

**Senate Committee on Local Government
Senator Dave Cox, Chair
State Capitol, Sacramento, California 95814**

Faster, Cheaper, Better?

**A Legislative Oversight Hearing on
How Counties Use Design-Build Contracting**

**Wednesday, January 20, 2010
State Capitol, Room 112**

Table of Contents

| | <u>Page</u> |
|----------------------------------|-------------|
| Introduction | 1 |
| LAO’s Oversight Report | 1 |
| Counties’ Public Works Contracts | 2 |
| What the LAO Said Five Years Ago | 4 |
| What the LAO Says Now | 4 |
| Legislators’ Choices | 5 |
| Timing | |
| Project Limits | |
| Contract Procedures | |
| Qualifications | |

The Committee’s staff appreciates the help it received from:

- **Helen Ho**, the Committee’s Senate Fellow in 2008-09 and author of “Local Agencies and Design-Build Contracting: A Briefing Paper for Legislators and Their Staffs,” September 9, 2009.
- **Jeremy G. March**, the author of *California Public Contract Law* (Solano Press Books, 2007).
- **Mark Whitaker** of the Legislative Analyst’s Office who wrote *Counties and Design-Build*, January 8, 2010: www.lao.ca.gov/laoapp/PubDetails.aspx?id=2161

Faster, Cheaper, Better?
A Legislative Oversight Hearing on
How Counties Use Design-Build Contracting

This briefing paper prepares the members of the Senate Local Government Committee for their January 20, 2010 oversight hearing on how counties use the design-build method of contracting for public works projects.

The Legislature first allowed county governments to use design-build contracting 15 years ago (AB 1717, Cortese, 1995). Today, all counties can use the design-build method to construct buildings and related improvements and county sanitation wastewater treatment facilities that cost more than \$2.5 million (Public Contract Code §20133). However, that statutory authority will automatically terminate on January 1, 2011 (Public Contract Code § 21033 [p]). The *Appendix* reprints the statutory language.

One of the central duties of any legislative body is to review how their statutes work and to determine if legislators should amend those laws. Oversight hearings allow legislators to identify public policy problems and explore statutory solutions. The Committee's January 20 hearing lets legislators review how counties have used their design-build powers, identify any problems, and prepare for new bills that may extend that authority.

LAO's Oversight Report

To help legislators review what counties have done with their design-build powers, on January 8, 2010, the Legislative Analyst's Office released *Counties and Design-Build*: www.lao.ca.gov/laoapp/PubDetails.aspx?id=2161

The LAO learned that five counties have used the design-build contracting method to complete five projects:

| <u>County</u> | <u>Project</u> | <u>Estimated Costs</u> | <u>Actual Costs</u> |
|----------------------|--------------------------|-------------------------------|----------------------------|
| Napa | Parking facility | \$15,200,000 | \$15,970,000 |
| San Joaquin | Administration building | \$92,860,000 | \$92,727,765 |
| Solano | Health & social services | \$27,799,741 | \$27,760,705 |
| Sonoma | Children's home | \$9,152,011 | \$7,654,810 |
| Stanislaus | Community swimming pool | \$2,641,125 | \$2,500,000 |

In addition, four counties told the LAO that they have 10 design-build projects underway, but not yet complete:

| <u>County</u> | <u>Project</u> | <u>Estimated Costs</u> |
|----------------|-----------------------------|------------------------|
| Los Angeles | Fire station | \$8,967,000 |
| Los Angeles | Fire station | \$9,464,000 |
| Los Angeles | Medical office building | \$10,800,000 |
| Los Angeles | Park, gym, community center | \$11,500,000 |
| Los Angeles | Historic refurbishment | \$47,794,000 |
| Los Angeles | Hospital | \$322,600,000 |
| Placer | Adult correctional facility | \$79,988,000 |
| Sacramento | Airport terminal | \$770,000,000 |
| San Bernardino | Medical center | \$20,549,817 |
| San Bernardino | Juvenile facility | \$55,600,106 |

Counties' Public Works Contracts

The Local Agency Public Construction Act spells out the procedures that local officials must follow when awarding public works contracts (Public Contract Code §20100, et seq.). The Act has historically required public agencies to use the *design-bid-build* method. However, state law allows specified state departments and local agencies to use the alternative *design-build* method.

The *design-bid-build* method is the most widely-used and well-established project delivery method. This approach splits construction projects into two distinct phases: design and construction. During the design phase, the local agency prepares detailed project plans and specifications using its own employees or by hiring outside architects and engineers. The design phase generally accounts for 5 to 10% of the project's total cost. Once project designs are complete, local officials invite bids from the construction community and award the contract to the lowest responsible bidder. The construction phase makes up the remaining 90 to 95% of the project's total cost.

Design-bid-build was a reaction to the favoritism, corruption, and waste associated with public works projects in the 19th century. Ever since contracting reforms formally separated the design and construction phases at the turn of the century, design-bid-build became the traditional procurement method for public agencies. However, some public officials are concerned about the inefficiency of the design-

bid-build method in terms of project cost, schedule, and productivity. They wanted to experiment with alternative project delivery methods.

The *design-build* project delivery method is a popular alternative to design-bid-build. Under design-build, the owner contracts with a single entity to both design and construct a project. Before inviting bids, the owner prepares documents that describe the basic concept of the project, as opposed to a complete set of drawings and specifications of the final product. In the bidding phase, the owner evaluates bids on a best-value basis, incorporating technical factors, such as qualifications and design quality, in addition to price. The winning “design-build entity,” which can be a single firm, a consortium, or a joint venture, is responsible for completing the design and all construction at the contract’s fixed price.

County officials must follow a four-step *design-build* method:

- Prepare documents describing the project and its specifications.
- Prepare a detailed request for proposals, inviting competitive bids.
- Establish a detailed procedure to pre-qualify design-build entities.
- Establish the procedures to select the design-build entity.

When pre-qualifying design-build entities, officials must collect at least 11 types of information. The design-build entity must list its proposed mechanical subcontractors and licenses. The entity must also report past worker safety violations, contracting problems, contract defaults, license violations, payroll violations, and bankruptcies. The entity must verify this information under oath.

When awarding contracts, county officials must select the design-build entity by using either a competitive bidding process in which the award goes to the lowest responsible bidder, or a “best value competition” in which the officials set the criteria. If officials choose to evaluate bids based on best-value, they must include the following five factors among their criteria and assign a minimum 10% weight to each:

- Price.
- Technical design and construction expertise.
- Life cycle costs over 15 years or more.
- Skilled labor force availability.
- Safety record.

The design-build statute defines “skilled labor force availability” to mean the bidder has an agreement with a registered apprenticeship program, approved by the

California Apprenticeship Council, which has graduated apprentices in each of the preceding five years.

The county must rank the top three responsive bidders and award the contract to the bidder whose proposal was ranked “most advantageous.” When officials announce the award, they must also identify the second and third ranked bidders.

What the LAO Said Five Years Ago

In 2005, the LAO published a review of state and local design-build practices, *Design-Build: An Alternative Construction System*. The Legislative Analyst compared the advantages and disadvantages of the design-build and design-bid-build methods. The report found that the design-build method can be a useful option for some public construction projects. The report also recommended:

- The Legislature should adopt an inclusive, uniform design-build statute that applies to all public entities.
- Design-build should be optional and not replace design-bid-build.
- Contracts for most project costs should be based on competitive bidding.
- State law should ensure access for the greatest number of contractors.
- There should be no cost limitations.
- Design-build contracting should be limited to buildings and related infrastructure.

What the LAO Says Now

In the 2010 review, *Counties and Design-Build*, the LAO offered four observations and recommendations. According to the LAO, the Legislature should:

- Adopt “a single statute ... that applies to all public agencies providing the same authority and limitations.”
- Limit its reporting requirements to new types of infrastructure projects, “such as ... a limited number of highway projects.”
- Eliminate maximum or minimum cost thresholds for design-build projects.
- Make project cost “a larger factor in awarding the [design-build] contract.”

Elaborating on that fourth recommendation, the LAO encouraged the Legislature to explicitly authorize the so-called “two-envelope system” of awarding contracts in which prequalified contractors:

develop a technical proposal, which is submitted in one envelope, with their price in a second envelope ... For those finalists whose technical proposals are satisfactory, the agency opens the second envelopes and the contract is awarded to the proposal having the lowest cost.

Legislators' Choices

With the January 1, 2011 sunset clause in mind, legislators have already introduced bills. **Senate Bill 879 (Cox)** makes the counties' design-build authority permanent and repeals future reporting requirements. To prepare for acting on the Cox bill and perhaps other measures in the coming months, legislators have several policy choices to consider.

Timing. State law has allowed county officials to experiment with the design-build contracting method, repeatedly extending the statute's sunset clause from 2000 to 2006 to 2011.

- ☞ *Should the Legislature allow the current law to sunset on January 1, 2011?*
- ☞ *Should the Legislature extend the sunset clause to January 1, 2016?*
- ☞ *Should the Legislature make the current law permanent?*

Project Limits. After considering the LAO's 2005 and 2010 recommendations:

- ☞ *Should the Legislature retain or repeal the \$2.5 million minimum price threshold for county design-build projects?*
- ☞ *Should the Legislature retain or repeal the language that limits county design-build contracts to buildings and related improvements and wastewater treatment facilities?*

Contract Procedures. The counties' design-build statute is slightly different from the laws that allow cities and redevelopment agencies to use design-build contracts.

- ☞ *Should the Legislature repeal the separate statutes in favor of a single law that applies to counties, cities, special districts, and redevelopment agencies?*
- ☞ *Should the Legislature explicitly allow the "two-envelope" system?*
- ☞ *Should the Legislature repeal the current requirements for the LAO to report on cities and redevelopment agencies' design-build contracts?*

Qualifications. In addition to the LAO's recommendations, the Committee also received specific advice from Jeremy G. March, an attorney and the author of *California Public Contract Law*, regarding the information that county officials should collect as part of their request for proposals. To increase public confidence in counties' design-build contracts, March believes that counties should specifically ask a design-build entity whether it has ever been convicted of --- or admitted to --- violating the federal False Claims Act or the California False Claims Act.

☞ *Should the Legislature require counties to ask design-build entities if they have violated the federal False Claims Act or the California False Claims Act?*

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Appendix: Public Contact Code §20133

20133. (a) A county, with approval of the board of supervisors, may utilize an alternative procedure for bidding on construction projects in the county in excess of two million five hundred thousand dollars (\$2,500,000) and may award the project using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable counties to utilize design-build for buildings and county sanitation wastewater treatment facilities. It is not the intent of the Legislature to authorize this procedure for other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructures.

(2) The Legislature also finds and declares that utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process.

(3) (A) For contracts awarded prior to either the effective date of regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code or the fees established by the department pursuant to subparagraph (B), if the board of supervisors elects to proceed under this section, the board of supervisors shall establish and enforce for design-build projects a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code. This requirement shall not apply to any project where the county or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

(B) For contracts awarded on or after both the effective date of regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code and the fees established by the department pursuant to this subparagraph, the board of supervisors shall pay a fee to the department, in an amount that the department shall establish, and as it may from time to time amend, sufficient to support the department's costs in ensuring compliance with and enforcing prevailing wage requirements on the project, and labor compliance enforcement as set forth in subdivision (b) of Section 1771.55. All fees collected pursuant to this paragraph shall be deposited in the State Public Works Enforcement Fund created by Section 1771.3 of the Labor Code, and shall be used only for enforcement of prevailing wages requirements on those projects.

(C) The Department of Industrial Relations may waive the fee set forth in subparagraph (B) if the board of supervisors has previously been granted approval by the director to initiate and operate a labor compliance program on its projects and requests to continue to operate that labor compliance program on its projects in lieu of labor compliance by the department pursuant to subdivision (b) of Section 1771.55. The fee shall not be waived for the board of supervisors if it contracts with a third party to initiate and enforce labor compliance programs on its projects.

(c) As used in this section:

(1) "Best value" means a value determined by objective criteria related to price, features, functions, and life-cycle costs.

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

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

(4) "Project" means the construction of a building and improvements directly related to the construction of a building, and county sanitation wastewater treatment facilities, but does not include the construction of other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructure.

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

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

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

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

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

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

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

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

(i) Significantly more important than cost or price.

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

(iii) Significantly less important than cost or price.

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

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

(i) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members known at the time of bid submission who will participate in the design-build contract, including, but not limited to, mechanical subcontractors.

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

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

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

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

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

(vii) Any instance in which the entity, or its owners, officers, or managing employees, defaulted on a construction contract.

(viii) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec. 3101 et seq.) withholding requirements settled against any member of the design-build entity.

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

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

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

(B) The information required pursuant to this subdivision shall be verified under oath by the entity and its members in the manner in which civil pleadings in civil actions are verified. Information that is not a public record pursuant to the California Public Records Act (Chapter 3.5

(commencing with Section 6250) of Division 7 of Title 1 of the Government Code) shall not be open to public inspection. (4) The county shall establish a procedure for final selection of the design-build entity. Selection shall be based on either of the following criteria:

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

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

(i) Competitive proposals shall be evaluated by using only the criteria and selection procedures specifically identified in the request for proposal. However, the following minimum factors shall each represent at least 10 percent of the total weight of consideration given to all criteria factors: price, technical design, and construction expertise, life cycle costs over 15 years or more, skilled labor force availability, and acceptable safety record.

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

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

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

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

(vi) For purposes of this paragraph, a bidder's "safety record" shall be deemed "acceptable" if their experience modification rate for the most recent three-year period is an average of 1.00 or less, and their average total recordable injury/illness rate and average lost work rate for the most recent three-year period does 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.

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

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

(f) All subcontractors that were not listed by the design-build entity in accordance with clause (i) of subparagraph (A) of paragraph (3) of subdivision (d) shall be awarded by the design-build entity in accordance with the design-build process set forth by the county in the design-build package. All subcontractors bidding on contracts pursuant to this section shall be

afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1. The design-build entity shall do both of the following:

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

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

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

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

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

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

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

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

(1) Each county that elects to proceed under this section and uses the design-build method on a public works project shall submit to the Legislative Analyst's Office before December 1, 2009, a report containing a description of each public works project procured through the design-build process and completed after November 1, 2004, and before November 1, 2009. The report shall include, but shall not be limited to, all of the following information:

(1) The type of project.

(2) The gross square footage of the project.

(3) The design-build entity that was awarded the project.

(4) The estimated and actual length of time to complete the project.

(5) The estimated and actual project costs.

(6) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protests.

(7) An assessment of the prequalification process and criteria.

(8) An assessment of the effect of retaining 5-percent retention on the project.

(9) A description of the Labor Force Compliance Program and an assessment of the project impact, where required.

(10) A description of the method used to award the contract. If best value was the method, the report shall describe the factors used to evaluate the bid, including the weighting of each factor and an assessment of the effectiveness of the methodology.

(11) An assessment of the project impact of "skilled labor force availability."

(12) An assessment of the design-build dollar limits on county projects. This assessment shall include projects where the county wanted to use design-build and was precluded by the dollar limitation. This assessment shall also include projects where the best value method was not used due to dollar limitations.

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

(m) Any county that elects to not use the authority granted by this section may submit a report to the Legislative Analyst's Office explaining why the county elected to not use the design-build method.

(n) On or before January 1, 2010, the Legislative Analyst shall report to the Legislature on the use of the design-build method by counties pursuant to this section, including the information listed in subdivision (l). The report may include recommendations for modifying or extending this section.

(o) Except as provided in this section, nothing in this act shall be construed to affect the application of any other law.

(p) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.