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## SENATE COMMITTEE ON EDUCATION

Senator Connie Leyva, Chair

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**Bill No:** SB 743 **Hearing Date:** April 10, 2019  
**Author:** Hertzberg  
**Version:** March 27, 2019  
**Urgency:** No **Fiscal:** No  
**Consultant:** Ian Johnson

**Subject:** School Facilities: design-build projects

### SUMMARY

This bill clarifies that, upon entering into a design-build contract for a project subject to the California Environmental Quality Act (CEQA), Los Angeles Unified School District shall retain the discretion to terminate the contract before final project design submittal and modify the project as needed to ensure project compliance with CEQA.

### BACKGROUND

Existing law:

- 1) Establishes the design-build method of construction project delivery, in which both the design and construction of a project are procured from the same entity, for use by school districts.
- 2) Establishes the CEQA to disclose to the public the significant environmental effects of a proposed discretionary project, through the preparation of an Initial Study, Negative Declaration, or Environmental Impact Report (EIR).
- 3) Encourages local agencies with projects subject to CEQA to integrate the CEQA requirements with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.

### ANALYSIS

This bill:

- 1) Establishes the following definitions for purposes of the section being added:
  - a) "Project" means all construction, alteration, demolition, installation, repair, and maintenance work that is subject to a project labor agreement.
  - b) "School district" means a school district that operates a labor compliance program that received final approval from the Department of Industrial Relations before January 1, 1997.

- 2) Species that a school district entering into a design-build contract for a project subject to the California Environmental Quality Act (CEQA) shall retain the discretion to do all of the following:
  - a) Terminate the contract at any time before a final project design is submitted to the Division of the State Architect for approval.
  - b) Modify the project design or feature in a manner the school district decides is necessary to comply with CEQA, including, but not limited to, incorporation of mitigation measures identified in an environmental review document for the project to mitigate environmental impacts that the project may cause, or the adoption of alternatives to the project.
  - c) Balance the benefits of the proposed project against any of the project's significant environmental effects if the effects cannot be otherwise avoided or mitigated to a less than significant level.
  - d) Disapprove the project design and not proceed with the project's final design and construction.
- 3) Requires design-build contracts to include terms specifying the conditions set forth above and condition the commencement of any activity beyond the design phase of the contract in compliance with applicable laws.
- 4) Prohibits a design-build entity or its subcontractors from engaging in any activity under a design-build contract beyond the design phase unless the school district issues a notice pursuant to existing Public Resources Code law.
- 5) Specifies that, for purposes of procuring and awarding a design-build contract, a school district is deemed to have complied with CEQA if the school district complies with the discretions above.

## STAFF COMMENTS

- 1) ***Need for the bill.*** According to the author, "The design-build method of project delivery provides many efficiencies to school construction projects, including cost-effective use of public funds and expedited project completion. However, in order to evaluate whether a proposed project is in compliance with the California Environmental Quality Act (CEQA), it is necessary to have certain information known about the proposed project that can only be revealed through the design development stage. However, the project design cannot be initiated by the design-builder until they are awarded the design-build contract. As such, oftentimes the design-build contract is awarded before the environmental review under CEQA has been approved by the Board of Education. It's also important to know that awarding of the design-build contract does not authorize the construction of the project until it satisfies its respective CEQA and Division of State Architect requirements.

Recently in the Los Angeles Unified School District, opponents to a project argued that by awarding the design-build contract, the school district had already

approved the project and committed itself to an irreversible and definite course of action without conducting the appropriate environmental review under California Environmental Quality Act (CEQA).”

- 2) ***Design-build contracting.*** Existing law authorizes school districts to use the design-build method for delivering construction projects. Whereas traditional project delivery requires the owner to manage two separate, and often adversarial, contracts with a designer and a builder, design-build projects involve a single point of responsibility, with the designer and builder working together from the beginning. Also central to the design-build method is best value procurement. Best value procurement means selecting project bidders based on experience, past performance, and features in addition to lowest price.
- 3) ***CEQA.*** CEQA is California’s broadest environmental law, with courts interpreting it to afford the fullest protection of the environment within the reasonable scope of the statutes. The act applies to all discretionary projects proposed to be conducted or approved by a California public agency, including private projects requiring discretionary government approval.

The overall purpose of CEQA is to disclose to the public the significant environmental effects of a proposed discretionary project through an Environmental Impact Report (EIR), prevent or minimize damage to the environment through development of project alternatives, enhance public participation in the environmental review process through scoping meetings, public notice, public review, hearings, and the judicial process, and improve interagency coordination through early consultations, scoping meetings, notices of preparation, and State Clearinghouse review.

Under CEQA, projects carried out by public agencies are subject to the same level of review as private projects requiring approval by public agencies. The intent is to ensure that no project that would cause significant environmental effects shall be approved as proposed if there are feasible alternatives or mitigation measures that would lessen those effects. Lastly, local agencies are encouraged to integrate CEQA with other environmental review, planning, and information gathering so as to cut costs and time and to apply the conservation of financial, governmental, physical, and social resources towards better mitigation.

- 4) ***At what point during the life of a project must an agency show CEQA compliance?*** An agency with a project subject to CEQA must complete an EIR before “committing” to the project. The point at which an agency is committed to a project is not precisely defined in statute. The courts have ruled that the degree to which a lead agency commits to a proposed project, taking into account the surrounding facts and context, ultimately determines when an EIR must be completed for CEQA compliance purposes.

In *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the California Supreme Court stated the following about when an agency has shown project commitment:

“When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publically defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project, the agency will not be easily deterred from taking whatever steps remain toward the project’s final approval.”

- 5) ***Can a school district enter a design-build contract before demonstrating California Environmental Quality Act (CEQA) compliance?*** Central to this bill is the question of whether or not a school district can enter into a design-build contract prior to showing compliance with the CEQA. Some have argued yes, as long as the contract is conditional on CEQA compliance being obtained. In *Save Tara v. City of West Hollywood*, the Court affirmed the importance of considering the surrounding facts and context of the project under contract, stating:

“A CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review.”

Given the court’s statement, it appears that only on a case-by-case basis can it be known if executing a project contract will trigger the point at which an agency must show CEQA compliance.

- 6) ***Existing law appears to pit design-build projects against CEQA’s chain of required events.*** CEQA law is ambiguous about when an Environmental Impact Report (EIR) showing CEQA compliance must be completed, and agencies have been sued for entering contract with project builders prior to completing an EIR. Design-build projects by definition combine project designers and builders into one contract, meaning no design functions can begin until a contract is executed. Therefore, there appears to be no way for school districts with design-build projects from avoiding a period of time when they are legally vulnerable under CEQA—the period of time between first entering the design-build contract and completing an EIR. According to sponsors of the bill, an EIR typically takes about one year to complete.
- 7) ***This approach has merit, but why only apply it to Los Angeles Unified School District?*** This bill seeks to address a fundamental way in which design-build projects and CEQA may be misaligned. By codifying that a school district entering into a design-build contract for a project subject to CEQA retains the discretion to (1) terminate the contract before final project design submittal and (2) modify the project as needed pursuant to an EIR, and requiring design-build contracts to include these provisions, this bill would make it clear that simply entering into a design-build contract does not mean a district is “committed” to the project as defined by the California Supreme Court in *Save Tara v. City of West Hollywood*.

However, as currently drafted this bill would only apply to Los Angeles Unified School District (LAUSD). According to the author, LAUSD is the only school district that is known to have been sued over a design-build project because of ambiguity within the statutes governing the California Environmental Quality Act (CEQA). Even so, there could be other school districts that will face legal challenges moving forward or that currently opt out of design-build contracting for fear of legal recourse related to CEQA.

**SUPPORT**

Los Angeles Unified School District

**OPPOSITION**

None received

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