

Date of Hearing: 06-29-2023

ASSEMBLY COMMITTEE ON TRANSPORTATION  
Laura Friedman, Chair  
SB 146 (Gonzalez and Friedman) – As Amended June 26, 2023

**SENATE VOTE:** Not applicable

**SUBJECT:** Public resources: infrastructure: contracting.

**SUMMARY:** Makes various changes related to Progressive Design-Build authority for the California Department of Transportation (Caltrans) and the Department of Water Resources (DWR), authorizes Job Order Contracting for Caltrans, and federal National Environmental Policy Act (NEPA) delegation to the Secretary of Transportation. Specifically, **this bill**, an urgency measure:

*National Environmental Policy Act (NEPA) delegation authority*

- 1) Extends the provisions under existing law that authorize the Secretary of Transportation to assume the responsibilities for any railroad, public transportation, or multimodal project under the federal NEPA of 1969 from January 1, 2025 to December 31, 2033.
- 2) Authorizes the Secretary, consistent with the requirements of any memorandum of understanding between the state and federal government, upon the request of a local or regional agency, to assume NEPA responsibilities for any railroad, local public transportation, or multimodal project implemented by the requesting local or regional agency until December 31, 2033.
- 3) Requires the Secretary to report to the transportation policy committees of the Legislature regarding which local or regional agencies requested that the secretary assume the authority under NEPA by December 31, 2033.
- 4) Clarifies that delegation of this authority does not change the requirements of the California Environmental Quality Act.

*Progressive design-build authority for the Department of Water Resources (DWR) and the Caltrans*

- 1) Authorizes DWR and Caltrans to use progressive design-build contracts for eight projects each for which the estimated price exceeds \$25 million until the authority expires on December 31, 2033.
- 2) Excludes projects pertaining to the design or construction of through-Delta conveyance facilities of the Sacramento-San Joaquin Delta or seawater desalination projects from using progressive design-build.

- 3) This bill does not authorize the following:
  - a) The use of design-build-operate;
  - b) The authority to perform construction inspection services for projects on or interfacing with the state highway system, which shall be performed by Caltrans; and,
  - c) The authority to perform construction inspection services for projects on the State Water Project or any other state-owned or -operated water resources facility, which shall be performed by the DWR.
- 4) Establishes how the procurement process for design-build projects for DWR and Caltrans will progress. Including:
  - a) Requires the department to set the scope and estimated project cost of the progressive design-build project;
  - b) Requires the department to prepare and issue a request for qualifications that details the scope of the project, qualification evaluation criteria and their assigned importance, and a request for a statement of qualifications;
  - c) Requires the department to review the submissions and to evaluate design-build entities only on the information submitted in the entity's statement of qualifications;
  - d) Grants the awarding department flexibility in negotiating contracts with the final list of qualified design-build entities; and,
  - e) Requires the director of DWR or Caltrans to upon issuance of a contract award, to publically announce its award, identifying the design-build entity to which the award was made and a statement regarding the basis of the award.
- 5) Requires design-build entities to provide payment and performance bonds. Requires the design-build contract to include errors and omissions insurance coverage for the design elements of the design-build project. Requires DWR and Caltrans to develop a standard payment and performance bond format.
- 6) Grants the department broad authority to amend, continue, or create a new contract with the awarded design-build entity after a guaranteed maximum price is agreed to, without an additional competitive bidding process. Deems, the design-build entity responsible for all costs that exceed the agreed guaranteed maximum price. Clarifies that design-build entities are not entitled to the difference between completed project cost and guaranteed maximum price. Requires all cost savings be returned to the fund it was originally appropriated from. Permits the DWR or Caltrans to exit a contract if the awarded design-build entity and the department fail to agree on a guaranteed maximum price. Permits DWR and Caltrans to solicit bids for the remaining work and award contracts on a best-value basis.
- 7) Authorizes the department to specify the type of subcontractor that must be included in a design-build entity statement of qualification. Establishes a process for a design-build entity to award contracts to subcontractors. Grants subcontractors full protection under labor law.
- 8) Requires DWR and Caltrans by January 1, 2034, to submit a report to the legislature detailing progressive design-build project metrics and a comprehensive review of the effectiveness of this procurement method to save time and reduce costs.

*Job order contracting for Caltrans*

- 1) Defines various terms related to job order contracting (JOC) and states legislative intent to enable the use of job order contracting when it is anticipated that it will reduce procurement costs or expedite project completion in a manner that is not achievable through the design-bid-build method, and improve the efficiency and efficacy of contracted work and not supplant work completed by the department's field maintenance employees.
- 2) Authorizes the Department of Transportation to use the job order contracting procurement method until December 31, 2033 and allows JOC to be used for highway maintenance, safety repairs, facility repairs, and installation of stormwater pollution control devices. Prohibits the department from using job order contracting for adding vehicular travel lanes.
- 3) Requires Caltrans to establish a procedure to prequalify job order contractors for projects.
- 4) Requires Caltrans to prepare the following documents for each job order contract:
  - a) A unit price catalog of construction tasks with preestablished unit prices;
  - b) Job order contract specifications; and,
  - c) Additional information detailing the department's needs.
- 5) Requires the department to develop a process for evaluating bids and requires this process to include a bid request period, a sealed bid submission period. Requires Caltrans to award job order contracts to the most qualified and responsive job order contractors.
- 6) Requires selected job order contractors to have sufficient bonding to cover the contract amount for construction services and risk and liability insurance required by Caltrans.
- 7) Restricts the job order contracts' value that Caltrans awards to small businesses and veteran business to \$5,000- \$250,000.
- 8) Restricts the length of the initial contract term to 12 months. Permits two additional 12-month extensions.
- 9) Requires Caltrans, on or before July 1 and until July 1 2033, to publish an annual report on its website that includes a listing of all projects awarded under job order contract, the name of each contractor, the estimated and actual project costs and estimated procurement time saving, and recommendations regarding the most appropriate uses for the JOC process.
- 10) Requires Caltrans' labor compliance program to monitor job order contracts to ensure their compliance with federal and state labor laws.

**EXISTING LAW:**

- 1) Allows the Secretary of the Transportation Agency to assume federal NEPA responsibilities for any railroad, public transportation, or multimodal project until January 1, 2025.  
(Government Code 13979.2)

- 2) Authorizes the Department of General Services (DGS) to use the progressive design-build procurement process for the construction of up to 3 capital outlay projects that are jointly approved by DGS and the Department of Finance (DOF). (Public Contract Code (PCC) 10198.1)
- 3) 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. (PCC 10198)
- 4) Establishes Caltrans and provides that it has full possession and control of all state highways and property and rights in property acquired for state highway purposes. Requires Caltrans to improve and maintain state highways. (Streets and Highways Code (SHC) 90)
- 5) The State Contract Act generally provides for a contracting process by state agencies for public works of improvement pursuant to a competitive bidding process, under which bids are awarded to the lowest responsible bidder, with specified alternative procurement procedures authorized in certain cases. (PCC 10100, et seq.)
- 6) Requires Caltrans to administer the Clean California Local Grant Program of 2021 to provide funding, upon appropriation, for grants to specified local entities for purposes of beautifying and cleaning up local streets and roads, tribal lands, parks, pathways, transit centers, and other public spaces, and administers the Clean California State Beautification Program of 2021 to provide funding, upon appropriation, for purposes of beautifying and cleaning up state highways. Authorizes Caltrans to use job order contracting for the Clean California Beautification Program of 2021 as specified. (SHC 91.43)
- 7) Creates a structure and framework for the construction of a \$3.25 billion state-owned open-access middle-mile broadband infrastructure through a third-party administrator overseen by the Department of Technology. Defines the construction process for middle-mile infrastructure:
  - a) Allows the use of a construction manager/general contractor method of construction, with no limit to the contract amount;
  - b) Allows for one or more contractors to be selected to build all or portions of the middle-mile;
  - c) Requires Caltrans to establish a procedure to prequalify job order contractors and prepare a set of documents for each job order contract that stipulates unit prices and job order contract specifications; and,
  - d) Allows the Office of Broadband and Digital Literacy, or Caltrans, to solicit competitive sealed bids from prequalified job order contractors for contracts lasting no more than 12 months, with two additional possible 12-month extensions or renewal periods. (GOV 11549.50-11549.55)

**FISCAL EFFECT:** Unknown

**COMMENTS:**

*National Environmental Policy Act Delegation Authority*

NEPA is a United States environmental law that promotes the enhancement of the environment. NEPA is applied to any major project, whether on a federal, state, or local level, that involves federal funding, work performed by the federal government, or permits issued by a federal agency.

The federal government allows for the assignment of US Department of Transportation environmental responsibilities under NEPA to states for highway projects, and more recently for railroad, public transportation, and/or multimodal projects. California via Caltrans has exercised this option for highway projects (since 2007) and more recently delegated this authority to the Secretary of the California State Transportation Agency (CalSTA) for rail, public transportation, and multimodal projects undertaken by state agencies.

According to Caltrans, “NEPA Assignment has resulted in documents being approved in less time; improved the efficiency in which Caltrans prepares, reviews, and approves environmental documents; improved the quality of documents; and provides for greater accountability through monitoring.” The recent statutory authority to CalSTA for NEPA delegation for rail, public transportation, and multimodal projects sunsets January 1, 2025.

Currently six other states have a NEPA delegation and a seventh state is in progress. Most of the delegations are for highway projects only and one state includes railroads, public transit and multimodal projects. It does not appear that any other state has a delegation for locally led projects.

*Progressive Design Build Authority for Caltrans and DWR*

State and Local agencies typically use the traditional design-bid-build method for constructing public works. This approach splits construction projects into two distinct phases: design and construction. During the design phase, the agency prepares detailed project plans and specifications using its own employees or by hiring outside architects and engineers. Once project designs are complete, agencies invite bids from the construction community and award the contract to the lowest responsible bidder. The design-bid-build process was developed to secure a fair and reasonable price for public works construction through competition between bidding contractors.

In 1990s, public works agencies began experimenting with alternative project delivery methods, namely to design-build. Design-build is an alternate method for procuring design and construction services for the delivery of public works projects from a single entity. Under the design-build method, a single contract covers the design and construction of a project with a single company or consortium that acts as both the project designer and builder. The design-build entity arranges all architectural, engineering, and construction services. The design-build entity is responsible for delivering the project at a guaranteed price and schedule based upon performance criteria set by the public agency.

Progressive design-build is a variant of traditional design-build contracting that generally includes two phases. In the first phase, the awarding authority uses a best-value process to select a design-build entity that completes preliminary plans and preconstruction services necessary to provide a cost estimate and final design proposal. The project then “progresses” to the second phase, where the awarding authority and the design-build entity agree to a final design, project cost (“guaranteed max price”), and schedule. If they cannot agree, there is an “off-ramp” between the two phases where the awarding authority can pursue other options, but still benefit from having the first phase work complete. This is different from traditional design-build, where the awarding entity contracts with a single entity to design and construct a project at a set price before design work begins, and without a similar off-ramp.

The Legislature enacted SB 785 (Wolk), Chapter 931, Statutes of 2014 to outline a standardized design-build procurement process. Legislation has been enacted in recent years to allow local agencies to use design build for specific projects such as AB 36 (Gallagher), Chapter 689, Statutes of 2021 to allow the Town of Paradise and the Paradise Irrigation District to use of design-build contracting for sewer and water conveyance projects. and AB 2932 (O’Donnell), Chapter 54, Statutes of 2020 to allow the City of Long Beach to use design-build for curb ramps to comply with ADA requirements. Most recently, the Legislature enacted SB 991 (Newman), Chapter 243, Statutes of 2022 authorizes local agencies, that 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 million for each project, similar to the progressive design-build process authorized for use by the Director of General Services.

All procurement methods contain some element of risk. Using the lowest bidder for highly complicated projects can sometimes lead local agencies to sacrifices in quality or significant change orders. Also, when methods require a different firm for design and construction, there can be inconsistencies between the two firms, leading to additional costs and delays. 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. Therefore, giving State agencies the flexibility to choose the best procurement methods can have some benefits.

### *Job Order Contracting*

Job Order Contracting (JOC) is a competitively bid, fixed price, indefinite-quantity contract for the performance of minor construction, renovation, and maintenance. JOC is typically used for well-defined, recurring, or repetitive work where quick execution is essential, not for single larger projects. These contracts can run for one or more years, and contracts can be renewed a limited number of times.

JOC was developed to simplify federal procurement for smaller contracts where bidding requirements were viewed as burdensome and expensive. The award of annual contracts on a unit price basis enables what would otherwise be multiple separately bid projects to be combined into one bid. It is not generally viewed as an appropriate method of contracting for large, complex construction projects that require extensive or innovative design or are likely to encounter changes and revisions during construction.

California counties have had the authority to use JOC since 1983. Furthermore, the Legislature has authorized multiple agencies to use JOC, some state and some local, including counties,

school districts, community college districts, and the California State University system. Finally, Caltrans is granted limited authority to use JOC for building the statewide Broadband “Middle-Mile” Network (BMMN) and the Clean California Program.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

None on file

**Opposition**

None on file

**Analysis Prepared by:** Farra Bracht / TRANS. / (916) 319-2093