



● **Board of Directors**
Communications and Legislation Committee

April 14, 2009 Board Meeting

8-8

Subject

Express support, if amended, for AB 958 (Eng, D-Monterey Park) – Design-build: metropolitan water districts: solar energy systems.

Description

Summary: Assembly Bill 958 introduced by Assembly Member Eng ([Attachment 1](#)), sponsored by MAPA/AFSCME Local 1001, would authorize metropolitan water districts to enter into design-build contracts for the construction of solar powered energy facilities costing in excess of \$1,000,000.

Background: Under existing law Metropolitan’s contracts for capital improvements in excess of \$25,000 are required to be competitively bid and awarded to the lowest responsive and responsible bidder. The authorized delivery system for capital improvements is the traditional design-bid-build process. Under this process, Metropolitan or its consultants design the project and prepare specifications incorporating the project design prior to bid. Design-build contracts are generally awarded on a “best value” rather than a low bid basis. The best value approach includes consideration of the qualifications of the design-builder and the quality of the project proposal as well as price in selection of the contractor. Many people believe that use of design-build contracts for project delivery allows projects to be completed more quickly with cost-savings and fewer disputes.

Express statutory authority is required for Metropolitan to enter into design-build contracts and to use best value rather than lowest responsible bidder as the basis for selection of a contractor. Assembly Member Eng has introduced AB 958 that would authorize metropolitan water districts to enter into design-build contracts and to utilize best value as the basis for award of a contract for a capital project solely for the construction of solar energy facilities costing in excess of \$1,000,000.

Additional provisions of the bill would require Metropolitan to either establish and enforce a labor compliance program for each such contract, or enter into a collective bargaining agreement that binds all of the contractors performing work on the projects. The legislation would also require Metropolitan to use specified selection criteria and to weight the criteria equally if awarding on the basis of best value. As proposed, the criteria limit price to 20 percent of the weight when using best value to award a contract. The other criteria that must have equal weight with price are technical design, life cycle costs, availability of a skilled labor force (defined as the bidder having an agreement with a registered apprenticeship program) and the bidder’s safety record.

Staff recommends support of AB 958 in order to provide Metropolitan with an alternative method to contract for solar energy facilities if the bill is amended to allow Metropolitan to have additional flexibility in weighting the criteria for best value selection in order to give more weight to the contract price.

If MAPA and Metropolitan reach agreement on the requested amendment, MAPA has requested that Metropolitan join them in co-sponsoring AB 958.

Policy

The Board has not established a policy with regard to alternative methods of contracting.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061 (b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and authorize the General Manager to express Metropolitan’s support for AB 958 if amended to allow more flexibility in the best value criteria for selection of a contractor. If amended in an acceptable form, Metropolitan will agree to co-sponsor the bill.

Fiscal Impact: Unknown

Business Analysis: If adopted, AB 958 would provide Metropolitan with an additional option in contracting for the construction of solar energy facilities.

Option #2

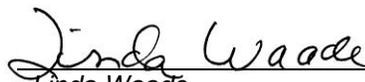
Take no position on AB 958.

Fiscal Impact: Unknown

Business Analysis: If AB 958 is not adopted, Metropolitan will not have the opportunity to use design-build contracting for the construction of solar energy facilities.

Staff Recommendation

Option #1


Linda Waade
Deputy General Manager, External Affairs

4/1/2009
Date


Jeffrey Kightlinger
General Manager

4/1/2009
Date

Attachment 1 – Assembly Bill 958

BLA #6635

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL**No. 958****Introduced by Assembly Member Eng**

February 26, 2009

An act to add Section 21568 to the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 958, as introduced, Eng. Design-build: metropolitan water districts: solar energy systems.

Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.

This bill would authorize a metropolitan water district to enter into design-build contracts for projects involving the design, construction, fabrication, and installation of a solar energy system in excess of \$1,000,000, in accordance with specified provisions. The bill would establish a procedure for submitting bids that includes a requirement that design-build entities provide a statement of qualifications submitted to the transportation entity that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would, by requiring a verification, create a new crime and thereby 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.

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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. Section 21568 is added to the Public Contract
2 Code, to read:
3 21568. (a) (1) Notwithstanding the requirements of Section
4 21565, this section provides an alternative procedure that a
5 metropolitan water district may utilize in the design, construction,
6 fabrication, and installation of a solar energy system, including
7 ancillary improvements directly related to the solar energy system,
8 in excess of one million dollars (\$1,000,000).
9 (2) Metropolitan water districts may award a project under this
10 section using either the lowest responsible bidder or by best value.
11 (b) (1) It is the intent of the Legislature to enable metropolitan
12 water districts to utilize cost-effective options for the installation
13 of solar energy facilities.
14 (2) The Legislature finds that cost-effective benefits are achieved
15 by shifting the liability and risk for cost containment and project
16 completion to the design-build entity.
17 (3) It is the intent of the Legislature to provide an alternative
18 and optional procedure for bidding and building solar construction
19 projects for metropolitan water districts.
20 (c) The design-build approach authorized by this section may
21 be used, but is not limited to use, when it is anticipated that it will
22 do any of the following:
23 (1) Reduce project cost.
24 (2) Expedite project completion.
25 (3) Provide design features not achievable through the
26 design-bid-build method.
27 (d) If a metropolitan water district elects to proceed under this
28 section, the metropolitan water district shall establish and enforce,
29 for design-build projects, a labor compliance program containing
30 the requirements outlined in Section 1771.5 of the Labor Code, or
31 it shall contract with a third party to operate a labor compliance
32 program containing the requirements outlined in Section 1771.5
33 of the Labor Code. This requirement shall not apply to any project

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1 where the metropolitan water district or the design-build entity
2 has entered into any collective bargaining agreement or agreements
3 that bind all of the contractors performing work on the projects.

4 (e) As used in this section, the following terms have the
5 following meanings:

6 (1) “Best value” means a value determined by objectives relative
7 to price, features, functions, and life-cycle costs.

8 (2) “Design-build” means a procurement process in which both
9 the design and construction of a project are procured from a single
10 entity.

11 (3) “Design-build entity” means a partnership, corporation, or
12 other legal entity that is able to provide appropriately licensed
13 contracting, architectural, and engineering services, as needed,
14 pursuant to a design-build contract.

15 (4) “Project” means the construction of solar energy installations
16 at regional or local water facilities including ancillary
17 improvements directly related to the solar energy system.

18 (f) Design-build projects shall progress in a four-step process,
19 as follows:

20 (1) (A) The metropolitan water district shall prepare a set of
21 documents setting forth the scope of the project. The documents
22 may include, but are not limited to, the size, type, and desired
23 design character of the buildings and site, performance
24 specifications covering the quality of materials, equipment, and
25 workmanship, preliminary plans or building layouts, or any other
26 information deemed necessary to describe adequately the
27 metropolitan water district’s needs. The performance specifications
28 and any plans shall be prepared by a design professional who is
29 duly licensed and registered in California.

30 (B) Any architect or engineer retained by the metropolitan water
31 district to assist in the development of the project-specific
32 documents shall not be eligible to participate in the preparation of
33 a bid with any design-build entity for that project.

34 (2) (A) Based on the documents prepared in paragraph (1), the
35 metropolitan water district shall prepare a request for proposals
36 that invites interested parties to submit competitive sealed proposals
37 in the manner prescribed by the metropolitan water district. The
38 request for proposals shall include, but is not limited to, the
39 following elements:

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1 (i) Identification of the basic scope and needs of the project or
2 contract, the expected cost range, and other information deemed
3 necessary by the metropolitan water district to inform interested
4 parties of the contracting opportunity, including, but not limited
5 to, the methodology that will be used by the metropolitan water
6 district to evaluate proposals, and, specifically, if the contract will
7 be awarded to the lowest responsible bidder.

8 (ii) Significant factors which the metropolitan water district
9 reasonably expects to consider in evaluating proposals, including
10 cost or price and all nonprice related factors.

11 (iii) The relative importance of weight assigned to each of the
12 factors identified in the request for proposals.

13 (B) With respect to clause (iii) of subparagraph (A), if a
14 nonweighted system is used, the agency shall specifically disclose
15 whether all evaluation factors, other than cost or price, when
16 combined are:

17 (i) Significantly more important than cost or price.

18 (ii) Approximately equal in importance to cost or price.

19 (iii) Significantly less important than cost or price.

20 (C) If the metropolitan water district chooses to reserve the right
21 to hold discussions or negotiations with responsive bidders, it shall
22 so specify in the request for proposal and shall publish separately,
23 or incorporate into the request for proposal, applicable rules and
24 procedures to be observed by the metropolitan water district to
25 ensure that any discussions or negotiations are conducted in good
26 faith.

27 (3) (A) The metropolitan water district shall establish a
28 procedure to prequalify design-build entities using a standard
29 questionnaire developed by the metropolitan water district. In
30 preparing the questionnaire, the metropolitan water district shall
31 consult with the construction industry, including representatives
32 of the building trades and surety industry. This questionnaire shall
33 require information, including, but not limited to, all of the
34 following:

35 (i) If the design-build entity is a partnership, limited partnership,
36 or other association, a listing of all of the partners, general partners,
37 or association members known at the time of bid submission who
38 will participate in the design-build contract, including, but not
39 limited to, mechanical subcontractors.

- 1 (ii) Evidence that the members of the design-build entity have
2 completed, or demonstrated the experience, competency, capability,
3 and capacity to complete projects of similar size, scope, or
4 complexity, and that proposed key personnel have sufficient
5 experience and training to competently manage and complete the
6 design and construction of the project, as well as a financial
7 statement that assures the metropolitan water district that the
8 design-build entity has the capacity to complete the project.
- 9 (iii) The licenses, registration, and credentials required to design
10 and construct the project, including information on the revocation
11 or suspension of any license, credential, or registration.
- 12 (iv) Evidence that establishes that the design-build entity has
13 the capacity to obtain all required payment and performance
14 bonding, liability insurance, and errors and omissions insurance.
- 15 (v) Any prior serious or willful violation of the California
16 Occupational Safety and Health Act of 1973, contained in Part 1
17 (commencing with Section 6300) of Division 5 of the Labor Code
18 or the federal Occupational Safety and Health Act of 1970 (Public
19 Law 91-596), settled against any member of the design-build entity,
20 and information concerning workers' compensation experience
21 history and worker safety program.
- 22 (vi) Information concerning any debarment, disqualification,
23 or removal from a federal, state, or local government public works
24 project. Any instance where an entity, its owners, officers, or
25 managing employees submitted a bid on a public works project
26 and were found to be nonresponsive, or were found by an awarding
27 body not to be a responsible bidder.
- 28 (vii) Any instance where the entity, its owners, officers, or
29 managing employees defaulted on a construction contract.
- 30 (viii) Any violations of the Contractors' State License Law
31 (Chapter 9 (commencing with Section 7000) of Division 3 of the
32 Business and Professions Code), excluding alleged violations of
33 federal or state law including the payment of wages, benefits,
34 apprenticeship requirements, or personal income tax withholding,
35 or of Federal Insurance Contribution Act (FICA; 26 U.S.C. Sec.
36 3101 et seq.) withholding requirements settled against any member
37 of the design-build entity.
- 38 (ix) Information concerning the bankruptcy or receivership of
39 any member of the design-build entity, including information
40 concerning any work completed by a surety.

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

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

13 (B) The information required pursuant to this subdivision shall
14 be verified under oath by the entity and its members in the manner
15 in which civil pleadings in civil actions are verified. Information
16 that is not a public record pursuant to the California Public Records
17 Act (Chapter 3.5 (commencing with Section 6250) of Division 7
18 of Title 1 of the Government Code) shall not be open to public
19 inspection.

20 (4) The metropolitan water district shall establish a procedure
21 for final selection of the design-build entity. Selection shall be
22 based on either of the following criteria:

23 (A) A competitive bidding process resulting in lump-sum bids
24 by the prequalified design-build entities. Awards shall be made to
25 the lowest responsible bidder.

26 (B) The metropolitan water district may use a design-build
27 competition based upon best value and other criteria set forth in
28 paragraph (2). The design-build competition shall include the
29 following elements:

30 (i) Competitive proposals shall be evaluated by using only the
31 criteria and selection procedures specifically identified in the
32 request for proposal. However, the following minimum factors
33 shall each represent at least 10 percent of the total weight of
34 consideration given to all criteria factors: price, technical design
35 and construction expertise, life-cycle costs over 15 years or more,
36 skilled labor force availability, and acceptable safety record. Each
37 of these factors shall be weighted equally.

38 (ii) Once the evaluation is complete, the top three responsive
39 bidders shall be ranked sequentially from the most advantageous
40 to the least.

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1 (iii) The award of the contract shall be made to the responsible
2 bidder whose proposal is determined, in writing, to be the most
3 advantageous.

4 (iv) Notwithstanding any provision of this code, upon issuance
5 of a contract award, the metropolitan water district shall publicly
6 announce its award, identifying the contractor to whom the award
7 is made, along with a written decision supporting its contract award
8 and stating the basis of the award. The notice of award shall also
9 include the metropolitan water district's second and third ranked
10 design-build entities.

11 (v) For purposes of this paragraph, "skilled labor force
12 availability" shall be determined by the existence of an agreement
13 with a registered apprenticeship program, approved by the
14 California Apprenticeship Council, which has graduated
15 apprentices in each of the preceding five years. This graduation
16 requirement shall not apply to programs providing apprenticeship
17 training for any craft that has been deemed by the Department of
18 Labor and the Department of Industrial Relations to be an
19 apprenticeable craft in the five years prior to enactment of this act.

20 (vi) For the purposes of this paragraph, a bidder's "safety
21 record" shall be deemed "acceptable" if their experience
22 modification rate for the most recent three-year period is an average
23 of 1.00 or less, and their average total recordable injury/illness
24 rate and average lost work rate for the most recent three-year period
25 does not exceed the applicable statistical standards for its business
26 category, or if the bidder is a party to an alternative dispute
27 resolution system, as provided for in Section 3201.5 of the Labor
28 Code.

29 (g) (1) Any design-build entity that is selected to design and
30 build a project pursuant to this section shall possess or obtain
31 sufficient bonding to cover the contract amount for nondesign
32 services and errors and omissions insurance coverage sufficient
33 to cover all design and architectural services provided in the
34 contract. This section does not prohibit a general or engineering
35 contractor from being designated the lead entity on a design-build
36 entity for the purposes of purchasing necessary bonding to cover
37 the activities of the design-build entity.

38 (2) Any payment or performance bond written for the purposes
39 of this section shall be written using a bond form developed by
40 the metropolitan water district.

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1 (h) All subcontractors that were not listed by the design-build
2 entity in accordance with clause (i) of subparagraph (A) of
3 paragraph (3) of subdivision (f) shall be awarded by the
4 design-build entity in accordance with the design-build process
5 set forth by the metropolitan water district in the design-build
6 package. 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 design-build entity
9 shall do both 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 metropolitan
13 water district.

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

17 (i) The minimum performance criteria and design standards
18 established pursuant to paragraph (1) of subdivision (f) shall be
19 adhered to by the design-build entity. Any deviations from those
20 standards may only be allowed by written consent of the
21 metropolitan water district.

22 (j) The metropolitan water district may retain the services of a
23 design professional or construction project manager, or both,
24 throughout the course of the project in order to ensure compliance
25 with this section.

26 (k) Contracts awarded pursuant to this section shall be valid
27 until the project is completed.

28 (l) Nothing in this section is intended to affect, expand, alter,
29 or limit any rights or remedies otherwise available at law.

30 (m) Nothing in this section shall affect either of the following:

31 (1) The restrictions on subcontracting imposed by a metropolitan
32 water district's merit system, or any memorandum of understanding
33 or operating policy.

34 (2) (2) The obligation of the metropolitan water district to meet
35 and confer with any employee organization concerning a matter
36 within the statutory scope of representation.

37 (n) Any design-build project procured under this section shall
38 provide for training of the permanent employees of the
39 metropolitan water district to maintain and repair the project once
40 completed.

1 (o) (1) If the metropolitan water district elects to award a project
 2 pursuant to this section, retention proceeds withheld by the
 3 metropolitan water district from the design-build entity shall not
 4 exceed 5 percent if a performance and payment bond, issued by
 5 an admitted surety insurer, is required in the solicitation of bids.

6 (2) In a contract between the design-build entity and the
 7 subcontractor, and in a contract between a subcontractor and any
 8 subcontractor thereunder, the percentage of the retention proceeds
 9 withheld shall not exceed the percentage specified in the contract
 10 between the metropolitan water district and the design-build entity.

11 If the design-build entity provides written notice to any
 12 subcontractor who is not a member of the design-build entity, prior
 13 to or at the time the bid is requested, that a bond may be required
 14 and the subcontractor subsequently is unable or refuses to furnish
 15 a bond to the design-build entity, then the design-build entity may
 16 withhold retention proceeds in excess of the percentage specified
 17 in the contract between the metropolitan water district and the
 18 design-build entity from any payment made by the design-build
 19 entity to the subcontractor.

20 (p) (1) The authority for design-build projects contained in this
 21 section is a new and independent authorization and shall not
 22 supersede, limit, or restrict any other statutory design-build
 23 authorization.

24 (2) Nothing in this section shall be construed to change the
 25 authority of a state department, agency, board, or commission.

26 (3) A qualified entity may use state funds for projects utilizing
 27 the design-build procedure under this section.

28 (4) Except as provided in this section, nothing in this section
 29 shall be construed to affect the application of any other law.

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