

SECOND REGULAR SESSION

[P E R F E C T E D]

SENATE BILL NO. 772

90TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR GOODE.

Read 1st time January 5, 2000, and 1,000 copies ordered printed.

Read 2nd time January 24, 2000, and referred to the Committee on Financial and Governmental Organization.

Reported from the Committee March 2, 2000, with recommendation that the bill do pass.

Taken up for Perfection April 12, 2000. Bill declared Perfected and Ordered Printed, as amended.

TERRY L. SPIELER, Secretary.

3395S.01P

AN ACT

To repeal section 144.062, RSMo Supp. 1999, relating to the procurement of services for state construction projects, and to enact in lieu thereof twelve new sections relating to the same subject, with an expiration date for certain sections.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Section 144.062, RSMo Supp. 1999, is repealed and twelve new sections enacted in lieu thereof, to be known as sections 8.875, 8.878, 8.881, 8.884, 8.887, 8.890, 8.893, 8.896, 8.899, 8.902, 144.062 and 327.395, to read as follows:

8.875. As used in sections 8.875 to 8.902, the following terms shall mean:

(1) "Design-build", a project for which the design and construction services are furnished under one contract;

(2) "Design-build contract", a contract between the division and a design-builder, to furnish the architecture or engineering and related design services required for a given public construction project and to furnish the labor, materials and other construction services for the same public project;

(3) "Design-builder", any individual, partnership, joint venture, corporation or other legal entity that furnishes the architectural or engineering services and construction services, whether itself or through subcontracts;

(4) "Design criteria consultant", a person, corporation, partnership or other legal entity duly registered and authorized to practice architecture or professional engineering in this state pursuant to chapter 327, RSMo, and who is employed by

contract to the division to provide professional design and administrative services in connection with the preparation of the design criteria package;

(5) "Design criteria package", performance-oriented specifications for the public construction project sufficient to permit a design-builder to prepare a response to the division's request for proposals for a design-build project;

(6) "Director", the director of the division of design and construction;

(7) "Division", the state office of administration, division of design and construction;

(8) "Evaluation team", a group of people selected by the director to evaluate the proposals of the design-builders. The team shall consist of at least two representatives of the division of design and construction and two representatives of the using agency. A fifth member shall be selected by the director and shall serve as chairman to facilitate the evaluation process and to vote only in case of a tie;

(9) "Proposal", an offer to enter into a design-build contract;

(10) "Request for proposals", the document by which the division solicits proposals for a design-build contract;

(11) "Stipend", an amount paid to the unsuccessful proposers to defray the cost of submission of phase II of the design build proposal.

8.878. 1. Notwithstanding any other provision of the law, the division of design and construction is hereby authorized to institute a pilot program whereby the design-build procurement process may be utilized on a limited number of public projects as set out below for the purpose of demonstrating the benefits of the design-build process in the public sector. This authorization for design-build procurement shall be for the sole and exclusive use of the division of design and construction.

2. The maximum number of projects to be procured on a design-build basis during the course of this pilot program shall be no more than four projects each with an estimated cost of five million dollars or less and no more than four projects each with an estimated cost of more than five million dollars.

3. The director of design and construction shall select those projects for which the use of the design-build procurement process is appropriate. In making that determination, the director shall consider:

(1) The likelihood that the design-build method of procurement will serve the public interest by providing substantial savings of time or money over the traditional design-bid-build delivery process;

(2) The time available to complete the project and meet the needs of the end user and any need to expedite the delivery process;

(3) The type of project and its suitability to the design-build process;

- (4) The size of the project;**
- (5) The level of agency knowledge and confidence about the project scope and definition;**
- (6) The availability of using agency staff to manage the project;**
- (7) The availability of the division of design and construction staff to manage the project.**

4. The director of design and construction shall present progress reports on any ongoing design-build projects to the general assembly at each regular session during the course of the pilot program. In addition, the director shall present a final detailed report of all completed design-build projects to the general assembly completed each year during the pilot program. Such final reports shall contain an assessment of the advantages and disadvantages of the design-build process relative to the traditional design-bid-build procurement process on such completed projects.

8.881. The division may adopt regulations pursuant to chapter 536, RSMo, for the conduct of the design-build process.

8.884. 1. The director shall determine the scope and level of detail required to permit qualified persons to submit proposals in accordance with the request for proposals given the nature of the project.

2. A design criteria consultant may be employed or retained by the division to assist in preparation of the request for proposal, perform periodic site visits, prepare progress reports, review and approve progress and final pay applications of the design-builder, review shop drawings and submittals, decide disputes, interpret the construction documents, perform inspections upon substantial and final completion, assist in warranty inspections and to provide any other professional service where the director deems it to be in the public interest to have an independent design professional assisting with the project administration. The consultant shall be selected and its contract negotiated in compliance with sections 8.285 to 8.291.

8.887. 1. Notice of requests for proposals shall be advertised in accordance with section 8.250. The division shall publish a notice of a request for proposal with a description of the project, the rationale for the decision to use the design-build method of procurement, the procedures for submittal and the selection criteria to be used.

2. The director shall establish in the request for proposal a time, place and other specific instructions for the receipt of proposals. Proposals not submitted in strict accordance with those instructions shall be subject to rejection.

3. A request for proposals shall be prepared for each design-build contract containing at minimum the following elements:

(1) The procedures to be followed for submitting proposals, the criteria for evaluation of proposals and their relative weight and the procedures for making

awards;

- (2) The proposed terms and conditions for the design-build contract;
- (3) The design criteria package;
- (4) A description of the drawings, specifications or other information to be submitted with the proposal, with guidance as to the form and level of completeness of the drawings, specifications or other information that will be acceptable;
- (5) A schedule for planned commencement and completion of the design-build contract;
- (6) Budget limits for the design-build contract, if any;
- (7) Affirmative action and minority or women business enterprise requirements for the design-build contract, if any;
- (8) Requirements including any available ratings for performance bonds, payment bonds and insurance; and
- (9) Any other information that the division in its discretion chooses to supply, including without limitation, surveys, soil reports, drawings of existing structures, environmental studies, photographs or references to public records.

4. The director shall solicit proposals in a three-stage process. Phase I shall be the solicitation of qualifications of the design-build team. Phase II shall be the solicitation of a technical proposal including conceptual design for the project, and phase III shall be the proposal of the construction cost.

5. The evaluation team shall review the submittals of the proposers and assign points to each proposal in accordance with sections 8.875 to 8.902 and section 327.395, RSMo, and as set out in the instructions of the request for proposal.

8.890. 1. Phase I shall require all proposers to submit a statement of qualifications which shall include, but not be limited to:

- (1) Demonstrated ability to perform projects comparable in design, scope and complexity;
- (2) References of owners for whom design-build projects have been performed;
- (3) Qualifications of personnel who will manage the design and construction aspects of the project;
- (4) The names and qualifications of the primary design consultants and contractors with whom the design-builder proposes to subcontract. The design-builder may not replace an identified subcontractor or subconsultant without the written approval of the director.

2. The evaluation team shall evaluate the qualifications of all proposers in accordance with the instructions of the request for proposal. Designers on the project shall be evaluated in accordance with the requirements of section 8.285 to 8.291. Qualified proposers selected by the evaluation team may proceed to phase II of

the selection process. Proposers lacking the necessary qualifications to perform the work shall be disqualified and shall not proceed to phase II of the process. Under no circumstances shall price or fee be a part of the prequalification criteria. Points assigned in the phase I evaluation process shall not carry forward to phase II of the process. All qualified proposers shall be ranked on points given in phases II and III only.

3. The director shall have discretion to disqualify any proposer, which in the director's opinion lacks the minimal qualifications required to perform the work.

4. Once a sufficient number of qualified proposers have been selected, the proposers shall have a specified amount of time with which to assemble phase II and phase III proposals.

8.893. Phase II of the process shall be conducted as follows:

(1) The director shall invite the top five qualified proposers to participate in phase II of the process. If there are not five qualified proposers, then all qualified proposers will be invited to submit phase II. If three qualified proposers cannot be identified, the contracting process will cease;

(2) Proposers must submit their design for the project, to the level of detail required in the request for proposal. The design proposal should demonstrate compliance with the requirements set out in the request for proposal;

(3) The schedule for completing a project as designed by a proposer may be considered as an element of evaluation in phase II;

(4) Up to twenty percent of the points awarded to each proposer in phase II may be based on each proposers' qualifications and ability to design, construct and deliver the project on time and within budget;

(5) Under no circumstances should the design proposal contain any reference to the cost of the proposal;

(6) The design submittals will be evaluated and assigned points in accordance with the requirements of the request for proposal. Phase II shall account for no more than fifty percent of the total point score as specified in the request for proposal.

8.896. Phase III shall be conducted as follows:

(1) The phase III proposal must provide a firm, fixed cost of construction. The proposal must be accompanied by bid security and any other required submittals, such as statements of minority participation as required by the request for proposal;

(2) Cost proposals must be submitted in accordance with the instructions of the request for proposal. Failure to submit a cost proposal on time shall be cause to reject the proposal. Phase III shall account for not less than fifty percent of the total point score as specified in the request for proposal;

(3) Proposals for phase II and phase III shall be submitted concurrently at the

time and place specified in the request for proposal. The phase III cost proposals shall be opened only after the phase II design proposals have been evaluated and assigned points;

(4) Cost proposals will be opened and read aloud at the time and place specified in the request for proposal. At the same time and place, the evaluation team will make public its scoring of phase II. Cost proposals will be evaluated in accordance with the requirements of the request for proposal. In evaluating the cost proposals, the low bidder shall be awarded the total number of points assigned to be awarded in phase III. For all other bidders, cost points will be calculated by reducing the maximum points available in phase III by two percent or more for each percentage point of the low bid by which the bidder exceeds the low bid and the points assigned will be added to the points assigned for phase II for each proposer;

(5) The responsive proposer with the highest total number of points will be awarded the contract. If the director determines, however, that it is not in the best interest of the state to proceed with the project pursuant to the proposal offered by the proposer with the highest total number of points, the director shall reject all proposals. In such event, all qualified proposers with lower point totals shall receive a stipend pursuant to section 8.899 and the proposer with the highest total number of points shall receive an amount equal to two times such stipend;

(6) If all proposals are rejected, the director may solicit new proposals using different design criteria, budget constraints or qualifications.

8.899. As an inducement to qualified proposers, the division shall pay a reasonable stipend, the amount of which shall be established in the request for proposal, to each prequalified design-builder whose proposal is responsive but not accepted. Upon payment of the stipend to any unsuccessful design-build proposer, the state shall acquire a nonexclusive right to use the design submitted by the proposer, and the proposer shall have no further liability for its use by the state in any manner. If the design-build proposer desires to retain all rights and interest in the design proposed, the proposer shall forfeit the stipend.

8.902. Any person or corporation that enters into a design-build contract with the division of design and construction does not violate the requirements of chapter 327, RSMo, so long as the architectural, engineering or land surveying services to be performed under the contract are performed by:

(1) Persons who are duly licensed in this state and who are employees of the design-build contractor which holds a certificate of authority from the board of registration; or

(2) Persons who are duly licensed in this state and who are under contract to the design-build contractor; or

(3) Corporations that hold current certificates of authority from the board for the appropriate profession which are under contract to the design-build contractor.

144.062. 1. With respect to exempt sales at retail of tangible personal property and materials for the purpose of constructing, repairing or remodeling facilities for:

(1) A county, other political subdivision or instrumentality thereof exempt from taxation under subdivision (10) of section 39 of article III of the Constitution of Missouri; or

(2) An organization sales to which are exempt from taxation under the provisions of subdivision (19) of subsection 2 of section 144.030; or

(3) Any institution of higher education supported by public funds or any private not for profit institution of higher education, exempt from taxation under subdivision (20) of subsection 2 of section 144.030; or

(4) Any private not for profit elementary or secondary school exempt from taxation under subdivision (22) of subsection 2 of section 144.030; or

(5) Any department or agency of the state, hereinafter collectively referred to as exempt entities, such exemptions shall be allowed for such purchases if the purchases are related to the entities' exempt functions and activities. In addition, the sales shall not be rendered nonexempt nor shall any material supplier or contractor be obligated to pay, collect or remit sales tax with respect to such purchases made by or on behalf of an exempt entity due to such purchases being billed to or paid for by a contractor or the exempt entity contracting with any entity to render any services in relation to such purchases, including but not limited to selection of materials, ordering, pickup, delivery, approval on delivery, taking of delivery, transportation, storage, assumption of risk of loss to materials or providing warranties on materials as specified by contract, use of materials or other purchases for construction of the building or other facility, providing labor, management services, administrative services, design or technical services or advice to the exempt entity, whether or not the contractor or other entity exercises dominion or control in any other manner over the materials in conjunction with services or labor provided to the exempt entity.

2. When any exempt entity contracts for the purpose of constructing, repairing or remodeling facilities, and purchases of tangible personal property and materials to be incorporated into or consumed in the construction of the project are to be made on a tax-exempt basis, such entity shall furnish to the contractor an exemption certificate authorizing such purchases for the construction, repair or remodeling project. The form and content of such project exemption certificate shall be approved by the director of revenue. The project exemption certificate shall include but not be limited to:

(1) The exempt entity's name, address, Missouri tax identification number and signature of authorized representative;

(2) The project location, description, and unique identification number;

(3) The date the contract is entered into, which is the earliest date materials may be purchased for the project on a tax-exempt basis;

(4) The estimated project completion date; and

(5) The certificate expiration date. Such certificate is renewable for a given project at the option of the exempt entity, only for the purpose of revising the certificate expiration date as necessary to complete the project.

3. The contractor shall furnish the certificate prescribed in subsection 2 of this section to all subcontractors, and any contractor purchasing materials shall present such certificate to all material suppliers as authorization to purchase, on behalf of the exempt entity, all tangible personal property and materials to be incorporated into or consumed in the construction of that project and no other on a tax-exempt basis. Such suppliers shall execute to the purchasing contractor invoices bearing the name of the exempt entity and the project identification number. Nothing in this section shall be deemed to exempt the purchase of any construction machinery, equipment or tools used in constructing, repairing or remodeling facilities for the exempt entity. All invoices for all personal property and materials purchased under a project exemption certificate shall be retained by the purchasing contractor for a period of five years and shall be subject to audit by the director of revenue.

4. Any excess resalable tangible personal property or materials which were purchased for the project by a contractor under a project exemption certificate but which were not incorporated into or consumed in the construction of the project shall either be returned to the supplier for credit or the appropriate sales or use tax on such excess property or materials shall be reported on a return and paid by such contractor not later than the due date of the contractor's Missouri sales or use tax return following the month in which it was determined that the materials were not to be used in the project.

5. No contractor or material supplier shall, upon audit, be required to pay tax on tangible personal property and materials incorporated into or consumed in the construction of the project, due to the failure of the exempt entity to revise the certificate expiration date as necessary to complete any work required by the contract. If it is determined that tax is owed on such property and materials due to the failure of the exempt entity to revise such certificate expiration date, the exempt entity shall be liable for the tax owed.

6. If an entity issues exemption certificates for the purchase of tangible personal property and materials which are incorporated into or consumed in the construction of its project and such entity is found not to have had the authority granted by this section to issue such exemption certificates, then such entity shall be liable for the tax owed on such personal property and materials. In addition, if an entity which does have the authority granted by this section to issue exemption certificates issues such certificates for the purchase of tangible personal property and materials which are incorporated into or consumed in the construction of a project, or part of a

project, which is found not to be related to such entity's exempt functions and activities, then such entity shall be liable for the tax owed on such personal property and materials.

327.395. 1. Any person or corporation that enters into a design-build contract for public or private construction shall be exempt from the requirement that such person hold a certificate of registration or such corporation hold a certificate of authority as long as the architectural, engineering or land surveying services to be performed under the contract are performed by persons who hold a certificate of registration for the appropriate profession and who are not employees of the design-build contractor, or provided such services are performed by corporations that hold current certificates of authority from the board for the appropriate profession.

2. Any design-build contractor who performs the design work itself, or who practices architecture, professional engineering or professional land surveying through his, her or its own employees, or who contracts to do so, must hold a current certificate of registration or certificate of authority from the board for the professions so practiced.

3. Nothing in this chapter shall prohibit the enforcement of a design-build contract by an unregistered or unauthorized person or entity who merely furnishes, but does not itself, or through its employees, perform the architectural, engineering or surveying required by the contract and who does not hold itself out as able to perform such services.

Section B. The enactment of sections 8.875, 8.878, 8.881, 8.884, 8.887, 8.890, 8.893, 8.896, 8.899 and 8.902, shall expire on December 31, 2004.

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