



- Board of Directors
Communications and Legislation Committee

4/12/2022 Board Meeting

7-16

Subject

Express support for SB 991 (Newman, D-Fullerton): Public contracts: progressive design-build: local agencies; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA

Executive Summary

Senate Bill (SB) 991 (**Attachment 1**) would authorize water and wastewater agencies to use the progressive design-build (PDB) project delivery method for any public works project in excess of \$5 million that would produce, store, supply, treat, or distribute water from any source.

PDB is a method in which a single entity is hired to do both the design and construction at an early stage in the project to allow increased collaboration among the owner, designer, and builder. SB 991 could benefit water agencies, including Metropolitan, by giving them the option to use PDB, which can reduce the overall project costs, risk, and schedules.

Details

Current California statutes place explicit limits on the types of contracting methods that public agencies can use on public works projects. The traditional design-bid-build method, where the lowest responsive and responsible bid is selected, is common practice. However, agencies that wish to use alternative delivery methods must first obtain authorization from the State legislature. Existing law, until January 1, 2025, authorizes certain local agencies, as defined, to use the design-build procurement process for specified public works with prescribed cost thresholds. Existing law requires specified information submitted by a design-build entity in the design-build procurement process to be certified under penalty of perjury.

The Water Collaborative Delivery Association, formerly the Design Build Council, an industry education group that supports collaborative-delivery methods for water and wastewater projects, is sponsoring SB 991 to expand project delivery options to include PDB. PDB authorization would benefit water agencies that plan to make significant investments in new sustainable water supply projects, such as those to advance the use of recycled water, by allowing the design-build contractor to work with the project owner during the project's design phase. Early collective engagement and collaboration by the owner, designer, and the contractor has potential benefits, which can reduce overall project risks, costs, and schedules.

If passed, SB 991 would authorize water and wastewater agencies to use the PDB method for public works projects in excess of \$5 million, similar to the California Department of General Services' authorization (Public Contract Code § 10187.5). SB 991 would allow water and wastewater agencies to use PDB through January 1, 2029.

Comparison of Bills

Metropolitan is separately sponsoring a bill to seek authorization for three new delivery methods: design-build, PDB, and construction manager/general contractor for the Regional Recycled Water Program and a select number of emergency drought mitigation projects. There are some notable differences between the Metropolitan-sponsored bill - AB 1845 (Calderon): Metropolitan Water District of Southern California: alternative project delivery method – and SB 991, which are identified below and outlined in **Table 1**.

SB 991 applies to local agencies, as defined. SB 991 allows only PDB and requires that the PDB entity be chosen through a qualifications-based selection process. Projects under SB 991 would also have a cost threshold of \$5 million. SB 991 contains a conflict of interest provision as well as a very prescriptive request for qualification (RFQ) process and requires that all construction subcontracts be awarded through a specified, owner-controlled process. SB 991 has no requirements for owner inspections, and while it is silent on design-build-operate (DBO) contracts, it does not specifically prohibit DBO contracts.

AB 1845 applies specifically to Metropolitan, and sets a cap on the number of projects irrespective of price. In addition, AB 1845 allows more owner discretion in the selection process, allowing for either a qualifications-based selection of the design-build entity, or a best-value selection through a request for proposal following an initial RFQ process. AB 1845 requires owner inspections and specifically prohibits DBO contracts. Both bills specifically require that all contractors and subcontractors performing work on applicable projects or contracts use a skilled and trained workforce that falls within an apprenticeable occupation in the building or construction trades. Both bills also allow for the identification of specific types of subcontractors to be included in the design-build entity's statement of qualifications.

Table 1

Category	SB 991	AB 1845
Alternative delivery method	PDB only	DB, PDB, CM/GC
Coverage	Water-related projects > \$5M	RRWP and drought projects
Sunset Date	January 1, 2029	DB January 1, 2025 PDB and CM/GC January 1, 2028
Conflict of Interest Language	Yes	Yes
Skilled & Trained Workforce Requirements	Enforceable commitment required unless agency has a project labor agreement (PLA)	Enforceable commitment required unless agency has PLA
Selection Process	Qualifications-based	Qualifications-based or Best Value
Subcontractor Selection Process	Owner's discretion	Owner's discretion

Staff recommends Metropolitan support SB 991 to allow water and wastewater agencies to use the PDB project delivery method, which has the following benefits:

- Enhanced opportunities for collaboration between owner and contractor through the design and construction process
- Enhanced potential for project risk identification and allocation between owner and contractor
- Greater flexibility in the contract award process, not limited to the lowest responsible bidder
- Potentially shorter project completion schedules, leading to earlier online dates
- Earlier cost certainty with the potential for lower overall project costs
- Increased opportunities for innovation through the collaborative design process

Supporters of the bill include the Association of California Water Agencies, California Association of Sanitation Agencies, California Municipal Utilities Association, Inland Empire Utilities Agency, Santa Clara Valley Water District, Silicon Valley Leadership Group, State Building & Construction Trades Council of California, The Bay Area Council, and Watereuse Association. There is no registered opposition.

Policy

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves legislative proposals that do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment (Public Resources Code Section 21065 and Section 15378(b)(1) of the State CEQA Guidelines).

CEQA determination for Option #2:

None required

Board Options

Option #1

Express a support position on SB 991 (Newman, D-Fullerton): Public contracts: progressive design-build: local agencies

Fiscal Impact: No direct fiscal impact; possible cost savings to local agencies that utilize PDB, including Metropolitan, if passed.

Business Analysis: Should SB 991 become law, local agencies would have the option to use the PDB project delivery method for projects that exceed \$5,000,000.

Option #2

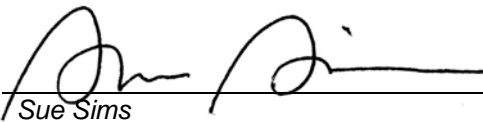
Take no position.

Fiscal Impact: No direct fiscal impact

Business Analysis: Should SB 991 become law, local agencies would have the option to use the PDB project delivery method for projects that exceed \$5,000,000.

Staff Recommendation

Option #1


Sue Sims
External Affairs Manager
4/6/2022
Date


Adel Hagekhalil
General Manager
4/6/2022
Date

Attachment 1 – SB 991 (Newman, D-Fullerton): Public contracts: progressive design-build: local agencies.

Ref# ea 12687305

AMENDED IN SENATE MARCH 22, 2022

SENATE BILL**No. 991**

Introduced by Senator Newman

February 14, 2022

An act to add *and repeal* Chapter 4.1 (commencing with Section 22170) ~~to~~ of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 991, as amended, Newman. Public contracts: progressive design-build: local agencies.

Existing law, until January 1, 2025, authorizes local agencies, as defined, to use the design-build procurement process for specified public works with prescribed cost thresholds. Existing law requires specified information submitted by a design-build entity in the design-build procurement process to be certified under penalty of perjury.

Existing law authorizes the Director of General Services to use the progressive design-build procurement process for the construction of up to 3 capital outlay projects, as jointly determined by the Department of General Services and the Department of Finance, and prescribes that process. Existing law defines "progressive design-build" as a project delivery process in which both the design and construction of a project are procured from a single entity that is selected through a qualifications-based selection at the earliest feasible stage of the project. Existing law, pursuant to the process, after selection of a design-build entity, authorizes the Department of General Services to contract for design and preconstruction services sufficient to establish a guaranteed maximum price, as defined. Existing law authorizes the department, upon agreement on a guaranteed maximum price, to amend the contract

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in its sole discretion, as specified. Existing law requires specified information to be verified under penalty of perjury.

This bill, until January 1, ~~2033~~, ~~authorizes 2029~~, *would authorize* local agencies, defined as any city, county, city and county, or special district authorized by law to provide for the production, storage, supply, treatment, or distribution of any water from any source, to use the progressive design-build process for public works projects in excess of \$5,000,000, similar to the progressive design-build process authorized for use by the Director of General Services. *The bill would require a local agency that uses the progressive design-build process to submit, no later than January 1, 2028, to the appropriate policy and fiscal committees of the Legislature a report on the use of the progressive design-build process containing specified information, including a description of the projects awarded using the progressive design-build process.* The bill would require *the design-build entity and its general partners or joint venture members to verify* specified information ~~to be~~ *verified* under penalty of perjury. By expanding the crime of perjury, the bill would impose a state-mandated local program.

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: yes.
State-mandated local program: yes.

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

1 SECTION 1. Chapter 4.1 (commencing with Section 22170)
2 is added to Part 3 of Division 2 of the Public Contract Code, to
3 read:

4
5 CHAPTER 4.1. LOCAL AGENCY PROGRESSIVE DESIGN-BUILD
6 CONTRACTING
7

8 22170. For purposes of this chapter, the following definitions
9 apply:

10 (a) ~~“Best value” means a value determined by evaluation of~~
11 ~~objective criteria that relate to demonstrated competence and on~~
12 ~~the professional qualifications necessary for the satisfactory~~

1 ~~performance of the services required. Other factors such as price,~~
2 ~~features, functions, and life-cycle costs may be considered. If the~~
3 ~~qualifications-based selection process includes estimates of cost~~
4 ~~as a factor, a best value determination may involve the selection~~
5 ~~of the lowest cost proposal meeting the interests of the local agency~~
6 ~~and meeting the objectives of the project, or a tradeoff between~~
7 ~~price and other specified factors.~~

8 *(a) (1) “Best value” means a value determined by evaluation*
9 *of objective criteria that may include, but are not limited to, price,*
10 *features, function, life-cycle costs, experience, and past*
11 *performance.*

12 *(2) A best value determination may involve the selection of the*
13 *lowest cost proposal meeting the interests of the local agency and*
14 *the objectives of the project, selection of the best proposal for a*
15 *stipulated sum established by the procuring local agency, or a*
16 *tradeoff between price and other factors.*

17 (b) “Construction subcontract” means each subcontract awarded
18 by the design-build entity to a subcontractor that will perform work
19 or labor or render service to the design-build entity in or about the
20 construction of the work or improvement, or a subcontractor
21 licensed by the State of California that, under subcontract to the
22 design-build entity, specially fabricates and installs a portion of
23 the work or improvement according to detailed drawings contained
24 in the plans and specifications produced by the design-build team.

25 (c) “Design-build entity” means a corporation, limited liability
26 company, partnership, joint venture, or other legal entity that is
27 able to provide appropriately licensed contracting, architectural,
28 and engineering services as needed pursuant to a design-build
29 contract.

30 (d) “Design-build project” means any project that treats, pumps,
31 stores, or conveys water, wastewater, recycled water, or advanced
32 treated water using the progressive design-build construction
33 procurement process described in this chapter.

34 (e) “Design-build team” means the design-build entity itself
35 and the individuals and other entities identified by the design-build
36 entity as members of its team. Members shall include the general
37 contractor and, if utilized in the design of the project, all electrical,
38 mechanical, and plumbing contractors.

39 (f) “Guaranteed maximum price” means the maximum payment
40 amount agreed upon by the local agency and the design-build entity

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1 for the design-build entity to finish all remaining design,
2 preconstruction, and construction activities sufficient to complete
3 and close out the project.

4 (g) “Local agency” means a city, county, city and county, or
5 special district authorized by law to provide for the production,
6 storage, supply, treatment, or distribution of any water from any
7 source.

8 (h) “Progressive design-build” means a project delivery process
9 in which both the design and construction of a project are procured
10 from a single entity that is selected through a qualifications-based
11 selection at the earliest feasible stage of the project.

12 (i) “Qualifications-based selection” means the process by which
13 the local agency solicits for services from the design-build entities
14 and that price is not the sole factor as the basis of award.

15 22171. A local agency may procure progressive design-build
16 contracts and use the progressive design-build contracting process
17 described in this chapter for public works projects in excess of
18 five million dollars (\$5,000,000).

19 22171.5. A local agency entering into design-build contracts
20 authorized under this chapter shall develop guidelines for a
21 standard organizational conflict-of-interest policy, consistent with
22 applicable law, regarding the ability of a person or entity that
23 performs services for the local agency relating to the solicitation
24 of a design-build project, to submit a proposal as a design-build
25 entity, or to join a design-build team.

26 22172. The procurement process for progressive design-build
27 projects shall progress as follows:

28 (a) The local agency shall prepare and issue a request for
29 qualifications in order to select a design-build entity to execute
30 the project. The request for qualifications shall include, but is not
31 limited to, the following elements:

32 (1) Documentation of the size, type, and desired design character
33 of the project and any other information deemed necessary to
34 describe adequately the local agency’s needs, including the
35 expected cost range, the methodology that will be used by the local
36 agency to evaluate the design-build entity’s qualifications, the
37 procedure for final selection of the design-build entity, and any
38 other information deemed necessary by the local agency to inform
39 interested parties of the contracting opportunity.

(2) Significant factors that the local agency reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, and all other non-price-related factors. The local agency may require that a cost estimate, including the detailed basis for the estimate, be included in the design-build entities' responses and consider those costs in evaluating the statements of qualifications.

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

(4) A standard template request for statements of qualifications prepared by the local agency. In preparing the standard template, the local agency may consult with the construction industry, the building trades and surety industry, and other local agencies interested in using the authorization provided by this chapter. The template shall require the following information:

(A) If the design-build entity is a privately held corporation, limited liability company, partnership, or joint venture, a listing of all of the entity's shareholders, partners, or members known at the time of the statement of qualification submission who will perform work on the project.

(B) Evidence that the members of the design-build team have completed, or have demonstrated the experience, competency, capability, and capacity to complete, projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the design-build entity has the capacity to complete the project.

(C) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

(D) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(E) Information concerning workers' compensation experience history and a worker safety program.

(F) If the proposed design-build entity is a corporation, limited liability company, partnership, joint venture, or other legal entity,

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1 a copy of the organizational documents or agreement committing
2 to form the organization.

3 (G) An acceptable safety record. A proposer's safety record
4 shall be deemed acceptable if its experience modification rate for
5 the most recent three-year period is an average of 1.00 or less, and
6 its average total recordable injury or illness rate and average lost
7 work rate for the most recent three-year period does not exceed
8 the applicable statistical standards for its business category or if
9 the proposer is a party to an alternative dispute resolution system
10 as provided for in Section 3201.5 of the Labor Code.

11 (5) The information required under this subdivision shall be
12 certified under penalty of perjury by the design-build entity and
13 its general partners or joint venture members.

14 (b) (1) A design-build entity shall not be evaluated for selection
15 unless the entity provides an enforceable commitment to the local
16 agency that the entity and its subcontractors at every tier will use
17 a skilled and trained workforce to perform all work on the project
18 or contract that falls within an apprenticeable occupation in the
19 building and construction trades, in accordance with Chapter 2.9
20 (commencing with Section 2600) of Part 1.

21 (2) This subdivision shall not apply if one or more of the
22 following requirements are met:

23 (A) The local agency has entered into a project labor agreement
24 that will bind all contractors and subcontractors performing work
25 on the project or contract to use a skilled and trained workforce,
26 and the entity agrees to be bound by that project labor agreement.

27 (B) The project or contract is being performed under the
28 extension or renewal of a project labor agreement that was entered
29 into by the local agency ~~prior to~~ *before* January 1, 2023.

30 (C) The entity has entered into a project labor agreement that
31 will bind the entity and all its subcontractors at every tier
32 performing the project or contract to use a skilled and trained
33 workforce.

34 (3) For purposes of this subdivision, "project labor agreement"
35 has the same meaning as provided in paragraph (1) of subdivision
36 (b) of Section 2500.

37 (c) At the close of the solicitation period, the local agency shall
38 review the submissions. The local agency may evaluate
39 submissions based solely upon the information provided in each
40 design-build entity's statement of qualifications. The local agency

1 may also interview some or all of the design-build entities to further
2 evaluate their qualifications for the project.

3 (d) Notwithstanding any other provision of this code, upon
4 issuance of a contract award, the local agency shall publicly
5 announce its award, identifying the design-build entity to which
6 the award is made, along with a statement regarding the basis of
7 the award. The statement regarding the local agency's contract
8 award and the contract file shall provide sufficient information to
9 satisfy an external audit.

10 22172.1. (a) The design-build entity shall provide payment
11 and performance bonds for the project in the form and in the
12 amount required by the local agency, and issued by a California
13 admitted surety. The amount of the payment bond shall not be less
14 than the amount of the performance bond.

15 (b) The design-build contract shall require errors and omissions
16 insurance coverage for the design elements of the project.

17 (c) The local agency shall develop a standard form of payment
18 and performance bond for its design-build projects.

19 22172.2. (a) After selecting a design-build entity based upon
20 qualifications, the local agency may enter into a contract and direct
21 the design-build entity to begin design and preconstruction
22 activities sufficient to establish a guaranteed maximum price for
23 the project.

24 (b) (1) Upon agreement of the guaranteed maximum price for
25 the project, the local agency, at its sole and absolute discretion,
26 may amend its contract to direct the design-build entity to complete
27 the remaining design, preconstruction, and construction activities
28 sufficient to complete and close out the project, and may add funds
29 not exceeding the guaranteed maximum price to the contract for
30 these activities.

31 (2) If the cost for completing all remaining design,
32 preconstruction, and construction activities sufficient to complete
33 and close out the project exceed the guaranteed maximum price,
34 the costs exceeding the guaranteed maximum price shall be the
35 responsibility of the design-build entity. If the cost for these
36 activities are less than the guaranteed maximum price, the
37 design-build entity shall not be entitled to the difference between
38 the cost and the guaranteed maximum price. These amounts shall,
39 at the discretion of the local agency, be shared, based on
40 preestablished percentages, defined in the request for qualifications.

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(c) If the local agency and the design-build entity do not reach agreement on a guaranteed maximum price, or the local agency otherwise elects not to amend the design-build entity's contract to complete the remaining work, the local agency may solicit proposals to complete the project from firms that submitted statements of qualifications pursuant to Section 22172. The local agency may also, upon written determination that it is in the best interest of the city, county, city and county, or special district, as applicable, to do so, formally solicit proposals from other design-build entities, and contract award shall be made on a best value basis.

22172.3. (a) The local agency, in each design-build request for qualifications, may identify specific types of subcontractors that shall be included in the design-build entity's statement of qualifications. All construction subcontractors that are identified in the statement of qualifications shall be afforded the protections of Chapter 4 (commencing with Section 4100) of Part 1.

(b) Following award of the design-build contract, except for those construction subcontractors listed in the statement of qualifications, the design-build entity shall proceed as listed in this subdivision in awarding construction subcontracts with a value exceeding one-half of 1 percent of the contract price allocable to construction work for projects with a contract value of greater than or equal to ten million dollars (\$10,000,000).

(1) Provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the local agency, including a fixed date and time on which qualifications statements, bids, or proposals will be due.

(2) Establish reasonable qualification criteria and standards.

(3) Award the subcontract ~~either on a best value basis or to the lowest responsible bidder.~~ *on a best value basis.* The process may include prequalification or short-listing.

(c) Subcontractors awarded construction subcontracts under this subdivision shall be afforded all the protections of Chapter 4 (commencing with Section 4100) of Part 1.

(d) A licensed construction contractor or subcontractor that provides design services used on a project authorized by this chapter shall not be subject to any liability arising from their

1 *design if the construction contract or subcontract for that design*
2 *is not performed by that contractor or subcontractor.*

3 22172.4. (a) If the local agency elects to award a project
4 pursuant to this chapter, retention proceeds withheld by the local
5 agency from the design-build entity shall not exceed 5 percent if
6 a performance and payment bond, issued by an admitted surety
7 insurer, is required in the solicitation. Work performed to establish
8 the guaranteed maximum price shall not be subject to retention.

9 (b) In a contract between the design-build entity and a
10 subcontractor, and in a contract between a subcontractor and any
11 subcontractor thereunder, the percentage of the retention proceeds
12 withheld shall not exceed the percentage specified in the contract
13 between the local agency and the design-build entity. If the
14 design-build entity provides written notice to any subcontractor
15 that is not a member of the design-build entity, before or at the
16 time the bid is requested, that a bond may be required, and the
17 subcontractor subsequently is unable or refuses to furnish a bond
18 to the design-build entity, then the design-build entity may withhold
19 retention proceeds in excess of the percentage specified in the
20 contract between the local agency and the design-build entity from
21 any payment made by the design-build entity to the subcontractor.

22 22172.5. (a) *Notwithstanding Section 10231.5 of the*
23 *Government Code, no later than January 1, 2028, a local agency*
24 *that uses the progressive design-build process pursuant to this*
25 *chapter shall submit to the appropriate policy and fiscal*
26 *committees of the Legislature a report on the use of the progressive*
27 *design-build process.*

28 (b) *The report shall include, but is not limited to, the following*
29 *information:*

30 (1) *A description of the project or projects awarded using the*
31 *progressive design-build process.*

32 (2) *The contract award amounts.*

33 (3) *The design-build entities awarded the project or projects.*

34 (4) *A description of any written protests concerning any aspect*
35 *of the solicitation, bid, or award of the contracts, including the*
36 *resolution of the protests.*

37 (5) *A description of the prequalification process.*

38 (6) *The number of specialty subcontractors listed by construction*
39 *trade type, on each project, that provided design services, but did*

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1 *not meet the target price for their scope of work, and therefore did*
2 *not perform construction services on that project.*

3 *(7) Whether or not any portion of a design prepared by the*
4 *specialty subcontractor that did not perform the construction work*
5 *for that design was used by the local agency.*

6 *(8) The number of specialty subcontractors listed by construction*
7 *trade type, on each project, that meet the definition of a small*
8 *business, as specified in paragraph (1) of subdivision (d) of Section*
9 *14837 of the Government Code.*

10 *(9) The number of specialty subcontractors listed by construction*
11 *trade type, on each project, that meet the definition of a*
12 *microbusiness, as specified in paragraph (2) of subdivision (d) of*
13 *Section 14837 of the Government Code.*

14 *(10) If a project awarded under this chapter has been completed,*
15 *an assessment of the project performance, including, but not limited*
16 *to, a summary of any delays or cost increases.*

17 *(c) The report submitted pursuant to subdivision (a) shall be*
18 *submitted in compliance with Section 9795 of the Government*
19 *Code.*

20 22173. Nothing in this chapter affects, expands, alters, or limits
21 any rights or remedies otherwise available at law.

22 22174. This chapter shall remain in effect only until January
23 1, ~~2033~~, 2029, and as of that date is repealed.

24 SEC. 2. No reimbursement is required by this act pursuant to
25 Section 6 of Article XIII B of the California Constitution because
26 the only costs that may be incurred by a local agency or school
27 district will be incurred because this act creates a new crime or
28 infraction, eliminates a crime or infraction, or changes the penalty
29 for a crime or infraction, within the meaning of Section 17556 of
30 the Government Code, or changes the definition of a crime within
31 the meaning of Section 6 of Article XIII B of the California
32 Constitution.

O