified or short-listed design-build entities, and requires awards to be made to the design-build entity that is the lowest responsible bidder.
- 12) Provides that for those projects utilizing best value as a selection method, the alternative design-build competition shall progress as follows:
 - a) Competitive proposals shall be evaluated by using only the criteria and selection procedures specifically identified in the request for proposal, with the following minimum factors that must be weighted as deemed appropriate by the awarding entity:
 - i) The proposing design-build entity's design cost, general conditions, overhead, and profit as a component of the project price, unless a stipulated sum is specified;
 - ii) Technical design and construction experience; and
 - iii) Life-cycle costs over 15 or more years.
 - b) Authorizes the school district to hold discussions or negotiations with responsive proposers.
 - c) Requires responsive proposers to be ranked based on a determination of value provided, with a limit of three proposers required to be ranked.
 - d) Requires the award of the contract to be made to the responsible design-build entity whose proposal is determined to have offered the best value to the public, and requires the school district to publicly announce its award, as specified.
 - e) Provides that the contract awarded shall be subject to further negotiation and amendment up to the sum of the costs of construction subcontracts awarded pursuant to this bill.
 - f) Specifies that the statement regarding the school district's contract award and the contract file shall provide sufficient information to satisfy an external audit.
- 13) Provides that a contract awarded pursuant to this bill shall be deemed a construction contract within the meaning of Education Code (EC) 17603, and subject to the requirements of PCC 20118.4.

California Environmental Quality Act (CEQA) factors

- 14) Specifies that a school district entering into a contract awarded pursuant to this bill that is subject to the CEQA shall retain the discretion to do all of the following:
 - a) Terminate the contract at any time before a final project design is submitted to the Division of State Architect for approval;

- b) Modify the project design or feature in a manner that school district decides is necessary to comply with the CEQA, including, but not limited to, incorporation of mitigation measures identified in the environmental review document;
 - c) Balance the benefits of the proposed project against any of the project's significant environmental effects if the effects cannot be otherwise avoided or mitigated to a less than significant level; and
 - d) Disapprove the project design and not proceed with the project's final design and construction.
- 15) Requires a contract awarded by a school district pursuant to this bill to include terms as identified in (14) and condition the commencement of any activity beyond the design phase of the contract in compliance with applicable laws, including CEQA.
- 16) Prohibits a design-build entity or its subcontractors from engaging in any activity, including demolition, excavation, grading, or construction beyond the design phase unless the school district issues a notice of determination with the county clerk, and issues a notice to proceed with construction.
- 17) Requires the design-build entity to provide payment and performance bonds for the project in the form and in the amount required by the awarding authority, and issued by a California admitted surety. The amount of the payment bond shall not be less than the amount of the performance bond.
- 18) Specifies that for purposes of procuring and awarding an alternative design-build contract, a school district is deemed to have complied with CEQA if the school district complies with (14) and a contract awarded contains the terms and conditions described in (15).

Bonds and Insurance

- 19) Requires the design-build entity to provide payment and performance bonds for the project in the form and in the amount required by the school district and issued by a California admitted surety. Prohibits the payment bond from being less than the amount of the performance bond.
- 20) Requires the alternative design-build contract to provide errors and omissions insurance coverage for the design elements of the project.
- 21) Requires the school district to develop a standard form of payment and performance bond for its alternative design-build projects.

Subcontractors

- 22) Authorizes the school district, in each alternative design-build request for proposals, to identify specific types of subcontractors that must be included in the design-build entity statement of qualifications and proposal. Provides that all subcontractors that are identified

in the proposal are afforded protections under the Subletting and Subcontracting Fair Practices Act.

- 23) Specifies that following an award of the alternative design-build contract, the design-build entity is required to proceed as follows in awarding construction subcontracts with a value exceeding one-half of 1% of the contract price allocable to construction work:
- a) Provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the school district;
 - b) Establish reasonable qualification criteria and standards; and
 - c) Award the subcontract either on a best value basis or to the lowest responsible bidder, which may include prequalification or short-listing.
- 24) Provides that the process stipulated in (23) does not apply to construction subcontracts listed in the original proposal.
- 25) Requires construction subcontracts to be subject to an open book evaluation by the school district. Specifies that if the school district determines the sum of the costs of the construction subcontracts exceeds the anticipated value of the project to the school district, or if any individual subcontracts are unreasonable, the school district may require the design-build entity to repeat the process described in (23) for those subcontracts or cancel the alternative design-build contract with the school district.
- 26) Provides that a licensed construction subcontractor that provides design services used on a project shall not be responsible for any liability arising from the subcontractor's design if the construction subcontract is not performed by the subcontractor.

Retention Proceeds

- 27) Provides that the retention proceeds withheld by the school district from the design-build entity shall not exceed 5%, and the retention proceeds withheld between the design-build entity and any subcontractor may not exceed the percentage specified in the contract between the school district and the design-build entity.
- 28) Specifies that if the design-build entity provides written notice to any subcontractor that is not a member of the design-build entity, before 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 from any payment made by the design-build entity to the subcontractor.

Report to the Legislature

- 29) Requires a school district that uses the alternative design-build procurement method to submit to the appropriate policy and fiscal committees of the Legislature a report on the use of the procurement method no later than January 1, 2028.

- 30) Requires the report to include, but not be limited to, the following information:
- a) A description of the projects awarded using the alternative design-build procurement method;
 - b) The contract award amounts;
 - c) The design-build entities awarded the projects;
 - d) A description of any written protests concerning any aspect of the solicitation, bid, or award of the contracts, including the resolution of the protests;
 - e) A description of the prequalification process; and
 - f) An assessment of the project performance, including, but not limited to, a summary of any delays or cost increases, if a project awarded pursuant to this bill has been completed.
- 31) Specifies that nothing in this bill affects, expands, alters, or limits any rights or remedies otherwise available at law.

EXISTING LAW:

- 1) Establishes a process, until January 1, 2025, for a school district governing board to enter into a design-build contract for both the design and construction of education facility projects over \$1 million, awarding the contract to either the low bid or the best value. (EC 17250.20)
- 2) 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 17250.10 – 17250.50)
- 3) 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; and
 - 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 20111 and 22002)
- 4) Authorizes the governing board of a school district to require each prospective bidder for a contract to participate in a prequalification process that includes the submission of a standardized questionnaire and financial statement in a form established by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. (PCC 20111)

FISCAL EFFECT: The Legislative Counsel has keyed this bill as a possible state-mandated local program.

COMMENTS:

Need for the bill. The author states, “The design-build procurement method fosters partnership between designers and contractors that results in efficiency and fewer change orders during the construction phase. However, school districts and other entities that use design-build contracting have found that without a design, it is difficult for a school district or the design-build team to predict the cost for the project. Existing design-build contracting does not allow for any adjustments from the initial contract price. As a result, contractors may add contingencies into their proposals to cover future uncertainties. These uncertainties include the unpredictable cost to construct the final design and inflation during the duration of the design phase. This leads to either higher costs to the school district due to the inability to adjust the initial price downward, or alternatively, a design plan that does not incorporate the needs for a new school (e.g., fewer classrooms, lower quality material) due to the inability to adjust the price upward. This bill will allow a school district to renegotiate payment after a design has been initiated or completed to ensure that the price a school district pays more accurately reflects the true costs.”

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 this process, 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.” AB 1402 (Simitian), Chapter 421, Statutes of 2001, established the design-build process that enabled a school district to issue a bid for both the design and construction of projects over \$10 million and authorized school districts to consider factors other than cost. The authority was extended several times. In 2015, AB 1358 (Dababneh), Chapter 752, Statutes of 2015, aligned school districts’ design-build contracting process with the process established for state and local agencies, reduced the threshold to projects over \$1 million, and extended the sunset to January 1, 2025.

Design-build. 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. The school district must 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, including whether the company has been in bankruptcy or involved in a civil lawsuit, licensing information, prior contracting experience (whether the contractor has completed other public works projects), whether the contractor has been involved or has been found to have violated any federal, state or local laws, and whether the contractor has violated any labor and health and safety laws, including prevailing wage.

A school district may award a design-build contract to the lowest bidder, or 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 district. Under a design-bid-build process, the architect works

independently on the design of the facility. Once construction begins, any problems identified by the contractor must be resolved, frequently with the school district acting as the mediator. Under design-build, the architect and contractor work together from the beginning of the project, thereby reducing conflicts and delays during the construction phase. 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.

In addition to K-12 schools and CCC districts, a number of design-build authorizations have been given to various cities and counties, state building projects, and transit districts. SB 785 (Wolk), Chapter 931, Statutes of 2014, repealed the authorization for a number of state and local agencies and enacted uniform provisions for the Department of General Services (DGS), the California Department of Corrections and Rehabilitation, and specified local agencies using the design-build method.

Progressive design-build. Another form of design-build is “progressive design-build,” a process employed predominantly by the private sector. In a primer by the Design Build Institute of America, progressive design-build is described as “a stepped or progressive process” whereby a design build team is selected using a best value selection method, “followed by a process whereby the owner then ‘progresses’ towards a design and contract price with the team (thus the term “Progressive”).”

Last year, the DGS received authorization to use progressive design-build for up to three state public works projects through a budget trailer bill, AB 137 (Committee on Budget), Chapter 77, Statutes of 2021. AB 137 defines “progressive design-build” as “a project delivery process in which both the design and construction of a project are procured from a single entity that is selected through a qualifications-based selection at the earliest feasible stage of the project.”

The process delineated in AB 137 has a lot of similarity to the design-build process, except that the initial selection of the design-build team is based predominantly on competence and qualifications. Cost may be considered, but it is not a requirement. Once a team is selected based on qualifications, the DGS may enter into a contract to start the design phase and preconstruction activities in order to determine a guaranteed maximum price for the project. After a guaranteed maximum price is set, AB 137 gives the DGS full authority to amend and add funds not to exceed the guaranteed maximum price to complete the project. AB 137 also stipulates that if the cost for completing all remaining design, preconstruction, and construction activities exceeds the guaranteed maximum price, the design-build entity must absorb the additional costs. If a guaranteed maximum price is not agreed upon or if the DGS chooses not to amend the contract to complete the remaining work, the DGS is authorized to cancel the contract and solicit proposals from other entities to complete the project.

What does AB 902 do? AB 902 does not propose a progressive design-build process for school districts. However, it does provide some flexibility for a school district to renegotiate price after the initial selection of the design-build entity. The bill establishes an alternative design-build procurement method as a pilot project by modifying the existing design-build process as follows:

- For projects using best value rather than lowest bidder, a proposing design-build entity’s design cost, general conditions (project specific costs), overhead (administrative), and profit as a component of the project price are added to the initial evaluation.

- After a contract has been awarded, and presumably after a design has started or has been completed, the contract is subject to further negotiations and changes up to the sum of the costs of construction subcontracts.
- A school district is authorized to review subcontractor bids received by the design-build entity through an open book evaluation, and allows the school district to require the design-build entity to repeat the subcontractor bidding process if the school district determines that the costs of the construction subcontracts exceed the anticipated value of the project or if the school district determines any individual subcontract is unreasonable.
- A school district retains the authority to cancel the alternative design-build contract. If a contract is cancelled, the bill has language specifying that a subcontractor is not responsible for any liability arising from the subcontractor's design if the construction subcontract is performed by another subcontractor.

The pilot project is limited to districts with over 50,000 ADA and projects over \$10 million. According to the California Department of Education, in 2019-20, 11 school districts had an enrollment of more than 50,000. Any district choosing to utilize the alternative design-build method must submit a report to the appropriate policy and fiscal committees of the Legislature by January 1, 2028, with specified information about the projects awarded using this method.

Committee amendment. *Staff recommends that the bill be amended* to clarify that the process a design-build entity must follow to award subcontracts does not apply to subcontractors who are part of the design-build team.

Arguments in support. The Los Angeles Unified School District, the sponsor of the bill, states, "By allowing school districts to enter into partnerships with entities that can both design and build school facilities, the parties can work cooperatively through the design and construction phases of a project. However, both parties face uncertainty at the inception of a design-build proposal. AB 902 would allow school districts and design-builders to negotiate actual construction costs once the design is complete. The design-builder would obtain subcontractor costs based on a design approved by the Division of State Architect. School districts would examine these subcontractor costs through an open book evaluation of the bids received by the design-builder. Since design-builders and their subcontractors would no longer need to add contingencies to their proposals to cover future uncertainties, the final construction costs are anticipated to be lower, resulting in savings for school districts."

Arguments in opposition. The Construction Employers' Association (CEA) has an oppose unless amended position and states, "AB 902 authorizes school districts that meet certain criteria to use the alternative design build selection process. CEA members do not oppose this. Unfortunately, the measure (17250.65c) also provides that school districts may evaluate each individual subcontract to determine if each individual subcontract is reasonable. If the district asserts that an individual subcontract is unreasonable, the district may demand that the individual subcontract be rebid. Failure to do so may result in termination of the entire contract....Standard industry practice is that the owner determines what they are prepared to pay and it is up to the design build team to meet that price, change the scope, or terminate the agreement. Project owners do not pick and choose who the contractor should hire, nor should they given that liability on a design build project falls on the design build team. To the extent that AB 902 were

amended to permit alternative design build without giving districts the authority to effectively disqualify individual subcontractors, then CEA would remove its opposition.”

Related legislation. AB 137 (Committee on Budget), Chapter 77, Statutes of 2021, authorized the DGS to use progressive design-build for three state capital outlay projects.

AB 1358 (Dababneh), Chapter 752, Statutes of 2015, aligned school districts’ design-build contracting process with the process established for state and local agencies, reduced the threshold for projects from \$2.5 million to \$1 million, and extended the sunset to January 1, 2025.

SB 785 (Wolk), Chapter 931, Statutes of 2014, aligned the design-build process for the DGS, the California Department of Corrections and Rehabilitation, and several local agencies.

SB 1509 (Simitian), Chapter 736, Statutes of 2012, extended the sunset for K-12 and CCC authorization to use design-build from January 1, 2014, to January 1, 2020.

SB 614 (Simitian), Chapter 471, Statutes of 2007, reduced the threshold for eligible K-12 and CCC projects from \$10 million to \$2.5 million, extended the authority to all CCC districts, and extended the sunset dates for both K-12 and CCCs to January 1, 2014.

AB 1000 (Simitian), Chapter 637, Statutes of 2002, authorized three CCC districts to utilize design-build contracts for projects over \$10 million with a sunset of January 1, 2008.

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. AB 1402 had an initial sunset of January 1, 2007.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles Unified School District (sponsor)

Opposition

Construction Employers’ Association

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