

Memorandum

To: CHAIR AND COMMISSIONERS

Date: February 11, 2009


From: BIMLA G. RHINEHART
Executive DirectorFile: Agenda Item 47
ACTIONRef: Design-Build Demonstration Program**ISSUE**

Should the Commission approve the attached Guidelines for Organizational Conflict of Interest Policy, the attached Standard Form of Payment and Performance Bond, and authorize the requested projects for design-build procurement.

RECOMMENDATION

Staff recommends that the Commission take three separate actions to approve the following:

1. Guidelines for Organizational Conflict of Interest Policy
2. Standard Form of Payment and Performance Bond
3. Project Authorizations for Design-Build Procurements as noted in the attached resolution.

BACKGROUND

The Design-Build Demonstration Program was established in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, as added by Chapter 2 of the Statutes of 2009 (Senate Bill 4, Second Extraordinary Session). The purpose of the program is described in Section 6800: "The design-build method of procurement authorized under this chapter should be evaluated for the purposes of exploring whether the potential exists for reduced project costs, expedited project completion, or design features that are not achievable through the traditional design-bid-build method. A demonstration program will allow for a careful examination of the benefits and challenges of design-build contracting on a limited number of projects. This chapter shall not be deemed to provide a preference for the design-build method over other procurement methodologies."

The Design-Build Demonstration Program authorizes use of the design-build method of procurement by local transportation entities for up to five projects and by the Department of Transportation for up to ten projects, subject to project authorization by the California Transportation Commission. The Demonstration Program requires that projects authorized by the Commission shall vary in size, type, and geographical location. The Commission shall also determine whether a transportation entity may award a design-build contract based on lowest responsible bid or best value, balancing the number

awarded according to each method to enable the Commission to determine the costs and benefits of using each method.

Eligibility for the Demonstration Program is limited to projects that the Commission has programmed for funding from the state transportation improvement program (STIP), from the state highway operation and protection program (SHOPP), from the Traffic Congestion Relief Program (TCRP), or from one of the programs designated under Proposition 1B of 2006.

In addition to project selection and authorization, the Demonstration Program requires the Commission to: develop guidelines for organizational conflict of interest policy, develop a standard form of payment and performance bond, and establish a peer review committee to conduct an evaluation of the 15 projects authorized by the Commission. Staff intends to address the peer review committee at a future time, following authorization of an appropriate number of projects to allow for an effective and constructive evaluation of authorized projects.

The attached documents reflect staff recommendations for the Commission's Guidelines for organizational conflict of interest policy, a standard form of payment and performance bond, and Commission authorization for design-build procurement.

1. Guidelines for Organizational Conflict of Interest Policy

The guidelines for organizational conflict of interest policy is referenced in Section 6803(e), which states: *"The commission shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the transportation entity 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. This conflict-of-interest policy shall apply to each transportation entity entering into design-build contracts authorized under this chapter."*

Staff developed the attached guidelines through a review of similar organizational conflict of interest policies referenced and adopted by other state departments of transportation as well as recommendations in the Code of Federal Regulations. These guidelines have also been developed in close coordination with Caltrans.

2. Standard Form of Payment and Performance Bonds

Payment and performance bonds are referenced in Section 6806 which states:

(a) The design-build entity shall provide payment and performance bonds for the project in the form and in the amount required by the transportation entity, and issued by a California admitted surety. In no case shall the amount of the payment bond be less than the amount of the performance bond.

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

(c) The commission shall develop a standard form of payment and performance bond. In developing the bond form, the commission shall consult with entities authorized to use the design-build procurement method under this chapter and with representatives of the surety industry to achieve a bond form that is consistent with surety industry standards and practices, while protecting the public interest.

Staff requested support from and relied on Caltrans for the development of the attached standard forms of payment and performance bond. For consistency with existing requirements, Caltrans modified forms of payment and performance bond already in use for conventional contracts to incorporate the design-build provisions. These forms of payment and performance bond were circulated to transportation stakeholders, construction industry and surety industry representatives for review and comment by Caltrans, and among those providing comments were Skanska US Civil West Inc., Kiewit Pacific Co., Engineering & Utility Contractors Association, and Travelers Bonds and Financial Products.

3. Project Authorization

A separate document with staff recommendations will be made available at or before the Commission's meeting.

Attachments:

1. Guidelines for Organizational Conflict of Interest Policy
2. Standard Form of Payment Bond for Design-Build Contracts
3. Standard Form of Performance Bond for Design-Build Contracts

CALIFORNIA TRANSPORTATION COMMISSION

DRAFT GUIDELINES FOR ORGANIZATIONAL CONFLICT OF INTEREST POLICY FOR THE DESIGN-BUILD DEMONSTRATION PROGRAM

The Design-Build Demonstration Program was established in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, as added by Chapter 2 of the Statutes of 2009 (Senate Bill 4, Second Extraordinary Session). The purpose of the program is described in Section 6800: “The design-build method of procurement authorized under this chapter should be evaluated for the purposes of exploring whether the potential exists for reduced project costs, expedited project completion, or design features that are not achievable through the traditional design-bid-build method. A demonstration program will allow for a careful examination of the benefits and challenges of design-build contracting on a limited number of projects. This chapter shall not be deemed to provide a preference for the design-build method over other procurement methodologies.”

The Demonstration Program authorizes use of the design-build method of procurement by local transportation entities for up to five projects and by the Department of Transportation (Department) for up to ten projects, subject to project authorization by the California Transportation Commission. The Demonstration Program requires that projects authorized by the Commission shall vary in size, type, and geographical location, and that the Commission shall also determine whether a transportation entity may award a design-build contract based on lowest responsible bid or best value. In addition to project selection and authorization, the Demonstration Program requires the Commission to: develop guidelines for standard conflict of interest policy, develop a standard form of payment and performance bond, and establish a peer review committee to conduct an evaluation of the 15 projects authorized by the Commission. The policy guidance for project authorization was adopted by the Commission in September 2009. The development of a standard form of payment and performance bond and the establishment of a peer review committee will be addressed separately.

The purpose of these guidelines is to set forth the Commission’s policy and expectations for the development of an organizational conflict of interest policy by the Department or a local transportation entity entering into design-build contracts authorized under this Demonstration Program. Nothing contained in these guidelines is intended to limit, modify, or otherwise alter the applicability or effect of relevant (federal and state) laws, rules, and regulations. All such laws, rules, and regulations shall apply in their normal manner irrespective of these guidelines.

Specific to organizational conflict of interest, Section 6803(e) states: “*The commission shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the transportation entity 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. This conflict-of-interest policy shall*

apply to each transportation entity entering into design-build contracts authorized under this chapter.”

The integrated nature of design-build procurement creates the potential for conflicts of interest. Disclosure, evaluation, and management of these conflicts and of the appearance of conflicts, require attention to state and federal laws, in the contracting process. Both state and federal laws govern disclosure and management of conflicts of interest in design and construction procurement processes. These guidelines embody the intent of encouraging competition through openness, impartiality, and public disclosure of relevant information. These guidelines will apply to all design-build contracts authorized under this Demonstration Program.

Organizational conflict of interest requirements that apply to design-build procurement for transportation projects, financed in whole or in part with federal funds, are addressed in Title 23 of the Code of Federal Regulations (CFR). The CFR require that state statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build request for qualifications (RFQ) or proposal (RFP) document as well as any contract for engineering services, inspection or technical support in the administration of the design-build contract, provide guidance and minimum standards to identify, mitigate or eliminate apparent or actual organizational conflicts of interest, and allow state standards to prevail if more stringent than the federal standards (23 CFR 636.116).

The CFR define “organizational conflict of interest” as follows: “Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the owner or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage” (23 CFR § 636.103).

The CFR also address conflict of interest standards that apply to individuals who serve as selection team members for the owner (23 CFR 636.117): “State laws and procedures governing improper business practices and personal conflicts of interest will apply to the owner's selection team members. In the absence of such state provisions, the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members.”

California laws and regulations establish the conflict of interest policy for state and local government agencies and require that these agencies adopt and promulgate a conflict of interest code, assigning disclosure categories and specifying the types of interests to be reported. In addition, the California Board for Professional Engineers and Land Surveyors provides guidance and has established conflict of interest rules applicable to those professionals licensed by the Board. These rules require full disclosure when a licensee has any business association or financial interest that may influence his or her judgment in connection with the performance of professional services and when a licensee provides professional services for two or more clients on a project or related project.

The responsibility to avoid or neutralize organizational conflict of interest ultimately rests with the person or firm potentially conflicted. Nevertheless, a contracting agency retains the sole discretion to determine on a case-by-case basis whether a conflict exists and whether actions

may be appropriate to avoid or neutralize such conflict. The determination regarding the existence of an actual or potential conflict or whether the conflict may be avoided or neutralized must be based on facts made available at the time the determination is made. Unknown facts or a change in the facts over time may necessitate a re-evaluation of the original conclusion. The contracting agency's concern with conflict must be balanced against the need to promote competition in the design-build procurement process. With that, these guidelines neither purport to address every situation that may arise in the context of a project nor to mandate a particular decision or determination by a contracting agency when faced with facts similar to those described herein.

In order to promote fairness and impartiality, conflict of interest policies and procedures by a contracting agency should address the following. The RFQ and/or RFP should also include standardized checklists or forms in order to collect and evaluate pertinent information.

- A. State statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build RFQ or RFP document as well as any contract for engineering services, inspection or technical support in the administration of the design-build contract.
 - 1) Consultants and/or sub-consultants who assist a contracting agency in the preparation of an RFQ or RFP document will not be allowed to participate as an offeror or join a team submitting a proposal in response to the RFP. However, a contracting agency may determine there is not an organizational conflict of interest for a consultant or sub-consultant where:
 - i. The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar "low-level" documents that will be incorporated into the RFP, and did not include assistance in development of instructions to offerors or evaluation criteria, or
 - ii. Where all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors.
 - 2) All solicitations for design-build contracts, including related contracts for inspection, administration or auditing services, must include a provision which:
 - i. Directs offerors attention to the contracting agency's conflict of interest policies;
 - ii. States the nature of the potential conflict as seen by the contracting agency;
 - iii. States the nature of the proposed restraint or restrictions (and duration) upon future contracting activities, if appropriate;
 - iv. Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation; and
 - v. Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals. The apparent successful offerors must disclose all relevant facts concerning any past, present or currently planned interests which may present an organizational conflict of interest. Such firms must state how their interests, or those of their chief executives, directors, key

project personnel, or any proposed consultant, contractor or subcontractor may result, or could be viewed as, an organizational conflict of interest. The information may be in the form of a disclosure statement or a certification.

- 3) Based upon a review of the information submitted, the contracting agency should make a written determination of whether the offeror's interests create an actual or potential organizational conflict of interest and identify any actions that must be taken to avoid, neutralize, or mitigate such conflict. The contracting agency should award the contract to the apparent successful offeror unless an organizational conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated.
- B. The organizational conflict of interest provisions in this subpart provide minimum standards for a contracting agency to identify, mitigate, or eliminate apparent or actual organizational conflicts of interest. To the extent that State-developed organizational conflict of interest standards are more stringent than that contained in this subpart, the State standards prevail.
 - C. If the environmental process (federal or state) has been completed prior to issuing the RFP, the contracting agency may allow a consultant or sub-consultant who prepared the environmental document to submit a proposal in response to the RFP.
 - D. If the environmental process (federal or state) has not been completed prior to issuing the RFP, the contracting agency may allow a sub-consultant to the preparer of the environmental document to participate as an offeror or join a team submitting a proposal in response to the RFP only if the contracting agency releases such sub-consultant from further responsibilities with respect to the preparation of the environmental document.

DRAFT

**Design-Build Demonstration Program
Standard Form of Payment and Performance Bond**

- 1.1. WHEREAS the Design-Build Demonstration Program was established in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, as added by Chapter 2 of the Statutes of 2009 (Senate Bill 4, Second Extraordinary Session), and
- 1.2. WHEREAS subject to the limitations of Chapter 6.5, a local transportation entity, if authorized by the California Transportation Commission, may utilize the design-build method of procurement for up to five projects that may be for local street or road, bridge, tunnel, or public transit projects within the jurisdiction of the entity, and
- 1.3. WHEREAS, subject to the limitations of Chapter 6.5, the Department of Transportation (Department), if authorized by the Commission, may utilize the design-build method of procurement for up to 10 state highway, bridge, or tunnel projects, and
- 1.4. WHEREAS the Commission is required to develop a standard form of payment and performance bond, and in developing the bond form, the commission shall consult with entities authorized to use the design-build procurement method and with representatives of the surety industry to achieve a bond form that is consistent with surety industry standards and practices, while protecting the public interest, and
- 1.5. WHEREAS the Commission has requested the support of the Department, pursuant to Government Code Section 14512, to develop these forms of payment and performance bond,
- 2.1. NOW THEREFORE BE IT RESOLVED that the Department has developed the attached forms for payment and performance bond for design-build contracts based on existing bond provisions already in use by the Department for conventional contracts, and
- 2.2. NOW THEREFORE BE IT RESOLVED that the Department has coordinated with the transportation engineering, construction and surety industries, and
- 2.3. BE IT FURTHER RESOLVED that the Commission has made these forms available to local transportation entities for review and comment prior to the Commission's action, and
- 2.4. BE IT FURTHER RESOLVED that the Commission hereby approves these forms and requests that the Department continue to take all steps necessary to keep these forms or payment and performance bond up-to-date, ensuring consistency with surety industry standards and practices, while protecting the public interest, and
- 2.5. BE IT FURTHER RESOLVED that the Commission requests that the Department make the updated forms of payment and performance bond available for use by all entities authorized to utilize the design-build method of procurement.

PAYMENT BOND FOR DESIGN-BUILD CONTRACTS

(To Accompany a Design-Build Contract)

[Public Contract Code § 6806]

(REV. 2/2010)

Contract No. _____

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS,

THAT WHEREAS, The State of California (State), acting by and through the Department of Transportation, has awarded to _____ (Principal), a Design-Build Contract (Contract), which contract is specifically incorporated by reference herein, as a contract for the design and construction described as follows:

AND WHEREAS, The Principal is required by Section 6806 of the Public Contract Code to furnish a payment bond (Bond) in connection with said Contract to secure the payment of claims of laborers, mechanics, material men, and other persons as provided by law;

NOW THEREFORE, We the undersigned _____ (Principal) and _____ (Surety) are held and firmly bound unto the State, in the sum of _____ Dollars (\$ _____), to be paid to the said State or its certain attorney, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH:

1. That if said Principal, or its heirs, executors, administrators successors or assigns or subcontractors, shall fail to pay any of the persons named in California Civil Code Section 3181, or anyone required to be paid by law, or amounts due under the Unemployment Insurance Code with respect to work or labor performed by such claimant, or any amounts required to be deducted, withheld, and paid over to the Franchise Tax Board from the wages of employees of the Principal and his subcontractors pursuant to Revenue and Taxation Code Section 18662 *et seq.* with respect to such work and labor, that the Surety herein will pay for the same in an amount not exceeding the sum specified in this Bond, otherwise the above obligation shall be null and void. In case suit is brought upon this Bond, the Surety will pay reasonable attorney's fee to be fixed by the court.
2. This Bond shall inure to the benefit of any of the persons named in Civil Code Section 3181 or anyone required to be paid by law under said contract so as to give a right of action to such persons or their assigns in any suit brought upon this Bond.
3. The said Surety agrees that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the work to be performed with respect to the project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any recession or attempted recession of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.
4. When this Bond had been furnished to comply with a statutory or other legal requirement in the location where the construction is to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not a common law bond.
5. This Bond shall cover all payment obligations for the said design-build work, including warranty payment obligations unless a separate warranty bond is provided by the Principal, but shall not cover any payment obligations covered by the Principal's errors and omissions insurance for the design elements of the work

required pursuant to the contract or by Section 6806(b) of the Public Contract Code or by any professional liability insurance whether or not such insurance is provided in an amount sufficient to cover such damages.

IN WITNESS WHEREOF, We have hereunto set our hands and seals on this _____ day of _____.

Correspondence or claims relating to this Bond should be sent to the Surety at the following address: _____

(Principal's name, title, and signature)

Surety
By _____
Attorney-in-Fact

NOTE: Signatures of those executing for the surety must be properly acknowledged, and a Power of Attorney attached.

CALIFORNIA ALL PURPOSE ACKNOWLEDGMENT

State of _____

County of _____ On this _____ day of _____ in the year of _____

before me, a notary public in and for the county and state aforesaid, personally appeared _____

_____ who proved to me on the basis of satisfactory evidence to be the person(s)

whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____(SEAL)_____

Signature of Notary Public

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Contract No. _____

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS,

THAT WHEREAS, The State of California (State), acting by and through the Department of Transportation, has awarded to _____ (Principal), a design-build contract (Contract) for the design and construction work described as follows:

AND WHEREAS, The Principal is required by Section 6806 of the Public Contract Code to furnish a bond in connection with said Contract guaranteeing the faithful performance of its obligations under the Contract thereof:

NOW THEREFORE, We the undersigned Principal and _____ (Surety) are held and firmly bound unto the State, in the sum of _____ Dollars (\$ _____), to be paid to the said State or its certain attorney, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH:

1. That if the above bound Principal, or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and agreements in the foregoing Contract, including any and all amendments, supplements, and alterations thereto made as therein provided, on his or their part to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the State, its officers and agents, as therein stipulated, then this obligation shall become and be null and void; otherwise, it shall be and remain in full force and virtue.
2. This Bond shall cover the cost to complete the said design and construction work, but shall not cover any damages of the type specified to be covered by the Principal's errors and omissions insurance for the design elements of the work required pursuant to the Contract and Section 6806(b) of the Public Contract Code or by any professional liability insurance, whether or not such insurance is provided in an amount sufficient to cover such damages.
3. The said Surety agrees that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the work to be performed with respect to the project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any recession or attempted recession of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover from this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications. The Surety agrees that payments made to contractors and suppliers to satisfy claims on the payment bond do not reduce the Surety's legal obligations under this Bond. Payments made to contractors or suppliers under any agreement where the Surety has arranged for completion of the work to satisfy this Bond will not be considered payment bond claims.

WITNESS WHEREOF, We have hereunto set our hands and seals on this _____ day of _____, 20____.

Correspondence or claims relating to this Bond should be sent to the Surety at the following address: _____

(Principal's name, title, and signature)

Surety
By _____
Attorney-in-Fact

NOTE: Signatures of those executing for the Surety must be properly acknowledged, and a Power of Attorney attached.

CALIFORNIA ALL PURPOSE ACKNOWLEDGMENT

State of _____

County of _____ On this _____ day of _____ in the year of _____

before me, a notary public in and for the county and state aforesaid, personally appeared _____

_____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____(SEAL)_____

Signature of Notary Public

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