



Construction & Infrastructure Law Blog

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Two New Laws Create More Design-Build Opportunities for Local Governments and State Agencies

By *[Meredith A. Jones-McKeown](#)*

Most Local Governments Can Now Use Design-Build Methodology on Projects Over \$1 Million

All cities can now use design-build project delivery systems for buildings with a value above \$1 million. For solid waste management and wastewater treatment facilities, a pilot program also allows cities, counties, and special districts to use the design-build method on 20 such projects if valued above \$2.5 million. Assembly Bill 642, codified at Public Contract Code §§ 20175.2 and 20193, took effect January 1, 2009. Existing law (Public Contract Code § 20133) already authorizes counties to use the design-build methodology for building and wastewater projects over \$2.5 million.

Although the design-build authorization will give local governments more flexibility in structuring new projects, the design-build process is still regulated, and many prominent features of California's Public Contract Code remain applicable (albeit in modified form). For example, the new law still requires that the subcontracting process be fair and competitive. Subcontractors must be listed in the design-build proposals, and any non-listed subcontractors must be selected through a competitive selection process. Additionally, payment and performance bonds are also required on the projects. For large projects, as a practical matter, the use of joint ventures may be necessary in order to access adequate bonding capacity to meet this requirement. Finally, the government entities seeking to use design-build process must pre-qualify bidders, and then use a formal evaluation process to select a winning bidder. The government entities have the choice of awarding the contracts either on a lump-sum, lowest bid basis (which seems inconsistent with the concept of design-build) or by evaluating the bidders using "best value" criteria, with minimum weights for the following factors: price (10%), technical and construction expertise (10%), 15-year building life cycle costs (10%), skilled labor availability (10%), and acceptable safety record (10%).

State Agencies and Local Governments Have Design-Build Authority for Highway, Bridge, and Tunnel and Other Building Projects

On February 20, 2009, Senate Bill 4 (enacted in Public Contract Code § 6800 et. seq. and 20688.6; and Government Code § 14661.1, § 70391.7) became law and changed the traffic patterns for highway construction. Under the new law, CalTrans can use the design-build methodology to implement 10 new highway, bridge, and tunnel projects; and local transportation agencies can use design – build on 5 such projects (with CalTrans authorization). An additional 5 design-build authorizations are earmarked for building projects by the Department of Corrections, Judicial Council, and Department of General Services. Redevelopment Agencies can also enter into up to 10 design-build infrastructure contracts (with State Public Works Board authorization), although each individual redevelopment agency is eligible for no more than 2 design-build projects.

The new design-build projects will be selected from bids presented by prequalified firms under one of three models, depending on size. For projects between \$250,000 and \$10 million in value, selection must be made based on lowest responsible bidder (raising the question of whether such a selection process is truly "design-build" in nature). For projects larger than \$10 million in value, selection can be made based on either (1) price and performance ("best value"); or (2) other criteria set forth by the agency in the design-build solicitation package. Where agencies use "best value" criteria to evaluate proposals, they must specify what criteria will be used to evaluate the proposals, with mandatory evaluation of price, life-cycle costs, construction experience, and building features. The "best value" projects may also include negotiations with responsive bidders pursuant to published rules, an innovation viewed by industry experts as an important tool. The awards are issued by a written decision that ranks the top three proposals. Errors & Omissions insurance is required for the design work portion of the projects.

As with AB642, SB4 maintains many requirements familiar to public works contractors. For example, the new law requires awarding agencies to implement new labor compliance programs to ensure prevailing wage minimums are met, and contains interim measures to ensure compliance prior to the adoption of such guidelines. Additionally, the bill contains subcontractor listing protections. Certain subcontractor trades may be identified and listed in the proposal, and where subcontractors are not listed, awards must be made pursuant to a competitive bidding process (either on a low-bid or best-value basis). Finally, performance and payment bonds are required. Unlike the equivalent provision in AB642, under SB4, the awarding agency has the discretion to determine the required amount of the bonds.

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