

ATTORNEY WORK PRODUCT

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RE: **A Summary of Progressive Design-Build Authority Under Public Contract Code sections 22185-22185.11 (SB 706)**

Executive Summary

SB 706 created new progressive design-build contracting authority for local agencies as of January 1, 2024. (See Public Contract Code §§ 22185-22185.11.) The new law authorizes cities, counties, cities and counties, and special districts to use progressive design-build for up to ten public works projects in excess of \$5 million each, and prescribes a "qualifications-based" selection process where price is not the sole evaluation factor.

Under the new law, the agency and selected design-build entity initially enter into a contract for design and preconstruction activities. As the design and preconstruction work advance, the design-build entity proposes a guaranteed maximum price or ("GMP") to complete the remaining preconstruction activities and construction work. If the agency accepts the GMP, the contract will be amended to authorize the construction work in exchange for the GMP. If the parties cannot agree on a GMP, the agency may terminate the contract and solicit proposals from other design-build entities to complete the project.

The requirements and procedures of the new law are summarized in more detail below.

Availability of PDB Authority Under PCC 22185-22185.11

The California legislature passed SB 706 (Caballero) in 2023, which provided additional authority for a "local agency" to use the progressive design-build ("**PDB**") project delivery method to procure up to 10 public works projects per agency in excess of \$5 million for each project. (Public Contract Code¹ § 22185.1.)

The "local agencies" eligible to use the authority conferred by SB 706 are cities, counties, cities and counties, and special districts. (§ 22185(g).) Eligible projects include "any project using the progressive design-build construction procurement process ... but does not include state-owned or state-operated facilities." (§ 22185(d).) Thus, a public agency can use this authority on any scope except state owned/operated facilities.

SB 706 became available on January 1, 2024, and sunsets on January 1, 2029.

¹ All citations are to the California Public Contract Code unless otherwise noted.

Key Defined Terms

SB 706 establishes includes the following defined terms:

- Agencies must use a "**qualifications-based selection**" process for a contract award under this law. This refers to a process by which the local agency solicits proposals for design and construction services from design-build entities, and price is not the sole factor as the basis of the award. (§ 22185(i).)
- The required compensation structure for construction work awarded under this law is a "**guaranteed maximum price**" or "**GMP**." The GMP is the maximum payment amount agreed upon by the local agency and the design-build entity for the entity to finish all remaining design, preconstruction, and construction activities sufficient to complete and close out the project. (§ 22185(f).)
- Subcontracts awarded after the initial PDB contract award must be awarded on a "**best value**" basis. This refers to a process that evaluates objective criteria that may include, but is not limited to, price, features, function, life-cycle costs, experience, and past performance. (§ 22185(a).) If the agency and design-build entity cannot agree on a GMP, the agency may re-procure completion of the project on a "best value basis."

Procedural Requirements for Procurement Process

The new law sets forth the following procedural requirements for the procurement process.

1. Organizational Conflict-of-Interest Policy.

As a preliminary matter, the agency must develop and adopt guidelines for a standard organizational conflict-of-interest policy consistent with applicable laws. (§ 22185.2.) The purpose of the policy is to mitigate the potential for conflicts of interest during the procurement and contracting process. This policy should be adopted prior to the submission date for Statements of Qualifications (**SOQs**) from the design-build entities.

2. Request for Qualifications.

The statute requires that the agency issue a request for qualifications (**RFQ**) to select a design-build entity. At a minimum, the RFQ must include the following elements:

- The size, type, design character, and any other information necessary to adequately describe the agency's needs, including the "expected cost range" of the project, methodology to evaluate qualifications, and procedures for final selection of the design-build entity. (§ 22185.3(a)(1).) The "expected cost range" does not require a full engineering estimate, but can be a preliminary estimate or budget for the project.
- Significant factors that the agency expects to consider in evaluating qualifications, including technical design and construction expertise, and all other non-price related factors. (§ 22185.3(a)(2).) The relative weight or importance of the factors must also be listed. (§ 22185.3(a)(3).) The agency may require the design-build entity to provide a

preliminary cost estimate and consider those costs in evaluating SOQs. (§ 22185.3(a)(2).)

- A standard, template RFQ that is prepared by the agency. (§ 22185.3(a)(4).) The RFQ must request the following information from design-build entities:
 - The form of the entity (i.e., whether it is a privately held corporation, limited liability company, partnership, or joint venture). (§ 22185.3(a)(4)(A).) The design-build entity must list all shareholders, partners, or members known at the time of SOQ submission who will perform work on the project. (*Ibid.*)
 - Evidence that the design-build team has completed, or has demonstrated the experience, competency, capability and capacity to complete projects of similar size, scope and complexity, and that the proposed key personnel have sufficient experience to manage and complete the project. (§ 22185.3(a)(4)(B).) This must include a financial statement that shows the design-build entity has the capacity to complete the project. (*Ibid.*)
 - Required licenses, registrations, and credentials (i.e., contractor licenses for all construction work and architect or engineer licenses for all professional design work) to design and construct the project. (§ 22185.3(a)(4)(C).) The RFQ should ask for information on the revocation or suspension of any license, registration, or credential. (*Ibid.*)
 - Evidence that shows that the design-build entity has the capacity to obtain payment and performance bonds, liability insurance, and errors and omissions insurance. (§ 22185.3(a)(4)(D).)
 - Information on workers' compensation experience history and a worker safety program. (§ 22185.3(a)(4)(E).)
 - A copy of the organizational documents that formed the design-build entity. (§ 22185.3(a)(4)(F).)
 - An acceptable safety record. (§ 22185.3(a)(4)(G).) The design-build entity's safety record is deemed acceptable if the experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury or illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category or if the proposer is a party to an alternative dispute resolution system as provided for in Labor Code section 3201.5. (*Ibid.*)
- The design-build entity must certify its SOQ under penalty of perjury. (§ 22185.3(a)(5).)

3. Skilled and Trained Workforce Commitment.

Design-build entities must also provide in their SOQs an enforceable commitment to the agency that the design-build entity and its subcontractors at every tier will use a skilled and trained

workforce to perform all work on the project that falls within an apprenticeable occupation in the building and construction trades. (§ 22185.3(b)(1).) This is not required if any of the following requirements are met: (1) the agency has entered into a Project Labor Agreement (PLA) that will bind all contractors and subcontractors performing work on the project to use a skilled and trained workforce, and the design-build entity agrees to be bound by that PLA; (2) the project is being performed under the extension or renewal of a PLA that was entered into by the agency before January 1, 2023; or (3) the design-build entity has entered into a PLA that will bind the entity and all its subcontractors at every tier performing the project to use a skilled and trained workforce. (§ 22185.3(b)(2).)

4. Evaluation and Contract Award.

The local agency may elect to award the PDB contract based solely on the information provided in the proposers' SOQs, or after conducting interviews with some or all of the proposers to further evaluate qualifications. (§ 22185.3(c).)

Upon issuance of the contract award, the agency must publicly announce the award, identifying the design-build entity to which the award is made, along with a statement regarding the basis of the award. (§ 22185.3(d).) The statement regarding the agency's contract award and the contract file must provide sufficient information to satisfy an external audit. (*Ibid.*)

Substantive Requirements

The statute includes the following substantive requirements for a PDB contract.

1. Guaranteed Maximum Price.

After selecting a design-build entity based on the procedures described above, the local agency may enter into a contract for design and preconstruction services sufficient to establish a GMP for the project. (§ 22185.5(a).) The GMP is developed as the entity performs design and preconstruction activities and should cover completing those activities and the construction work for the project. PDB generally incorporates the principle of "open book" transparent contract pricing, which means there could be provisions in the PDB Contract that require the design-build entity to share all cost information to facilitate development of the GMP. These "open book" requirements can vary significantly from project to project.

Notably, under this statute, compensation for construction activities must pursuant to a GMP, and not a lump sum amount. (§ 22185.5(a).) If actual construction costs exceed the GMP, the design-build entity is responsible for the excess costs. However, if actual construction costs are less than the GMP, the design-build entity is only entitled to their actual costs, and not the full GMP. (§ 22185.5(b)(2).)

2. The "Off-Ramp."

One of the differentiating features for a PDB contract as compared to other project delivery models is the ability of the parties to voluntarily part ways prior to completion of construction. This is sometimes referred to as a contractual "off ramp." If the local agency and design-build entity do not reach an agreement on the GMP to complete the project, the local agency may solicit proposals from other design-build entities that responded to the original RFQ. (§

22185.5(c)(1).) Presumably, the local agency would terminate the contract with the initial design-build entity before soliciting new proposals. Alternatively, upon a written determination that it is in the best interest of the agency, the agency may also solicit proposals from other design-build entities that did not respond to the original RFQ and evaluate them on a "best value" basis. (*Ibid.*)

3. Subcontractors.

Local agencies may specify subcontractors that need to be identified in the proposer's SOQ. (§ 22185.6(a).) After the contract is awarded, any additional subcontractors must be procured on a "best value" basis, which awards may include prequalification or short-listing at the agency's discretion. (§ 22185.6(b)(3).) All construction subcontractors are afforded the protections of the subcontractor listing law in sections 4100 *et seq.* (§ 22185.6(c).)

4. Retention.

Retention proceeds withheld by the local agency from the design-build entity are not allowed to exceed 5% if a performance and payment bond is required by the RFQ. (§ 22185.7(a).) Work performed to establish the GMP are not subject to retention. (*Ibid.*)

5. Legislative Report.

The local agency must submit a report on the use of PDB to the appropriate policy and fiscal committees of the Legislature by December 31, 2028. Generally, the report must describe the project, contract amount, provide a description of the process, and provide information on specialty subcontractors. The information required to be submitted in the report is prescribed in section 22185.8.

Conclusion

Under sections 22185-22185.11, PDB is available for most projects undertaken by California public agencies over \$5 million.

Projects using this PDB authority must be awarded by the local agency on a "qualification-based" metric where price is not the sole evaluation factor. Price may be considered in the award process, such as a lump sum for design and preconstruction services, but it cannot be the sole evaluation factor. The design-build contract is awarded pursuant to a one-step process, requiring the issuance of an RFQ.

The construction compensation must be based on a GMP, and not a lump sum amount. If the parties cannot agree on a GMP during the design and preconstruction phase, the contract must allow the agency to complete the project using other design-build entities.

Agencies that utilize PDB under these sections must submit a detailed report on the covered projects to the State legislature by December 31, 2028.