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SB-706 Public contracts: progressive design-build: local agencies. (2023-2024)

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Senate Bill No. 706

CHAPTER 500

An act to add and repeal Chapter 4.7 (commencing with Section 22185) of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

[Approved by Governor October 08, 2023. Filed with Secretary of State October 08, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

SB 706, Caballero. Public contracts: progressive design-build: local agencies.

Existing law authorizes the Director of General Services to use the progressive design-build procurement process for the construction of up to 3 capital outlay projects, as jointly determined by the Department of General Services and the Department of Finance, and prescribes that process. Existing law defines "progressive design-build" as a project delivery process in which both the design and construction of a project are procured from a single entity that is selected through a qualifications-based selection at the earliest feasible stage of the project.

Existing law, until January 1, 2029, authorizes local agencies, defined as any city, county, city and county, or special district authorized by law to provide for the production, storage, supply, treatment, or distribution of any water from any source, to use the progressive design-build process for up to 15 public works projects in excess of \$5,000,000 for each project, similar to the progressive design-build process authorized for use by the Director of General Services.

Existing law requires a local agency that uses the progressive design-build process to submit, no later than January 1, 2028, to the appropriate policy and fiscal committees of the Legislature a report on the use of the progressive design-build process containing specified information, including a description of the projects awarded using the progressive design-build process. Existing law requires the design-build entity and its general partners or joint venture members to verify specified information under penalty of perjury.

This bill would, until January 1, 2030, provide additional authority for cities, counties, cities and counties, or special districts to use the progressive design-build process for up to 10 public works in excess of \$5,000,000, not limited to water-related projects, excluding projects on state-owned or state-operated facilities. The bill would require information to be provided under penalty of perjury and would require similar reports due no later than December 31, 2028.

By expanding the crime of perjury, the bill would impose a state-mandated local program.

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. Chapter 4.7 (commencing with Section 22185) is added to Part 3 of Division 2 of the Public Contract Code, to read:

CHAPTER 4.7. Local Agency Design-Build Contracting

22185. For purposes of this chapter, the following definitions apply:

(a) (1) "Best value" means a value determined by evaluation of objective criteria that may include, but are not limited to, price, features, function, life-cycle costs, experience, and past performance.

(2) A best value determination may involve the selection of the lowest cost proposal meeting the interests of the local agency and the objectives of the project.

(b) "Construction subcontract" means each subcontract awarded by the design-build entity to a subcontractor that will perform work or labor or render service to the design-build entity in or about the construction of the work or improvement, or a subcontractor licensed by the State of California that, under subcontract to the design-build entity, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications produced by the design-build team.

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

(d) "Design-build project" means any project using the progressive design-build construction procurement process described in this chapter, but does not include projects on state-owned or state-operated facilities.

(e) "Design-build team" means the design-build entity itself and the individuals and other entities identified by the design-build entity as members of its team. Members shall include the general contractor and, if utilized in the design of the project, all electrical, mechanical, and plumbing contractors.

(f) "Guaranteed maximum price" means the maximum payment amount agreed upon by the local agency and the design-build entity for the design-build entity to finish all remaining design, preconstruction, and construction activities sufficient to complete and close out the project.

(g) "Local agency" means a city, county, city and county, or special district.

(h) "Progressive design-build" means a project delivery process in which both the design and construction of a project are procured from a single entity that is selected through a qualifications-based selection at the earliest feasible stage of the project.

(i) "Qualifications-based selection" means the process by which the local agency solicits for services from the design-build entities and that price is not the sole factor as the basis of award.

22185.1. A local agency may procure progressive design-build contracts and use the progressive design-build contracting process described in this chapter for up to 10 public works projects in excess of five million dollars (\$5,000,000) for each project.

22185.2. A local agency entering into design-build contracts authorized under this chapter shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team.

22185.3. The procurement process for progressive design-build projects shall progress as follows:

(a) The local agency shall prepare and issue a request for qualifications in order to select a design-build entity to execute the project. The request for qualifications shall include, but is not limited to, the following elements:

(1) Documentation of the size, type, and desired design character of the project and any other information deemed necessary to describe adequately the local agency's needs, including the expected cost range, the methodology that will be used by the local agency to evaluate the design-build entity's qualifications, the procedure for final selection of the design-build entity, 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 and construction expertise, and all other non-price-related factors. The local agency may require that a preliminary cost

estimate be included in the design-build entities' responses and consider those costs in evaluating the statements of qualifications.

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

(4) 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 chapter. The template shall require the following information:

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

(B) Evidence that the members of the design-build team have completed, or have 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, and a financial statement that ensures that the design-build entity has the capacity to complete the project.

(C) The licenses, registration, and credentials required to design and construct 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 design-build entity 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) If the proposed design-build entity is a corporation, limited liability company, partnership, joint venture, or other legal entity, a copy of the organizational documents or agreement committing to form the organization.

(G) An acceptable safety record. A proposer's safety record shall be deemed acceptable if its experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury or 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 proposer is a party to an alternative dispute resolution system as provided for in Section 3201.5 of the Labor Code.

(5) The information required under this subdivision shall be certified under penalty of perjury by the design-build entity and its general partners or joint venture members.

(b) (1) A design-build entity shall not be evaluated for selection unless the entity provides an enforceable commitment to the local agency that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeship occupation in the building and construction trades, in accordance with Chapter 2.9 (commencing with Section 2600) of Part 1.

(2) This subdivision shall not apply if one or more of the following requirements are met:

(A) The local agency has entered into a project labor agreement that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce, and the entity agrees to be bound by that project labor agreement.

(B) The project or contract is being performed under the extension or renewal of a project labor agreement that was entered into by the local agency before January 1, 2023.

(C) The entity has entered into a project labor agreement that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.

(3) For purposes of this subdivision, "project labor agreement" has the same meaning as provided in paragraph (1) of subdivision (b) of Section 2500.

(c) At the close of the solicitation period, the local agency shall review the submissions. The local agency may evaluate submissions based solely upon the information provided in each design-build entity's statement of qualifications. The local agency may also interview some or all of the design-build entities to further evaluate their qualifications for the project.

(d) Notwithstanding any other provision of this code, upon issuance of a contract award, the local agency shall publicly announce its award, identifying the design-build entity to which the award is made, along with a statement regarding the basis of the award.

The statement regarding the local agency's contract award and the contract file shall provide sufficient information to satisfy an external audit.

22185.4. (a) The design-build entity shall provide payment and performance bonds for the project in the form and in the amount required by the local agency, and issued by a California admitted surety. The amount of the payment bond shall not be less than the amount of the performance bond.

(b) The design-build contract shall require errors and omissions insurance coverage for the design elements of the project.

(c) The local agency shall develop a standard form of payment and performance bond for its design-build projects.

22185.5. (a) After selecting a design-build entity based upon qualifications, the local agency may enter into a contract and direct the design-build entity to begin design and preconstruction activities sufficient to establish a guaranteed maximum price for the project.

(b) (1) Upon agreement of the guaranteed maximum price for the project, the local agency, at its sole and absolute discretion, may amend its contract with the design build entity to contract for the remaining design, preconstruction, and construction activities sufficient to complete and close out the project, consistent with the guaranteed maximum price. In the event that there are unforeseen site conditions, the local agency may amend its contract with the design build entity accordingly and consistent with the guaranteed maximum price, to enable the entity to complete the remaining design, preconstruction, and construction activities sufficient to complete and close out the project.

(2) If the cost for completing all remaining design, preconstruction, and construction activities sufficient to complete and close out the project exceed the guaranteed maximum price, the costs exceeding the guaranteed maximum price shall be the responsibility of the design-build entity. If the cost for these activities are less than the guaranteed maximum price, the design-build entity shall not be entitled to the difference between the cost and the guaranteed maximum price unless there is a prior written agreement concerning the sharing of these funds. For purposes of this section, cost shall include the design-build entity's direct costs, general conditions, overhead, and fee.

(c) (1) If the local agency and the design-build entity do not reach agreement on a guaranteed maximum price, or the local agency otherwise elects not to amend the design-build entity's contract to complete the remaining work, the local agency may solicit proposals to complete the project from firms that submitted statements of qualifications pursuant to Section 22185.3. The local agency may also, upon written determination that it is in the best interest of the city, county, city and county, or special district, as applicable, to do so, formally solicit proposals from other design-build entities, and contract award shall be made on a best value basis.

(2) The design professionals responsible for performing design services on behalf of a design-build entity that has been replaced pursuant to paragraph (1) shall have sole liability for their design errors and omissions, provided the local agency elects to use their complete and stamped designs with subsequent design-build entities or licensed contractors.

22185.6. (a) The local agency, in each design-build request for qualifications, may identify specific types of subcontractors that shall be included in the design-build entity's statement of qualifications. All construction subcontractors that are identified in the statement of qualifications shall be afforded the protections of Chapter 4 (commencing with Section 4100) of Part 1.

(b) Following award of the design-build contract, except for those construction subcontractors listed in the statement of qualifications, the design-build entity shall proceed as listed in this subdivision in awarding construction subcontracts with a value exceeding one-half of 1 percent of the contract price allocable to construction work for projects with a contract value of greater than or equal to ten million dollars (\$10,000,000).

(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 qualifications statements, bids, or proposals will be due.

(2) Establish reasonable qualification criteria and standards.

(3) Award the subcontract on a best value basis. The process may include prequalification or short-listing.

(c) Subcontractors awarded construction subcontracts under this subdivision shall be afforded all the protections of Chapter 4 (commencing with Section 4100) of Part 1.

(d) A construction subcontractor licensed pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code that provides design services used on a project authorized by this chapter shall not be subject to any liability arising from their design if the construction subcontract for that design is not performed by that subcontractor.

22185.7. (a) If the local agency elects to award a project pursuant to this chapter, retention proceeds withheld by the local agency 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. Work performed to establish the guaranteed maximum price shall not be subject to retention.

(b) In a contract between the design-build entity and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld shall not exceed the percentage specified in the contract between the local agency and the design-build entity. If the design-build entity provides written notice to any subcontractor that is not a member of the design-build entity, before 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 local agency and the design-build entity from any payment made by the design-build entity to the subcontractor.

22185.8. (a) Notwithstanding Section 10231.5 of the Government Code, no later than December 31, 2028, a local agency that uses the progressive design-build process pursuant to this chapter shall submit, to the appropriate policy and fiscal committees of the Legislature, a report on the use of the progressive design-build process.

(b) The report shall include, but is not limited to, the following information:

(1) A description of the project or projects awarded using the progressive design-build process.

(2) The contract award amounts.

(3) The design-build entities awarded the project or projects.

(4) A description of any written protests concerning any aspect of the solicitation, bid, or award of the contracts, including the resolution of the protests.

(5) A description of the prequalification process.

(6) The number of specialty subcontractors listed by construction trade type, on each project, that provided design services, but did not meet the target price for their scope of work, and therefore did not perform construction services on that project.

(7) Whether or not any portion of a design prepared by the specialty subcontractor that did not perform the construction work for that design was used by the local agency.

(8) The number of specialty subcontractors listed by construction trade type, on each project, that meet the definition of a small business, as specified in paragraph (1) of subdivision (d) of Section 14837 of the Government Code.

(9) The number of specialty subcontractors listed by construction trade type, on each project, that meet the definition of a microbusiness, as specified in paragraph (2) of subdivision (d) of Section 14837 of the Government Code.

(10) If a project awarded under this chapter has been completed, an assessment of the project performance, including, but not limited to, a summary of any delays or cost increases.

(c) The report submitted pursuant to subdivision (a) shall be submitted in compliance with Section 9795 of the Government Code.

22185.9. Nothing in this chapter authorizes a local agency to perform work on a state-owned or state-operated facility.

22185.10. Nothing in this chapter affects, expands, alters, or limits any rights or remedies otherwise available at law.

22185.11. This chapter shall remain in effect only until January 1, 2030, and as of that date is repealed.

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.