

FIRST REGULAR SESSION

SENATE BILL NO. 388

98TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR WASSON.

Read 1st time February 3, 2015, and ordered printed.

ADRIANE D. CROUSE, Secretary.

1484S.02I

AN ACT

To repeal sections 8.683 and 8.685, RSMo, and to enact in lieu thereof four 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Section A. Sections 8.683 and 8.685, RSMo, are repealed and four new
2 sections enacted in lieu thereof, to be known as sections 8.683, 8.685, 67.5050,
3 and 67.5060, to read as follows:

8.683. Upon award of a construction management services contract, the
2 successful construction manager shall contract with the public owner to furnish
3 his skill and judgment in cooperation with, and reliance upon, the services of the
4 project architect or engineer. The construction manager shall furnish business
5 administration, management of the construction process and other specified
6 services to the public owner and shall perform in an expeditious and economical
7 manner consistent with the interest of the public owner. Should the public owner
8 determine it to be in the public's best interest, the construction manager may
9 provide or perform basic services for which reimbursement is provided in the
10 general conditions to the construction management services contract. The
11 construction manager shall [not, however,] be permitted to bid on or perform any
12 of the actual construction on a public works project in which he is acting as
13 construction manager, [nor shall any construction firm which controls, is
14 controlled by, or shares common ownership or control with, the construction
15 manager be allowed to bid on or perform work on such project] **but only if such**
16 **construction manager submits a sealed bid in the same manner as any**
17 **other bidder**. The actual construction work on the project shall be awarded by
18 competitive bidding as provided by law. All successful bidders shall contract

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

19 directly with the public owner, but shall perform at the direction of the
20 construction manager unless otherwise provided in the construction manager's
21 contract with the public owner. All successful bidders shall provide payment and
22 performance bonds to the public owner. All successful bidders shall meet all the
23 obligations of a prime contractor to whom a contract is awarded, pertaining to the
24 payment of prevailing wages pursuant to sections 290.210 to 290.340. In
25 addition, all nonresident employers shall meet the bonding and registration
26 requirements of sections 285.230 to 285.234.

8.685. [No] Construction management services [contract] may be awarded
2 by a public owner on a negotiated basis as provided herein [if] **regardless of**
3 **whether** the construction manager, or a firm that controls, is controlled by, or
4 shares common ownership or control with the construction manager, guarantees,
5 warrants, or otherwise assumes financial responsibility for the work of others on
6 the project; or provides the public owner with a guaranteed maximum price for
7 the work of others on the project; or furnishes or guarantees a performance or
8 payment bond for other contractors on the project. [In any such case, the contract
9 for construction management services shall be let by competitive bidding as in the
10 case of contracts for construction work.]

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

2 (1) **"Construction manager-at-risk," a sole proprietorship,**
3 **partnership, corporation, or other legal entity that assumes the risk for**
4 **the construction, rehabilitation, alteration, or repair of a facility at the**
5 **contracted price as a general contractor and provides consultation to**
6 **the political subdivision regarding construction during and after the**
7 **design of the facility;**

8 (2) **"Construction manager", the legal entity which proposes to**
9 **enter into a construction manager-at-risk contract pursuant to this**
10 **section.**

11 2. **Any political subdivision may use the construction manager-**
12 **at-risk method for a project. In using that method and in entering into**
13 **a contract for the services of a construction manager-at-risk, the**
14 **political subdivision shall follow the procedures prescribed by this**
15 **section.**

16 3. **Before selecting, or concurrently with the selection of, a**
17 **construction manager-at-risk, the political subdivision shall select or**
18 **designate an engineer or architect who shall prepare the construction**

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

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

36 5. The political subdivision shall select the construction
37 manager-at-risk in either a one-step or two-step process. The political
38 subdivision shall prepare a request for proposal, in the case of a one-
39 step process, or a request for qualifications, in the case of a two-step
40 process. The request for proposal or qualifications shall include
41 general information on the project site, project scope, schedule,
42 selection criteria, and the time and place for receipt of proposals or
43 qualifications, as applicable; a statement as to whether the selection
44 process is a one-step or two-step process; and other information that
45 may assist the political subdivision in its selection of a construction
46 manager-at-risk. The political subdivision shall state the selection
47 criteria in the request for proposal or qualifications. The selection
48 criteria may include the construction manager's experience, past
49 performance, safety record, proposed personnel and methodology, and
50 other appropriate factors that demonstrate the capability of the
51 construction manager. If a one-step process is used, the political
52 subdivision may request, as part of the proposal, proposed fees and
53 prices for fulfilling the general conditions. If a two-step process is
54 used, the political subdivision shall not request fees or prices in step
55 one. In step two, the political subdivision may request that five or

56 fewer construction managers, selected solely on the basis of
57 qualifications, provide additional information, including the
58 construction manager's proposed fee and its price for fulfilling the
59 general conditions. By either method, past performance, experience,
60 references, and capacity shall account for a minimum of sixty percent
61 of the evaluation. Cost shall account for a maximum of forty percent
62 of the evaluation.

63 6. The political subdivision shall publish the request for proposal
64 or qualifications in a manner prescribed by the political subdivision.

65 7. For each step, the political subdivision shall receive, publicly
66 open, and read aloud the names of the construction managers. Within
67 thirty days after the date of opening the proposals, the political
68 subdivision or its representative shall evaluate and rank each proposal
69 submitted in relation to the criteria set forth in the request for
70 proposal. The political subdivision shall interview at least two of the
71 top qualified offerers.

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

85 9. A construction manager-at-risk shall publicly advertise, in the
86 manner prescribed by chapter 8, and receive bids or proposals from
87 trade contractors or subcontractors for the performance of all major
88 elements of the work other than the minor work that may be included
89 in the general conditions. A construction manager-at-risk may seek to
90 perform portions of the work itself if the construction manager-at-risk
91 submits its bid or proposal for those portions of the work in the same
92 manner as all other trade contractors or subcontractors and if the

93 political subdivision determines that the construction manager-at-risk's
94 bid or proposal provides the best value for the political subdivision.

95 10. The construction manager-at-risk and the political
96 subdivision or its representative shall review all trade contractor or
97 subcontractor bids or proposals in a manner that does not disclose the
98 contents of the bid or proposal during the selection process to a person
99 not employed by the construction manager-at-risk, engineer, architect,
100 or political subdivision. All bids or proposals shall be made public
101 after the award of the contract or within seven days after the date of
102 the final selection of bids and proposals, whichever is later.

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

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

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**
6 **qualifications-based selection, between a political subdivision and a**
7 **design-builder to furnish the architectural, engineering, and related**
8 **design services and the labor, materials, supplies, equipment, and other**
9 **construction services required for a design-build project;**

10 (3) **"Design-build project", the design, construction, alteration,**
11 **addition, remodeling, or improvement of any buildings or facilities**
12 **under contract with a political subdivision;**

13 (4) **"Design-builder", any individual, partnership, joint venture,**
14 **or corporation, which is subject to qualifications-based selection, and**
15 **offers to provide or provides design services and general contracting**
16 **services through a design-build contract, where services within the**
17 **scope of the practice of professional architecture or engineering are**
18 **performed respectively by a licensed architect or licensed engineer and**
19 **where services within the scope of the practice of general contracting**
20 **are performed by a licensed general contractor or other legal entity**
21 **that furnishes architecture or engineering services and construction**
22 **services, either directly or through subcontracts;**

23 (5) **"Design criteria consultant", a person, corporation,**
24 **partnership, or other legal entity duly registered and authorized to**
25 **practice architecture or professional engineering in this state pursuant**
26 **to chapter 327 and who is employed by contract by the political**
27 **subdivision to assist the political subdivision in the development of**
28 **project design criteria, requests for proposals, evaluation of proposals,**
29 **evaluation of the construction under a design-build contract to**
30 **determine adherence to the design criteria, and any additional services**
31 **requested by the political subdivision to represent its interests in**
32 **relation to a project. The design criteria consultant may not submit a**
33 **proposal or furnish design or construction services for the design-build**
34 **contract for which its services were sought;**

35 (6) **"Design criteria package", performance-oriented program,**
36 **scope, and specifications for the design-build project sufficient to**
37 **permit a design-builder to prepare a response to the political**
38 **subdivision's request for proposal for a design-build project, which may**
39 **include capacity, durability, standards, ingress and egress**

40 requirements, description of the site, surveys, soil and environmental
41 information concerning the site, interior space requirements, material
42 quality standards, design and construction schedules, site development
43 requirements, provisions for utilities, storm water retention and
44 disposal, parking requirements, applicable governmental code
45 requirements, preliminary designs for the project or portions thereof,
46 and other criteria for the intended use of the project;

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

48 (a) Within the practice of architecture as defined in section
49 327.091, or within the practice of professional engineering as defined
50 in section 327.181; or

51 (b) Performed by a registered architect or professional engineer
52 in connection with the architect's or professional engineer's
53 employment or practice;

54 (8) "Proposal", an offer in response to a request for proposal by
55 a design-builder to enter into a design-build contract for a public
56 facility construction project pursuant to this section;

57 (9) "Public facility construction project", the process of
58 designing, constructing, reconstructing, altering, or renovating a
59 building owned by a political subdivision;

60 (10) "Qualifications-based selection", the selection process
61 described in sections 8.285 to 8.291;

62 (11) "Request for proposal", the document by which the political
63 subdivision solicits proposals for a design-build contract;

64 (12) "Stipend", an amount paid to the unsuccessful and
65 responsive, shortlisted design-builders to defray the cost of
66 participating in phase II of the qualifications-based selection process.

67 2. Notwithstanding any other provision of law to the contrary,
68 any political subdivision is authorized to enter into design-build
69 contracts for design-build projects that exceed an expenditure of
70 twenty-five million dollars.

71 3. In using a design-build contract, the political subdivision shall
72 determine the scope and level of detail required to permit qualified
73 persons to submit proposals in accordance with the request for
74 proposal given the nature of the project.

75 4. Unless the political subdivision currently employs full-time
76 licensed architects, engineers, or other staff with experience or duties

77 relating to the administration of construction work and contracts, a
78 design criteria consultant shall be employed or retained by the political
79 subdivision to assist in preparing the request for proposal, perform
80 periodic site visits, prepare progress reports, review and approve
81 progress and final pay applications of the design-builder, review shop
82 drawings and submittals, decide disputes, interpret the construction
83 documents, perform inspections upon substantial and final completion
84 of the project, assist in warranty inspections, and provide any other
85 professional service when the political subdivision deems it to be in the
86 public interest to have an independent design professional assisting
87 with the project administration. The consultant shall be selected and
88 its contract negotiated in compliance with sections 8.285 to 8.291.

89 5. Notice of requests for proposals shall be advertised in
90 accordance with section 8.250. The political subdivision shall publish
91 a notice of a request for proposal with a description of the project, the
92 rationale for the decision to use the design-build method of
93 procurement, the procedures for submittal, and the selection criteria
94 to be used.

95 6. The political subdivision shall establish in the request for
96 proposal a time, place, and other specific instructions for the receipt
97 of a proposal. Proposals not submitted in strict accordance with those
98 instructions shall be subject to rejection.

99 7. A request for proposal shall be prepared for each design-build
100 contract containing, at a minimum, the following elements:

101 (1) The procedures to be followed for submitting proposals, the
102 criteria for evaluating proposals and their relative weight, and the
103 procedures for making awards;

104 (2) The proposed terms and conditions for the design-build
105 contract;

106 (3) The design criteria package;

107 (4) A description of the drawings, specifications, or other
108 information to be submitted with the proposal, with guidance as to the
109 form and level of completeness of the drawings, specifications, or other
110 information that will be acceptable;

111 (5) A schedule for planned commencement and completion of the
112 design-build contract;

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

114 (7) Requirements including any available ratings for
115 performance bonds, payment bonds, and insurance; and

116 (8) Any other information that the political subdivision in its
117 discretion chooses to supply, including, without limitation, surveys, soil
118 reports, drawings of existing structures, environmental studies,
119 photographs, or references to public records, or affirmative action and
120 minority business enterprise requirements consistent with state and
121 federal law.

122 8. The political subdivision shall solicit proposals in a three-
123 stage process. Phase I shall be the solicitation of qualifications of the
124 design-build team. Phase II shall be the solicitation of a technical
125 proposal including conceptual design for the project, and phase III
126 shall be the proposal of the construction cost.

127 9. The political subdivision shall review the submitted proposals
128 and assign points to each proposal in accordance with this section and
129 as set out in the instructions of the request for proposal.

130 10. Phase I shall require all the design-builders to submit a
131 statement of qualification which shall include:

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

134 (2) References of owners for whom design-build projects have
135 been performed;

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

138 (4) The names and qualifications of the primary design
139 consultants and the contractors with whom the design-builder proposes
140 to subcontract. The design-builder may not replace an identified
141 subcontractor or subconsultant without the written approval of the
142 political subdivision.

143 11. The political subdivision shall evaluate the qualifications of
144 all the design-builders who submitted proposals in accordance with the
145 instructions included with the request for proposal. Architectural and
146 engineering services on the project shall be evaluated in accordance
147 with the requirements of sections 8.285 and 8.291. Qualified design-
148 builders selected by the evaluation team may proceed to phase II of the
149 selection process. Design-builders lacking the necessary qualifications
150 to perform the work shall be disqualified and shall not proceed to

151 **phase II of the process. Under no circumstances shall a price or fee be**
152 **a part of the prequalification criteria. Points assigned in phase I of the**
153 **evaluation process shall not carry forward to phase II of the**
154 **process. All qualified design-builders shall be ranked on points given**
155 **in phases II and III only.**

156 **12. The political subdivision shall have discretion to disqualify**
157 **any design-builder, which in the political subdivision's opinion, lacks**
158 **the minimal qualifications required to perform the work.**

159 **13. Once a sufficient number of qualified design-builders have**
160 **been selected, the design-builders shall have a specified amount of time**
161 **to assemble phase II and phase III proposals.**

162 **14. Phase II of the process shall be conducted as follows:**

163 **(1) The political subdivision shall invite up to the top five**
164 **qualified design-builders to participate in phase II of the process;**

165 **(2) Design-builders shall submit their design for the project to**
166 **the level of detail required in the request for proposal. The design**
167 **proposal shall demonstrate compliance with the requirements set out**
168 **in the request for proposal;**

169 **(3) The ability of the design-builder to meet the schedule for**
170 **completing a project as specified by the owner may be considered as an**
171 **element of evaluation in phase II;**

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

176 **(5) Under no circumstances shall the design proposal contain any**
177 **reference to the cost of the proposal;**

178 **(6) The submitted designs shall be evaluated and assigned points**
179 **in accordance with the requirements of the request for proposal. Phase**
180 **II shall account for no less than forty percent of the total point score**
181 **as specified in the request for proposal; and**

182 **(7) At least two and no more than five of the top design-builders**
183 **are to be interviewed by the entity prior to evaluating the phase III**
184 **proposals.**

185 **15. Phase III shall be conducted as follows:**

186 **(1) The phase III proposal shall provide a firm, fixed cost of**
187 **construction. The proposal shall be accompanied by bid security and**

188 any other items, such as statements of minority participation, required
189 by the request for proposal;

190 (2) Cost proposals shall be submitted in accordance with the
191 instructions of the request for proposal. The political subdivision shall
192 reject any proposal that is not submitted on time. Phase III shall
193 account for not less than forty percent of the total point score as
194 specified in the request for proposal;

195 (3) Proposals for phase II and phase III shall be submitted
196 concurrently at the time and place specified in the request for
197 proposal. The phase III cost proposals of the top selected finalists shall
198 be opened only after the phase II design proposals have been evaluated
199 and assigned points;

200 (4) Cost proposals shall be opened and read aloud at the time
201 and place specified in the request for proposal. At the same time and
202 place, the evaluation team shall make public its scoring of phase
203 II. Cost proposals shall be evaluated in accordance with the
204 requirements of the request for proposal. In evaluating the cost
205 proposals, the lowest bidder shall be awarded the total number of
206 points assigned to be awarded in phase III. For all other bidders, cost
207 points shall be calculated by reducing the maximum points available in
208 phase III by two percent or more for each percentage point by which
209 the bidder exceeds the lowest bid and the points assigned shall be
210 added to the points assigned for phase II for each design-builder;

211 (5) If the political subdivision determines that it is not in the
212 best interest of the political subdivision to proceed with the project
213 pursuant to the proposal offered by the design-builder with the highest
214 total number of points, the political subdivision shall reject all the
215 proposals. In such event, all qualified design-builders with lower point
216 totals shall receive a stipend and the design-builder with the highest
217 total number of points shall receive an amount equal to two times such
218 stipend. If the political subdivision decides to award the project, the
219 responsive design-builder with the highest number of points shall be
220 awarded the contract; and

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

224 16. As an inducement to qualified design-builders, the political

225 subdivision may pay a reasonable stipend, the amount of which shall
226 be established in the request for proposal, to each prequalified design-
227 builder whose proposal is responsive but not accepted. Upon payment
228 of the stipend to any unsuccessful design-builder, the political
229 subdivision shall acquire a nonexclusive right to use the design
230 submitted by the design-builder, and the design-builder shall have no
231 further liability for the use of the design by the political subdivision in
232 any manner. If the design-builder desires to retain all rights and
233 interest in the proposed design, the design-builder shall forfeit the
234 stipend.

235 17. The payment bond requirements of section 107.170 shall
236 apply to the design-build project. All persons furnishing design
237 services shall be deemed to be covered by the payment bond the same
238 as any person furnishing labor and materials; however, the
239 performance bond for the design-builder does not need to cover the
240 design services as long as the design-builder, or its subcontractors
241 providing design services, carry professional liability insurance in an
242 amount established by the political subdivision in the request for
243 proposal.

244 18. Any person or firm providing architectural, engineering,
245 landscape architecture, or land-surveying services for the design-
246 builder on the design-build project shall be duly licensed or authorized
247 in this state to provide such services as required by chapter 327.

248 19. Under section 327.465, any design-builder that enters into a
249 design-build contract for a political subdivision is exempt from the
250 requirement that such person or entity hold a certificate of
251 registration, or that such corporation hold a certificate of authority, if
252 the architectural, engineering, or land-surveying services to be
253 performed under the contract are performed through subcontracts with
254 properly licensed and authorized persons or entities, and not
255 performed by the design-builder or its own employees.

256 20. The provisions of this section shall expire September 1, 2025.

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