

SECOND REGULAR SESSION

SENATE BILL NO. 789

98TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR WASSON.

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ADRIANE D. CROUSE, Secretary.

5101S.01I

AN ACT

To amend chapter 67, RSMo, by adding thereto three new sections relating to construction contracts entered into by public entities.

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

Section A. Chapter 67, RSMo, is amended by adding thereto three new sections, to be known as sections 67.5050, 67.5060, and 67.5070, 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 a project. 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 procedures prescribed by this section.

3. Before or concurrently with selecting a construction manager-at-risk, the political subdivision shall select or designate an engineer or architect who shall prepare the construction documents for the project and who shall comply with all state laws, as applicable. If the engineer or architect is not a full-time employee of the political

21 subdivision, the political subdivision shall select the engineer or
22 architect on the basis of demonstrated competence and qualifications
23 as provided by sections 8.285 to 8.291. The political subdivision's
24 engineer or architect for a project may not serve, alone or in
25 combination with another, as the construction manager-at-risk. This
26 subsection does not prohibit a political subdivision's engineer or
27 architect from providing customary construction phase services under
28 the engineer's or architect's original professional service agreement in
29 accordance with applicable licensing laws.

30 4. The political subdivision may provide or contract for,
31 independently of the construction manager-at-risk, inspection services,
32 testing of construction materials, engineering, and verification of
33 testing services necessary for acceptance of the project by the political
34 subdivision.

35 5. The political subdivision shall select the construction
36 manager-at-risk in a two-step process. The political subdivision shall
37 prepare a request for qualifications for the first step of the two-step
38 process that includes general information on the project site, project
39 scope, schedule, selection criteria, and the time and place for receipt
40 of proposals or qualifications, as applicable, and other information that
41 may assist the political subdivision in its selection of a construction
42 manager-at-risk. The political subdivision shall state the selection
43 criteria in the request for proposals or qualifications, as
44 applicable. The selection criteria may include the construction
45 manager's experience, past performance, safety record, proposed
46 personnel and methodology, and other appropriate factors that
47 demonstrate the capability of the construction manager-at-risk. The
48 political subdivision shall not request fees or prices in step one. In
49 step two, the political subdivision may request that five or fewer
50 construction managers, selected solely on the basis of qualifications,
51 provide additional information, including the construction manager-at-
52 risk's proposed fee and its price for fulfilling the general
53 conditions. Qualifications shall account for a minimum of forty percent
54 of the evaluation. Cost shall account for a maximum of sixty percent
55 of the evaluation.

56 6. The political subdivision shall publish the request for
57 proposals or qualifications in a manner prescribed by the political

58 subdivision.

59 7. For each step, the political subdivision shall receive, publicly
60 open, and read aloud the names of the construction managers. Within
61 forty-five days after the date of opening the proposals or qualification
62 submissions, the political subdivision or its representative shall
63 evaluate and rank each proposal or qualification submission submitted
64 in relation to the criteria set forth in the request for proposals or
65 request for qualifications. The political subdivision shall interview at
66 least two of the top qualified offerors as part of the final selection.

67 8. The political subdivision or its representative shall select the
68 construction manager that submits the proposal that offers the best
69 value for the political subdivision based on the published selection
70 criteria and on its ranking evaluation. The political subdivision or its
71 representative shall first attempt to negotiate a contract with the
72 selected construction manager. If the political subdivision or its
73 representative is unable to negotiate a satisfactory contract with the
74 selected construction manager, the political subdivision or its
75 representative shall, formally and in writing, end negotiations with
76 that construction manager and proceed to negotiate with the next
77 construction manager in the order of the selection ranking until a
78 contract is reached or negotiations with all ranked construction
79 managers end.

80 9. A construction manager-at-risk shall publicly advertise, in the
81 manner prescribed by chapter 50, and receive bids or proposals from
82 trade contractors or subcontractors for the performance of all major
83 elements of the work other than the minor work that may be included
84 in the general conditions. A construction manager-at-risk may seek to
85 perform portions of the work itself if the construction manager-at-risk
86 submits its sealed bid or sealed proposal for those portions of the work
87 in the same manner as all other trade contractors or subcontractors
88 and if the political subdivision determines that the construction
89 manager-at-risk's bid or proposal provides the best value for the
90 political subdivision. The political subdivision shall have the authority
91 to restrict the construction manager-at-risk from submitting bids to
92 perform portions of the work.

93 10. The construction manager-at-risk and the political
94 subdivision or its representative shall review all trade contractor or

95 subcontractor bids or proposals in a manner that does not disclose the
96 contents of the bid or proposal during the selection process to a person
97 not employed by the construction manager-at-risk, engineer, architect,
98 or political subdivision involved with the project. All bids or proposals
99 shall be made public at least four business days prior to the award of
100 the contract but after all bids are evaluated and clarified.

101 11. If the construction manager-at-risk reviews, evaluates, and
102 recommends to the political subdivision a bid or proposal from a trade
103 contractor or subcontractor but the political subdivision requires
104 another bid or proposal to be accepted, the political subdivision may
105 compensate the construction manager-at-risk by a change in price,
106 time, or guaranteed maximum cost for any additional cost and risk that
107 the construction manager-at-risk may incur because of the political
108 subdivision's requirement that another bid or proposal be accepted.

109 12. If a selected trade contractor or subcontractor defaults in the
110 performance of its work or fails to execute a subcontract after being
111 selected in accordance with this section, the construction manager-at-
112 risk may itself, without advertising, fulfill the contract requirements
113 or select a replacement trade contractor or subcontractor to fulfill the
114 contract requirements. If a fixed contract amount or guaranteed
115 maximum price has not been determined at the time the contract is
116 awarded, the penal sums of the performance and payment bonds
117 delivered to the political subdivision shall each be in an amount equal
118 to the project budget, as set forth in the request for qualifications. The
119 construction manager-at-risk shall deliver the bonds not later than the
120 tenth day after the date the construction manager-at-risk executes the
121 contract unless the construction manager-at-risk furnishes a bid bond
122 or other financial security acceptable to the political subdivision to
123 ensure that the construction manager-at-risk will furnish the required
124 performance and payment bonds if a guaranteed maximum price is
125 established.

126 13. The provisions of this section shall not apply to any
127 metropolitan sewer district established under article VI, section 30(a)
128 of the Constitution of Missouri, home rule city, or county with a charter
129 form of government.

130 14. (1) Civil works projects such as roads, streets, bridges,
131 utilities, water supply projects, water plants, wastewater plants, water

132 distribution and wastewater conveyance facilities, airport runways and
133 taxiways, storm drainage and flood control projects, or transit projects
134 commonly designed by professional engineers shall be limited to those
135 projects in excess of two million dollars.

136 (2) Non-civil works projects such as buildings, site
137 improvements, and other structures, habitable or not, commonly
138 designed by architects shall be limited to those projects in excess of
139 seven million dollars.

140 15. Notwithstanding the provisions of section 23.253 to the
141 contrary, the provisions of this section shall expire September 1, 2025.

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

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

5 (2) "Design-build contract", a contract which is subject to a
6 qualifications-based selection process described in sections 8.285 to
7 8.291 between a political subdivision and a design-builder to furnish
8 the architectural, engineering, and related design services and the
9 labor, materials, supplies, equipment, and other construction services
10 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 commonly designed by professional engineers in excess of two million
20 dollars; and

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

24 (4) "Design-builder", any individual, partnership, joint venture,
25 or corporation subject to a qualifications-based selection that offers to
26 provide or provides design services and general contracting services
27 through a design-build contract in which services within the scope of

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

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

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

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

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

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

65 engineer's employment or practice;

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

69 (9) "Qualifications-based selection", the selection process
70 described in sections 8.285 to 8.291;

71 (10) "Request for proposals", the document by which the political
72 subdivision solicits proposals for a design-build contract; and

73 (11) "Stipend", an amount paid to the unsuccessful but
74 responsive, short-listed design-builders to defray the cost of
75 participating in phase II of the qualifications-based selection process
76 described in this section.

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

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

94 4. Notice of requests for proposals shall be advertised in
95 accordance with section 8.250 or by a virtual notice procedure that
96 notifies interested parties for at least twenty various purchases, design
97 contracts, construction contracts, or other contracts each year for the
98 political subdivision. The political subdivision shall publish a notice
99 of a request for proposals with a description of the project, the
100 procedures for submission, and the selection criteria to be used.

101 5. The political subdivision shall establish in the request for

102 proposals a time, place, and other specific instructions for the receipt
103 of proposals. Proposals not submitted in strict accordance with the
104 instructions shall be subject to rejection.

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

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

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

112 (3) The design criteria package;

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

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

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

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

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

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

133 8. The political subdivision shall review the submissions of the
134 proposals and assign points to each proposal in accordance with this
135 section and as set out in the instructions of the request for proposals.

136 9. Phase I shall require all design-builders to submit a statement
137 of qualifications that shall include, but not be limited to:

138 (1) Demonstrated ability to perform projects comparable in

139 design, scope, and complexity;

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

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

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

150 (5) The approximate percentage of ownership by design
151 professionals of the legal entity of the design-builder or legal entity
152 that contracts with the design-builder.

153 10. The political subdivision shall evaluate the qualifications of
154 all the design-builders who submitted proposals in accordance with the
155 instructions of the request for proposals. Architectural and
156 engineering services on the project shall be evaluated in accordance
157 with the requirements of sections 8.285 and 8.291. Qualified design-
158 builders selected by the evaluation team may proceed to phase II of the
159 selection process. Design-builders lacking the necessary qualifications
160 to perform the work shall be disqualified and shall not proceed to
161 phase II of the process. This process of short listing shall narrow the
162 number of qualified design-builders to not more than five or fewer than
163 two. Under no circumstances shall price or fees be a part of the
164 prequalification criteria. Points assigned in phase I of the evaluation
165 process shall not carry forward to phase II of the process. All qualified
166 design-builders shall be ranked on points given in phases II and III
167 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 proposals. The design
180 proposal shall demonstrate compliance with the requirements set out
181 in the request for proposals;

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
193 proposals. Phase II shall account for not less than forty percent of the
194 total point score as specified in the request for proposals.

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 proposals;

200 (2) Cost proposals shall be submitted in accordance with the
201 instructions of the request for proposals. The political subdivision
202 shall 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 proposals;

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 proposals, 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 interviewed and assigned points,
210 ranked in order, and posted;

211 (4) Cost proposals shall be opened and read aloud at the time
212 and place specified in the request for proposals. 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 proposals. 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 two percent or more for each
220 percentage point by which the bidder exceeds the lowest bid and the
221 points assigned shall be added to the points assigned for phase II for
222 each 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 proposals, 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 subcontractors
254 providing design services carry professional liability insurance in an
255 amount established by the political subdivision in the request for
256 proposals.

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

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

269 19. The provisions of this section shall not apply to any
270 metropolitan sewer district established under article VI, section 30(a)
271 of the Constitution of Missouri, home rule city, or county with a charter
272 form of government.

273 20. The authority to use design-build and design-build contracts
274 provided under this section shall expire September 1, 2025.

 67.5070. 1. As used in this section, "specialty construction design"
2 means any contract that involves the provision of engineering and
3 construction services either directly by a party to the contract or
4 through subcontractors retained by a party to the contract.

5 2. Any political subdivision may enter into a special construction
6 design contract for engineering, design, and construction of a
7 wastewater or water treatment project.

8 3. In disbursing community development block grants under 42
9 U.S.C. Sections 5301 to 5321, the department of economic development
10 shall not reject wastewater or water treatment projects solely for
11 utilizing specialty construction design contracts.

12 4. The department of natural resources shall not preclude

13 **specialty construction design contracts from consideration for funding**
14 **provided by the water and wastewater loan fund under section 644.122.**

15 **5. A political subdivision planning a specialty construction**
16 **design project shall retain an engineer duly licensed in this state to**
17 **assist in preparing any necessary bid documents and specifications and**
18 **evaluations of submissions and bids.**

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