

Date of Hearing: April 11, 2016

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

AB 2126 (Mullin) – As Introduced February 17, 2016

SUBJECT: Public contracts: Construction Manager/General Contractor contracts

SUMMARY: Expands from 6 to 12 the number of projects for which the California Department of Transportation (Caltrans) is authorized to use the Construction Manager/General Contractor (CMGC) procurement method. Of the 12 projects, at least 10 projects have to have construction costs greater than \$10 million and at least 8 projects have to use Caltrans employees or Caltrans consultants.

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) Describes the CMGC procurement method and makes legislative findings and declarations regarding benefits related to risk transfer and project phasing using CMGC.
- 4) Authorizes the Caltrans to use CMGC on no more than six projects, at least five of which must have construction costs greater than \$10,000,000, and at least four of which have to use Caltrans employees or Caltrans consultants.
- 5) Defines key terms as follows relative to authority granted to Caltrans to use CMGC:
 - 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. The contract for construction services may be entered into at the same time as the contract for preconstruction services, or at a later time. The execution of the design and the construction of the project may be in sequential phases or concurrent phases;
 - b) "Preconstruction services" to mean advice given during the design phase of a project related to, for example, scheduling, pricing, and phasing to assist the department design a more constructible project; and,
 - c) "Project" to mean the construction of a highway, bridge, or tunnel.
- 6) Sets forth provisions governing the process for procuring CMGC services.

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 the project owner: 1) preparing, or causing to be prepared, complete project design specifications and estimates; 2) 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.

In 2012, 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. CMGC is an emerging project delivery method that potentially combines the best of both design-bid-build and design-build. Using CMGC, Caltrans can 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, Caltrans 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 department to the contractor, and ensure project constructability. Additionally, CMGC allows Caltrans to have greater control of design decisions. It also allows the department 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.

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 2126 increases the number of projects for which Caltrans can use CMGC from 6 to 12. The author introduced the bill to increase the opportunities to reduce costs and expedite highway congestion relief projects in the state.

Committee comments: As a part of the authority granted in AB 2498, Caltrans is required to report each year on the progress of its CMGC contracts. Last year, Caltrans reported that, although it was still early in the process, it appears that the department will realize substantial savings through the use of CMGC on these projects. These early indications are consistent with those reported by other transportation agencies that have been granted statutory authority to use CMGC in recent years. Consequently, modestly increasing the number of projects for which Caltrans can gain additional experience with the use of CMGC seems reasonable and prudent.

Related legislation: The Administration is proposing trailer bill language that would increase from 6 to 12 the number of contracts for which Caltrans can use CMGC.

AB 2374 (Chiu), Extends existing authority for regional transportation agencies to use the CMGC procurement method to include ramp projects that are not on the state highway system and removes the limitation that a CMGC project is in a sales tax measure expenditure plan.

Previous legislation: 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.

REGISTERED SUPPORT / OPPOSITION:

Support

Associated General Contractors
Bay Area Council
California Transportation Commission
City/County Association of San Mateo County
San Mateo County Economic Development Association

Opposition

None on file

Analysis Prepared by: Janet Dawson / TRANS. / (916) 319-2093