

SECOND REGULAR SESSION

SENATE BILL NO. 748

91ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR GOODE.

Pre-filed December 1, 2001, and 1,000 copies ordered printed.

TERRY L. SPIELER, Secretary.

3182S.011

AN ACT

To amend chapters 8, 227 and 327, RSMo, by adding thereto twelve new sections relating to design-build, with an expiration date.

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

Section A. Chapters 8, 227 and 327, RSMo, are amended by adding thereto twelve new sections, to be known as sections 8.1000, 8.1003, 8.1006, 8.1009, 8.1012, 8.1015, 8.1018, 8.1021, 8.1024, 8.1027, 227.107 and 327.465, to read as follows:

8.1000. As used in sections 8.1000 to 8.1027, 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.

8.1003. 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.

8.1006. The division may adopt regulations pursuant to chapter 536, RSMo, for the conduct of the design-build process.

8.1009. 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.

8.1012. 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 8.1000 to 8.1027 and section 327.395, RSMo, as set out in the instructions of the request for proposal.

8.1015. 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.

8.1018. 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.

8.1021. 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 8.1024 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.

8.1024. 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.

8.1027. 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.

227.107. 1. Notwithstanding any provision of section 227.100 to the contrary, as an alternative to the requirements and procedures specified by sections 227.040 to 227.100, the state highways and transportation commission is authorized to enter into one interstate highway design-build pilot project contract within ten years of the effective date of this section. Authority for design-build authorized by this section shall expire upon completion of the project selected, unless reauthorized by law.

2. For the purpose of this section a "design-builder" is defined as an individual, corporation, partnership, joint venture or other entity, including combinations of such entities making a proposal to perform or performing a design-build highway project contract.

3. For the purpose of this section, "design-build highway project contract" is defined as the procurement of all materials and services necessary for the design, construction, reconstruction or improvement of a state highway project in a single contract with a design-builder capable of providing the necessary materials and services.

4. For the purpose of this section, "highway project" is defined as the design, construction, reconstruction or improvement of highways or bridges under contract with the state highways and transportation commission, which is funded by state, federal or local funds or any combination of such funds.

5. In using a design-build highway project contract, the commission shall establish a written procedure by rule for prequalifying design-builders before such design-builders will be allowed to make a proposal on the project.

6. In any design-build highway project contract, whether involving state or federal funds, the commission shall require that each person submitting a request for qualifications provide a detailed disadvantaged business enterprise participation plan. The plan shall provide information describing the experience of the person in meeting

disadvantaged business enterprise participation goals, how the person will meet the department of transportation's disadvantaged business enterprise participation goal and such other qualifications that the commission considers to be in the best interest of the state.

7. The commission is authorized to issue a request for proposals to a maximum of five design-builders prequalified in accordance with subsection 5 of this section.

8. The commission may require approval of any person performing subcontract work on the design-build highway project.

9. The bid bond and performance bond requirements of section 227.100 and the payment bond requirements of section 107.170, RSMo, shall apply to the design-build highway project.

10. The commission is authorized to prescribe the form of the contracts for the work.

11. The commission is empowered to make all final decisions concerning the performance of the work under the design-build highway project contract, including claims for additional time and compensation.

12. The provisions of sections 8.285 to 8.291, RSMo, shall not apply to the procurement of architectural, engineering or land surveying services for the design-build highway project, except that any person providing architectural, engineering or land surveying services for the design-builder on the design-build highway project must be licensed in Missouri to provide such services.

13. The commission shall pay a reasonable stipend to prequalified responsive design-builders who submit a proposal, but are not awarded the design-build highway project.

14. The commission shall comply with the provisions of any act of congress or any regulations of any federal administrative agency which provides and authorizes the use of federal funds for highway projects using the design-build process.

15. The commission shall promulgate administrative rules to implement this section or to secure federal funds. Such rules shall be published for comment in the Missouri Register and shall include prequalification criteria, the make-up of the prequalification review team, specifications for the design criteria package, the method of advertising, receiving and evaluating proposals from design-builders, the criteria for awarding the design-build highway project based on the

design criteria package and a separate proposal stating the cost of construction, and other methods, procedures and criteria necessary to administer this section.

16. The commission shall make a status report to the members of the general assembly and the governor following the award of the design-build project, as an individual component of the annual report submitted by the commission to the Joint Transportation Oversight Committee in accordance with the provisions of section 21.795, RSMo. The annual report prior to advertisement of the design-build highway project contract shall state the goals of the project in reducing costs and/or the time of completion for the project in comparison to the design-bid-build method of construction and objective measurements to be utilized in determining achievement of such goals. Subsequent annual reports shall include: the time estimated for design and construction of different phases or segments of the project and the actual time required to complete such work during the period; the amount of each progress payment to the design builder during the period and the percentage and a description of the portion of the project completed regarding such payment; the number and a description of design change orders issued during the period and the cost of each such change order; upon substantial and final completion, the total cost of the design-build highway project with a breakdown of costs for design and construction; and such other measurements as specified by rule. The annual report immediately after final completion of the project shall state an assessment of the advantages and disadvantages of the design-build method of contracting for highway and bridge projects in comparison to the design-bid-build method of contracting and an assessment of whether the goals of the project in reducing costs and/or the time of completion of the project were met.

17. The commission shall give public notice of a request for qualifications in at least two public newspapers that are distributed wholly or in part in this state and at least one construction industry trade publication that is distributed nationally.

18. The commission shall publish its cost estimates of the design-build highway project award and the project completion date along with its public notice of a request for qualifications of the design-build project.

19. If the commission fails to receive at least two responsive submissions from design-builders considered qualified, submissions shall not be opened and it shall readvertise the project.

20. The provisions of this section shall be applicable to one interstate pilot highway project which shall be selected by the commission and shall have a total maximum annual expenditure of one hundred twenty-five million dollars for the life of the design-build project.

327.465. 1. As used in this section, 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 owner, owner's agent, tenant or other party and a design-build contractor to furnish the architecture, engineering and related design services, and the labor, materials and other construction services required for a specific public or private construction project;

(3) "Design-build contractor", any individual, partnership, joint venture, corporation or other legal entity that furnishes architecture or engineering services and construction services either directly or through subcontracts.

2. Any design-build contractor that enters into a design-build contract for public or private construction shall be exempt from the requirement that such person or entity hold a certificate of registration or such corporation hold a certificate of authority if the architectural, engineering or land surveying services to be performed under the contract are performed by:

(1) Persons who hold a certificate of registration for the appropriate profession and who are not employees of the design-build contractor; or

(2) Corporations that hold current certificates of authority from the board for the appropriate profession.

3. Any design-build contractor who performs the design work directly, or who practices architecture, professional engineering or professional land surveying through the contractor's employees, or who contracts to do so, shall hold a current certificate of registration or certificate of authority from the board for the profession so practiced.

4. Nothing in this chapter shall prohibit the enforcement of a

design-build contract by an unregistered or unauthorized design-build contractor who only furnishes, but does not directly 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. This act shall expire on December 31, 2004.

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