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FEBRUARY 23, 2001

An act to add and repeal Chapter 2.5 (commencing with Section 17250.10) of Part 10.5 of the Education Code, relating to **public works**.

LEGISLATIVE COUNSEL'S DIGEST

AB 1402, Simitian. **Public works**: design-build contracts.

Under existing law, a school district governing board is required to let any contract for a **public** project that costs \$15,000 or more to the lowest responsible bidder.

Existing law also requires school districts constructing school facilities to meet various requirements, including requirements pertaining to seismic safety, the contents of plans for school construction, use of factory-built school buildings, and the acquisition of proposed schoolsites.

This bill would authorize school district governing boards to enter into a design-build contract, as defined, in which factors in addition to price and cost may be considered in awarding a contract for the design and construction of a school facility that exceeds \$10,000,000. The bill would require the Superintendent of **Public** Instruction to develop guidelines for design-build projects within 6 months after the operative date of the bill. The bill would require each contract to prohibit construction or alteration of any school building without the prior written approval of the plans by the Department of General Services, and would prescribe related matters. The bill would require a school district that elects to use the design-build process to submit its report to the Legislative Analyst, and would require the Legislative Analyst to submit an interim report to the Legislature by January 1, 2004, and a final report by January 1, 2006. The provisions of the bill would be repealed on January 1, 2007.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 2.5 (commencing with Section 17250.10) is added to Part 10.5 of the Education Code, to read:

CHAPTER 2.5. DESIGN-BUILD CONTRACTS

17250.10. (a) It is the intent of the Legislature to enable school districts to utilize safe and cost-effective options for building and modernizing school facilities. The Legislature has recognized the merits of the design-build procurement process in the past by authorizing its use for projects undertaken by the University of California, specified local government projects, and state office buildings.

(b) The Legislature also finds and declares that school districts

utilizing a design-build contract require a clear understanding of the roles and responsibilities of each participant in the design-build process. The benefits of a design-build contract project delivery system include an accelerated completion of the projects, cost containment, reduction of construction complexity, and reduced exposure to risk for the school district. The Legislature also finds that the cost-effective benefits to the school districts are achieved by shifting the liability and risk for cost containment and project completion to the design-build entity.

(c) It is the intent of the Legislature to provide an optional, alternative procedure for bidding and building school construction projects.

(d) In addition, it is the intent of the Legislature that the full scope of design, construction, and equipment awarded to a design-build entity shall be authorized in a single funding phase. The funding phase may be authorized concurrently with, or separately from, the phase that authorizes the creation of the performance criteria and concept drawings.

(e) It is the intent of the Legislature that design-build procurement as authorized by the act adding this chapter shall not be construed to extend, limit, or change in any manner the legal responsibility of **public** agencies and contractors to comply with existing laws.

17250.15. As used in this chapter, the following terms have the following meanings:

(a) "Best value" means a value determined by objective criteria and may include, but need not be limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the school district.

(b) "Design-build" means a procurement process in which both the design and construction of a project are procured from a single entity.

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

17250.20. Upon making a determination by a school district governing that it is in the best interest of the school district, the governing board may enter into a design-build contract for both the design and construction of a school facility if that expenditure exceeds ten million dollars (\$10,000,000) if, after evaluation of the traditional design, bid, and build process of school construction and of the design-build process in a **public** meeting, the governing board makes written findings that use of the design-build process on the specific project under consideration will accomplish one of the following objectives: reduce comparable project costs, expedite the project's completion, or provide features not achievable through the traditional design-bid-build method. The governing board shall also review the guidelines developed pursuant to Section 17250.40 and shall adopt a resolution approving the use of a design-build contract pursuant to this article prior to entering into a design-build contract.

17250.25. Design-build projects shall progress as follows:

(a) (1) The school district governing board shall prepare a request for proposal setting forth the scope of the project that may include, but is not limited to, the size, type and desired design character of the buildings and site, performance specifications

covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the school district's needs. The performance specifications and any plans shall be prepared by a design professional duly licensed or registered in this state.

(2) Each request for proposal shall do all of the following:

(A) Identify the basic scope and needs of the project or contract, the expected cost range, and other information deemed necessary by the school district to inform interested parties of the contracting opportunity.

(B) Invite interested parties to submit competitive sealed proposals in the manner prescribed by the school district.

(C) Include a section identifying and describing the following:

(i) All significant factors and subfactors that the school district reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors and subfactors.

(ii) The methodology and rating or weighting scheme that will be used by the school district governing board in evaluating competitive proposals and specifically whether proposals will be rated according to numeric or qualitative values.

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

(iv) As an alternative to clause (iii), the governing board of a school district shall specifically disclose whether all evaluation factors other than cost or price, when combined, are any of the following:

(I) Significantly more important than cost or price.

(II) Approximately equal in importance to cost or price.

(III) Significantly less important than cost or price.

(v) If the school district governing board wishes to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for proposal and shall publish separately or incorporate into the request for proposal applicable rules and procedures to be observed by the school district to ensure that any discussions or negotiations are conducted in a fair and impartial manner.

(3) Notwithstanding Section 4-315 of Title 24 of the California Code of Regulations, an architect or structural engineer who is party to a design-build entity may perform the services set forth in Section 17302.

(b) (1) The school district shall establish a procedure to prequalify design-build entities using a standard questionnaire developed by the Director of the Department of Industrial Relations. In preparing the questionnaire, the director shall consult with the construction industry, including representatives of the building trades, surety industry, school districts, and other affected parties. This questionnaire shall require information including, but not limited to, all of the following:

(A) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members who will participate as subcontractors in the design-build contract, including, but not limited to, electrical and mechanical subcontractors.

(B) Evidence that the members of the design-build entity have completed, or 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.

(C) The licenses, registration, and credentials required to design and construct the project, including 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, as well as a financial statement that assures the school district that the design-build entity has the capacity to complete the project.

(E) Any prior serious or willful violation of the California Occupational Safety and Health Act of 1973 (Part 1 (commencing with Section 6300) of Division 5 of the Labor Code) or the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), settled against any member of the design-build entity, and information concerning a contractor member's workers' compensation experience history and worker safety program.

(F) Information concerning any debarment, disqualification, or removal from a federal, state or local government **public works** project.

(G) Any instance where an entity, its owners, officers, or managing employees, submitted a bid on a **public works** project and were found by an awarding body not to be a responsible bidder.

(H) Any instance where the entity, its owner, officers, or managing employees defaulted on a construction contract.

(I) Any prior violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of Federal Insurance Contribution Act (FICA) withholding requirements, settled against any member of the design-build entity.

(J) Information concerning the bankruptcy or receivership of any member of the entity, including information concerning any work completed by a surety.

(K) Information concerning all settled adverse claims, disputes, or lawsuits between the owner of a **public works** project and any member of the design-build entity during the five-year period preceding submission of the bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this period.

(L) In the case of a partnership or other association that is not a legal entity, a copy of the agreement creating the partnership or association.

(2) The information required pursuant to this subdivision shall be verified under oath by the design-build entity and its members in the manner in which civil pleadings in civil actions are verified. Information that is not a **public** record pursuant to the California **Public** Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code) shall not be open to **public** inspection.

(c) The school district shall establish a procedure for final selection of the design-build entity. Selection shall be based on either of the following criteria:

(1) A competitive bidding process resulting in lump-sum bids by the prequalified design-build entities. Award shall be made on the basis of the lowest responsible bid.

(2) Notwithstanding any other provision of this code or of Section 20110 of the **Public** Contract Code, a school district may use a design-build competition based upon performance and other criteria set forth by the governing board in the solicitation of proposals. Criteria used in this evaluation of proposals may include, but need not be limited to, the proposed design approach, life cycle costs, project features, and project functions. However, competitive proposals shall be evaluated by using the criteria and source selection procedures specifically identified in the request for proposal. Once the evaluation is complete, all responsive bidders shall be ranked from the most advantageous to least advantageous to the school district.

(A) Any architectural or engineering firm or individual retained by the governing body of the school district to assist in the development criteria or preparation of the request for proposal shall not be eligible to participate in the competition with the design-build entity.

(B) The award of the contract shall be made to the responsible bidder whose proposal is determined, in writing by the school district, to be the best value to the school district.

(C) Proposals shall be evaluated and scored solely on the basis of the factors and source selection procedures identified in the request for proposal. However, the following minimum factors shall collectively represent at least 50 percent of the total weight or consideration given to all criteria factors: price, technical expertise, life cycle costs over 15 years or more, skilled labor force availability, and acceptable safety record.

(D) The school district governing board shall issue a written decision supporting its contract award and stating in detail the basis of the award. The decision and the contract file must be sufficient to satisfy an external audit.

(E) Notwithstanding any provision of the **Public** Contract Code, upon issuance of a contract award, the school district governing board shall publicly announce its awards identifying the contractor to whom the award is made, the winning contractor's price proposal and its overall combined rating on the request for proposal evaluation factors. The notice of award shall also include the agency's ranking in relation to all other responsive bidders and their respective price proposals and a summary of the school district's rationale for the contract award.

(F) For the purposes of this chapter, "skilled labor force availability" means that an agreement exists with a registered apprenticeship program, approved by the California Apprenticeship Council, which has graduated apprentices in the preceding five years.

This graduation requirement shall not apply to programs providing apprenticeship training for any craft that has not been deemed by the Department of Labor and the Department of Industrial Relations to be an apprenticable craft in the two years prior to enactment of this act.

(G) For the purposes of this chapter, a bidder'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 bidder is a party to an alternative dispute resolution system as provided for in Section 3201.5 of the Labor Code.

17250.30. (a) Any design-build entity that is selected to design and build a project pursuant to this chapter shall possess or obtain sufficient bonding to cover the contract amount for nondesign services, and errors and omission insurance coverage sufficient to cover all design and architectural services provided in the contract.

This chapter does not prohibit a general or engineering contractor from being designated the lead entity on a design-build entity for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(b) Any payment or performance bond written for the purposes of this chapter shall use a bond form developed by the Department of General Services pursuant to subdivision (i) of Section 14661 of the Government Code. The purpose of this subdivision is to promote uniformity of bond forms to be used on school district design-build projects throughout the state.

(c) (1) All subcontracts that were not listed by the design-build entity in accordance with Section 17250.25 shall be awarded by the design-build entity.

(2) The design-build entity shall do all of the following:

(A) Provide **public** notice of the availability of work to be subcontracted.

(B) Provide a fixed date and time on which the subcontracted work will be awarded.

(3) Subcontractors bidding on contracts pursuant to this subdivision shall be afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the **Public** Contract Code.

(4) 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 may not exceed the percentage specified in the contract between the school district and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a member of the design-build entity, prior to 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 school district and the design-build entity from any payment made by the design-build entity to the subcontractor.

(5) In accordance with the provisions of applicable state law, the design-build entity may be permitted to substitute securities in lieu of the withholding from progress payments. Substitutions shall be made in accordance with Section 22300 of the **Public** Contract Code.

(d) The school district shall establish and enforce a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code or shall contract with a third party to operate a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code. This requirement shall not apply to projects where the school district or the design-build entity has entered into a collective bargaining agreement that binds all of the contractors performing work on the project.

17250.35. (a) The minimum performance criteria and design

standards established pursuant to this chapter by a school district for quality, durability, longevity, and life cycle costs, and other criteria deemed appropriate by the school district shall be adhered to by the design-build entity. Any deviations from those standards may only be allowed by written consent of the school district. The governing board may, and is strongly encouraged to, retain the services of an architect or structural engineer throughout the course of the project in order to ensure compliance with this chapter. Any architect or structural engineer retained pursuant to this subdivision shall be duly licensed and registered in California.

(b) The school district governing board shall be the employer of the inspector. The project inspector shall be fully independent from any member of the design-build entity and may not have any affiliation with any member of the design-build entity or any of the project subcontractors. The total price of the project shall be determined either upon receipt of the lump-sum bids as set forth in paragraph (1) of subdivision (c) of Section 17250.25, or by completion of the process pursuant to paragraph (2) of subdivision (c) of Section 17250.25.

(c) Each contract with a design-build entity shall provide that no construction or alteration of any school building pursuant to this section shall commence prior to the receipt of the written approval of the plans, as to the safety of design and construction, from the Department of General Services. Compliance with this provision shall be deemed to be in compliance with Sections 17267 and 17297.

(d) The design-build entity shall be liable for building the facility to specifications set forth in the design-build contract in the absence of contractual language to the contrary.

17250.40. The Superintendent of **Public** Instruction shall, in consultation with the Secretary for Education, the Department of General Services, the Energy Resources, Conservation and Development Commission, Seismic Safety Commission, school district representatives, and industry representatives, develop guidelines for design-build projects. The guidelines shall be developed within six months of the operative date of this chapter.

17250.45. Each school district governing board that adopts the design-build process for a school construction project shall submit to the Legislative Analyst a report on the project at the completion of the project. Completion shall have the same meaning as defined in subdivision (c) of Section 7107 of the **Public** Contract Code. This report shall be submitted within 60 days after completion of the project. The Legislative Analyst shall submit an interim report to the Legislature by January 1, 2004, and a final report to the Legislature by January 1, 2006. The reports shall include, but not be limited to, all of the following information as to each project:

(a) The type of facility.

(b) The gross square footage of the facility.

(c) The company or contractor who was awarded the project.

(d) The estimated and actual length of time to complete the project.

(e) The estimated and actual project cost.

(f) A description of the relative merits of a project procured pursuant to this chapter and similar projects procured pursuant to other provisions of this code.

(g) A description of any written protest concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protest.

(h) Other pertinent information that may be instructive in evaluating whether the design-build method of procurement should be continued, expanded, or prohibited.

(i) The findings established pursuant to Section 17250.20 and a post-completion evaluation as to whether the findings were achieved.

(j) Any Labor Code violations discovered during the course of construction or following completion of the project, as well as any fines or penalties assessed.

17250.50. A school district shall not commence any additional design-build projects if 60 days has elapsed after completion of a design-build project without having filed the report to the Legislative Analyst's Office required pursuant to Section 17250.45.

SEC. 2. This act does not exempt design-build contracts from otherwise applicable provisions of the **Public** Contract Code unless the exemption is granted expressly, or by necessary implication.

SEC. 3. Unless expressly authorized in this act, no otherwise applicable provision of the Field Act (Article 3 (commencing with Section 17365) of Chapter 3 of Part 10.5 of, and Article 7 (commencing with Section 81130) of Chapter 1 of Part 49 of, the Education Code) may be waived, amended, or ignored by the school district or the design-build entity.

SEC. 4. This act shall remain in effect only until January 1, 2007, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2007, deletes or extends that date.

SEC. 5. This act shall not apply to contracts in effect prior to the operative date of this act. Unless expressly set forth in this act, nothing in this act is intended to affect, expand, alter, or limit rights or remedies otherwise available at law.