



Contra
Costa
County

To: Board of Supervisors
From: LEGISLATION COMMITTEE
Date: May 24, 2016

Subject: Oppose position on SB 1170 (Wieckowski) Public Contracts: Water Pollution Prevention Plans

RECOMMENDATION(S):

ADOPT an "Oppose" position on SB 1170 (Wieckowski) Public Contracts: Water Pollution Prevention Plans, a bill that would prohibit a public entity, charter city, or charter county from delegating to a contractor the development of a plan to prevent or reduce water pollution or runoff on a public works contract, or to assume responsibility for the completeness and accuracy of a plan developed by that entity, as recommended by the Legislation Committee.

FISCAL IMPACT:

No immediate fiscal impact.

BACKGROUND:

At its May 7, 2015 meeting, the Legislation Committee considered the recommendation from the Public Works Director to recommend a position of "Oppose" to the Board of Supervisors on SB 1170.

Status: 04/20/2016 From SENATE Committee on ENVIRONMENTAL QUALITY: Do

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY ADMINISTRATOR

☐ RECOMMENDATION OF BOARD COMMITTEE

Action of Board On: **05/24/2016** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: John Gioia, District I Supervisor
Candace Andersen, District II Supervisor
Mary N. Piepho, District III Supervisor
Karen Mitchoff, District IV Supervisor
Federal D. Glover, District V Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: May 24, 2016

David Twa, County Administrator and Clerk of the Board of Supervisors

By: Stacey M. Boyd, Deputy

Contact: L. DeLaney,
925-335-1097

cc:

pass to Committee on APPROPRIATIONS. (7-0)

Bill Analysis - 04/18/2016 - Senate Environmental Quality Committee

BACKGROUND: (CONT'D)

Existing law:

1) Under the federal Clean Water Act and the state Porter-Cologne Water Quality Control Act:

a) Charges the State Water Resources Control Board (SWRCB) with the regulation and protection of water quality.

b) Prohibits the discharge of pollutants to surface waters unless the discharger obtains a permit from SWRCB.

c) Establishes the National Pollutant Discharge Elimination System (NPDES) permit program requiring the SWRCB and the nine California regional water quality control boards to prescribe waste discharge requirements which, among other things, regulate the discharge of pollutants in stormwater associated with construction activity to waters of the United States from construction sites that disturb one or more acres of land surface, or that are part of a common plan of development or sale that disturb more than one acre of land surface.

2) Prohibits a local public entity, charter city, or charter county from requiring a bidder on a public works contract to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except as specified.

This bill:

1) Prohibits a public entity, charter city, or charter county from delegating to a contractor the development of a plan, as defined, used to prevent or reduce water pollution or runoff on a public works contract, except as provided.

2) Prohibits a public entity, charter city, or charter county from requiring a contractor on a public works contract that includes compliance with a plan to assume responsibility for the completeness and accuracy of a plan developed by that entity.

3) Provide that these prohibitions do not apply to contracts that use:

a) Design-build.

b) Best value.

c) Construction manager at-risk contracts where the construction manager is authorized to retain a plan developer for the project owners.

Background

1) Stormwater Pollution Prevention Plans (SWPPP). Public and private owners of construction projects that disturb one or more acres of land must comply with the NPDES Permit (Permit), which regulates the discharge of stormwater and non-stormwater (such as improper dumping, spills, or leakage from storage tanks) from certain construction activities and is enforced by SWRCB's nine Regional Water Quality Control Boards (regional boards). The Permit requires, among other things, the development of an SWPPP that demonstrates compliance with the Permit. An SWPPP is a comprehensive, detailed, site-specific, written document that:

- a) Identifies potential sources of stormwater pollution on a construction site;
- b) Describes stormwater control measures and Best Management Practices (BMPs) that will be used to reduce or eliminate pollutants in stormwater discharges from the project site, and
- c) Identifies the procedures the operator of the project site will implement to comply with the terms and conditions of the Permit.

A project's SWPPP may be developed by the project owner or prepared by a contractor's SWPPP developer. The Permit requires SWPPPs to be prepared and certified by a Qualified SWPPP Developer (QSD), who must be a registered engineer or other licensed professional. Many other SWPPP tasks (such as site inspections) must be conducted directly by, or under the supervision of, a QSD or Qualified SWPPP Practitioner (QSP), who must also be certified. There are extensive qualification and training requirements for both the QSD and QSP.

Typically, the owner of the construction site is designated the "discharger" from the site and is therefore the "Legally Responsible Person" under the Permit.

Consequently, the party required to ensure compliance with the terms of the Permit is the property owner, not the contractor. There are serious potential costs for failure to comply with the Permit.

Any person who violates a condition of the Permit is subject to a civil penalty, which could be as high as \$37,500 per calendar day of a

violation, plus sanctions provided by the Clean Water Act.

2) Public Contracting. The Public Contract Code spells out requirements for public entities when contracting for public works projects. The Local Agency Public Construction Act requires local officials to invite bids for construction projects and then award contracts to the lowest responsible bidder. This design-bid-build method is the traditional, and most widely-used, approach to public works construction. However, over the last two decades, legislators have gradually expanded local governments' authority to procure construction projects using various alternatives to the design-bid-build project delivery method, including "design-build," "construction manager at risk," and "best value" contracting. Chief among the potential benefits of these methods is that they transfer some of the risk associated with the construction from the public entity to the contractor.

State law also controls some aspects of project design and execution. The Professional Engineers Act requires, among other things, engineering and architectural plans to be developed by licensed engineers or architects. Title 12 of the Civil Code (commencing with Section 2772) governs indemnity generally and provides that a contract requiring indemnification of a public agency for that agency's willful misconduct or sole negligence is void. However, Title 12 also provides that parties to a contract, including a public agency, may negotiate liability among themselves for design defects and any other liability relating to the contract. Finally, the Public Contract Code disallows public entities from requiring bidders to assume responsibility for the completeness and accuracy of the designs for public works projects, except on clearly designated design-build projects.

Many public entities require contractors to include in their bids the cost of preparing and implementing SWPPPs, and have begun requiring contract provisions that indemnify the public entity against penalties associated with violations of the Permit and prohibit change orders associated with SWPPPs. In addition, construction costs in California declined sharply for several years beginning in 2007, creating intense competition for projects among contractors, reducing margins. Some contractors want to restrict the ability of public agencies to require contractors to prepare SWPPPs as part of a public works contract.

Contractors work on multiple construction projects over time, or even simultaneously. Accordingly, many develop preexisting relationships

with QSDs or employ them within their own organization. Some larger public agencies may also retain their own QSDs, but it doesn't make sense for smaller ones that rarely build new public works to do the same. SB 1170 allows local agencies to contract separately with an engineer or architect for an SWPPP, but this simply puts a public agency in the position of being the general contractor for the project--requiring experience and relationships which smaller agencies may not have. Moreover, SWPPPs are ever-changing documents. Construction projects frequently change in response to unforeseen circumstances or issues with the site, and the SWPPP must be revised to reflect those changes. Contractors who are actually performing work on a site are in the best position to know when the plan must be modified. Requiring the contractor to develop and maintain the SWPPP--and ensuring that the contractor bears the risk of violating the Permit--sets up the right incentives for the people performing the work to ensure that the SWPPP effectively protects water quality. SB 1170 would remove these incentives and increase the burden on unprepared local agencies, potentially resulting in illegal pollutant discharges, fines to the state and local governments, and water quality problems.

Comments

1) Purpose of Bill. According to the author, this bill "ensures that adequate resources are allocated to the pollution prevention planning process by clarifying that public owners are responsible for the preparation of SWPPPs required on public works projects. This bill prohibits public owners from delegating responsibility to contractors for SWPPP design."

The author further argues that "the bill clarifies existing law which requires licensed design professionals to create engineering and architectural plans." The author states that existing law already bars public owners from making contractors assume responsibility for the design of stormwater plans.

The author asserts that this bill "clarifies the intent of the permit designation of project owners as the Legally Responsible Party."

2) Responsibility and Consequences. The Permit defines the "discharger" as "[t]he Legally Responsible Person or entity subject to the General Permit." The Permit defines the Legally Responsible Person as falling into specified eligible categories, including "[a] person, company, agency or other entity that possesses a real property interest . . . in the land upon which the construction or land

disturbance activities will occur for the regulated site."

The Permit states a contractor is not qualified to be the Legally Responsible Person, unless they fall into limited categories (those employed and duly authorized on U.S. Army Corp of Engineers Projects or those engaged in pollution and remediation projects).

The Permit is typically held in the name of the property owner. Consequently, the party required to ensure compliance with the Permit is the property owner, not the contractor. The Permit also requires the discharger (i.e., owner) to file Permit registration documents, annual reports and other compliance information. The discharger must certify that the information provided regarding the project site is accurate and complete. The discharger must allow entry to the project site for inspections and provide records required to be kept under the Permit.

Any person who violates a condition of the Permit is subject to a civil penalty, which could be as high as \$37,500 per calendar day of a violation, plus sanctions provided by the Clean Water Act.

3) Contracting Agencies' Perspective. According to staff at SWRCB, the practice of delegating development of an SWPPP to the contractor is neither new nor unusual. This is frequently the practice they see in construction projects that must obtain a Permit and develop an SWPPP. They note that the discharger, or the responsible party for the Permit, is named on the Permit and is always the owner/agency, not the contractor. Thus, responsibility for compliance with the Permit remains with the owner/agency, regardless of which party develops the SWPPP.

SWRCB staff also asserts that most municipalities don't have the expertise to develop SWPPPs and don't have the resources to retain QSDs on staff. QSDs are typically employed by environmental consulting firms that perform the work of developing SWPPPs under contract, either with a contractor (which is more common), or with the owner/agency. (Some large contracting firms keep QSDs on staff, but many smaller firms don't have the resources to do so.)

Local contracting agencies indicate that they often require contractors to design and submit SWPPPs because a contractor's plan or approach for construction dictates the sequence of excavation, backfill, and temporary stockpiling of material on a typical project. They contend that a contractor-designed SWPPP can incorporate an optimal construction sequence selected by the contractor and incorporate it

into their SWPPP, thereby maximizing efficiency and reducing costs.

An owner-designed SWPPP would necessarily have to assume a sequence of excavation, etc. (and effects upon drainage) that might occur under one construction sequence/scenario. This might not be the optimum sequence that the contractor would elect to use (and would have incorporated into its own SWPPP plan).

For this reason, it makes more sense to require the party actually responsible for the construction sequence of operations to be the one implementing its sequence into the design of an SWPPP. An owner-designed SWPPP would unnecessarily lock in all bidders to one single type of construction sequence/plan envisioned by the owner prior to the bid opening, one which may not necessarily be the lowest cost option.

4) Mandate. The California Constitution generally requires the state to reimburse local agencies for their costs when the state imposes new programs or additional duties on them. According to the Legislative Counsel's Office, SB 1170 creates a new state-mandated local program. SB 1170 disclaims this mandate by saying that the Legislature finds that there is no mandate in the act. Ultimately, the Commission on State Mandates may make the final determination on whether a mandate exists.

Related/Prior Legislation

The provisions of SB 1170 are similar to those of AB 1315 (Alejo, 2015), except the amendments that were taken to SB 1170 limit the types of projects where the prohibitions apply, and that AB 1315 did not disclaim the state mandate and did not purport to be declaratory of existing law. AB 1315 was held under submission in the Assembly Appropriations Committee.

DOUBLE REFERRAL:

This measure was heard in Senate Governance and Finance Committee on March 30, 2016, and passed out of committee with a vote of 7-0.

SOURCE:

Associated General Contractors

SUPPORT:

American Subcontractors Association, California Chapter

California Legislative Conference of the Plumbing, Heating, and Piping Industry
California Sheet Metal and Air Conditioning Contractors, National Association
California Chapters of the National Electrical Contractors Association
California State Council of Laborers
California-Nevada Conference of Operating Engineers
Northern California Allied Trades
Southern California Contractors Association
United Contractors
Wall and Ceiling Alliance

OPPOSITION:

Association of California Healthcare Districts
Association of California School Administrators
Association of California Water Agencies
California Association of Sanitation Agencies
California Association of School Business Officials
California Municipal Utilities Association
California School Boards Association
California Special Districts Association
California State Association of Counties
California State University
Coalition for Adequate School Housing
League of California Cities
Rural County Representatives of California
Three Valleys Municipal Water District
Urban Counties of California

ARGUMENTS IN SUPPORT:

The support believes that SB 1170 "confirms that the public owner is required to be the 'Legally Responsible Person' under the Permit and this requirement will not be shifted to the contractor. SWPPP design responsibility/risk will be maintained with public owner that best knows the stormwater and drainage characteristics of the site and surrounding areas. The bidding contractor is far less familiar with the site and likely totally unfamiliar with the surrounding area at the time a contract is entered into."

ARGUMENTS IN OPPOSITION:

The opposition states that "on projects that encompass at least one acre of land, SWPPPs must be developed to ascertain potential sources of stormwater pollution on construction sites and identify the control measures needed to be taken during the construction process. SWPPPs

must be written, amended and certified by qualified personnel who are knowledgeable in the principles and practice of erosion and sediment controls and possess the skills needed to assess conditions at the construction site that could impact stormwater quality." The opposition argues that "public agencies rely on the expertise of qualified SWPPP developers, known as QSDs, to conduct this work. As agencies do not have the resources nor the regular workload required to employ such personnel throughout the year."

The opposition points out that "SWPPPs are currently in accordance with the general contractor's construction plans. As construction progresses, SWPPPs must often be modified to accommodate the constantly changing conditions of a construction site. The general contractor is in the best position to create the construction plan and contract for the corresponding SWPPP. A general contractor-developed SWPPP can incorporate an optimal construction sequence selected by the contractor thereby maximizing efficiency and reducing costs."

The opposition argues that, "SB 1170 would turn this standing process on its head by prohibiting public agencies from contracting with the general contractor to develop a SWPPP and statutorily restricting the agencies remaining options to an engineer or architect. A separate entity developing a SWPPP would have to assume a sequence of work that might occur under one construction scenario but not another."

Attachment A includes the bill text. Attachment B is a letter of opposition from CSAC.

CONSEQUENCE OF NEGATIVE ACTION:

Contra Costa County would not have a position on the bill.

ATTACHMENTS

Attachment A: SB 1170 bill text

Attachment B: CSAC Letter