

Date of Hearing: April 8, 2024

ASSEMBLY COMMITTEE ON TRANSPORTATION
Lori D. Wilson, Chair
AB 2879 (Vince Fong) – As Introduced February 15, 2024

SUBJECT: High-Speed Rail Authority: contracting.

SUMMARY: Requires the California High-Speed Rail Authority (HSRA) to approve any contract change order with a value greater than \$100 million.

EXISTING LAW:

- 1) Creates the HSRA in the California State Transportation Agency with 11 members: five appointed by the Governor, two appointed by Senate Committee on Rules, two appointed by the Speaker of the Assembly, and one each ex-officio member appointed by the Senate and Assembly. (Public Utilities Code Section 185020)
- 2) Requires HSRA to direct the development and implementation of an intercity high-speed rail service. (PUC 185030)
- 3) Authorizes the HSRA to enter into contracts with private or public entities for the design, construction, and operation of high-speed trains. (PUC 185036)
- 4) Requires HSRA to appoint an executive director to administer the affairs of the authority. (PUC 185024)

FISCAL EFFECT: Unknown

COMMENTS: "Change order" is the industry term for an amendment to a construction contract that changes the contractor's scope of work. Change orders are inevitable on public infrastructure projects, especially mega projects, due to the construction industry being a complicated, dynamic, and an uncertain business.

Most change orders modify the work required by contract documents (which, in turn, usually increases the contract cost) or adjust the amount of time the contractor has to complete the work, or both. For there to be a valid change order, the owner and contractor must both agree on all terms. On average, change orders account for approximately 8-14% of all capital construction costs.

Key causes of transportation infrastructure project change orders include contract administration, allowable contingencies, quantity omission or error, differing site conditions, and design changes.

Chapter 796 of 1996 (SB 1420, Kopp) established HSRA to plan and construct a high-speed rail system that would link the state's major population centers. In November 2008, voters approved Proposition 1A, which authorized the state to sell \$10 billion in general obligation bonds to partially fund the system, as well as related projects. Construction of the rail line began in the Central Valley and work is actively underway to construct a double-track fully electrified high-speed rail line between Merced and Bakersfield.

As of the beginning of 2024, \$11.7 billion has been spent on capital expenditures, of which, \$10.1 billion has been for work between Merced and Bakersfield. Construction of a 22.5 mile segment in the Central Valley from the Tulare-Kern County line to Poplar Avenue in Kern County is substantially complete. Most of the right-of way for the Central Valley construction has been acquired and notable progress is being made to relocate utilities along the current construction segment. In addition, designs for the extensions to Merced and Bakersfield and the four Central Valley stations are on schedule and will reach the 30% design threshold in 2024.

Through 2023, nearly \$2 billion has been spent on change orders, or approximately 17% of total capital construction costs. Of these change orders, 10 change orders have exceeded \$100 million, three of which occurred in 2023. HSRA posts all of the change orders to the project since 2016 on its website <https://hsr.ca.gov/about/transparency-accountability/change-orders/>.

Change orders for the high-speed rail project in 2023 range from \$9,557 to fully compensate the contractor for the costs to remove unsuitable soil with concrete debris encountered during the excavation for the Union Pacific Railroad, Westside Shoofly; to \$107 million to compensate the contractor for managing utility relocations for AT&T and PG&E; to \$154 million for claims from Tutor Perini/Zachry/Parsons to completely resolve delays and time-related claims of the contractor and its subcontractors from 2/2/2021 through 8/1/2023. The largest change order to date was in 2020 for \$199 million to compensate the contractor for construction of an intrusion protection barrier.

Currently, the HSRA's CEO approves all change orders under the authority the Board delegates to him. HSRA has an internal processes to approve change orders and the level of review increases as the dollar value of the change order increases. For example, all change orders exceeding \$1 million and less than \$5 million are approved by a senior contract manager. Change orders between \$5 million and \$20 million are approved by various high-level internal managers. Change orders greater than \$20 million are approved by the internal business oversight committee. The CEO approves change orders exceeding \$25 million and reports them to the Board.

According to HSRA, as the project moves forward, most of the procurements are likely to be smaller in value and as a result it is less likely that HSRA contracts will experience change orders that exceed \$100 million.

According to the author: "Fifteen years after the voters approved Proposition 1A, the High-Speed Rail Authority has spent \$10.4 billion and has yet to complete even 1 mile of total-track. So much money has been mismanaged that the Authority can no longer afford to build even one-third of the total route without an infusion of billions of dollars. The public deserves transparency in how the Authority spends their money. Assembly Bill 2879 will require the High-Speed Rail Authority's Board to hold a public hearing and vote during their monthly meetings on change orders that will cost the state \$100 million or more. The prolific use of change orders has allowed the High-Speed Rail project to balloon in cost without public oversight. AB 2879 will shed light on the High-Speed Rail change order process in an effort to bring more accountability and transparency into this project."

Committee Comments: While change orders are an essential part of the construction process, the high-speed rail project has experienced a magnitude of change orders that exceeds the industry norm. This may, in part, be due to the project being a mega-project. Mega-projects often encounter more significant challenges than less complicated projects where the state has years of experience.

This bill potentially increases accountability, transparency, and oversight. However, there is a balance to be struck between what is the appropriate threshold to increase accountability and at the same time not be overly burdensome, so that approval of change orders might delay construction. Also, it is unclear if approval by the Board would result in a substantively different outcome than the CEO's approval. The Legislature also may want to consider if there is value in having a group more independent from the project approve change orders, such as the California Transportation Commission (CTC). The CTC approves all change orders for Caltrans projects if the cost increase is 10% greater than the contract amount.

In order to increase oversight of the high-speed rail project and change orders, it may be beneficial to require HSRA to provide more information about change orders on its website. Currently the same level of detail is provided (a few sentences at most) for a change order of several thousand dollars as a change order exceeding \$100 million. It may also be useful to add functionality that would allow visitors to the website to be able to download the change order information.

Related legislation: AB 441 (Patterson) of 2013 requires the authority to provide, to the appropriate policy and fiscal committees of the Legislature, a copy of each contract entered into by the authority if the dollar value of the goods or services to be provided or performed under the contract is \$25,000 or more, as well as a copy of each contract amendment and contract change order agreed to by the authority for \$25,000 or more. (This bill died in the Assembly Transportation Committee.)

AB 463 (Logue) of 2013 requires the same reports as AB 441, but also for each contractor and subcontractor. (This bill died in the Assembly Transportation Committee.)

AB 456 (Chiu), Chapter 489, Statutes of 2019 extends the operations of the public contract claims resolution process until January 1, 2027. This claim process prescribes various requirements regarding the formation, content, and enforcement of state and local public contracts. It also makes a claim resolution process applicable to any claim by a contractor in connection with a public works project against a public entity.

AB 1235 (Patterson) of 2021 creates the Joint Legislative High-Speed Rail Oversight Committee to provide ongoing and independent oversight of the high-speed rail project by performing specified duties, and would require the committee to make recommendations to the appropriate standing policy and budget committees of both houses of the Legislature to guide decisions concerning the state's programs, policies, and investments related to high-speed rail. The bill would require the authority to provide the committee with certain documents and information within prescribed timelines and change orders. (This bill died in the Assembly Transportation Committee).

REGISTERED SUPPORT / OPPOSITION:

Support

None on file

Opposition

None on file

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