BOARD OF DIRECTORS

Luis Avila, President
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(Vacant), Director

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BOARD OF DIRECTORS SPECIAL MEETING

Monday, June 12, 2023 @ 6:00 pm
Del Puerto Health Center, 1700 Keystone Pacific Parkway, Ste B, North Conference Room

PUBLIC COMMENT PERIOD: Matters under the jurisdiction of the Board and not on the posted agenda may be addressed by the general public at the beginning of the regular agenda. If you wish to speak on an item on the agenda, you are welcome to do so during consideration of the agenda item itself. If you wish to speak on a matter that does not appear on the agenda, you may do so during the Public Comment period; however, California law prohibits the Board from acting on any matter which is not on the posted agenda unless it is determined to be an emergency by the Board of Directors. Persons speaking during the Public Comment will be limited to five minutes. Depending on the number of persons wishing to speak, speaking time may be reduced to allow all public members to address the Board. Public comments must be addressed to the board through the President. Comments to individuals or staff are not permitted.

CONSENT CALENDAR: These matters include routine financial and administrative actions and are identified with an asterisk (*). All items on the consent calendar will be voted on as a single action at the beginning of the meeting under the section titled "Consent Calendar" without discussion. If you wish to discuss an item on the Consent Calendar, please notify the Clerk of the Board prior to the beginning of the meeting or you may speak about the item during Public Comment Period.

REGULAR CALENDAR: These items will be individually discussed and include all items not on the consent calendar, all public hearings, and correspondence.

CLOSED SESSION: Is the portion of the meeting conducted in private without the attendance of the public or press to discuss certain confidential matters specifically permitted by the Brown Act. The public will be provided an opportunity to comment on any matter to be considered in closed session prior to the Board adjourning into closed session.

ANY MEMBER OF THE AUDIENCE DESIRING TO ADDRESS THE BOARD ON A MATTER ON THE AGENDA: Please raise your hand or step to the podium at the time the Board President announces the item. In order that interested parties have an opportunity to speak, any person addressing the Board will be limited to a maximum of 5 minutes unless the President of the Board grants a longer period.

BOARD AGENDAS AND MINUTES: Board agendas and minutes are typically posted on the Internet on Friday afternoons preceding a Monday meeting at the following website: https://dphealth.specialdistrict.org/board-meetings.

Materials related to an item on this Agenda submitted to the Board after distribution of the agenda packet are available for public inspection in the District office at 875 E Street, Patterson, CA during normal business hours. Such documents are also available online, subject to staff's ability to post the documents before the meeting, at the following website https://dphealth.specialdistrict.org/board-meetings.

NOTICE REGARDING NON-ENGLISH SPEAKERS: Board of Director meetings are conducted in English and translation to other languages is not provided. Please arrange for an interpreter, if necessary.

REASONABLE ACCOMMODATIONS: In compliance with the Americans with Disabilities Act, if you need special assistance to participate in this meeting, please contact the Clerk of the Board at (209) 892-8781. Notification 72 hours prior to the meeting will enable the District to make reasonable arrangements to ensure accessibility to this meeting.

Cell phones must be silenced or set in a mode to not disturb District business during the meeting.

DEL PUERTO HEALTH CARE DISTRICT
Board of Directors Meeting
Monday, June 12, 2023 @ 6:00 pm

1. **Call to Order**

2. **Pledge of Allegiance**

3. **Board of Directors Roll Call**

4. **Reading the Vision, Mission, and Value Statements**

   Vision: "A locally cultivated, healthier community."

   Mission: "To provide, promote, and partner in quality healthcare for all."

   Values: "Compassion – Commitment – Excellence"

5. **Public Comment Period** *[Members of the public may address the Board on any issues on the Consent Calendar and items not listed on the agenda that are within the purview of the District. Comments on the agenda are made when the Board considers each item. Each speaker is allowed a maximum of five minutes. Board members may not comment or act on items not on the agenda.]*

6. **Declarations of Conflict** *[Board members disclose any conflicts of interest with agenda items]*

7. **Approval of Agenda** — **Action**

8. **Regular Calendar**

   A. Design Bid Build vs. Design Build Contracting Choice — **Action**

   B. Nexus Study Requirements and Request for Proposal Publication — **Information**

9. **Verbal Reports**

   A. CEO Annual Evaluation – Directors Stokman and Campo - collection of director-completed evaluations & distribution of CEO Proposed FY 2023-24 Work Plan and 2023 Salary Study

10. **Director Correspondence, Comments, Future Agenda Items** — **Information**

11. **Upcoming Regular Board and Standing Committee Meeting Dates Information**

   Finance – Wed, Jun 21, 2023 @ 8:00 AM — Board - Mon, Jun 26, 2023 @ 6:00 PM

   Finance – Wed, Jul 26, 2023 @ 8;00 AM — Board – Mon, Jun 31, 2023 @ 6:00PM

   Finance – Wed, Aug 23, 2023 @ 8:00 AM — Board – Mon, Aug 28, 2023 @ 6:00 PM

12. **Adjourn**

BOARD OF DIRECTORS OF DEL PUERTO HEALTH CARE DISTRICT

Board Meeting – June 12, 2023

Department: Chief Executive Office CEO Concurrence: Yes

Consent Calendar: No 4/5 Vote Required: No

SUBJECT: **Design-Bid-Build (DBB) vs. Design-Build (DB) – Staff Recommendation**

STAFF REPORT: The District has heard from Joe Simile of Simile Construction Service (March 2021) and City of Patterson Planning Department (June 2021) each of whom compared and contrasted Design-Build and Design-Bid-Build. The consensus from both groups was Design-Build would be preferable if the district has the option. In April 2022, the board received the legal opinion from David Gehrig of Hansen Bridgett which concluded the facility has a close enough nexus to the district's existing health center to be considered "related to a … health facility building," thereby allowing the District to utilize the design-build authority in Section 32132.5 for design and construction. The conceptual design architect, Eric Wohle in March of 2023 also expressed his professional opinion on the options without stating a preference. Additionally, Ms. Freese attended a six-hour seminar on public project contracting which covered many benefits of Design-Build

Healthcare/Public Safety facilities are complex projects that require a highly coordinated and efficient design and construction process. Many health care districts (e.g., Tahoe Forest, Peninsula Healthcare District, Beach Cities Healthcare District) have successfully used design-build for their projects – staff is unaware of any project which failed under this model. The DB method's advantages of faster project completion, greater efficiency in design, and simplified communication make it an ideal choice for DPHCD. A single point of responsibility may help reduce the potential for disputes between the district, designer, and contractor.

In May 2023, the board requested additional information on any fiscal transparency requirements that may differentiate the two methods. Regardless of the project delivery method, maintaining **fiscal transparency involves 1) open and competitive processes, 2) clear documentation, 3) regular reporting, and 4) public disclosure of relevant information**. These practices help promote accountability, discourage corruption, and build trust among stakeholders and the public.

RECOMMENDATION: Staff recommends the board approve Design-Build (DB) as the preferred contracting method for this project.

DISTRICT PRIORITY: Fiscal transparency; fiscal stewardship

FISCAL IMPACT: None

STAFFING IMPACT: None

CONTACT PERSON: Karin Freese, CEO and Paul Willette, Director of Ambulance Operations

ATTACHMENT(S): Email dated May 23, 2023, discussing fiscal transparency
Agenda Action Item Summary which was tabled from May 22, 2023
2015 article by David Gehrig on benefits of Design-Build for public projects
Table of Contents from Public Contracting Laws seminar May 23-24, 2023
Seminar slides which compare and contrast DBB with DB

RECOMMENDED BOARD ACTION:

ROLL CALL REQUIRED: NO

RECOMMENDED MOTION: *I move the Board of Directors to adopt a Design-Build approach for the District Office and Ambulance Station construction project.*

Motion Made By	*Motion*	*Second*
Director Avila		
Director Campo		
Director Benefield		
Director Stokman		
[vacant]		

Roll Call Vote	*Aye*	*No*	*Abstain*	*Absent*
Director Avila				
Director Campo				
Director Benefield				
Director Stokman				
[vacant]				

BOARD OF DIRECTORS OF DEL PUERTO HEALTH CARE DISTRICT

Board Meeting – May 22, 2023

Department: Chief Executive Office CEO Concurrence: Yes

Consent Calendar: Yes 4/5 Vote Required: No

SUBJECT: **Design-Bid-Build (DBB) vs. Design-Build (DB) – Staff Recommendation**

STAFF REPORT: Design-Bid-Build (DBB) and Design-Build (DB) are two common contracting methods used in construction projects. In the DBB method, the district hires a designer or architect to create the project's design and then invites bids from contractors to construct it. In contrast, the DB method involves hiring a single contractor to both design and construct the project.

There are advantages and disadvantages to both methods, and choosing the preferred method depends on various factors, such as the project's complexity, timeline, budget, and the owner's preferences.

Method	Advantages	Disadvantages
Design-Bid-Build (DBB)	- The owner has greater control over the design and can ensure it meets their specific needs and preferences. - The competition between contractors can lead to lower construction costs. - The owner can select a contractor based on their expertise, experience, and qualifications.	- The design phase and bidding process can be lengthy, causing delays in the project's start date. - The contractor is not involved in the design phase, which may lead to misunderstandings and errors during construction. - Change orders are common in DBB projects, resulting in additional costs and delays.
Design-Build (DB)	- The design and construction phases can overlap, leading to faster project completion. - The contractor is involved in the design phase, which can lead to a more efficient and cost-effective design. - - The single point of responsibility simplifies communication and reduces the potential for disputes between the owner, designer, and contractor.	- The owner has less control over the design, which may not meet their specific needs and preferences. - The lack of competition may lead to higher construction costs. - The owner may be limited in their choice of contractor, as only contractors with design capabilities or partnerships can be considered.

The District has heard from a large project general contractor, the City planning department, legal counsel, and the conceptual design architect express their professional opinion on the options. Those with a preference suggested the district consider Design-Build. Many healthcare districts utilize DBB for their projects.

Recommendation: Staff recommends Design-Build (DB) as the preferred contracting method. Healthcare/Public Safety facilities are complex projects that require a highly coordinated and efficient design and construction process. The DB method's advantages of faster project completion, greater efficiency in design, and simplified communication make it an ideal choice for DPHCD. A single point of responsibility may help reduce the potential for disputes between the district, designer, and contractor.

DISTRICT PRIORITY: Fiscal transparency; fiscal stewardship

FISCAL IMPACT: None

STAFFING IMPACT: None

CONTACT PERSON: Karin Freese, CEO & Paul Willette, Director of Ambulance Operations

ATTACHMENT(S): None

RECOMMENDED BOARD ACTION:

ROLL CALL REQUIRED: NO

RECOMMENDED MOTION: *I move the Board of Directors to adopt a Design-Build approach for the District Office and Ambulance Station construction project.*

Motion Made By	*Motion*	*Second*
Director Avila		
Director Campo		
Director Benefield		
Director Stokman		
[vacant]		

Roll Call Vote	*Aye*	*No*	*Abstain*	*Absent*
Director Avila				
Director Campo				
Director Benefield				
Director Stokman				
[vacant]				

Design-Build For Public Works Projects

Wednesday, May 6, 2015 General Session; 3:15 – 4:50 p.m.

David S. Gehrig, Hanson Bridgett

DISCLAIMER: *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

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Notes:

A Step Forward for Public Works Contracting

Design-Build in the Public Sector After the Adoption of SB 785

By David S. Gehrig
April 10, 2015

I. Introduction

Design-build contracts combine professional design services and construction services into a single contract with the owner. This contracting approach provides a number of efficiencies over the traditional approach of awarding separate contracts for design services and construction, commonly known as the design-bid-build approach. These benefits include greater flexibility in awarding a contract, higher quality work, greater cost certainty, fewer claims, and other benefits discussed in more detail later in this paper.

While design-build has been a common delivery method in private sector construction for several decades, it is still relatively new in the public sector. The legislature first approved design-build authority for public agencies in 2001 with the passage of AB 598, which authorized "transit operators" to award contracts for transit projects of at least $10 million on a design-build basis. A variety of other statutes followed authorizing other types of public agencies to utilize design-build, including AB 1329 which authorized cities to utilize design-build in 2006.

Last year, the legislature revamped design-build authority for public agencies pursuant to SB 785. SB 785, which went in to effect January 1, 2015, repealed most of the existing design-build statutes applicable to different types of agencies,[1] and replaced them with a single statute applicable to "local agencies," including cities.

This paper will examine the current landscape for design-build contracting on public works projects, including the requirements of SB 785 and how they differ from the

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[1] The following design-build statutes were repealed by SB 785: Public Contract Code sections 20209.5020209.14 (transit operators), 20193 (wastewater, solid waste, recycled water), 20133 (counties), 20175.2 (cities), 20688.6 (redevelopment agencies), and 20301.5 (Santa Clara Valley Transportation Authority); Government Code sections 14661 (California Department of General Services), and 14661.1 (California Department of Corrections); and Health and Safety Code section 32132.5 (Sonoma Valley and Marin Health Care Districts). The following design-build statutes were left in place: Education Code sections 17250.10-17250.50 (school districts), and 81700-81708 (community college districts); and Public Contract Code section 10708 (California State University).

previous design-build statute for cities. This paper will also discuss the benefits of design-build, provide observations regarding the prequalification process and the proposal evaluation process, and offer recommendations for creative contracting approaches to achieve successful outcomes on your design-build projects.

II. Rise of Design-Build in the Public Sector

The legislature is obviously becoming more comfortable with design-build as a contracting approach for public agencies, and with good reason. A report published by the California Legislative Analyst's Office ("LAO") in 2010, summarizing the success of 15 design-build projects awarded by counties, made several interesting observations:

- Of 5 completed projects, 2 were completed below estimated costs (5 and 16 percent), 2 projects were completed at the estimated cost, and 1 project was completed approximately 5 percent over the estimated cost.
- Of the 5 completed projects, all finished close to their targeted completion date. One project scheduled for 18 months was completed in 16 months, while the longest delay was 3 months on a scheduled 16-month project.
- Each of the 15 projects was awarded on a "best value" basis, not lowest bidder.
- Each county that submitted a report "expressed support for the design-build process and was pleased with the project outcomes."
- The LAO concluded that the information provided by the counties "did not provide any evidence that would discourage the Legislature from granting design-build authority on an ongoing basis to local agencies."
- Going forward, the LAO also recommended that a single, uniform statute be adopted for all public agencies to standardize the process, and that cost limitations be eliminated altogether.

While somewhat dated, the LAO's report is indicative of a trend toward increased use of design-build by California public agencies. The successful outcomes on design-build projects reported in the LAO's report mirror our own anecdotal experience with positive outcomes on design-build projects in the public sector. Our clients are increasingly willing to try design-build for individual projects, and those that have done so have generally been very pleased. In general, projects are completed more quickly, for similar costs and greater price certainty, and with greater quality and fewer claims.

One such example occurred on a relatively recent design-build project for a Bay Area transit operator that constructed a new bus fuel and wash facility. This was the transit agency's first design-build project. Despite the effort required to develop new contract documents specific to the project, and the relatively small budget of approximately $5 million, the project was completed on time, on budget, and prompted the General Manager to comment that he does not know why more agencies don't use design-build.

III. Benefits of Design-Build

Those who believe in the value of design-build contracting, including public agencies that have achieved successful project outcomes, tout a variety of benefits over the traditional design-bid-build approach. These benefits include:

- Greater flexibility in the contract award process.
- A single point of accountability (eliminates finger-pointing between designer and contractor).
- Higher quality construction work.
- Fewer change orders.
- Fewer claims.
- Faster project completion.
- Lower project cost.
- Greater cost certainty.
- More opportunity for innovation.

Research has confirmed many of these benefits on private sector projects. According to the seminal study done on this topic in 1998 by Dr. Victor Sanvido and Dr. Mark Konchar[2] on average design-build projects achieve a 6.1% savings over the same project awarded on a design-bid-build basis. Similarly, design-build projects are delivered 33.5% faster than projects awarded on a design-bid-build basis, and the construction work alone was completed 12% faster. Benefits were also measured in the categories of cost growth (5.2% less than design-bid-build) and schedule growth (11.4% less design-bid-build). At least one other study has come to similar conclusions about the benefits of design-build over design-bid-build with regard to achieving project specific sustainability goals.[3]

In light of the empirical support for the benefits of design-build in the private sector, the migration of design-build to the public sector seems both logical and inevitable. Cities should at least consider design-build as a project delivery method for projects exceeding $5 million. Eventually, as in the private sector, design-build could become as common as design-bid-build.

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[2] "Comparison of U.S. Project Delivery Systems," Journal of Construction Engineering and Management November/December 1998, Dr. Mark Konchar and Dr. Victor Sanvido, Pennsylvania State University.

[3] See "Influence of Project Delivery Methods on Achieving Sustainable High Performance Buildings: Report on Case Studies," 2010, Commissioned by the Charlies Pankow Foundation and the Design-Build Institute of America.

IV. SB 785: New Design-Build Law for "Local Agencies"

A. Overview of SB 785

The new design-build law adopted pursuant to SB 785 is located in Public Contract Code sections 22160-22169 ("SB 785"). The procedures and substantive provisions are generally similar to the previous design-build statute applicable to cities under now repealed Public Contract Code section 20175.2. For instance, SB 785 requires that local agencies prequalify proposers before inviting those prequalified proposers to submit proposals in response to an RFP. SB 785 also allows local agencies to award a contract on the basis of the "best value" to the agency, which requires the establishment objective criteria including three statutorily mandated criteria.

SB 785 essentially carried over the same restrictions on the types of projects that can be awarded on a design-build basis that were included in Section 20175.2. Specifically, for cities, SB 785 can only be used for the:

> construction of a building or buildings and improvements directly related to the construction of a building or buildings, county sanitation wastewater treatment facilities, and park and recreational facilities, but does not include the construction of other infrastructure, including but not limited to streets and highways, public rail transit, or water resources facilities and infrastructure.

The restrictions are effectively identical to those in Section 20175.2, except that construction of park and recreation facilities is now expressly authorized instead of just tacitly. While the application of SB 785 to "local agencies" gave the initial appearance of a significant broadening of design-build authority, the restrictions on the types of projects still indicates that SB 785 is only an incremental step toward making design-build available for all public works projects. While this is disappointing, the trend is at least continuing in the right direction.

The dollar threshold under SB 785 remains at $1 million, as it was under Section 20175.2. (Public Contract Code section 22162.) There is, however, no cost threshold for contracts for the acquisition and installation of technology applications or surveillance equipment designed to enhance safety, disaster preparedness, and homeland security efforts. (Public Contract Code section 22162(b).)

There are also some important changes to the design-build requirements under SB 785, which are summarized below.

B. Differences Between SB 785 and Public Contract Code section 20175.2

There are several important differences between SB 785 and its predecessor statute under Public Contract Code section 20175.2. First, SB 785 applies more broadly to "local agencies," which are defined in Public Contract Code section 22161(f) as follow:

(1) A city, county, or city and county.
(2) A special district that operates wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities.
(3) Any transit district, included transit district, municipal operator, included municipal operator, any consolidated agency, as described in Section 132353.1 of the Public Utility Code, any joint powers authority formed to provide transit service, any county transportation commission created pursuant to Section 130050 of the Public Utilities Code, or any other local or regional agency, responsible for the construction of transit projects.

The fact that SB 785 applies to this broader range of public agencies, in conjunction with the repeal of most previously adopted design-build statutes, will consolidate statutory authority and eliminate inconsistencies between design-build statutes. It should be beneficial to cities in that statutory interpretation issues and contracting approaches can be shared between a larger group of agencies, enhancing their collective wisdom.

SB 785 now requires public agencies to develop guidelines for a "standard organizational conflict of interest policy." (Public Contract Code section 22162(c).) The guidelines must be "consistent with applicable law, regarding the ability of a person or entity, that performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team." Section 22162(c) does not specify which "applicable law" the guidelines must be consistent with, and there are several laws that should be considered depending on the particular project, origin of funding, and type of public agency making the award. The term "organizational conflict of interest" is not specifically addressed under California statutory laws regarding conflicts of interest, such as Government Code section 1090[4]

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[4] Compliance with Government Code section 1090 should always be considered in conjunction with the drafting of the organizational conflict of interest policy, as some contractors who assist with the pre-award development of the contract would "participate in the making of a contract." (Government Code §1090.) Moreover, appellate cases have held that independent contractors hired by public agencies can be considered public "officers" under the statute under some circumstances. Specifically, "independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency's contracts." (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114.) Most of these cases address the actions of outside legal counsel advising public agencies, and none address an engineering, architectural or design consultants advising a public agency. In most instances, a design firm providing preliminary design services prior to the issuance of an RFP for a design-build project will not be involved in contract award decisions. Accordingly, such firms would probably not be in a position to exert "considerable influence" over a public agency's contracting decisions such that they would be considered a public "officer" under Government Code section 1090 and trigger those statutory requirements. (See generally *Hub City Solid Waste v. City of Compton* supra, and *California Housing Finance Agency v. Hanover/California Management and*
(footnote continued)

or the Political Reform Act. However, there is significant guidance regarding organizational conflicts of interest under federal grant law which must be considered for a variety of different federally funded projects, including transit projects funded by the Federal Transit Administration ("FTA").[5] The basic concept is that where a firm or contractor has a role in assisting an agency with planning or developing a project during its initial stages, it is barred from competing for subsequent contracts where the firm has a competitive advantage over other proposers or where its prior involvement would impair its objectivity on the project. This could include a consultant preparing an environmental review where additional work might depend on the clearance of the project, or an engineering consultant who might participate on a design-build team after assisting in the development of the initial design concepts. These guidelines should be drafted carefully, and ideally should include a screening process at the outset of the procurement in conjunction with the prequalification process. The earlier organizational conflicts are identified, the better chance a proposer team has of correcting them before it has expended significant time and resources on a proposal. In most cases, cities should consider notifying firms seeking to assist on the initial design work that they will not be allowed to participate in the design-build phase. The potential disqualification of such professionals may impair the city's ability to attract qualified consultants to assist in the early design phase, particularly for unique projects requiring specialized skills, as they may prefer to compete for the more lucrative design-build work.

SB 785 now expressly prohibits the award of a contract for design-build-operate services, except for operations during a training or transition period. (Public Contract Code section 22164(a)(2).) The predecessor statute was ambiguous on this point, but SB 785 clearly limits contract awards to design-build. As a result, if a city desires to award a contract that includes an operation component after a new facility is constructed, it must seek other contracting authority, such as under the Infrastructure Financing Act applicable to fee producing infrastructure facilities (Government Code section 5956-5956.10) or the Energy Conservation Contract statutes (Government Code section 4217.10-4217.18.)

During the prequalification process, SB 785 now authorizes local agencies to either pre-qualify proposers or shortlist proposers. This provides useful flexibility in that short-listing allows an agency to determine how many proposers will be allowed to participate in the proposal process after the statements of qualification have been submitted and

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Accounting Center (2007) 148 Cal.App.4th 682.) Nonetheless, the specific role of the design consultant should be considered carefully in order to confirm that the provisions of Government Code section 1090 are not implicated.

[5] See the Common Grant Rule issued by the Office of Management and Budget, and implemented by 26 federal departments and agencies (see specific CFR sections for the Department of Energy, Department of Education, Department of Health and Human Services, Department of Housing and Urban Development, and Department of Transportation, etc.); FTA Circular 4220.1F; Section 3(a) of the FTA Master Agreement.

reviewed. In other words, the agency has the discretion to create a large or small short-list depending on the quality of the qualification statements submitted. This differs from a true prequalification process where an objective qualification standard is established in the Request for Qualifications document, which must then be applied to advance all proposers that have met that standard even if the number of proposers is larger or smaller than ideal.

SB 785 no longer includes a Labor Compliance Program requirement, in contrast to the predecessor statute. This is not because the legislature is no longer interested in encouraging compliance with Labor Code provisions, but because the enforcement scheme was changed recently pursuant to SB 854. Pursuant to SB 854, all public works contractors performing work on projects over $1000 must now submit electronic certified payroll records to the California Department of Industrial Relations ("DIR") automatically for all public works projects within the state. The DIR will review all certified payroll records and monitor for prevailing wage violations, eliminating the need for local agencies to conduct an in-house Labor Compliance Program. Contractors are also obligated to register with the DIR on an annual basis, and submit a registration fee of $300.

SB 785 includes a new requirement for design-build contractors to provide an "enforceable commitment" to use a "skilled and trained workforce" at the RFQ stage of the process. (Public Contract Code section 22164(c).)

SB 785 only requires that three specific evaluation criteria be considered by an agency in evaluating proposals. (See Public Contract Code section 22164(f).) The following three criteria "shall be weighted as deemed appropriate by the local agency: (A) Price, unless a stipulated sum is specified. (B) Technical design and construction expertise. (C) Life-cycle costs over 15 or more years." This provision provides significantly more flexibility than the five specific criteria in the predecessor statute that were each required to comprise 10% of the evaluation criteria.

SB 785 requires that the payment bond be in an amount not "less than the performance bond." (Public Contract Code section 22165(a).) This language would appear to allow the agency the discretion to require bonds in less than 100% of the total contract amount.

Finally, the agency must issue a written statement in conjunction with the contract award indicating the basis of award. (Public Contract Code section 22164(f)(5).)

V. Greater Flexibility for Charter Cities

Charter cities are exempt from the state statutory requirements established pursuant to SB 785. Depending on the details of their individual City Charters and Ordinances, charter cities may have significantly more flexibility in how to award a design-build project. For instance, a charter city can tailor all of its contract award criteria and need

not consider the three criteria set forth in SB 785, can avoid prequalifying proposers, and could even negotiate directly with a single design-build contractor.

One charter city we worked with recently already had some flexibility for alternate project delivery methods in its charter, but chose to enhance this by revising its contracting ordinance to make it abundantly clear that the particular contracting approach considered (design-build-operate, with the authority to pay proposers a stipend) was authorized. If your charter city is contemplating a design-build award and a revision to the contracting ordinance is required, it may be prudent to consider drafting the ordinance broadly so as to allow for all potentially useful project delivery methods for future projects (design-build, design-build operate, competitive negotiation, construction manager at risk, integrated project delivery), where a deviation from design-bid-build is allowed. Language regarding keeping the award process fair and open, and encouraging creative and innovative solutions is also a good idea.

VI. Prequalification of Proposers

As mentioned above, SB 785 requires that an agency prequalify all proposers before requesting proposals. SB 785 requires that the public agency develop a request for qualifications ("RFQ"). (See Public Contract Code section 20164(b).) The RFQ must include each of the following elements:

- Basic scope of the project
- Expected cost range
- Methodology that will be used to evaluate proposals
- Procedure for final selection
- Significant factors that agency will consider in evaluating proposals
- Standard template for Statement of Qualifications

The easiest place to start for developing an RFQ is the model Prequalification Questionnaire developed by the California Department of Industrial Relations, specifically developed for design-build projects. The DIR's Questionnaire includes a section with mandatory pass/fail requirements, as well as scored questions, and a scoring key. These can all be revised and adapted for a particular project. For instance, it is important for the agency to decide which team members it intends to prequalify. Not all team members and subcontractors need to be prequalified, but certainly those that are most important to the success of the project should be.

Prequalification should not be viewed as a one-size fits all process. Often, the prequalification process must be tailored to the particular project to ensure that the bar is set high enough to create a field of qualified proposers, but not so high as to limit competition. In our experience, the agency may benefit from circulating a draft of the prequalification questionnaire for industry review and comment. If specific requirements are too stringent, comments from potential proposers may bring this to light. In some instances, it may be necessary to revise the RFQ or questionnaire after responses are submitted and are deemed to be inadequate. On one recent project, an agency we

worked with was initially not able to prequalify any of five interested proposers. After revising the requirements for an audited financial statement and overly stringent licensing requirements and re-issuing the prequalification questionnaire, four of five potential proposers were prequalified. On another recent project we were involved in, requirements that all team members needed specific experience in the United States were relaxed to allow foreign experience, given that many engineering consultants on the design-build teams were based in Europe.

VII. Tailoring the Evaluation Process to Your Project

SB 785 includes some requirements with regard to the proposal evaluation process, including:

- Three specific criteria that must be considered in the evaluation process (as discussed above).
- The RFP must include the basic scope and needs of the project, the estimated cost, the methodology to evaluate proposals (best value or low bid, the significant factors considered in evaluating proposals, the relative weight of those factors, and any negotiation procedures after proposal submission. (Public Contract Code section 22164(d).)
- The RFP must specify which specific subcontractors must be included in the proposals. (Public Contract Code section 22166.)

In spite of these requirements, agencies still have significant flexibility to create a process that is suited to their particular project. For instance, since only three evaluation criteria are specified, and the weight of those three criteria can be established by the agency, that allows for wide discretion as to what the remaining criteria and weighting will be. For more technically complex projects, more emphasis should be placed on factors such as technical expertise, experience on comparable projects, team qualifications, and qualifications of key subcontractors. For projects that are not particularly technically complex, greater emphasis can be placed on price. Each agency is free to tailor its evaluation criteria to essentially create its own definition of "best value" for each particular project.[6]

Public agencies also have significant discretion with regard to how the proposals must be submitted and evaluated. Variations can include: 1) a single proposal including both price and technical information which are ranked immediately after submission; 2) a

---

[6] "Best Value" is defined as "a value determined by evaluation of objective criteria that may include, but not be limited to price, features, functions, life-cycle costs, experience, and past performance. A best value determination may involve the selection of the lowest costs proposal meeting the interests of the local agency and meeting the objectives of the project, selection of the best proposal for a stipulated sum established by the procuring agency, or a tradeoff between price and other specified factors." (Public Contract Code section 22161(a).)

"two envelope" process where price is considered only after technical proposals are ranked and short-listed; and 3) an initial technical submittal, followed by price proposals submitted only by short-listed proposers. Each of these approaches is legally viable under SB 785, and each have their merits depending on the goals of the particular procurement.

Finally, public agencies also have significant discretion with regard to discussions, negotiations and Best and Final Offer ("BAFO") procedures after proposal submission. The most common approach is to enter into negotiations with the highest ranked proposer after the proposal evaluation process has been completed. Negotiations can focus on price aspects, scope of services provided, proposer team details, etc., although it is wise for the agency to provide itself latitude in these negotiations in the language of the RFP. Another approach is for the agency to request BAFOs from all short-listed proposers to induce additional competition on price.

In short, public agencies have significant flexibility to tailor the proposal evaluation process under SB 785, provided the agency follows the procedures that are set forth in the RFP.

VIII. Creative Contracting Approaches

Many creative contracting approaches have been developed on private sector design-build projects, which can be incorporated into a public procurement, including the approaches summarized below (each of which is legally viable under SB 785).

A. Alternative Technical Concepts

Where an owner desires to consider alternatives to its initial conceptual design in an effort to find more innovative and cost effective ways to approach a project, requesting alternative technical concepts ("ATCs") from proposers in conjunction with proposals can be a very useful tool. ATCs have been defined as any concept, submitted by a proposer and accepted by the owner, that differs from the requirements of the RFP and contract documents and results in performance and quality of the end product that is equal to or better than the of the initial conceptual design. Anecdotally, requesting ATCs usually results in at least one improvement over the initial conceptual design, if not several.

There are different ways to approach ATCs in terms of timing of submission, and confidentiality. One approach we have employed on a recent design-build transit project is to require submission of ATCs in advance of proposals. If an ATC is approved by the agency, it may be included with the proposal, with separate pricing for both the initial conceptual design and the ATC design. The approved ATC remains confidential and is not shared with other proposers.

Another approach to ATCs is to invite submission in conjunction with proposals as alternative approaches to the work. This approach saves time in that a separate review

process in advance of proposal submission is not required. In addition, the RFP can specify that all rights to the ATCs are owned by the agency, regardless of whether the proposer that submits the ATC is awarded the contract. This is obviously a more aggressive approach to ATCs that some design-build contractors will object to, particularly if no stipend is offered in conjunction with proposal submission. However, because SB 785 is silent on ATCs, each of these approaches is legal and cities are free to consider how ATCs might benefit their project. The results can be very positive.

On a relatively recent project for the seismic retrofit of a public hospital we assisted with, the public agency was able to realize approximately 35% in savings through the incorporation of ATCs submitted by the proposers. The RFP required each of the proposers to submit a proposal based on the design included in the bridging documents, but also allowed proposers to submit alternative proposals based on their own conceptual design (subject to certain project requirements and design criteria set forth in the bridging documents). Proposers were encouraged to work with their team members to create alternative design solutions. In every case, the alternative conceptual design that the project teams came up with were more economical than the approach in the bridging documents. This resulted in an approximately 23% savings from the design-builder competitors' alternative design solutions. After the best value proposer was selected, the project team (which included the architect, structural engineer, the contractor and the mechanical, electrical and plumbing design-build subcontractors) continued to collaborate with public agency staff to further hone the conceptual design, eventually realizing an additional 12% savings.

B. Bonus for Successful Outcome (the Carrot)

Everyone involved in public works contracting is familiar with liquidated damages, which are ordinarily charged against a contractor on a daily basis in the event that the contractor is late in completing the work. In effect, this provision is a contractual "stick" to motivate the contractor to complete the work on time. Although less common, a contractual "carrot" in the form of a bonus for a successful outcome can also be useful. A bonus can be awarded for just about any achievement on the project that can be measured or confirmed. The most obvious application of a bonus is for early completion of the work, and can be awarded in the form of an amount for each day that the design-build contractor completes work early. Other examples include lump sum bonuses completing a milestone in advance of a specified date, for completing the project with less than a specified number of job related injuries, exceeding specified energy use targets, etc.

Including a bonus for a successful outcome provides an additional benefit in terms of contractor relations. Just adding language to allow for the award of a bonus will demonstrate to the contractor that the agency views the project as a collaborative venture where both parties will ideally succeed, rather than an adversarial "zero sum game" that design-bid-build projects are frequently viewed as. Collaborative contracting principles have expanded significantly over the last ten years in the private sector as owners and contractors realize that the more their respective interests are aligned, the

greater the likelihood of success. These principles are encompassed by broader contracting approaches known as Integrated Project Delivery or Lean construction, elements of which are gradually making their way into public works contracting as well.

C. Stipends

Stipends, paid to proposers to defray the cost of preparing their proposals, are common for large scale design-build projects in the private sector. The stipend can be paid to each proposer that submits a fully responsive proposal, or limited to just the short-listed proposers. Depending on the size of the project, they can be as high as several hundred thousand dollars, or even over $1 million. The reasoning behind paying a stipend is that for large projects, proposers must invest significant time and effort to investigate and evaluate the project, analyze different approaches to performing the work, assembling a team, and pricing their work. This process is significantly more involved than on a design-bid-build project where the design is fully established, and there are fewer variables to consider. Where ATCs are requested, preparation of a proposal for a design-build project is yet more involved. In order to encourage a sufficient number of experienced and high quality design-build teams to propose on a project, it is sometimes necessary to offer a stipend to defray at least some of the cost of preparing a proposal. According to the Design-Build Institute of America, other benefits of paying a stipend include signaling the intent that the owner is serious about going forward with the project, and encouraging proposers to expend the time, money and resources to provide a more creative and comprehensive solution.[7]

Industry surveys indicate that stipends are frequently set between .01 and .25 percent of the project budget, considering what is required to generate sufficient market interest from the most highly qualified design-build teams.[8] Without a stipend, owners run a risk of not getting the highest caliber proposers to participate.

Admittedly, stipends are uncommon in the public sector, and in some ways appear to run against public policy goals of public procurement. Paying for proposals seems contrary to protecting public funds and ensuring that they are spent wisely, given the traditional approach of awarding public works projects to the lowest bidder. However, I am unaware of any legal prohibition against stipends paid on public works projects in California, and they are expressly legal in other states, like Washington. In essence, a public agency is paying for high quality proposals that it would not otherwise receive. The stipend can also be tied expressly to ownership of rights to the ATCs, further justifying the value the agency receives from paying the stipend.

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[7] "DBIA Position Statement, Use of Stipends," 2010, Design-Build Institute of America.

[8] "DBIA Position Statement, Use of Stipends," 2010, Design-Build Institute of America.

Ultimately, whether an agency decides to pay a stipend for proposals depends on the competitive dynamics of the particular project. If there is sufficient interest from quality design-build teams without a stipend, it need not be included. On the other hand, if interest is marginal, a stipend may improve the quality of proposals enough to allow for a successful project.

IX. Reality Check: Design-Build is Not Ideal for Every Project

Design-build may not be ideal for every project. Thought should be given at the outset of each project to assess whether design-build is the best project delivery method, or whether the benefits are outweighed by one of the few drawbacks. For instance, where an agency seeks close control over design details, design-bid-build may be a better choice, because the agency will be able to monitor, revise and fine tune the design before the project is put out to bid. Under a design-build project, the agency relinquishes a degree of control over design details in favor of more efficient project delivery and overall quality. Similarly, where an agency wants to keep the initial conceptual designer on board to complete the design, design-build is not an option because organizational conflict of interest rules preclude the initial designer from participating on the final project.

It is also important to note that the prequalification process extends the time to contract award by several months. However, the time spent prequalifying and ranking proposals carefully should be reflected in a higher quality design-build contractor, which should in turn lead to higher quality and more efficient work.

Finally, for those agencies that have not awarded a design-build project in the past, there is obviously a ramp-up required in terms of educating internal staff, management, and council-members as to how the process works. In addition, project team members (owner's representative, project engineer and legal counsel) should be selected carefully to ensure that the project documents are sound. For the agency's first design-build project, additional effort will be required to prepare a new RFQ and RFP that comply with SB 785. Where the size of the project is below a certain dollar threshold ($5 million), or where the design work is relatively simple and design-build would not result in significant efficiencies, the time and effort involved in the ramp-up may not be worth it.

However, for the right project, design-build can be a significant improvement over design-bid-build, and might well change the way your city approaches public works projects going forward.

X. Conclusion

Design-build is becoming a more viable project delivery method for cities and other public agencies in California with each passing year. The number of agencies that have awarded design-build contracts with successful results continues to grow, in conjunction with their collective wisdom. The benefits of design-build for those agencies willing to deviate from the standard design-bid-build approach can be significant: the flexibility of a best value award process, a single point of accountability, higher quality of work, fewer change orders, fewer claims, faster project completion, greater cost certainty, and more innovation. In light of these benefits, and the broader availability of design-build under SB 785, design-build contracting in the public sector should continue to grow.

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Karin Freese

From: Karin Freese
Sent: Tuesday, May 23, 2023 4:51 PM
To: Karin Freese
Subject: Fiscal transparency in Design-Bid-Build versus Design-Build
Attachments: 5-2015-Spring-David-Gehrig-Design-Build-For-Public-Works-Projects.pdf

Dear Board and Staff members,

At yesterday evening's board meeting an explanation and comparison of fiscal transparency tools in the Design-Bid-Build and Design-Bid methods was requested.

Fiscal transparency refers to the extent to which government budgets, expenditures, and financial activities are open, accessible, and understandable to the public. In the context of construction projects, such as design-bid-build and design-build, fiscal transparency plays a crucial role in ensuring accountability and preventing corruption. Following is an explanation and comparison of the fiscal transparency tools:

1. Design-Bid-Build (DBB): In the design-bid-build method, the project is divided into two distinct phases: the design phase and the construction phase. Here are some methods of ensuring fiscal transparency in DBB:

    a. Open and Competitive Bidding: The bidding process should be open to all qualified contractors, ensuring fair competition. Advertisements or announcements regarding the bidding process must be made public, providing project details, specifications, and bid requirements.

    b. Transparent Bid Evaluation: The evaluation process should be conducted transparently, with clear criteria and evaluation procedures. It's important to establish an evaluation committee that includes members from different relevant departments or agencies to ensure impartiality.

    c. Public Disclosure of Bid Results: After the bidding process is completed, the results, including bid amounts and the winning contractor, should be publicly disclosed. This helps to maintain transparency and allows the public to scrutinize the decision-making process.

    d. Clear Budgetary Information: Throughout the project, detailed information about the project budget, including cost estimates, expenditures, and any changes or modifications, should be made available to the public. This allows for accountability and ensures that funds are allocated and spent appropriately.

2. Design-Build (DB): In the design-build method, the project owner contracts a single entity responsible for both the design and construction aspects. While this approach differs from DBB, fiscal transparency can still be maintained through the following methods:

    a. Competitive Selection Process: The selection of the design-build entity should follow a competitive process. This involves issuing requests for qualifications or proposals from interested entities, ensuring that multiple firms have an opportunity to participate.

    b. Transparent Contract Negotiations: Once the design-build entity is selected, the negotiation process for the contract should be transparent. The contract should clearly define and document key terms, such as the project scope, deliverables, cost estimates, and payment schedules.

    c. Regular Progress Reporting: The design-build entity should be required to provide regular progress reports, including financial updates, to the project owner. These reports should outline expenditures, any changes to the budget, and reasons for deviations, ensuring transparency and accountability.

    d. Oversight and Auditing: Independent oversight and auditing can help ensure fiscal transparency. External auditors or government agencies may periodically review the project's financial records, verifying that funds are used appropriately and in accordance with contractual obligations.

Regardless of the project delivery method, maintaining fiscal transparency involves 1) open and competitive processes, 2) clear documentation, 3) regular reporting, and 4) public disclosure of relevant information. These practices help promote accountability, discourage corruption, and build trust among stakeholders and the general public.

For additional information on the design-build for public agencies process, I have attached a paper from David Gehrig. You may remember he is the attorney we consulted with originally on our district's ability to utilize design-build on this project.

Please submit questions and requests for additional information before the June 12 special board meeting. Your questions will be researched, and the answer will be given to all board members simultaneously.

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California Special Districts Association

Virtual Contracting Workshop 2023

May 24-25, 2023

PUBLIC CONTRACTING AND COMPETITIVE BIDDING MANUAL

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Public Contracting Laws and Competitive Bidding in California

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SEMINAR OVERVIEW

Topics Covered Today:

- Selecting a Contracting Method
- Generally Applicable Statutes and Requirement
- Procuring Consultants, Architects, Engineers, Construction Managers
- Preparing the Construction Contract
- Procuring the Construction Team
- Common Bidding Issues and Bid Protests
- Managing Construction Issues, Project Change, and Emerging Claims
- Understanding and Drafting for Claims on Public Works Projects
- Managing Project Closeout
- Managing the Disputes and Claims Process Required Under PCC § 9204

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Contracting Options and Selection of a Contracting Method

Design-Bid-Build

- Design
  - Owner Prepares
  - Owner Controls
- Bid
  - Contractors price the design
  - Contractors select and list their subcontractors
  - Award to low, responsive, responsible bidder
- Build
  - Contractor builds the original design
  - Plus changes

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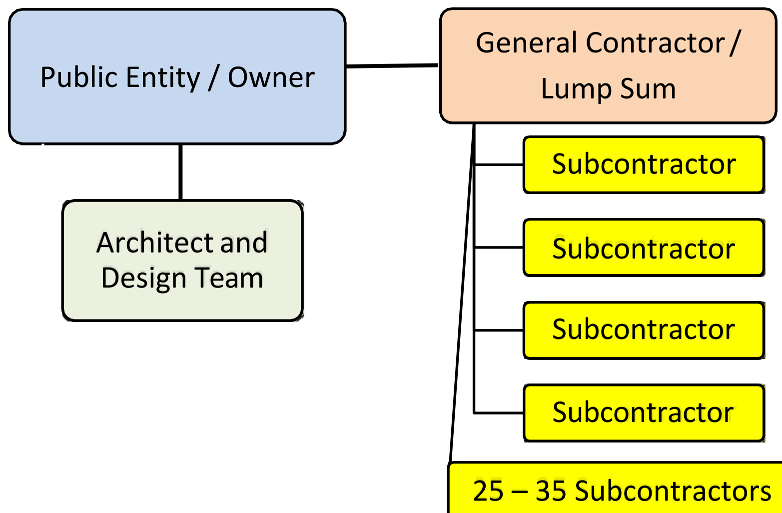
Design-Bid-Build



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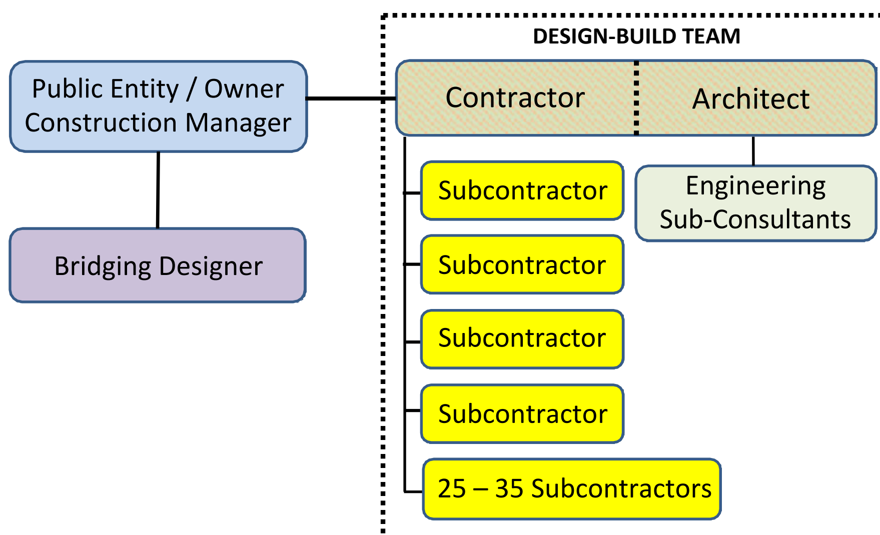
Design-Bid-Build

- Design
  - No Contractor involvement in preparing
  - No Contractor "ownership"
- Bid
  - Transparent, competitive process
  - No Owner involvement in phasing, scope definition, bidding or selection of subcontractors
- Build
  - Change and pricing of change is a regular process

Design-Build



Design-Build

- Single Entity Provides Design and Construction
- Prerequisites
  - Eligible "project" (PCC § 22161)
  - Conflict of interest policy (PCC § 22164(a)(2)
- Prequalify Using a Standard Template for Statement of Qualifications (PCC § 22164(b)(3))
  - Experience with projects of similar size, scope, or complexity
  - Proposed key personnel have sufficient experience
  - Financial statement that ensures that the design-build entity has the capacity to complete the project.

Design-Build Request for Proposals

- RFP Elements
  - Scope definition (bridging documents) (PCC § 22164(a)(1))
  - Expected cost range (Public Contract Code § 22164(a)(1))
  - Significant factors that the local agency reasonably expects to consider in evaluating proposals (PCC § 22164(d)(2))
  - Procedure for final selection (PCC § 22164(b)(1))
  - Reserve the right to request proposal revisions and hold discussions and negotiations with responsive proposers (PCC § 22164(b)(4))
- Shortlist requires enforceable commitment to use a skilled and trained workforce (PCC § 22164(c)(1).)

Design-Build – Key Issues

- Prequalification Tailored to Project
- Negotiation Allowed in RFP Stage
- Experienced Bridging Designer
- Experienced Project Management
- Scope Definition
  - Tradeoffs: Scope definition vs. design and construction flexibility
  - Change is costly in time and money
  - DB will provide what the scope of work requires
  - Owner will not control what the owner does not specify
- Review and Acceptance of Developing Design

BOARD OF DIRECTORS OF DEL PUERTO HEALTH CARE DISTRICT

Board Meeting – June 12, 2023

Department:	Chief Executive Office	CEO Concurrence:	Yes
Consent Calendar:	No	4/5 Vote Required:	No

SUBJECT: **Nexus Study Requirements and Request for Proposal Publication**

STAFF REPORT: The California Mitigation Fee Act (CMFA) is a state law that provides guidelines and regulations for local agencies to impose fees on new development projects. These fees are intended to mitigate the impacts of development on public infrastructure and services. One important requirement of the CMFA is the Five-Year Findings provision.

The Five-Year Findings requirement mandates that local agencies review and evaluate the fees they collect under the CMFA every five years. This review aims to assess whether the fees being charged are still necessary and proportionate to address the impacts of community development.

During the Five-Year Findings process, the local agency must thoroughly analyze various factors. They typically examine changes in the cost of providing public facilities and services, changes in land use patterns, population growth, and any other relevant information that may impact the need for fees. The agency must also consider the specific purposes for which the fees were initially imposed and determine if those purposes are still valid.

Based on this analysis, the agency will decide whether to retain, modify, or eliminate the fees. If the agency decides to retain or modify the fees, it must demonstrate a reasonable relationship between the fees and the impacts of new development. This means the fees must be reasonably connected to the need for infrastructure and services resulting from the development.

The Five-Year Findings requirement ensures that the fees imposed under the CMFA remain fair and justified over time. It allows for a periodic reassessment of the fees to ensure that they align with the current needs and circumstances of the community. This provision promotes transparency, accountability, and the responsible management of development impact fees in California.

RECOMMENDATION: Staff recommends an RFP be issued for a Development Impact Fee NEXUS Study

DISTRICT PRIORITY: Transparency, accountability, and responsible management of development impact fees

FISCAL IMPACT: TBD

STAFFING IMPACT: None

CONTACT PERSON: Karin Freese, CEO

ATTACHMENT(S): Mitigation Fee Act’s Five-Year Findings Requirement

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RECOMMENDED BOARD ACTION: None – information only

The Mitigation Fee Act's Five-Year Findings Requirement: Beware Costly Pitfalls

Friday, May 6, 2022

Glen Hansen, Senior Counsel, Abbott & Kindermann
Rick Jarvis, Managing Partner, Jarvis, Fay & Gibson

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THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT: BEWARE COSTLY PITFALLS

presented at

LEAGUE OF CALIFORNIA CITIES
2022 City Attorneys Spring Conference

Friday, May 6, 2022, 9:00-10:15 a.m. General Session
Westin Carlsbad, Carlsbad, California

RICK W. JARVIS, Managing Partner, Jarvis, Fay & Gibson, LLP (Panelist)

GLEN HANSEN, Senior Counsel, Abbott & Kindermann, Inc. (Panelist)

ERIC DANLY, City Attorney, Petaluma (*Session Moderator*)

OVERVIEW

The Mitigation Fee Act (specifically Government Code section 66001, subdivision (d)) requires local agencies to adopt "five-year findings" accounting for development impact fee proceeds held unexpended for more than five years. It further provides that agencies must refund the moneys held if they fail to make the required findings. The statute is vaguely written, and recent court decisions have interpreted it in a draconian manner, suggesting that a local agency must automatically refund its development fee proceeds if the court determines the findings to be defective, without any chance for the agency to cure the defect. As a result, there appears to be an increase in lawsuits seeking such refunds.

Every city that has development fee proceeds collected and unexpended for more than five years faces the risk of such litigation, including arguments that it is too late for the city to cure any defects in its most-recent five-year findings and that it must automatically refund all of the retained funds. City attorneys and staff should scrutinize their most recently adopted five-year findings and, even more importantly, make sure to carefully review and "bullet-proof" the next five-year findings when those become due. In addition, the League of California Cities should seriously consider pursuing legislative reform to clarify existing requirements (perhaps working from recently-adopted legislation imposing new requirements for nexus studies, including a requirement to update them every eight years). In the meantime, municipal litigation counsel should strive to carefully brief these issues in currently pending appeals, to better educate the appellate courts and to hopefully succeed in obtaining rulings that are workable for public agencies and consistent with the Act's purpose of offsetting the impacts of new development.

The following analysis outlines the existing legal requirements, summarizes recent court decisions, and identifies potential areas for legislative reform.

ANALYSIS:

I. DEVELOPMENT FEES IMPOSED BY CITIES

A. Authority To Impose Development Fees

- Cities have the inherent police power to impose development impact fees on development projects. (*Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638; *Shappell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 234.)

- Cities "commonly impose[]" such fees "in order to lessen the adverse impact of increased population generated by the development." (*Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1504.)

- Such fees are "only fair" because the "developer has created a new, and cumulatively overwhelming, burden on local government facilities, and therefore … should offset the additional responsibilities required of the public agency by the dedication of land, construction of improvements, or payment of fees, all needed to provide improvements and services required by the new development …." (*Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325.)

B. Limitations For Imposing Development Fees

- Federal Takings Jurisprudence – The U.S. Supreme Court has interpreted the Takings Clause to impose certain limitations on the ability of public agencies to impose exactions on development projects, so that they do not use their leverage over development approvals to require developers to give up property rights having nothing to do with their development impacts.

  - Nexus - *Nollan v. California Coastal Commission* (1987) 483 U.S. 825
  - Rough Proportionality - *Dolan v. City of Tigard* (1994) 512 U.S. 374
  - Applies to Monetary Exactions - *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595

- California Constitution

  – Legislatively imposed development mitigation fees "*must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development*." (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671.)

- The Mitigation Fee Act (aka "AB 1600") – Government Code §§ 66000 *et seq*. ("MFA") – Discussed below.

II. MITIGATION FEE ACT REQUIREMENTS

A. MFA Requirements For Legislative Adoption

- The MFA essentially requires nexus findings for all legislatively-adopted development fees (Govt. Code § 66001, subd. (a)). The findings must:
  – Identify the purpose of the fee
  – Identify the use to which the fee is to be put
  – Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed
  – Determine how there is a reasonable relationship between the need for the public facilities to be funded by the fee and the type of development projects on which the fee is imposed

- Nexus studies (Govt. Code § 66016.5 [effective 1/1/22]) Originally, the term "nexus" or "nexus study" never actually appeared in the Mitigation Fee Act. However, the Legislature has now adopted new legal requirements for such nexus studies. The new nexus requirements:

  – Require identification of the existing level of service, the proposed new level of service, and an explanation why the new level of service is appropriate (where applicable)
  – Generally require fees on housing developments to be proportional to square footage unless the city makes findings in support of a different metric
  – Require adoption at public hearing with 30 days' notice
  – Must be updated at least every 8 years, starting 1/1/22

B. MFA Requirements for Fee Imposition on Individual Development Projects

- If the development impact fees are imposed on a particular project based on a legislatively-adopted fee schedule, the requirements in Government Code

section 66001, subdivision (a), apply, and not the requirements of subdivision (b):

– *See Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 336 ["Subdivisions (a) and (b) describe different stages of a fee imposition process. Subdivision (a)--which speaks of use and need in relation to a 'type' of development project and of agency action 'establishing, increasing, or imposing' fees--applies to an initial, quasi-legislative adoption of development fees. Subdivision (b)--which speaks of 'imposing' fees and of a reasonable relationship between the 'amount' of a fee and the 'cost of the public facility or portion of [it] attributable to the development on which the fee is imposed'--applies to adjudicatory, case- by-case actions."])

– *See AMCAL Chico LLC v. Chico Unified School Dist.* (2020) 57 Cal.App.5th 122, 127 ["For a general fee applied to all new residential development, a site-specific showing is not required"]. *See also Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School Dist.* (2019) 34 Cal.App.5th 775, 786; *Cresta Bella Cresta Bella, LP v. Poway Unified School Dist.* (2013) 218 Cal.App.4th 438, 447.

- By comparison, if the development impact fees are imposed based on an administratively imposed (ad hoc) assessment, then subdivision (b) of section 66001 applies:

  – "In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (§ 66001(b).)

  – "At the time the local agency imposes a fee for public improvements on a specific development project, it shall identify the public improvement that the fee will be used to finance." (§ 66006(f).)

- Developers have 90 days to protest and 180 days to bring an as-applied challenge.

- Caveat: The 90-day exhaustion requirement and 180-day statute apply *ASSUMING* city has given developer written notice of protest rights under § 66020(d)(1)! Failure to give such notice of protest rights could toll the statute of limitations for bringing legal action challenging the fee (subject to potential laches defenses).

- § 66020 provides the exclusive method for making an "as applied" challenge to a development fee. (*Merkoh Associates, LLC v. Los Angeles Unified School Dist.* (2016) 245 Cal.App.4th 1031.)

C. MFA Requirements for Post-Collection Use and Accounting of Fee Revenues

- Development fee proceeds must be deposited in separate account or fund and be expended "solely for the purpose for which the fee was collected." (§ 66006 (c).)

- Cities must adopt annual reports within 180 days of the close of each fiscal year (§ 66006 (b).):

  - Describing of the type of fee, its amount, and beginning and ending balance
  - Specifying the amounts collected during the year and interest earned
  - Listing each public improvement for which fees were expended, including the percentage of the project costs funded by the fees
  - Providing an approximate date by which construction of the improvements will commence, if sufficient funds have been collected

- Fee refund remedies (§ 66001(e), (f))

  - Once sufficient funds have been collected to complete financing of public improvements, cities have 180 days to identify an approximate date when construction will be commenced.

  - If a city does not identify an approximate construction commencement date, then it must refund the fees to the current property owners on a prorated basis, including accrued interest.

  - "By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means."

– If administrative costs of refunding fees exceed the amount to be refunded, the agency may hold a public hearing to determine how to allocate the revenues "for some other purpose for which fees are collected … and which serves the project on which the fee was originally imposed."

D. MFA's Five-Year Findings Requirement

- Statutory five-year findings requirement (§ 66001(d)(1))

  – For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make specified findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted. The findings must:

    A. Identify the purpose to which the fee is to be put.

    B. Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.

    C. Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements …

    D. Designate the approximate dates on which the funding referred to in subparagraph (C) is expected to be deposited into the appropriate account or fund.

  – Five-year findings "shall be made in connection with [the annual reporting under § 66006(b)]."
    [§§66006(b) requires the report to be filed within 180 days of the end of the fiscal year]

- Refund remedies for failure to make five-year findings (§ 66001(d)(1))

  – "If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e)."

  – In *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350:

- The city was ordered city to refund over $10 million in development fees that had been collected over two decades to fund beach parking.
- The city never developed any plan to use the funds.
- The city had multiple studies conducted that concluded that there was no need for additional beach parking, but the city continued collecting the fee.
- The court found that the "Five-Year Report" the city adopted failed to make the specified findings and "dodges the question."
- The court rejected challenges to prior expenditures to purchase a vacant lot and for administrative overhead costs – the city need only refund "unexpended" funds.
- "The five-year findings requirement imposed a duty on the City to *reexamine* the need for the unexpended Beach Parking Impact Fees … . The City may not rely on findings it made 20 years earlier to justify the original establishment of the Beach Parking Impact Fee, or the findings it made 13 years earlier to justify reducing the amount of the fee. *Instead, the Act required the City to make new findings demonstrating a continuing need for beach parking improvements caused by the new development in the noncoastal zone*."
- The court held that the city was required to make the refunds without any opportunity to cure the defects.

– In *County of El Dorado v. Superior Court* (2019) 42 Cal.App.5th 620, 625-627:

  - The court held that challenges to five-year findings seeking refunds are subject to a one-year statute of limitations, because the refunds are a "penalty or forfeiture" subject to Code of Civil Procedure section 340(a).

  - But the court also confusingly held that a claim for refund of development impact fee payments could be pursued after the running of the one-year statute of limitations based on the "continuous accrual doctrine." (*County of El Dorado v. Superior Court, supra,* 42 Cal.App.5th at pp. 620, 627-628 ["If [plaintiff's claim is] not made within one year of the deadline for findings, the plaintiff has only a limited remedy for the subsequent payments made within one year before filing a refund action, not the entire corpus existing at the time of the deadline. The County's liability for failure to

comply with its statutory duty is accordingly limited."]) This holding is troubling insofar as it seems to confuse the need to adopt findings for funds held more than five years with the ongoing collection of new development fees, which shouldn't be subject to any such findings requirements unless and until held for more than five years.

- Current issues and questions regarding Five-Year Findings (which could warrant statutory clarification from the Legislature):

  – Must cities make the five-year findings for all amounts in the fund, or only for amounts held for over five years as of the close of the fiscal year? The "plain language" of Section 65001(d) could be interpreted either way.

  – Are five-year findings required for any accounts that had some balance five years prior, even though the funds from five years ago have been fully expended, if a balance still exists in the fund five years later due to the collection of subsequently-paid fees?

  – If a refund is required, is a city required to refund all amounts held in the fund, or only amounts held for more than five years? What about amounts recently collected after the close of the fifth fiscal year?

  – Must cities conduct new nexus studies or other analysis in support of the five-year findings? (Presumably not since new Section 66016.5 only requires updated studies every eight years. However, note the language in *Walker v. City of San Clemente* that "the Act required the City to make new findings demonstrating a continuing need for beach parking improvements caused by the new development in the noncoastal zone.")

  – The five-year findings are due within 180 days after the close of the fiscal year (typically, by December 27). If a city is late in making the findings, must it refund all the funds for which the findings were required?

  – If a court later determines that a city's five-year findings are legally inadequate, should the city be given the opportunity to cure any such inadequacy before being required to refund the funds?

– What is the statute of limitations for challenging the adequacy of a city's five-year findings? While the court in *County of El Dorado* held that the statute of limitations is only one year, that holding is premised on a questionable finding that the refund requirement is analogous to a forfeiture or penalty. It is not clear whether other appellate courts will agree.

- <u>Possible legislative reforms</u>

  <u>Legislative reforms that could help cities accountably manage their development fee programs and avoid litigation and refund risks include:</u>

  – Clarifying the procedures for challenging five-year findings, including providing an opportunity to cure any procedural defects and setting forth a statute of limitations.
    - ➢ Removing any suggestion that the refund requirement is a "penalty or forfeiture"
    - ➢ Perhaps adding an administrative procedure that requires litigants to raise objections with the local agency before they are able to sue in court

  – Clarifying accounting requirements for improvements included in capital improvement programs.

  – Giving agencies more flexibility on how to address shifting infrastructure needs.

  – Reconciling the requirement for "five-year findings" with the newly-adopted statutory requirement to update nexus studies every eight years, as set forth in Government Code section 66016.5 (effective 1/1/22)