

SECOND REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILLS NOS. 789 & 595
98TH GENERAL ASSEMBLY

Reported from the Committee on Commerce, Consumer Protection, Energy and the Environment, February 25, 2016, with recommendation that the Senate Committee Substitute do pass.

5101S.05C

ADRIANE D. CROUSE, Secretary.

AN ACT

To amend chapter 67, RSMo, by adding thereto two new sections relating to construction management.

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

Section A. Chapter 67, RSMo, is amended by adding thereto two new sections, to be known as sections 67.5050 and 67.5060, to read as follows:

67.5050. 1. As used in this section, the following terms mean:

(1) "Construction manager", the legal entity that proposes to enter into a construction management-at-risk contract under this section;

(2) "Construction manager-at-risk", a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for the construction, rehabilitation, alteration, or repair of a project at the contracted price as a general contractor and provides consultation to a political subdivision regarding construction during and after the design of the project.

2. Any political subdivision may use the construction manager-at-risk method for: civil works projects such as roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, airport runways and taxiways, storm drainage and flood control projects, or transit projects commonly designed by professional engineers in excess of two million dollars; and non-civil works projects such as buildings, site improvements, and other structures, habitable or not, commonly designed by architects in excess of three million dollars. In using that method and in entering into a contract for the services of a construction manager-at-risk, the political subdivision shall follow the

22 procedures prescribed by this section.

23 3. Before or concurrently with selecting a construction manager-
24 at-risk, the political subdivision shall select or designate an engineer
25 or architect who shall prepare the construction documents for the
26 project and who shall comply with all state laws, as applicable. If the
27 engineer or architect is not a full-time employee of the political
28 subdivision, the political subdivision shall select the engineer or
29 architect on the basis of demonstrated competence and qualifications
30 as provided by sections 8.285 to 8.291. The political subdivision's
31 engineer or architect for a project may not serve, alone or in
32 combination with another, as the construction manager-at-risk. This
33 subsection does not prohibit a political subdivision's engineer or
34 architect from providing customary construction phase services under
35 the engineer's or architect's original professional service agreement in
36 accordance with applicable licensing laws.

37 4. The political subdivision may provide or contract for,
38 independently of the construction manager-at-risk, inspection services,
39 testing of construction materials, engineering, and verification of
40 testing services necessary for acceptance of the project by the political
41 subdivision.

42 5. The political subdivision shall select the construction
43 manager-at-risk in a two-step process. The political subdivision shall
44 prepare a request for qualifications, for the case of the first step of the
45 two-step process, that includes general information on the project site,
46 project scope, schedule, selection criteria, and the time and place for
47 receipt of proposals or qualifications, as applicable, and other
48 information that may assist the political subdivision in its selection of
49 a construction manager-at-risk. The political subdivision shall state the
50 selection criteria in the request for proposals or qualifications, as
51 applicable. The selection criteria may include the construction
52 manager's experience, past performance, safety record, proposed
53 personnel and methodology, and other appropriate factors that
54 demonstrate the capability of the construction manager-at-risk. The
55 political subdivision shall not request fees or prices in step one. In
56 step two, the political subdivision may request that five or fewer
57 construction managers, selected solely on the basis of qualifications,
58 provide additional information, including the construction manager-at-

59 risk's proposed fee and its price for fulfilling the general
60 conditions. Qualifications shall account for a minimum of forty percent
61 of the evaluation. Cost shall account for a maximum of sixty percent
62 of the evaluation.

63 6. The political subdivision shall publish the request for
64 proposals or qualifications by publication in a newspaper of general
65 circulation published in the county where the political subdivision is
66 located once a week for two consecutive weeks prior to opening the
67 proposals or qualifications submissions or by a virtual notice procedure
68 that notifies interested parties for at least twenty various purchases,
69 design contracts, construction contracts, or other contracts each year
70 for the political subdivision.

71 7. For each step, the political subdivision shall receive, publicly
72 open, and read aloud the names of the construction managers. Within
73 forty-five days after the date of opening the proposals or qualification
74 submissions, the political subdivision or its representative shall
75 evaluate and rank each proposal or qualification submission submitted
76 in relation to the criteria set forth in the request for proposals or
77 request for qualifications. The political subdivision shall interview at
78 least two of the top qualified offerors as part of the final selection.

79 8. The political subdivision or its representative shall select the
80 construction manager that submits the proposal that offers the best
81 value for the political subdivision based on the published selection
82 criteria and on its ranking evaluation. The political subdivision or its
83 representative shall first attempt to negotiate a contract with the
84 selected construction manager. If the political subdivision or its
85 representative is unable to negotiate a satisfactory contract with the
86 selected construction manager, the political subdivision or its
87 representative shall, formally and in writing, end negotiations with
88 that construction manager and proceed to negotiate with the next
89 construction manager in the order of the selection ranking until a
90 contract is reached or negotiations with all ranked construction
91 managers end.

92 9. A construction manager-at-risk shall publicly advertise, in the
93 manner prescribed by chapter 50, and receive bids or proposals from
94 trade contractors or subcontractors for the performance of all major
95 elements of the work other than the minor work that may be included

96 in the general conditions. A construction manager-at-risk may seek to
97 perform portions of the work itself if the construction manager-at-risk
98 submits its sealed bid or sealed proposal for those portions of the work
99 in the same manner as all other trade contractors or
100 subcontractors. All sealed bids or proposals shall be submitted at the
101 time and location as specified in the advertisement for bids or
102 proposals and shall be publicly opened and the identity of each bidder
103 and their bid amount shall be read aloud. The political subdivision
104 shall have the authority to restrict the construction manager-at-risk
105 from submitting bids to perform portions of the work.

106 10. The construction manager-at-risk and the political
107 subdivision or its representative shall review all trade contractor,
108 subcontractor, or construction manager-at-risk bids or proposals in a
109 manner that does not disclose the contents of the bid or proposal
110 during the selection process to a person not employed by the
111 construction manager-at-risk, engineer, architect, or political
112 subdivision involved with the project. If the construction
113 manager-at-risk submitted bids or proposals, the political subdivision
114 shall determine if the construction manager-at-risk's bid or proposal
115 offers the best value for the political subdivision. After all proposals
116 have been evaluated and clarified, the award of all subcontracts shall
117 be made public.

118 11. If the construction manager-at-risk reviews, evaluates, and
119 recommends to the political subdivision a bid or proposal from a trade
120 contractor or subcontractor but the political subdivision requires
121 another bid or proposal to be accepted, the political subdivision shall
122 compensate the construction manager-at-risk by a change in price,
123 time, or guaranteed maximum cost for any additional cost and risk that
124 the construction manager-at-risk may incur because of the political
125 subdivision's requirement that another bid or proposal be accepted.

126 12. If a selected trade contractor or subcontractor materially
127 defaults in the performance of its work or fails to execute a subcontract
128 after being selected in accordance with this section, the construction
129 manager-at-risk may itself, without advertising, fulfill the contract
130 requirements or select a replacement trade contractor or subcontractor
131 to fulfill the contract requirements. The penal sums of the performance
132 and payment bonds delivered to the political subdivision shall each be

133 in an amount equal to the fixed contract amount or guaranteed
134 maximum price. The construction manager-at-risk shall deliver the
135 bonds not later than the tenth day after the date the fixed contract
136 amount or guaranteed maximum price is established.

137 13. This section shall not apply to:

138 (1) Any metropolitan sewer district established under article VI,
139 section 30(a) of the Constitution of Missouri;

140 (2) Any special charter city, or any city or county governed by
141 home rule under article VI, section 18 or 19 of the Constitution of
142 Missouri that has adopted a construction manager-at-risk method via
143 ordinance, rule or regulation.

144 14. Notwithstanding the provisions of section 23.253 to the
145 contrary, the provisions of this section shall expire September 1, 2026.

67.5060. 1. As used in this section, the following terms mean:

2 (1) "Design-build", a project delivery method subject to a three-
3 stage qualifications-based selection for which the design and
4 construction services are furnished under one contract;

5 (2) "Design-build contract", a contract which is subject to a three-
6 stage qualifications-based selection process similar to that described
7 in sections 8.285 to 8.291 between a political subdivision and a design-
8 builder to furnish the architectural, engineering, and related design
9 services and the labor, materials, supplies, equipment, and other
10 construction services required for a design-build project;

11 (3) "Design-build project", the design, construction, alteration,
12 addition, remodeling, or improvement of any buildings or facilities
13 under contract with a political subdivision. Such design-build projects
14 include, but are not limited to:

15 (a) Civil works projects, such as roads, streets, bridges, utilities,
16 water supply projects, water plants, wastewater plants, water
17 distribution and wastewater conveyance facilities, airport runways and
18 taxiways, storm drainage and flood control projects, or transit projects;
19 and

20 (b) Non-civil works projects, such as buildings, site
21 improvements, and other structures, habitable or not, commonly
22 designed by architects in excess of seven million dollars;

23 (4) "Design-builder", any individual, partnership, joint venture,
24 or corporation subject to a qualification-based selection that offers to

25 provide or provides design services and general contracting services
26 through a design-build contract in which services within the scope of
27 the practice of professional architecture or engineering are performed
28 respectively by a licensed architect or licensed engineer and in which
29 services within the scope of general contracting are performed by a
30 general contractor or other legal entity that furnishes architecture or
31 engineering services and construction services either directly or
32 through subcontracts or joint ventures;

33 (5) "Design criteria consultant", a person, corporation,
34 partnership, or other legal entity duly licensed and authorized to
35 practice architecture or professional engineering in this state under
36 chapter 327, who is employed by or contracted by the political
37 subdivision to assist the political subdivision in the development of
38 project design criteria, requests for proposals, evaluation of proposals,
39 the evaluation of the construction under a design-build contract to
40 determine adherence to the design criteria, and any additional services
41 requested by the political subdivisions to represent its interests in
42 relation to a project. The design criteria consultant may not submit a
43 proposal or furnish design or construction services for the design-build
44 contract for which its services were sought;

45 (6) "Design criteria package", performance-oriented program,
46 scope, and specifications for the design-build project sufficient to
47 permit a design-builder to prepare a response to a political
48 subdivision's request for proposals for a design-build project, which
49 may include capacity, durability, standards, ingress and egress
50 requirements, performance requirements, description of the site,
51 surveys, soil and environmental information concerning the site,
52 interior space requirements, material quality standards, design and
53 construction schedules, site development requirements, provisions for
54 utilities, storm water retention and disposal, parking requirements,
55 applicable governmental code requirements, preliminary designs for
56 the project or portions thereof, and other criteria for the intended use
57 of the project;

58 (7) "Design professional services", services that are:

59 (a) Within the practice of architecture as defined in section
60 327.091, or within the practice of professional engineering as defined
61 in section 327.181; or

62 **(b) Performed by a licensed or authorized architect or**
63 **professional engineer in connection with the architect's or professional**
64 **engineer's employment or practice;**

65 **(8) "Proposal", an offer in response to a request for proposals by**
66 **a design-builder to enter into a design-build contract for a design-build**
67 **project under this section;**

68 **(9) "Request for proposal", the document by which the political**
69 **subdivision solicits proposals for a design-build contract; and**

70 **(10) "Stipend", an amount paid to the unsuccessful but**
71 **responsive, short-listed design-builders to defray the cost of**
72 **participating in phase II of the selection process described in this**
73 **section.**

74 **2. In using a design-build contract, the political subdivision shall**
75 **determine the scope and level of detail required to permit qualified**
76 **persons to submit proposals in accordance with the request for**
77 **proposals given the nature of the project.**

78 **3. A design criteria consultant shall be employed or retained by**
79 **the political subdivision to assist in preparation of the design criteria**
80 **package and request for proposal, perform periodic site visits to**
81 **observe adherence to the design criteria, prepare progress reports,**
82 **review and approve progress and final pay applications of the design-**
83 **builder, review shop drawings and submissions, provide input in**
84 **disputes, help interpret the construction documents, perform**
85 **inspections upon substantial and final completion, assist in warranty**
86 **inspections, and provide any other professional service assisting with**
87 **the project administration. The design criteria consultant may also**
88 **evaluate construction as to the adherence of the design criteria. The**
89 **consultant shall be selected and its contract negotiated in compliance**
90 **with sections 8.285 to 8.291 unless the consultant is a direct employee**
91 **of the political subdivision.**

92 **4. Notice of requests for proposals shall be advertised by**
93 **publication in a newspaper of general circulation published in the**
94 **county where the political subdivision is located once a week for two**
95 **consecutive weeks prior to opening the proposals, or by a virtual notice**
96 **procedure that notifies interested parties for at least twenty various**
97 **purchases, design contracts, construction contracts, or other contracts**
98 **each year for the political subdivision. The political subdivision shall**

99 **publish a notice of a request for proposal with a description of the**
100 **project, the procedures for submission, and the selection criteria to be**
101 **used.**

102 **5. The political subdivision shall establish in the request for**
103 **proposal a time, place, and other specific instructions for the receipt**
104 **of proposals. Proposals not submitted in strict accordance with the**
105 **instructions shall be subject to rejection.**

106 **6. A request for proposal shall be prepared for each design-build**
107 **contract containing at minimum the following elements:**

108 **(1) The procedures to be followed for submitting proposals, the**
109 **criteria for evaluating proposals and their relative weight, and the**
110 **procedures for making awards;**

111 **(2) The proposed terms and conditions for the design-build**
112 **contract, if available;**

113 **(3) The design criteria package;**

114 **(4) A description of the drawings, specifications, or other**
115 **information to be submitted with the proposal, with guidance as to the**
116 **form and level of completeness of the drawings, specifications, or other**
117 **information that will be acceptable;**

118 **(5) A schedule for planned commencement and completion of the**
119 **design-build contract, if any;**

120 **(6) Budget limits for the design-build contract, if any;**

121 **(7) Requirements including any available ratings for**
122 **performance bonds, payment bonds, and insurance, if any;**

123 **(8) The amount of the stipend which will be available; and**

124 **(9) Any other information that the political subdivision in its**
125 **discretion chooses to supply including, but not limited to, surveys, soil**
126 **reports, drawings of existing structures, environmental studies,**
127 **photographs, references to public records, or affirmative action and**
128 **minority business enterprise requirements consistent with state and**
129 **federal law.**

130 **7. The political subdivision shall solicit proposals in a three-**
131 **stage process. Phase I shall be the solicitation of qualifications of the**
132 **design-build team. Phase II shall be the solicitation of a technical**
133 **proposal including conceptual design for the project. Phase III shall be**
134 **the proposal of the construction cost.**

135 **8. The political subdivision shall review the submissions of the**

136 proposals and assign points to each proposal in accordance with this
137 section and as set out in the instructions of the request for proposal.

138 9. Phase I shall require all design-builders to submit a statement
139 of qualification that shall include, but not be limited to:

140 (1) Demonstrated ability to perform projects comparable in
141 design, scope, and complexity;

142 (2) References of owners for whom design-build projects,
143 construction projects, or design projects have been performed;

144 (3) Qualifications of personnel who will manage the design and
145 construction aspects of the project; and

146 (4) The names and qualifications of the primary design
147 consultants and the primary trade contractors with whom the design-
148 builder proposes to subcontract or joint venture. The design-builder
149 may not replace an identified contractor, subcontractor, design
150 consultant, or subconsultant without the written approval of the
151 political subdivision.

152 10. The political subdivision shall evaluate the qualifications of
153 all the design-builders who submitted proposals in accordance with the
154 instructions of the request for proposal. Architectural and engineering
155 services on the project shall be evaluated in accordance with the
156 requirements of sections 8.285 and 8.291. Qualified design-builders
157 selected by the evaluation team may proceed to phase II of the
158 selection process. Design-builders lacking the necessary qualifications
159 to perform the work shall be disqualified and shall not proceed to
160 phase II of the process. This process of short listing shall narrow the
161 number of qualified design-builders to not more than five nor fewer
162 than two. Under no circumstances shall price or fees be a part of the
163 prequalification criteria. Design-builders may be interviewed in either
164 phase I or phase II of the process. Points assigned in phase I of the
165 evaluation process shall not carry forward to phase II of the
166 process. All qualified design-builders shall be ranked on points given
167 in phases II and III only.

168 11. The political subdivision shall have discretion to disqualify
169 any design-builder who, in the political subdivision's opinion, lacks the
170 minimum qualifications required to perform the work.

171 12. Once a sufficient number of no more than five and no fewer
172 than two qualified design-builders have been selected, the design-

173 **builders shall have a specified amount of time in which to assemble**
174 **phase II and phase III proposals.**

175 **13. Phase II of the process shall be conducted as follows:**

176 **(1) The political subdivision shall invite the top qualified design-**
177 **builders to participate in phase II of the process;**

178 **(2) A design-builder shall submit its design for the project to the**
179 **level of detail required in the request for proposal. The design**
180 **proposal shall demonstrate compliance with the requirements set out**
181 **in the request for proposal;**

182 **(3) The ability of the design-builder to meet the schedule for**
183 **completing a project as specified by the political subdivision may be**
184 **considered as an element of evaluation in phase II;**

185 **(4) Up to twenty percent of the points awarded to each design-**
186 **builder in phase II may be based on each design-builder's qualifications**
187 **and ability to design, contract, and deliver the project on time and**
188 **within the budget of the political subdivision;**

189 **(5) Under no circumstances shall the design proposal contain any**
190 **reference to the cost of the proposal; and**

191 **(6) The submitted designs shall be evaluated and assigned points**
192 **in accordance with the requirements of the request for proposal. Phase**
193 **II shall account for not less than forty percent of the total point score**
194 **as specified in the request for proposal.**

195 **14. Phase III shall be conducted as follows:**

196 **(1) The phase III proposal shall provide a firm, fixed cost of**
197 **design and construction. The proposal shall be accompanied by bid**
198 **security and any other items, such as statements of minority**
199 **participation as required by the request for proposal;**

200 **(2) Cost proposals shall be submitted in accordance with the**
201 **instructions of the request for proposal. The political subdivision shall**
202 **reject any proposal that is not submitted on time. Phase III shall**
203 **account for not less than forty percent of the total point score as**
204 **specified in the request for proposal;**

205 **(3) Proposals for phase II and phase III shall be submitted**
206 **concurrently at the time and place specified in the request for**
207 **proposal, but in separate envelopes or other means of submission. The**
208 **phase III cost proposals shall be opened only after the phase II design**
209 **proposals have been evaluated and assigned points, ranked in order,**

210 and posted;

211 (4) Cost proposals shall be opened and read aloud at the time
212 and place specified in the request for proposal. At the same time and
213 place, the evaluation team shall make public its scoring of phase
214 II. Cost proposals shall be evaluated in accordance with the
215 requirements of the request for proposal. In evaluating the cost
216 proposals, the lowest responsive bidder shall be awarded the total
217 number of points assigned to be awarded in phase III. For all other
218 bidders, cost points shall be calculated by reducing the maximum
219 points available in phase III by at least one percent for each percentage
220 point by which the bidder exceeds the lowest bid and the points
221 assigned shall be added to the points assigned for phase II for each
222 design-builder;

223 (5) If the political subdivision determines that it is not in the
224 best interest of the political subdivision to proceed with the project
225 pursuant to the proposal offered by the design-builder with the highest
226 total number of points, the political subdivision shall reject all
227 proposals. In this event, all qualified and responsive design-builders
228 with lower point totals shall receive a stipend and the responsive
229 design-builder with the highest total number of points shall receive an
230 amount equal to two times the stipend. If the political subdivision
231 decides to award the project, the responsive design-builder with the
232 highest number of points shall be awarded the contract; and

233 (6) If all proposals are rejected, the political subdivision may
234 solicit new proposals using different design criteria, budget
235 constraints, or qualifications.

236 15. As an inducement to qualified design-builders, the political
237 subdivision shall pay a reasonable stipend, the amount of which shall
238 be established in the request for proposal, to each prequalified design-
239 builder whose proposal is responsive but not accepted. Such stipend
240 shall be no less than one-half of one percent of the total project
241 budget. Upon payment of the stipend to any unsuccessful design-
242 builder, the political subdivision shall acquire a nonexclusive right to
243 use the design submitted by the design-builder, and the design-builder
244 shall have no further liability for the use of the design by the political
245 subdivision in any manner. If the design-builder desires to retain all
246 rights and interest in the design proposed, the design-builder shall

247 **forfeit the stipend.**

248 **16. The payment bond requirements of section 107.170 shall**
249 **apply to the design-build project. All persons furnishing design**
250 **services shall be deemed to be covered by the payment bond the same**
251 **as any person furnishing labor and materials; however, the**
252 **performance bond for the design-builder does not need to cover the**
253 **design services as long as the design-builder or its design consultants**
254 **providing design services carry professional liability insurance in an**
255 **amount established by the political subdivision in the request for**
256 **proposals. In no event shall the bond cover any damages of the type**
257 **covered by such liability insurance.**

258 **17. Any person or firm performing architectural, engineering,**
259 **landscape architecture, or land-surveying services for the design-**
260 **builder on the design-build project shall be duly licensed or authorized**
261 **in this state to provide such services as required by chapter 327.**

262 **18. Under section 327.465, any design-builder that enters into a**
263 **design-build contract with a political subdivision is exempt from the**
264 **requirement that such person or entity hold a license or that such**
265 **corporation hold a certificate of authority if the architectural,**
266 **engineering, or land-surveying services to be performed under the**
267 **design-build contract are performed through subcontracts or joint**
268 **ventures with properly licensed or authorized persons or entities, and**
269 **not performed by the design-builder or its own employees.**

270 **19. This section shall not apply to:**

271 **(1) Any metropolitan sewer district established under article VI,**
272 **section 30(a) of the Constitution of Missouri; or**

273 **(2) Any special charter city, or any city or county governed by**
274 **home rule under article VI, section 18 or 19 of the Constitution of**
275 **Missouri that has adopted a design-build process via ordinance, rule,**
276 **or regulation.**

277 **20. The authority to use design-build and design-build contracts**
278 **provided under this section shall expire September 1, 2026.**

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