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AB-2551 Contract procurement: surface storage projects. (2015-2016)

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Assembly Bill No. 2551

CHAPTER 760

An act to add Article 60.6 (commencing with Section 20928) to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to water.

[Approved by Governor September 28, 2016. Filed with Secretary of State September 28, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2551, Gallagher. Contract procurement: surface storage projects.

The Local Agency Public Construction Act establishes procedures and requirements for contracting by local agencies for the construction of public works, including the requirement to award the contract to the lowest responsible bidder. Existing law governing specified water districts requires those districts to use competitive bidding and to award the contract to the lowest responsible bidder.

This bill would allow a local agency to use the construction manager at-risk, design-build, or design-build-operate method of delivery on a surface storage project, as described. The bill would require these contracts to be awarded on a best value basis or to the lowest responsible bidder, and establish a procurement process for these contracts. The bill would require the bidder to certify specified information under penalty of perjury. By expanding the crime of perjury, the bill would impose a state-mandated local program. The bill would also prohibit a contracting entity from being prequalified or short-listed unless it provides an enforceable commitment to the local agency that the entity and its subcontractors 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.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Article 60.6 (commencing with Section 20928) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 60.6. Surface Storage Projects

20928. The Legislature finds and declares that alternative project delivery, using the best value procurement methodology, has been authorized for various agencies that have reported benefits from those projects, including reduced project costs, expedited project start and completion, simplified project controls and accountability, and design features that are not achievable through the traditional design-bid-build method.

20928.1. (a) A surface storage project identified in the CALFED Bay-Delta Program Record of Decision, dated August 28, 2000, that receives funding pursuant to Division 26.7 (commencing with Section 79700) of the Water Code may use, in addition to any other methods of project delivery otherwise allowable by irrigation districts, county water districts, or other similar water districts by law, the following methods of project delivery:

- (1) Construction manager at-risk.
- (2) Design-Build, including conventional, progressive, and target price.
- (3) Design-build-operate.

(b) The contract shall be awarded on a best value basis or to the lowest responsible bidder.

20928.2. The procurement process for the project shall progress as follows:

(a) The local agency shall prepare a set of documents setting forth the scope and estimated price of the project. The documents may include, but need not be 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 local agency's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California.

(b) The local agency shall prepare and issue a request for qualifications in order to prequalify or short-list the entities, including subcontractors and suppliers, whose bids shall be evaluated for final selection. The request for qualifications shall include, but need not be limited to, the following elements:

(1) Identification of the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the local agency to evaluate bids, the procedure for final selection of the bidder, and any other information deemed necessary by the local agency to inform interested parties of the contracting opportunity.

(2) Significant factors that the local agency reasonably expects to consider in evaluating qualifications, including technical design-related expertise, construction expertise, acceptable safety records, and all other nonprice-related factors.

(3) A standard template request for statements of qualifications prepared by the local agency. In preparing the standard template, the local agency may consult with the construction industry, the building trades and surety industry, and other local agencies interested in using the authorization provided by this article. The template shall require all of the following information:

(A) If the bidder is a privately held corporation, limited liability company, partnership, or joint venture, comprised of privately-held entities, a listing of all of the shareholders, partners, or members known at the time of statement of qualification submission who will perform work on the project.

(B) Evidence that the members of the contracting team 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 project, and a financial statement that ensures that the bidder has the capacity to complete the project.

(C) The licenses, registration, and credentials required for the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

(D) Evidence that establishes that the bidder has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(E) Information concerning workers' compensation experience history and a worker safety program.

(F) An acceptable safety record. "Safety record" means the prior history concerning the safe performance of construction contracts. The criteria used to evaluate a bidder's safety record shall include, at a minimum, its experience modification rate for the most recent three-year period, and its average total recordable injury or illness rate and average lost work rate for the most recent three-year period.

(4) The information required under this subdivision shall be certified under penalty of perjury by the bidder and its general partners or joint venture members.

(c) A contracting entity shall not be prequalified or short-listed unless the entity provides an enforceable commitment to the local agency that the entity and its subcontractors 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.

(1) For purposes of this subdivision:

(A) "Apprenticeable occupation" means an occupation for which the chief had approved an apprenticeship program pursuant to Section 3075 of the Labor Code prior to January 1, 2014.

(B) "Skilled and trained workforce" means a workforce that meets all of the following conditions:

(i) All the workers are either skilled journeypersons or apprentices registered in an apprenticeship program approved by the Chief of the Division of Apprenticeship Standards.

(ii) (I) For work performed on or after January 1, 2017, at least 30 percent of the skilled journeypersons employed to perform work on the contract or project by the bidder and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation that was either approved by the Chief of the Division of Apprenticeship Standards pursuant to Section 3075 of the Labor Code or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(II) For work performed on or after January 1, 2018, at least 40 percent of the skilled journeypersons employed to perform work on the contract or project by the bidder and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation that was either approved by the Chief of the Division of Apprenticeship Standards pursuant to Section 3075 of the Labor Code or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(III) For work performed on or after January 1, 2019, at least 50 percent of the skilled journeypersons employed to perform work on the contract or project by the bidder and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation that was either approved by the Chief of the Division of Apprenticeship Standards pursuant to Section 3075 of the Labor Code or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(IV) For work performed on or after January 1, 2020, at least 60 percent of the skilled journeypersons employed to perform work on the contract or project by the bidder and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation that was either approved by the Chief of the Division of Apprenticeship Standards pursuant to Section 3075 of the Labor Code or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(iii) For an apprenticeable occupation in which no apprenticeship program had been approved by the chief prior to January 1, 1995, up to one-half of the graduation percentage requirements of clause (ii) may be satisfied by skilled journeypersons who commenced working in the apprenticeable occupation prior to the chief's approval of an apprenticeship program for that occupation in the county in which the project is located.

(C) "Skilled journeyperson" means a worker who either:

(i) Graduated from an apprenticeship program for the applicable occupation that was approved by the chief or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(ii) Has at least as many hours of on-the-job experience in the applicable occupation as would be required to graduate from an apprenticeship program for the applicable occupation that is approved by the chief.

(2) The apprenticeship graduation percentage requirements of subparagraph (B) of paragraph (1) are satisfied if, in a particular calendar month, either of the following is true:

(A) The required percentage of the skilled journeypersons employed by the contractor or subcontractor to perform work on the contract or project meet the graduation percentage requirement.

(B) For the hours of work performed by skilled journeypersons employed by the contractor or subcontractor on the contract or project, the percentage of hours performed by skilled journeypersons who met the graduation requirement meets or exceeds the required graduation percentage.

(3) A contractor or subcontractor need not meet the apprenticeship graduation requirements of subparagraph (B) of paragraph (1) if, during the calendar month, the contractor or subcontractor employs skilled journeypersons to perform fewer than 10 hours of work on the contract or project.

(4) A subcontractor need not meet the apprenticeship graduation requirements of subparagraph (B) of paragraph (1) if both of the following requirements are met:

(A) The subcontractor was not a listed subcontractor under Section 4104 or a substitute for a listed subcontractor.

(B) The subcontract does not exceed one-half of 1 percent of the price of the prime contract.

(5) (A) A contractor, bidder, or other entity's commitment that a skilled and trained workforce will be used to perform the project or contract shall be established by the contractor, bidder, or other entity's agreement with the local agency that the contractor, bidder, or other entity and its subcontractors at every tier will comply with this subdivision and that the contractor, bidder, or other entity will provide the local agency with a report on a monthly basis while the project or contract is being performed, as to whether the contractor, bidder, or other entity and its subcontractors are complying with the requirements of this subdivision.

(B) If the contractor, bidder, or other entity fails to provide the monthly report required by this section, or provides a report that is incomplete, the local agency shall withhold further payments until a complete report is provided.

(C) If a monthly report does not demonstrate compliance with this chapter, the local agency shall withhold further payments until the contractor, bidder, or other entity provides a plan to achieve substantial compliance with this article, with respect to the relevant apprenticeable occupation, prior to completion of the contract or project.

(D) A monthly report provided to the public agency or other awarding body shall be a public record under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and shall be open to public inspection.

(6) This subdivision shall not apply if the contractor, bidder, or other entity has entered into a project labor agreement that will bind itself and all its subcontractors who perform construction work on the project, and the contractor, bidder, or other entity agrees to be bound by the project agreement.

(d) The local agency shall make the list of prequalified entities available to the public.

(e) Based on the documents prepared as described in subdivision (a), the local agency shall prepare a request for bids that invites prequalified or short-listed entities to submit competitive sealed bids in the manner prescribed by the local agency. The request for bids shall include, but need not be limited to, all of the following elements:

(1) Identification of the basic scope and needs of the project or contract, the estimated cost to perform the work being requested, the methodology that will be used by the local agency to evaluate bids, whether the contract will be awarded on the basis of best value or to the lowest responsible bidder, and any other information deemed necessary by the local agency to inform interested parties of the contracting opportunity.

(2) Significant factors that the local agency reasonably expects to consider in evaluating bids, including, but not limited to, cost or price and all nonprice-related factors.

(3) The relative importance or the weight assigned to each of the factors identified in the request for bids.

(4) If a best value selection method is used, the local agency may reserve the right to request bid revisions and hold discussions and negotiations with responsive bidders, in which case the local agency shall so specify in the request for bids and shall publish separately or incorporate into the request for bids applicable procedures to be observed by the local agency to ensure that any discussions or negotiations are conducted in good faith.

(f) For those projects utilizing low bid as the final selection method, the competitive bidding process shall, if appropriate for the delivery method, result in lump-sum bids by the prequalified or short-listed entities, and awards shall be made to the bidder that is the lowest responsible bidder.

(g) For those projects utilizing best value as a selection method, the competition shall progress as follows:

(1) Competitive bids shall be evaluated by using only the criteria and selection procedures specifically identified in the request for bids. The following minimum factors, however, shall be included, if applicable to the delivery method and weighted as deemed appropriate by the local agency:

(A) Price, unless a stipulated sum is specified and including financial and bonding capacity requirements.

- (B) Technical design, procurement, and construction expertise.
- (C) Proposed construction approach, sequencing, and methods.
- (D) Compliance with the requirements of the owner-provided performance specification.
- (E) Ability to meet the milestone schedule dates and, if applicable, any liquidated damages.
- (F) Ability to meet the quality requirements.
- (G) Proposed risk allocation and sharing.
- (H) Safety record.
- (I) Warranty.
- (J) Life-cycle costs over 15 or more years as specified by the local agency.

(2) Pursuant to subdivision (e), the local agency may hold discussions or negotiations with responsive bidders using the process articulated in the local agency's request for bids.

(3) When the evaluation is complete, the responsive bidders shall be ranked based on a determination of value provided by the local agency if no more than three bidders are required to be ranked.

(4) The award of the contract shall be made to the responsible bidder whose bid is determined by the local agency to have offered the best value to the public.

(5) Notwithstanding any provision of the Water Code, upon issuance of a contract award the local agency shall publicly announce its award, identifying the bidder to which the award is made, along with a statement regarding the basis of the award.

(6) The statement regarding the local agency's contract award, described in paragraph (5), and the contract file shall provide sufficient information to satisfy an external audit.

20928.3. (a) The local agency, in each request for proposals, may identify specific types of subcontractors that must be included in the entity statement of qualifications and proposal.

(b) Following award of the contract, the entity shall proceed as follows in awarding construction subcontracts with a value exceeding one-half of 1 percent of the contract price allocable to construction work:

- (1) Provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the local agency, including a fixed date and time on which qualification statements, bids, or proposals will be due.
- (2) Establish reasonable qualification criteria and standards.
- (3) Award the subcontract either on a best value basis or to the lowest responsible bidder. The process may include prequalification or short-listing. The foregoing process does not apply to construction subcontractors listed in the original proposal.

20928.4. Any project constructed pursuant to this article shall be subject to Part 1 (commencing with Section 6000) of Division 3 of the Water Code.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.