



# California Passes New Design-Build Law for Highway Projects

04.01.2009 | By **Edmund V. Caplicki III**

During the past decade, the California legislature has considered numerous bills to enable use of best value design-build for state highway projects but none of those bills became law.<sup>[i]</sup> Six weeks ago this trend changed, with passage of Senate Bill 4 (SBX2 4). This bill, which was adopted near the end of the second extraordinary 2009-2010 session and signed by Governor Schwarzenegger on February 20, 2009, allows design-build to be used for up to 15 transportation projects. We are hopeful that the new law represents the start of a new era for highway construction in California.

The statute gives the California Transportation Commission (CTC) authority to decide which projects to include in the program. Local transportation entities (defined to include transportation authorities created by county boards of supervisors, transportation planning agencies, county transportation commissions, and certain other agencies<sup>[ii]</sup>) have authority for up to five projects, which may include local street or road, bridge, tunnel, or public transit projects.<sup>[iii]</sup> The California Department of Transportation (Caltrans) has authority for up to ten projects, which may include state highway, bridge or tunnel projects.<sup>[iv]</sup>

SBX2 4 also permits design-build for certain other types of public projects and allows the use of public-private partnerships for transportation projects.<sup>[v]</sup>

## Procurement Methodology

The procuring agency for a design-build project authorized under SBX2 4 may use either a best value or a low bid selection process, as approved by the CTC. The CTC must ensure that use of low bid and best value is balanced among the approved projects, so that the costs and benefits of each method can be assessed.<sup>[vi]</sup>

The requirement to use a low bid selection methodology is unusual. Most industry experts recommend that project owners use either a best value or qualifications-based selection process, in order to obtain the full benefit of the innovation inherent in the design-build delivery methodology. Also, it is not clear why a local agency would want to volunteer to subject itself to the SBX2 4 requirements for a low bid design-build project, since many local agencies already have the ability to use low bid design-build without the need for special legislation.<sup>[vii]</sup>

Procurements under the statute involve two steps: prequalification based on a standard form questionnaire prepared by the procuring agency,<sup>[viii]</sup> followed by a request for proposals issued to the prequalified firms.<sup>[ix]</sup> In determining whether a firm is prequalified, the agency must consider technical design and construction expertise and skilled labor force availability. Statements of qualifications are exempt from disclosure under the Public Records Act<sup>[x]</sup> - this is essentially the same exemption that applies to prequalification questionnaires under the construction prequalification law.<sup>[xi]</sup>

The statute prescribes the steps to be followed in developing procurement packages, with special requirements applicable to the ten Caltrans projects as discussed in more detail below.

### **Selection Methodology**

The process for selecting a design-builder will depend on whether the CTC authorizes the procuring agency to use competitive bidding or a best value process. For procurements involving competitive bidding, bidders would be required to provide sealed bids including lump sum prices, and award would be made to the lowest responsible bidder amongst the pre-qualified bidders.<sup>[xii]</sup>

Procurements using a best value process are subject to detailed requirements similar to those found in previous California design-build statutes.<sup>[xiii]</sup> The request for proposals must specify the criteria to be used to evaluate proposals, which must include price, technical design and construction expertise, and life-cycle costs. Unlike previous California design-build statutes, SBX2 4 does not place minimum weightings on these criteria.<sup>[xiv]</sup> This is a positive change, since the previous bills limited the procuring agency's flexibility to add criteria to the list found in the statute, and limited the agency's ability to give greater weight to one factor or another for the purpose of incentivizing proposers to meet project needs and achieve agency goals.

The best value procurement process under SBX2 4 may include negotiations with responsive bidders—a tool that has proved useful for past design-build projects. A negotiations phase gives the agency the opportunity: to review technical proposals and advise the proposers of any weaknesses that should be corrected in revised proposals; to review pricing and consider whether scope adjustments are appropriate to keep the project within budget; and to bargain with one or more of the proposers to obtain the best deal for the public.

Upon conclusion of a best value procurement process, the contract would be awarded (if at all) to the responsible bidder offering the best value proposal. The award must be publicly announced, along with a list identifying the rankings of the top three proposers and a written decision supporting the award.

### **Predevelopment Services for Caltrans Projects**

A particular item of note in the bill is the role to be played by Caltrans regarding predevelopment services for the ten Caltrans projects.<sup>[xv]</sup> Section 6808(a) states that Caltrans "is the responsible agency for predevelopment services, including performance specifications, preliminary engineering, prebid services,

the preparation of project reports and environmental documents, and construction inspection services." The predevelopment services may be performed by Caltrans employees or consultants.

Under Section 6808(a), Caltrans "is also the responsible agency for the preparation of documents that may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering quality of materials, equipment, and workmanship, preliminary plans, and any other information deemed necessary to describe adequately the needs of the transportation entity." Again, these services may be performed by Caltrans employees or consultants.

The provisions requiring Caltrans to provide these services likely were included in the bill at the request of the Professional Engineers in California Government, which has opposed previous bills proposing to allow design-build to be used for state highway projects. The provisions allowing Caltrans to use consultants for such services were included to ensure compliance with Article XXII of the California Constitution, which explicitly permits Caltrans to use outside consultants for such work.<sup>[xvi]</sup>

### **Labor Compliance**

Legislative concerns regarding labor compliance are evident in the bill, which includes provisions that are intertwined with regulations concerning compliance with prevailing wage and labor requirements to be adopted by the Department of Industrial Relations (DIR).

If a contract is awarded before these regulations have been promulgated, the procuring agency is required either to implement a labor compliance program or to contract with an entity to implement such a program. However, no such program is required if the agency or the design-builder has entered into a collective bargaining agreement relating to the project.<sup>[xvii]</sup> In this regard, it should be noted that a recent Executive Order issued by President Obama makes it possible for state and local agencies to require project labor agreements (PLAs) on federally funded projects.<sup>[xviii]</sup>

If the contract is awarded after the DIR regulations are in place, the procuring agency is required to pay a fee to DIR to support its costs in ensuring compliance with and enforcing prevailing wage requirements on the project, and labor compliance enforcement. The fee may be waived for transportation entities that have a labor compliance program.<sup>[xix]</sup>

### **Other Significant Provisions**

The statute includes a number of other notable provisions:

1. In order to be eligible, projects must be in the Statewide Transportation Improvements Program (STIP) or meet certain other criteria.<sup>[xx]</sup>
2. The CTC is required to develop a conflict of interest policy.<sup>[xxi]</sup> Among other things, this would address circumstances under which consultants involved in project planning and preliminary engineering would be precluded from participating on design-build teams.
3. The RFP may identify required categories of subcontractors to be included on the design-builder's team.<sup>[xxii]</sup> The design-builder must identify those subcontractors in its proposal, and may also identify other subcontractors. If the selected design-builder wishes to enter into any subcontracts with entities not listed in the proposal, it must advertise the availability of the work, set forth reasonable qualification criteria and

standards, and award the subcontract either on a low bid or best value basis.<sup>[xxiii]</sup>

4. The design-builder will be required to provide performance and payment bonds "in the amount required by the transportation entity." This provision gives the transportation entity discretion to require bonds in amounts less than 100 percent of the contract price—superseding provisions in the Civil Code and Public Contract Code that would otherwise require 100 percent bonds to be provided (or in some cases 50 percent bonds).<sup>[xxiv]</sup> Requirements to obtain 100 percent bonds (or even 50 percent bonds) are problematic for large projects, due to market limitations on bond size and constraints on contractor bonding capacity. The solution adopted by SBX2 4 is consistent with the federal Miller Act, which generally requires 100 percent payment bonds for federal projects but specifically allows the contracting officer to reduce the bond amount if he or she determines that a 100 percent bond is impracticable.<sup>[xxv]</sup>

Agencies are required to use standard performance and payment bond forms developed by the CTC.<sup>[xxvi]</sup> The statute does not provide a timeline for development of these forms, but observers hope the CTC will develop them expeditiously.

5. The design-builder is required to provide errors and omissions insurance covering design work for the project.<sup>[xxvii]</sup>

6. The procuring agency is required to provide yearly reports to the CTC during the course of the project.<sup>[xxviii]</sup> A peer review committee will evaluate all the design-build transportation projects.<sup>[xxix]</sup> The CTC will issue annual reports on the projects and is to issue an interim report to the Legislature no later than June 30, 2012 and a final report no later than June 30, 2015.<sup>[xxx]</sup>

7. The law sunsets on January 1, 2014.<sup>[xxxi]</sup>

## **Conclusion**

California was one of the pioneers in the use of design-build for highway projects, starting with the San Joaquin Hills Toll Road and I-10 La Cienega Overcrossing in the early 1990's, followed by the Eastern Toll Road, SR-91 Express Lanes and South Bay Expressway. However, the California legislature has been slow to pass legislation providing general authority to use design-build for highway projects. SBX2 4 is a welcome addition to the public contracting toolbox in California.

[i] It should be noted that two of the design-build laws passed during this period permitted design-build to be used for state highway projects—the transit operator design-build law (Pub. Cont. Code §§ 20209.5 et seq., passed in 2000) and the I-405 design-build law (Pub. Cont. Code §§ 20209.20 et seq., passed in 2006). The transit operator law did not specifically permit use of best value design-build for highway projects. Although that law was used for the Garden Grove Freeway (SR-22) HOV Lane Design-Build Project, it was amended in 2004 to preclude its future use for state highway projects (SB 1130, 2003-2004 Session, amending Pub. Cont. Code §§ 20209.13(b).) The statute for the I-405 project requires use of a low bid selection process.

[ii] Pub.Cont.Code § 6801(g).

[iii] Pub. Cont. Code § 6802(a).

[iv] Pub. Cont. Code § 6802(b).

[v] Other Nossaman E-Alerts discuss the public private partnership aspects of the bill as well as design-build authorization provided for other types of projects. To view the E-Alert titled "California Legislation Expands Design Build Authority for Public Facilities," please click [here](#). To view the E-Alert titled "California Passes First Significant Transportation PPP Law in 20 Years," please click [here](#).

[vi] Pub. Cont. Code § 6803(b).

[vii] Local agencies in California are generally subject to a requirement to select design professionals based on qualifications (Gov. Code § 4526), and many agencies are required to award construction contracts to the low bidder. It is possible to meld these two requirements--with qualifications of the designer considered in a prequalification phase of the procurement, and with the contract awarded to the low bidder among the prequalified proposers that have submitted a technically acceptable proposal. State agencies are generally subject to a requirement to award design contracts by negotiating with the most highly qualified design firm, and to award construction contracts to the low bidder - a combination of requirements which makes it impossible for such agencies to use design-build without special legislation.

[viii] Pub. Cont. Code § 6805(c)(1)-(4).

[ix] Pub. Cont. Code § 6805(b)(1)-(4).

[x] Pub. Cont. Code § 6805(c)(4).

[xi] See Pub. Cont. Code § 20101.

[xii] Pub. Cont. Code § 6805(d).

[xiii] See, e.g., Pub. Cont. Code §§ 20175.2 (cities), 20193 (wastewater), and 20209.5 et seq. (transit operators).

[xiv] Notably, one section of SBX2 4 refers to the RFP listing the "relative importance or the weight" of the factors (Pub. Cont. Code § 6805(b)(3)) while another section refers to the award being based on the "weight" of the factors (Pub. Cont. Code § 6805(e)(1)). Relative importance provides more flexibility to the contracting entity in assessing proposals.

[xv] Pub. Cont. Code § 6808(a)-(b).

[xvi] Pub. Cont. Code § 6808(b). Article XXII was added to the California Constitution in 2000, when the California voters adopted Proposition 35, known as the "Fair Competition and Taxpayer Savings Act." In 2008, a law allowing the use of design-build for a high occupancy vehicle project in Los Angeles and requiring predevelopment services to be performed by Caltrans personnel, was challenged under Prop 35. The court held the requirement was invalid. *Consulting Engineers and Land Surveyors of California v. California Department of Transportation* (2008) 167 Cal.App.4th 1457, 84 Cal.Rptr.3d 900.

[xvii] Pub. Cont. Code § 6804(a).

[xviii] An upcoming Nossaman E-Alert will discuss various issues associated with such requirements.

[xix] Pub. Cont. Code § 6804(b)-(c).

[xx] Pub. Cont. Code § 6803(c).

[xxi] Pub. Cont. Code § 6803(e).

[xxii] Pub. Cont. Code § 6807(a).

[xxiii] Pub. Cont. Code § 6807(a)-(c).

[xxiv] Civ. Code § 3248; Pub. Cont. Code § 10222.

[xxv] 40 U.S.C. § 3131(b)(2).

[xxvi] Pub. Cont. Code § 6806(b).

[xxvii] Pub. Cont. Code § 6806(a)-(c).

[xxviii] Pub. Cont. Code § 6811(a).

[xxix] Pub. Cont. Code § 6803(d).

[xxx] Pub. Cont. Code § 6811(b); Sen. Bill No. 4X2 (2009-2010 2nd Ex. Sess.) §6(d).

[xxxi] Pub. Cont. Code § 6813.