

2024 New Laws Series, Part 3: Infrastructure Package Expands Progressive Design-Build and Design-Build, Streamlines CEQA for Select Projects

California Special Districts Association, 11/18/23

The California State Legislature passed three bills in 2023 which help public agencies with infrastructure projects. SB 706 (Caballero) expands progressive design-build authority to a wider range of agencies and projects, AB 400 (Blanca Rubio) expands the availability of traditional design-build, and SB 149 (Caballero) streamlines California Environmental Quality Act (CEQA) requirements for certified projects. Each of the bills is summarized below.

SB 706: Progressive Design-Build Authority for Local Agencies

SB 706 (Caballero) authorizes cities, counties, cities and counties, and special districts to use the progressive design-build (PDB) process for up to 10 public works in excess of \$5 million each, excluding projects on state-owned or state-operated facilities. Unlike a predecessor statute (SB 991) adopted last year, SB 706 is not limited to water-related projects. This new authorization expires on January 1, 2030.

PDB is a variation of the traditional design-build delivery method which differs in three primary ways:

1. A PDB contract is awarded at the earliest feasible stage of the project, usually immediately after a conceptual design is available, while a traditional design-build contract is awarded later – after a 30 percent bridge design is complete.
2. A PDB contract award does not include a construction price at the time of award, while a traditional design-build contract includes a lump sum price at the time of award.
3. A PDB contract requires that the parties negotiate the construction price on an "open book" basis over the initial phase of the project with contractual "off-ramp" provisions in the event that the parties don't come to agreement, while a traditional design-build contract has none of these features

In short, PDB is one of the most collaborative forms of contracting available to California public agencies. It creates significant flexibility for an agency, but also significant challenges in negotiating the construction price, schedule, and final design.

SB 706, along with SB 617, are the latest expansion of PDB authority in California, after SB 991 and AB 1845 were adopted last year. These statutes are drafted very similarly. Collectively, they now authorize PDB for a truly wide range of agencies and projects. The

wording of the statutes offers agencies flexibility in how the procurement process and contract terms are structured. However, agencies should be aware of the significant differences between traditional design-build and PDB outlined above.

In our experience, there are several approaches that maximize an agency's chances for a successful outcome on a PDB project. Initially, it is important for agencies to educate their internal and external stakeholders about the unique features of the delivery method, including the fact that the construction price will not be known at the time of award. It is also important for an agency to assemble an owner team with PDB experience. This might include an owner's advisor firm to assist with development of initial technical design documents and procurement support, and outside legal counsel experienced with the delivery method.

The agency should also tailor its procurement process to address its priorities:

- Use a one-step procurement to maximize speed of award.
- Employ a two-step procurement for more in-depth screening of proposers.
- Offer a stipend to responsive proposers to boost industry interest in a project.
- Host confidential one-on-one meetings to help optimize the procurement process and obtain the best proposals.
- Score interviews as part of the evaluation process, and award more points to those proposers who demonstrate superior communication and collaboration skills.

Finally, within the PDB agreement, we recommend including a robust off-ramp clause that provides the agency with the right to require the design-builder to complete the 100 percent construction documents when the agency takes the off-ramp. In addition, the agreement should include a clear agency budget for the project and an obligation for the design-builder to design to that budget. Successful PDB projects we have been a part of have included these elements.

The expansion of PDB authority under SB 706 is exciting for California special districts. However, agencies should be aware of the significant ramp-up required to coordinate a PDB project for the first time.

AB 400: Expansion of Design-Build Authority for Transit Projects

AB 400 (Blanca Rubio) modified the existing local agency design-build statute located in Public Contract Code Sections 22160-22169 to expand the types of agencies that may utilize the design-build authority for "transit capital projects." Specifically, AB 400 modified Public Contract Code section 22161(f)(3) so that any joint powers authority "responsible for the construction of transit projects" may utilize the authority – as opposed to any joint powers authority "formed to provide transit services." While the revision may seem inconsequential at first glance, it may result in an appreciable expansion of the number of agencies that can utilize the authority, since many more agencies can form a joint powers authority to construct a transit project.

Here is the complete list of agencies authorized to utilize the design-build authority under the revised law, with the new text regarding joint powers authorities (provided the project fits within the limitations for authorized projects and exceeds \$1 million in value):

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 Utilities Code, any joint powers authority, 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.
4. The San Diego Association of Governments, as referenced in the San Diego Regional Transportation Consolidation Act (Chapter 3 (commencing with Section 132350) of Division 12.7 of the Public Utilities Code).
5. The Stanislaus Regional Water Authority. (PCC § 22161.)

In addition, AB 400 extended the sunset date for the law from January 1, 2025 to January 1, 2031.

SB 149: Streamlining of CEQA Procedures for Projects Certified by the Governor

SB 149 (Caballero) extended existing CEQA streamlining benefits for infrastructure projects from January 1, 2024 to January 1, 2032. An "infrastructure project" means (1) An energy infrastructure project, (2) A semiconductor or microelectronic project, (3) A transportation-related project, or (4) A water-related project. (PRC §21189.81.) Under SB 149, the Governor can certify infrastructure projects for streamlining benefits related to CEQA if:

1. the project will result in a minimum investment of \$100 million in California upon completion of construction;
2. the project creates high-wage, highly skilled jobs that pay prevailing wages and living wages, provides construction jobs and permanent jobs for Californians, helps reduce unemployment, and promotes apprenticeship training;
3. for a clean energy project, the project does not result in any net additional emission of greenhouse gases, including greenhouse gas emissions from employee transportation;
4. the project complies with certain solid waste and recycling laws;
5. the applicant has entered into a binding and enforceable agreement that all mitigation measures required under this division to certify the project under this chapter shall be conditions of approval of the project;
6. the applicant agrees to pay the costs of the trial court and the court of appeal in hearing and deciding any case challenging a lead agency's action on a certified project under this division; and
7. the applicant agrees to pay the costs of preparing the record of proceedings for the project concurrent with review and consideration of the project under this division.

Certified projects enjoy benefits including the requirement that judicial actions challenging projects certified by the Governor be resolved, to the extent feasible, within 270 days after the filing of the record of proceedings with the court.

SB 149 also requires an action or proceeding challenging the certification of an environmental impact report (EIR) for infrastructure projects or the granting of any project

approvals, including any potential appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 270 days of the filing of the record of proceedings with the court.

Conclusion

SB 706, AB 400, and SB 149 expand the statutory authority for utilizing design-build and PDB and streamline the CEQA process. With the right support and thoughtful consideration of the issues outlined above, these new laws will help agencies more efficiently deliver important infrastructure projects.

CSDA Opposes Costly 2024 Ballot Initiatives Targeting Public Records and Development Impact Fees

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On Thursday, November 16, CSDA's Board of Directors met in Sacramento and adopted "oppose" positions on a pair of ballot initiatives that may appear before California voters on the November 2024 ballot. The two ballot initiatives, numbered 23-0015A1 and 23-0025A1 respectively, would impose onerous new mandates related to public records and severely limit the ability to fund infrastructure necessary to support new housing.

Ballot Initiative 23-0015A1 "Government Transparency Act"

Proponents of Ballot Initiative 23-0015A1, an organization called Consumer Watchdog, have dubbed their proposal the "Government Transparency Act." The title given to the initiative by the California Office of the Attorney General reads as follows: "INCREASES REQUIREMENTS ON GOVERNMENT AGENCIES AND LEGISLATURE WHEN RESPONDING TO RECORDS REQUESTS. INITIATIVE STATUTE."

Fittingly, according to the California Legislative Analyst's Office, the requirements that the initiative would place on local agencies would likely cost in excess of \$1 billion. In independently assessing the measure's impact on local agencies, CSDA has concluded that the Initiative 23-0015A1 will have potentially devastating impacts on local agency finances, placing excessive records retention requirements on public agencies— all of which remain ineligible for reimbursement pursuant to the state mandate process. The ballot initiative would dramatically increase a public agency's exposure to litigation, and could stimulate a cottage industry dedicated to pursuing California Public Records Act litigation. CSDA's analysis of the measure is available [here](#).

Ballot Initiative 23-0025A1 "California Homeownership Affordability Act"

Meanwhile, proponents of Ballot Initiative 23-0025A1, Fox News contributor Stephen Hilton and Californians for Homeownership, self-titled their proposal the "California Homeownership Affordability Act." The title given to this initiative by the California Office of the Attorney General reads as follows: "LIMITS ENVIRONMENTAL LAWSUITS CHALLENGING NEW HOUSING CONSTRUCTION. CAPS DEVELOPMENT FEES ON NEW HOUSING. INITIATIVE STATUTE."

As determined by the California Legislative Analyst's Office, "[t]he 2 percent cap on local government development fees [imposed by this initiative] would reduce local government revenue likely by at least hundreds of millions of dollars per year, potentially exceeding \$1 billion per year." CSDA's own analysis concluded that the initiative will have major impacts on local agency finances, placing an onerous two percent cap on development impact fees.

Special districts that collect impact fees would face significant budget shortfalls resulting from slashed impact fee receipts, or would be forced to seek significant tax and fee increases on current residents that may be unwilling or unable to pay. Moreover, shifting the cost-burden from developers and new homeowners to current residents could lead to litigation under Proposition 218 by taxpayers claiming it is unconstitutional for current residents to subsidize services provided to developers and new residents. CSDA's analysis of the measure is available [here](#).

To qualify for the November 5, 2024 General Election, proponents of initiative statute statewide ballot measures must secure 546,651 valid signatures from registered voters according to the following timeline (note that initiative constitutional amendments require 874,641 signatures):

- April 23, 2024: Last day for proponent(s) to file the petition with county elections officials.
- May 3, 2024: Last day for county elections officials to complete raw count totals and certify raw numbers to the Secretary of State.
- May 9, 2024: Last day for Secretary of State to determine whether the initiative petition meets the minimum signature requirement and, if the minimum signature requirement has been met, to notify counties to verify a random sampling of signatures.
- June 21, 2024: Last day for county elections officials to verify and certify results of the random sampling of signatures to the Secretary of State.
- June 27, 2024: Last day for Secretary of State to determine that the measure qualifies for the ballot or a full check is necessary. At this point, if a full check is necessary, the measure would not be eligible for the November 5, 2024, General Election ballot.