

AMENDED IN ASSEMBLY MARCH 28, 2007

CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

ASSEMBLY BILL

No. 916

Introduced by Assembly Member Niello
(Principal coauthor: Senator Cox)

February 22, 2007

An act to ~~amend Section 20133~~ *add and repeal Section 20133.1* of the Public Contract Code, relating to ~~design-build~~ *public contracts*.

LEGISLATIVE COUNSEL'S DIGEST

AB 916, as amended, Niello. ~~Design-build projects. Public contracts: alternative procurement procedure: County of Sacramento.~~

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. ~~Existing law, until January 1, 2011, authorizes certain counties, with the approval of the board of supervisors, to enter into design-build contracts, as defined, in accordance with specified provisions.~~

~~This bill would specify that "projects" does not include the construction or improvements of a building that is owned and operated as part of a public airport.~~

This bill would declare the intent of the Legislature to authorize an alternative method of procurement for airport-related construction projects in the County of Sacramento. This bill would authorize the County of Sacramento to use the construction manager at-risk method, as defined, for contracting on airport-related construction projects, as specified. This bill would establish a procedure for the submission and evaluation of bids, as specified. This bill would also require the County

of Sacramento to submit a report, as specified, to the Legislative Analysts Office if it utilizes this alternative method of procurement.

This bill would require a construction manager, as defined, to implement a labor compliance program for projects utilizing the construction manager at-risk method. The bill also would make legislative findings and declarations as to the necessity of a special statute for the County of Sacramento.

This bill would require specified information to be verified under oath, thus imposing a state-mandated local program by expanding the scope of an existing crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
 State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 20133.1 is added to the Public Contract
- 2 Code, to read:
- 3 20133.1. (a) This section provides for an alternative
- 4 procurement procedure for building construction projects
- 5 applicable only to airport-related construction in the County of
- 6 Sacramento subject to approval of the board of supervisors.
- 7 (b) (1) It is the intent of the Legislature to enable the utilization
- 8 of a construction manager at-risk project method as a cost-effective
- 9 option for building and modernizing public facilities on a limited
- 10 and pilot basis. It is not the intent of the Legislature to authorize
- 11 this procedure for facilities unrelated to airport improvement.
- 12 (2) The Legislature finds and declares that utilizing a
- 13 construction manager at-risk project method requires a clear
- 14 understanding of the roles and responsibilities of each participant
- 15 in the process. The Legislature also finds that cost-effective benefits
- 16 are achieved by shifting the liability and risk for cost containment
- 17 and project schedule to the construction manager and by permitting
- 18 the coherent phasing of projects into discrete contract increments.

1 (3) *The construction manager at-risk method may be used, but*
2 *is not limited to, when it is anticipated that it will reduce project*
3 *costs or expedite project completion in a manner that is not*
4 *achievable through the design-bid-build method.*

5 (4) *If the board of supervisors elects to proceed under this*
6 *section, the board of supervisors shall establish and enforce a*
7 *labor compliance program containing the requirements outlined*
8 *in Section 1771.5 of the Labor Code, or it shall contract with a*
9 *third party to operate a labor compliance program containing the*
10 *requirements outlined in Section 1771.5 of the Labor Code. This*
11 *requirement shall not apply to any project where the county or the*
12 *construction manager has entered into any collective bargaining*
13 *agreement or agreements that bind all of the contractors*
14 *performing work on the projects.*

15 (c) *As used in this section:*

16 (1) *“Construction manager at-risk method” means a project*
17 *delivery method in which there is a separate contract for*
18 *construction services and a separate contract for design services.*
19 *The contract for construction services may be entered into at the*
20 *same time as the contract for design services, or at a later time.*
21 *The execution of the design and the construction of the project*
22 *may be in sequential phases or concurrent phases.*

23 (2) *“Construction manager” means a partnership, corporation,*
24 *or other legal entity that is able to provide appropriately licensed*
25 *contracting and engineering services as needed pursuant to a*
26 *construction manager at-risk contract.*

27 (3) *“County” means the County of Sacramento.*

28 (4) *“Project” means the construction of a building and*
29 *improvements directly related to improvements of a public,*
30 *commercial airport in the County of Sacramento.*

31 (d) *Construction manager at-risk method projects shall progress*
32 *as follows:*

33 (1) (A) *The county shall establish a procedure for the evaluation*
34 *and selection of a construction manager through a request for*
35 *qualifications (RFQ). The RFQ shall include, but not be limited*
36 *to, the following:*

37 (i) *If the entity is a partnership, limited partnership, or other*
38 *association, a listing of all of the partners, general partners, or*
39 *association members known at the time of the bid submission who*

1 will participate in the construction manager at-risk method
2 contract, including, but not limited to, mechanical subcontractors.

3 (ii) Evidence that the members of the entity have completed, or
4 demonstrated the experience, competency, capability, and capacity
5 to complete, projects of similar size, scope, or complexity, and that
6 proposed key personnel have sufficient experience and training to
7 competently manage and complete the construction of the project,
8 as well as a financial statement that assures the county that the
9 entity has the capacity to complete the project, construction
10 expertise, and an acceptable safety record.

11 (iii) The licenses, registration, and credentials required to
12 construct the project, including information on the revocation or
13 suspension of any license, credential, or registration.

14 (iv) Evidence that establishes that the entity has the capacity to
15 obtain all required payment and performance bonding, liability
16 insurance, and errors and omissions insurance.

17 (v) Any prior serious or willful violation of the California
18 Occupational Safety and Health Act of 1973, contained in Part 1
19 (commencing with Section 6300) of Division 5 of the Labor Code,
20 or the federal Occupational Safety and Health Act of 1970 (Public
21 Law 91-596), settled against any member of the entity, and
22 information concerning workers' compensation experience history
23 and worker safety program.

24 (vi) Information concerning any debarment, disqualification,
25 or removal from a federal, state, or local government public works
26 project. Any instance in which an entity, its owners, officers, or
27 managing employees submitted a bid on a public works project
28 and were found to be nonresponsive, or were found by an awarding
29 body not to be a responsible bidder.

30 (vii) Any instance in which the entity, or its owners, officers, or
31 managing employees, defaulted on a construction contract.

32 (viii) Any violations of the Contractors' State License Law
33 (Chapter 9, commencing with Section 7000) of Division 3 of the
34 Business and Professions Code), excluding alleged violations of
35 federal or state law including the payment of wages, benefits,
36 apprenticeship requirements, or personal income tax withholding,
37 or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec.
38 3101 et seq.) withholding requirements settled against any member
39 of the entity.

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

4 (x) Information concerning all settled adverse claims, disputes,
5 or lawsuits between the owner of a public works project and any
6 member of the entity during the five years preceding submission
7 of a bid pursuant to this section, in which the claim, settlement,
8 or judgment exceeds fifty thousand dollars (\$50,000). Information
9 shall also be provided concerning any work completed by a surety
10 during this period.

11 (xi) In the case of a partnership or other association that is not
12 a legal entity, a copy of the agreement creating the partnership or
13 association and specifying that all partners or association members
14 agree to be fully liable for the performance under the contract.

15 (xii) For the purposes of this paragraph, a construction
16 manager's "safety record" shall be deemed "acceptable" his or
17 her experience modification rate for the most recent three-year
18 period is an average of 1.00 or less, and his or her average Total
19 Recordable Injury/Illness rate and average lost work rate for the
20 most recent three-year period does not exceed the applicable
21 statistical standards for its business category or if the construction
22 manager is a party to an alternative dispute resolution system as
23 provided for in Section 3201.5 of the Labor Code.

24 (B) The information required pursuant to this subdivision shall
25 be verified under oath by the entity and its members in the manner
26 in which civil pleadings in civil actions are verified. Information
27 that is not a public record pursuant to the California Public
28 Records Act (Chapter 3.5 (commencing with Section 6250) of
29 Division 7 of Title 1 of the Government Code) shall not be open
30 to public inspection.

31 (2) (A) For each contract included in the request for
32 qualifications, the county shall then enter into separate
33 negotiations for the contract with the highest qualified person or
34 firm on the final list for that contract. However, if the request for
35 qualifications is for multiple contracts and specifies that all of the
36 multiple contracts will be awarded to a single construction
37 manager, there may be a single negotiation for all of the multiple
38 contracts. The negotiations shall include consideration of
39 compensation and other contract terms that the county determines
40 to be fair and reasonable to the county. In making this decision,

1 the county shall take into account the estimated value, the scope,
2 the complexity and the nature of the professional services or
3 construction services to be rendered. If the county is not able to
4 negotiate a satisfactory contract with the highest qualified person
5 or firm on the final list, regarding compensation and on other
6 contract terms the county determines to be fair and reasonable,
7 the county shall formally terminate negotiations with that person
8 or firm. The county may undertake negotiations with the next most
9 qualified person or firm on the final list in sequence until an
10 agreement is reached or a determination is made to reject all
11 persons or firms on the final list.

12 (B) If a contract for construction services is entered into
13 pursuant to this section and includes preconstruction services by
14 the construction manager, the county shall enter into a written
15 contract with the construction manager for preconstruction
16 services under which contract the county shall pay the construction
17 manager a fee for preconstruction services in an amount agreed
18 upon by the county and the construction manager. The
19 preconstruction services contract may include fees for services to
20 be performed during the contract period; provided, however, the
21 county shall not request or obtain a fixed price or a guaranteed
22 maximum price for the construction contract from the construction
23 manager or enter into a construction contract with the construction
24 manager until after the county has entered into a services contract.
25 Every preconstruction services contract shall provide for the
26 subsequent negotiation for construction of all or any discreet phase
27 or phases of the project.

28 (C) Construction shall not commence on any phase, package,
29 or element until the county and construction manager agree in
30 writing on either a fixed price that the county will pay for the
31 construction to be commenced or a guaranteed maximum price
32 for the construction to be commenced and construction schedule
33 for the project. The construction manager shall not perform more
34 than 15 percent of the work covered by the fixed price or
35 guaranteed maximum price agreement reached. Work that is not
36 performed directly by the construction manager shall be bid to
37 subcontractors pursuant to subdivision (f).

38 (e) (1) Any construction manager that is selected to construct
39 a project pursuant to this section shall possess or obtain sufficient

1 *bonding to cover the contract amount for construction services,*
2 *and such risk and liability insurance as the county may require.*

3 (2) *Any payment or performance bond written for the purposes*
4 *of this section shall be written using a bond form developed by the*
5 *county.*

6 (f) *All subcontractors bidding on contracts pursuant to this*
7 *section shall be afforded the protections contained in Chapter 4*
8 *(commencing with Section 4100) of Part 1. The construction*
9 *manager at-risk shall do all of the following:*

10 (1) *Provide public notice of the availability of work to be*
11 *subcontracted in accordance with the publication requirements*
12 *applicable to the competitive bidding process of the county.*

13 (2) *Provide a fixed date and time on which the subcontracted*
14 *work will be awarded in accordance with the procedure established*
15 *pursuant to this section.*

16 (3) *Comply with any subcontracting procedures adopted by the*
17 *county that were included in the county's Request for*
18 *Qualifications. If the county has adopted procedures to prequalify*
19 *public works contractors, the construction manager may use the*
20 *procedures to prequalify subcontractors.*

21 (g) *The county may retain the services of a design professional*
22 *or construction project manager, or both, throughout the course*
23 *of the project in order to ensure compliance with this section.*

24 (h) *Contracts awarded pursuant to this section shall be valid*
25 *until the project is completed.*

26 (i) *Nothing in this section is intended to affect, expand, alter,*
27 *or limit any rights or remedies otherwise available at law.*

28 (j) (1) *If the county elects to award a contract for a construction*
29 *project pursuant to this section, retention proceeds withheld by*
30 *the county from the entity shall not exceed 5 percent if a*
31 *performance and payment bond, issued by an admitted surety*
32 *insurer, is required in the solicitation of bids.*

33 (2) *In a contract between the construction manager and the*
34 *subcontractor and in a contract between a subcontractor and any*
35 *subcontractor thereunder, the percentage of the retention proceeds*
36 *withheld may not exceed the percentage specified in the contract*
37 *between the county and the construction manager. If the*
38 *construction manager provides written notice to any subcontractor*
39 *who is not a member of the construction manager, prior to or at*
40 *the time the bid is requested, that a bond may be required and the*

1 subcontractor subsequently is unable or refuses to furnish a bond
2 to the construction manager, then the construction manager may
3 withhold retention proceeds in excess of the percentage specified
4 in the contract between the county and the construction manager
5 from any payment made by the construction manager to the
6 subcontractor.

7 (k) If the county that elects to proceed under this section and
8 uses the construction manager at-risk method on a public works
9 project, the county shall submit to the Legislative Analyst's Office
10 before December 1, 2012, a report containing a description of
11 each public works project procured through the construction
12 manager at-risk process and completed after November 1, 2008,
13 and before November 1, 2012. The report shall include, but not
14 be limited to, all of the following information:

15 (1) The type of project.

16 (2) The gross square footage of the project.

17 (3) The entity that was awarded the project.

18 (4) The estimated and actual length of time to complete the
19 project.

20 (5) The estimated and actual project costs.

21 (6) A description of any written protests concerning any aspect
22 of the solicitation, bid, proposal, or award of the project, including
23 the resolution of the protests.

24 (7) An assessment of the prequalification process and criteria.

25 (8) An assessment of the effect of retaining 5-percent retention
26 on the project.

27 (9) A description of the Labor Force Compliance Program and
28 an assessment of the project impact, where required.

29 (10) An assessment of the most appropriate uses for the
30 construction manager at-risk approach.

31 (l) If the county elects not to use the authority granted by this
32 section, it may submit a report to the Legislative Analyst's Office
33 explaining why the county elected to not use the construction
34 manager at-risk method.

35 (m) On or before January 1, 2013, the Legislative Analyst shall
36 report to the Legislature on the use of the construction manager
37 at-risk method by counties pursuant to this section, including the
38 information listed in subdivision (k). The report may include
39 recommendations for modifying or extending this section.

1 (n) Except for the reporting requirements, this section shall
2 remain in effect only until January 1, 2013, and as of that date is
3 repealed, unless a later enacted statute, that is enacted before
4 January 1, 2013, deletes or extends that date.

5 SEC. 2. The Legislature finds and declares that a special law
6 is necessary and that a general law cannot be made applicable
7 within the meaning of Section 6 of Article XIII B of the California
8 Constitution because of a unique need to construct airport-related
9 buildings in the County of Sacramento.

10 SEC. 3. No reimbursement is required by this act pursuant to
11 Section 6 of Article XIII B of the California Constitution because
12 the only costs that may be incurred by a local agency or school
13 district will be incurred because this act creates a new crime or
14 infraction, eliminates a crime or infraction, or changes the penalty
15 for a crime or infraction, within the meaning of Section 17556 of
16 the Government Code, or changes the definition of a crime within
17 the meaning of Section 6 of Article XIII B of the California
18 Constitution.

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**All matter omitted in this version of the bill
appears in the bill as introduced in the
Assembly, February 22, 2007. (JR11)**