

Date of Hearing: July 10, 2019

ASSEMBLY COMMITTEE ON EDUCATION
Patrick O'Donnell, Chair
SB 743 (Hertzberg) – As Amended April 29, 2019

SENATE VOTE: 38-0

SUBJECT: School facilities: design-build projects

SUMMARY: Requires a specified school district to meet certain requirements and include those requirements as terms and conditions in a design-build contract for the purpose of meeting the California Environmental Quality Act (CEQA) requirements. Specifically, **this bill:**

- 1) Establishes the following definitions:
 - a) “Project” means all construction, alteration, demolition, installation, repair, and maintenance work that is subject to a project labor agreement that meets the requirements of Section 2500 of the Public Contract Code.
 - b) “School district” means a school district that operates a labor compliance program that received final approval from the Department of Industrial Relations before January 1, 1997.
- 2) Requires a design-build contract awarded by a school district for a project to condition the commencement of any activity beyond the design phase of the contract in compliance with applicable laws, including the CEQA.
- 3) Requires the school district to comply with and include the following terms in the design-build contract:
 - a) The school district shall retain discretion to do all of the following:
 - i) Terminate the contract at any time before a final project design is submitted to the Division of the State Architect (DSA) for approval;
 - ii) Modify the project design or feature in a manner the school district decides is necessary to comply with the CEQA, including, but not limited to, incorporation of mitigation measures identified in an environmental review document for the project to mitigate environmental impacts that the project may cause, or the adoption of alternatives to the project;
 - iii) 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
 - iv) Disapprove the project design and not proceed with the project’s final design and construction.
- 4) Prohibits the design-build entity or its subcontractors performing work on a project for a school district from engaging in any activity, including demolition, excavation, grading, or

construction, under a contract beyond the design phase unless the school district issues a notice pursuant to subdivision (a) of Section 21152 of the Public Resources Code, as applicable, and issues a notice to proceed with the construction.

- 5) Specifies that for purposes of procuring and awarding a design-build contract for a project, a school district is deemed to have complied with the CEQA if the school district complies with and the contract awarded contains the terms and conditions in (3) above.
- 6) Finds and declares that a special statute is necessary and that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique fiscal and infrastructure difficulties being suffered by the Los Angeles Unified School District (LAUSD).

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. (Education Code (EC) Section 17250.20)
- 2) Finds and declares that the design-build method of project delivery, using a best value procurement methodology, has reported benefits, including reduced project costs, expedited project completion and design features that are not achievable through the traditional design-bid-build method. (EC Section 17250.10)
- 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 17250.15 – 17250.40)
- 4) 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. (Public Contract Code Sections 20111 and 22002)
- 5) Establishes the CEQA and requires all lead agencies to prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report (EIR) on any project they propose to carry out or approve that may have a significant effect on the environment. Specifies the process and requirements for compliance with CEQA. (Public Resources Code 21000 et seq.)

FISCAL EFFECT: This bill has been keyed non-fiscal by the Legislative Counsel.

COMMENTS:

Background on design-build contracting. 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 responsible bidder. This process is commonly called "design-bid-build." 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, and required the Legislative Analyst's Office to submit a report with information on the experiences of districts that used the design-build process and make recommendations to the Legislature. In 2007, the sunset was extended to January 1, 2014, and the threshold for eligible projects was reduced from \$10 million to \$2.5 million. In 2015, AB 1358 (Chapter 752, Statutes of 2015), aligned the process for school districts awarding contracts through the design-build method with the design-build process established for state and local agencies, reduced the threshold for participation from \$2.5 million to \$1 million, and extended the sunset date to January 1, 2025.

Design-build. Under a design-build process, a K-12 school 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 also establish a process to prequalify design-build entities using a standard questionnaire developed by the Department of Industrial Relations.

Rather than selecting the contractor based solely on the lowest offer, a school 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 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 are working together from the beginning of the project, thereby reducing conflicts, delays, and additional costs 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 community college districts, reduce costs by reducing change orders once construction begins.

In addition to K-12 schools and California Community Colleges (CCC) districts, a number of design-build authorizations have been given to various cities and counties, state building projects, and transit districts.

CEQA. CEQA is intended to inform the public of potential environmental effects of a proposed activity undertaken by a governmental agency, or an activity financed or that require approval by a governmental agency, and identify mitigation measures or alternatives to the proposed project. This is done through the development of an EIR. Public Resources Code 21151.8 specifically prohibits a local governing board of a school district from certifying an EIR unless the EIR

identifies specified information (including whether the site is a current or former hazardous waste disposal site, the site contains one or more pipelines that carries hazardous substances, and the site is within 500 feet of a freeway or busy traffic corridor), and has made written findings to address the environmental impacts. Education Code Section 17213, citing the school district as a lead agency under CEQA, conforms the requirements for location of a school to the Public Resources Code and prohibits the purchase of property if the school is to be located on the aforementioned sites.

Purpose of this bill. This bill is sponsored by the LAUSD and applies only to LAUSD to clarify that the district is authorized to enter into a design-build contract prior to compliance with the CEQA as long as the district meets certain requirements and the contract contains specified terms and conditions.

According to LAUSD:

The expedited nature of design-build, while timely and cost-effective, sometimes runs into timing issues, when it comes to California Environmental Quality Act (CEQA) review. In order to evaluate whether a proposed project complies with the California Environmental Quality Act (CEQA), it is necessary to have certain information known about the proposed project that can only be revealed through the design development stage.

These coinciding timelines can lead to differing interpretations about what has or has not been approved in a project. For example, it was recently concluded by some that because the Los Angeles Unified School District awarded a design-build contract, the school district had already officially approved the project, thus committing itself to an irreversible and definite course of action without conducting the appropriate environmental review under CEQA.

In 2018, the Los Angeles Conservancy challenged a design-build contract for a modernization project at Roosevelt High School, stating, "...the District has pre-committed itself in a manner that precludes alternatives under CEQA by entering into a contract for design and construction of the Project that included specific requirements for the design."

Design-build contracting method and CEQA. One of the main issues raised by this bill is whether there is a conflict between the design-build contracting method and when a school district "approves" a project under CEQA. The purpose of establishing the design-build contracting method is to allow a school district to award a contract that allows an architect and a contractor to work together from the outset of the project to achieve efficiency and reduce costs. CEQA requires an entity to prepare and certify the completion of the EIR on a project it *proposes* to carry out or approve that may have a significant effect on the environment in order to address impacts identified in the EIR or seek alternative options to the project. Title 14, Section 15352 of the California Code of Regulations defines "approval" as the "decision by a public agency, which commits the agency to a definite course of action in regard to a project intended to be carried out by the person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval."

Can a school district enter a design-build contract before demonstrating CEQA compliance?

Central to this bill is the question of whether or not a school district can enter into a design-build contract prior to showing compliance with the CEQA. There have been differing opinions as to what constitutes “approval” or “commitment” to a project. Some would argue that it is allowed as long as the contract is conditional on CEQA compliance being obtained. In other incidences, such as in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, neighbors opposed to a project converting a home to apartments for low-income seniors sued the City of West Hollywood for violating CEQA by not completing an EIR before approving a loan and a conditional agreement. The California Supreme Court found that the contract, loan, and comments made by city officials showed commitment to the project. The Supreme Court affirmed the importance of considering the surrounding facts and context of the project under contract, stating:

A CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review.

This bill clarifies that LAUSD, for the purpose of complying with CEQA, may enter into a design-build contract as long as the district complies with and the contract contains the following terms and conditions:

- 1) The school district retains discretion to: a) terminate the contract at any time before a final project design is submitted to the DSA for approval; b) modify the project design or feature in a manner the school district decides is necessary to comply with the CEQA; 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.
- 2) Commencement of any activity beyond the design phase of the contract is conditioned upon compliance with applicable state laws, including the CEQA.

These provisions ensure that the district maintains control of the project and may make changes to the design or even abandon the project in order to address issues identified in an EIR. The bill also prohibits the 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 files a notice of approval with the county where the project is located and issues a notice to proceed with the construction.

It is unclear whether design-build contracts awarded in other school districts have been challenged.

Related legislation. AB 695 (Medina), pending on the Senate Floor, extends from January 1, 2020, to January 1, 2030 the authority for CCC districts to use the design-build method, and applies the existing provisions regarding the use of a skilled and trained workforce on state, school district, and local government design-build projects to community college design-build contracts advertised for bid or awarded on or after July 1, 2020.

Prior legislation. AB 1358 (Dababneh), Chapter 752, Statutes of 2015, aligned the process for school districts awarding contracts through the design-build method with the design-build process established for state and local agencies, lowered the threshold for projects eligible to use design-build to \$1 million, and extended the authorization for school districts to use design-build contracting to January 1, 2025.

SB 785 (Wolk), Chapter 931, Statutes of 2014, aligned the design-build process for the Department of General Services, 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, extended the authority to use design-build to the CCCs, reduced the threshold for eligible projects from \$10 million to \$2.5 million and extended the sunset for school districts and CCC districts to use design-build to January 1, 2014.

AB 1402 (Simitian), Chapter 421, Statutes of 2001, established, until January 1, 2007, the authorization for school districts to use the design-build contracting method for projects over \$10 million and authorized school districts to consider factors other than cost.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles Unified School District (sponsor)
State Construction and Building Trades Council

Opposition

None on file

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