

Date of Hearing: April 27, 2015

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

AB 1171 (Linder) – As Amended April 21, 2015

SUBJECT: Construction Manager/General Contractor method: regional transportation agencies: projects on expressways

SUMMARY: Authorizes regional transportation agencies (RTAs) to use an alternative procurement method referred to as construction manager/general contractor (CMGC) contracts, under limited circumstances. Specifically, this bill:

- 1) Describes the CMGC procurement method and makes legislative findings and declarations regarding benefits related to risk transfer and project phasing using CMGC.
- 2) Defines key terms as follows:
 - a) "Construction manager/general contractor method" to mean a project delivery method in which a construction manager is procured to provide preconstruction services during the design phase of the project and construction services during the construction phase of the project. Contracts for preconstruction services and construction services can be, but need not be, entered into at the same time and the design and construction phases of a project may be carried out sequentially or concurrently;
 - b) "Preconstruction services" to mean advice given during the design phase of a project related to, for example, scheduling, pricing, and phasing;
 - c) "Project" to mean the construction of an expressway that is not on the state highway system; and
 - d) "Regional transportation agency" to broadly include, among other entities, regional transportation planning agencies, county transportation commission, joint powers authorities, and local transportation authorities.
- 3) Authorizes an RTA to use the CMGC project delivery method to design and construct projects on expressways that are not on the state highway system if the projects are developed in accordance with an expenditure plan approved by the voters as of January 1, 2014.
- 4) Provides that the entity responsible for maintenance of local streets and roads within the same jurisdiction of the expressway shall be responsible for the maintenance of the expressway.
- 5) Sets forth provisions governing the process for procuring CMGC services.

EXISTING LAW:

- 1) Sets forth provisions governing public works contracting. These provisions generally prohibit public agencies from contracting with the same firm for both the design and the construction phases of a project.
- 2) Generally requires public works construction contracts to be awarded to the lowest responsible bidder.
- 3) Authorizes the California Department of Transportation (Caltrans) to use CMGC on no more than six projects, at least five of which must have construction costs greater than \$10,000,000.
- 4) Authorizes the Santa Clara County Valley Transportation Authority, the San Mateo County Transit District, and the San Diego Association of Governments to use CMGC for transit projects.

FISCAL EFFECT: Unknown

COMMENTS: For decades, the traditional process for procuring public works projects has been the design-bid-build process. This process relies on: 1) a design entity preparing complete project design specifications and estimates; 2) the project owner putting the complete package out to bid for construction; and 3) awarding the construction contract to the lowest responsible bidder. The design-bid-build process was developed to protect taxpayers from extravagance, corruption, and other improper practices by public officials as well as to secure a fair and reasonable price for public works construction by injecting competition amongst bidders into the process.

Although design-bid-build generally results in the lowest cost construction contract, it is not without its drawbacks, including:

- 1) Projects generally take longer to complete because designs must be entirely completed, permits obtained, and right-of-way acquired before the construction contract can be bid and awarded.
- 2) Designs prepared for a competitive low-bid procurement are developed to allow for a broad range of construction approaches. As a result, low-bid designs do not always equate to the most efficient designs possible, depending on a particular contractor's strengths or capabilities.
- 3) Because the project designer does not have the benefit of consulting with the entity that will ultimately be responsible for construction of the project, there may be significant issues that the designer does not anticipate, particularly constructability issues. This can result in change orders that ultimately drive up the price of the contract.
- 4) Low-bid is not always the least expensive option, once change orders and contractor claims are factored into the overall project costs.

In the early 1990s, public works agencies grew frustrated with design-bid-build and began experimenting with more innovative project delivery methods, namely design-build. Design-

build is an alternate method for procuring design and construction services that provides for the delivery of public works projects from a single entity. Design-build combines project design, permit, and construction schedules in order to streamline the traditional design-bid-build environment.

Design-build differs from design-bid-build in some key areas, including:

- 1) Overall elapsed project delivery times are shorter because construction can begin before final design is complete.
- 2) Project costs and schedule risks are more heavily borne by the design-build contractor.
- 3) Construction claims and change orders are minimized.
- 4) Designs can be developed to take advantage of a particular contractor's strengths and abilities, thereby reducing the need to "over-design" for generic use as in design-bid-build.
- 5) Project specifications are typically based on definitive performance criteria (which may or may not be well established by the project owner) rather than established specifications.
- 6) Contracts are awarded based on best-value analyses rather than low-bid.

Design-build contracts are not without their drawbacks as well. For example, with a design-build project, the project owner must give up a good deal of control over the details of the project design. Additionally, design-build contractors are typically selected using qualifications-based selection criteria or best value analysis. These approaches are more subjective than a low-bid approach, potentially subjecting the public works owner to greater contract challenges and higher costs.

This bill provides limited authority for RTAs to use CMGC, an emerging project delivery method that potentially combines the best of both design-bid-build and design-build, similar to authority already granted to Caltrans, the Santa Clara County Valley Transportation Authority, the San Mateo County Transit District, and the San Diego Association of Governments. Using CMGC, RTAs will be able to engage a design and construction management consultant (construction manager) to act as its consultant during the pre-construction phase and as the general contractor during construction. During the design phase, the construction manager acts in an advisory role, providing constructability reviews, value engineering suggestions, construction estimates, and other construction-related recommendations. Later, each agency and the construction manager can agree that the project design has progressed to a sufficient enough point that construction may begin. The two parties then work out mutually agreeable terms and conditions for the construction contract, and, if all goes well, the construction manager becomes the general contractor and construction on the project commences, well before design is entirely complete.

The CMGC process provides continuity and collaboration between the design and construction phases of the project. Construction managers have an incentive to provide input during the design phase that will enhance constructability of the project later because they know that they will have the opportunity to become the general contractor for the project. Furthermore, CMGC promises to save project delivery time, provide earlier cost certainty, transfer risks from the RTA to the contractor, and ensure project constructability. Additionally, CMGC allows each agency

to have greater control of design decisions. It also allows each agency to design the project to compliment the CMGC's strengths and capabilities, thereby avoiding the need to over-design the project to provide maximum competitiveness in a low-bid procurement.

At one point, the Federal Highway Administration (FHWA) considered CMGC "innovative" and required prior approval before states could use the process on a federal-aid contract; however, that approval is no longer necessary. According to FHWA, projects that are best suited for the CMGC process are those for which the owner needs contractor feedback during the design phase. These projects include complex components that require innovation and are typically located in urban, more congested areas. Other projects that are a good fit for the CMGC process are projects that entail extensive public involvement or include right-of-way or utility issues that affect the overall schedule. Seventeen states authorize the use of CMGC contracts for transportation.

There are potential drawbacks of using CMGC contracts. According to guidance published by the City of Seattle, CMGC contracts carry risks, including:

- 1) They are difficult and complex.
- 2) The procurement process takes longer and consumes greater project staff time than traditional design-bid-build contracts.
- 3) Project teams face steep learning curves.
- 4) Successful construction cost negotiations require experienced staff.

Other literature on the use of CMGC contracts is generally consistent with Seattle's guidance regarding concerns for risks associated with CMGC contracts and cautions that CMGC is not appropriate for every project. However, the same literature suggests that, if carefully implemented, CMGC has the potential to significantly improve project delivery.

AB 1171 provides limited authority for RTAs to use CMGC on expressway projects that are not on the state highway system, similar to authority already granted to Caltrans, Santa Clara County Valley Transportation Authority, the San Mateo County Transit District, and the San Diego Association of Governments to use CMGC for transit projects. These other entities have not yet completed any projects using CMGC so their overall experience with this procurement method is not yet known.

Supporters of this bill suggest that early collaboration and coordination between the designer and the construction contractor should lead to innovations that reduce costs, increase efficiency, or accelerate project delivery, particularly on large and complex projects. One of the projects for which CMGC would be used if this bill is successful is the Capital Southeast Connector project in Sacramento County.

Previous legislation: AB 1724 (Frazier) of 2014 would have granted RTAs broad authority to use CMGC. AB 1724 passed the Assembly but was held in Senate Transportation and Housing Committee.

AB 2498 (Gordon), Chapter 752, Statutes of 2012, authorized Caltrans to use CMGC on no more than six projects, at least five of which must have construction costs greater than \$10 million.

SB 1549 (Vargas), Chapter 767, Statutes of 2012, authorized the San Diego Association of Governments to use CMGC contracting on transit projects.

AB 797 (Gordon), Chapter 320, Statutes of 2013, authorized the Santa Clara Valley Transportation Authority and the San Mateo County Transit District to use CMGC contracting on transit projects.

REGISTERED SUPPORT / OPPOSITION:

Support

Associated General Contractors
Capital SouthEast Connector JPA Board of Directors
Riverside County Transportation Commission
Sacramento Metropolitan Chamber of Commerce

Opposition

None on file

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