



North Dakota Legislative Council

Prepared for the Government Services Committee
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STUDY OF INFRASTRUCTURE DEVELOPMENT AND CONSTRUCTION MANAGEMENT PROCUREMENT - BACKGROUND MEMORANDUM

Section 4 of House Bill No. 1288 (2023) ([appendix](#)) provides for a Legislative Management study regarding infrastructure development by private operators as provided for under North Dakota Century Code Chapter 48-02.1, agency construction management procurement procedures under Section 48-01.2-19, and construction management at-risk delivery methods under Section 48-01.2-20. The study must include input from contractor groups and other stakeholders to determine how public-private partnerships are being used and whether the use of these partnerships has been successful.

BACKGROUND - STATUTORY PROVISIONS

Chapter 48-01.2 addresses public improvement bids and contracts. The chapter generally applies to the construction, repair, or alteration of a public improvement undertaken by the state or a political subdivision. Section 48-01.2-01(4) defines "construction" as the process of building, altering, repairing, improving, or demolishing any public structure or building or other improvement to any public property. Section 48-01.2-01(21) defines a "public improvement" as "any improvement undertaken by a governing body for the good of the public and which is paid for with any public funds, including public loans, bonds, leases, or alternative funding, and is constructed on public land or within an existing or new public building or any other public infrastructure or facility if the result of the improvement will be operated and maintained by the governing body." Road construction and maintenance and certain Public Service Commission projects are exempted from the definition of a "public improvement" and are thus excluded from the requirements of Chapter 48-01.2. Section 48-01.2-02 requires a governing body, if the project is estimated to cost more than \$200,000, to procure plans, drawings, and specifications for the work from an architect or engineer.

Section 48-01.2-04(1) requires a governing body to advertise for bids by publishing an advertisement for 3 consecutive weeks if the public improvement is estimated to cost more than \$200,000. Section 48-01.2-04(2) provides the governing body may contract for the construction of a public improvement without seeking bids if the governing body declares an emergency exists.

Section 48-01.2-06 provides that multiple prime bids for the general, electrical, and mechanical portions of a project are required when any individual general, electrical, or mechanical contract or any combination of individual contracts is in excess of \$200,000. That section also authorizes a governing body to allow the submission of single prime bids or bids for other portions of the project, but prohibits the governing body from accepting the single prime bid unless that bid is lower than the combined total of the lowest responsible multiple bids for the project. Section 48-01.2-17 authorizes a governing body, after competitive bids for the general, electrical, and mechanical work are received as part of the multiple prime bids, to assign the electrical and mechanical contract and any other contracts to the general contractor for the project to facilitate the coordination and management of the work.

Section 48-01.2-07 requires the governing body to open all bids at the time stated in the notice and award the contract to the lowest responsible bidder. Section 48-01.2-01(19) defines "lowest responsible bidder" as "the lowest best bidder for the project considering past experience, financial condition, past work with the governing body, and other pertinent attributes that may be identified in the advertisement for bids." The governing body may reject any and all bids and readvertise for bids if no bid is satisfactory.

CONSTRUCTION MANAGEMENT

Background

Construction management is generally defined as a professional service that applies management techniques to the planning, design, and construction of a project from inception to completion for the purpose of controlling time, cost, and quality. Section 48-01.2-01(7) defines "construction manager" as "a contractor licensed under Chapter 43-07 or an individual employed by a licensed contractor which has the expertise and resources to assist

a governing body with the management of the design, contracting, and construction aspects of a public improvement." Section 48-01.2-18 provides that a governing body may use the agency construction management or construction management at-risk delivery methods for construction of a public improvement.

Agency Construction Management

Section 48-01.2-01(1) defines "agency construction management" as "a public improvement delivery method through which a person provides to a governing body experienced construction management services, including ideas on constructability, documentation of design and construction, and coordination of project schedules." Section 48-01.2-19 provides the following procurement procedures for agency construction management:

1. A governing body electing to utilize the agency construction management delivery method shall establish a construction management services selection committee composed of individuals the governing body determines to be qualified to make an informed decision as to the most competent and qualified person for the proposed public improvement.
2. The agency selection committee shall:
 - a. Develop a description of the proposed public improvement;
 - b. Enumerate each required agency construction management service for the proposed public improvement; and
 - c. Prepare the formal invitation request for qualifications, which must include the project title, the general scope of work, a description of each service required for the public improvement, the final selection criteria, the address to which responses to the request must be submitted, and the deadline for submission of responses.
3. The governing body shall publish a notice of the request for qualifications in a newspaper of general circulation in the county in which the public improvement is located and in a construction trade publication, electronic service, builders exchange, or other industry-recognized method in general circulation among the contractors, building manufacturers, and dealers in this state and shall be published for three consecutive weeks, with the first publication being at least twenty-one days before the date of opening of the request for qualifications. Upon written request, the governing body shall mail a copy of the invitation to any interested party.
4. After the submission deadline, the selection committee shall hold interviews with at least three persons that have responded to the advertisement and which are deemed most qualified on the basis of information available before the interviews. If less than three persons have responded to the advertisement, the committee may readvertise or hold interviews with any person that submitted a response. The selection committee's determination as to which person will be interviewed must be in writing and must be based upon the committee's review and evaluation of all materials submitted. The written report of the committee must list the name of each person that responded to the advertisement and enumerate any reason for selecting any person to be interviewed. The written report must be available to the public upon written request. The purpose of the interviews must be to provide any information required by the selection committee to fully acquaint the committee members with the relative qualifications of each person that responded to the advertisement.
5. The selection committee shall evaluate each person interviewed on the basis of the following criteria:
 - a. The past performance of the person with respect to prior public improvements.
 - b. The qualifications of proposed personnel.
 - c. The willingness to meet time and budget requirements of the governing body.
 - d. The business location of the person.
 - e. The recent, current, and projected workloads of the person.
 - f. Any related experience performing agency construction management services on projects of similar size and scope.
 - g. Any recent or current work by the person for the agency.
 - h. The ability of the person to provide the bond for the person's portion of the work on the public improvement.
 - i. The possession by the person of a class A contractor's license.

6. Based upon the evaluation under subsection 5, the selection committee shall rank the three persons which, in its judgment, are most qualified. If fewer than three persons responded to the advertisement, the selection committee shall rank each person that responded. The selection committee's report ranking the interviewed persons must be in writing and must include data substantiating the committee's determinations. The data must be available to the public upon written request.
7. The selection committee shall submit its written report ranking the interviewed persons to the governing body for evaluation and approval by the governing body. The governing body shall determine the final ranking of each person and provide written notification of the order of preference to each person that responded to the request for qualifications.
8. After providing the notice under subsection 7, the governing body shall negotiate a contract for services with the most qualified person at a compensation which is fair and reasonable to the governing body. If the governing body is unable to negotiate a satisfactory contract with that person, the governing body shall terminate negotiations with that person and commence negotiations in the same manner with the second and then the third most qualified person until a satisfactory contract has been negotiated. If no agreement is reached, three additional persons in order of the original ranking must be selected after consultation with the selection committee, and negotiations must be continued in the same manner until agreement is reached.
9. The governing body, at any time, may reject all proposals and readvertise or select another allowed project delivery method.

Construction Management At-Risk

Section 48-01.2-01(6) defines "construction management at-risk" as "a public improvement delivery method through which a construction manager provides advice to the governing body during the planning and design phase of a public improvement, negotiates a contract with the governing body for the general construction bid package of the public improvement, and contracts with subcontractors and suppliers for the actual construction of the public improvement." Section 48-01.2-20 provides the following procurement procedures for construction management at-risk:

1. A governing body electing to utilize a construction management at-risk delivery process for a proposed public improvement shall create a selection committee composed of:
 - a. An administrative individual from the governing body.
 - b. A registered architect.
 - c. A registered engineer.
 - d. A licensed contractor.
2. The governing body may compensate members of the selection committee. A member of the selection committee is not eligible to submit a proposal for the construction management at-risk contract under consideration.
3. Before issuing a notice of request for qualifications to enter a construction management at-risk services contract, the selection committee shall establish the content of the request for qualifications, which must include the following:
 - a. The identity of the governing body and a list of the members of the selection committee;
 - b. A description of the proposed public improvement;
 - c. The proposed budget limits of the public improvement;
 - d. The commencement and completion date of the public improvement;
 - e. The procedures to be used in submitting proposals;
 - f. The qualifications evaluation criteria and the relative weighting of items;
 - g. The subcontractor selection process to be used for construction services;
 - h. The number of persons to be included in the final list;
 - i. A statement indicating whether formal interviews will be held;
 - j. A statement indicating whether fees and prices must be included in any proposal;
 - k. A description of contract terms and conditions for the construction management at-risk services contract, including a description of the scope of services to be provided;

- I. A description of the procedures to be used for making the contract award;
 - m. The insurance and bonding requirements and a statement requiring any person submitting a proposal to include with the proposal a certificate of insurance, indicating liability coverage; and
 - n. The identification and location of other pertinent information the governing body may possess, including surveys, soils reports, drawings or models of existing structures, environmental studies, photographs, or references to public records.
4. The request for qualifications submittal procedures must include the specific format that must be used by a construction manager at-risk when submitting a request for qualifications and the submission deadline location for submission of the request for qualifications.
5. The selection committee shall determine the appropriate evaluation criteria for each request for qualifications, including:
 - a. The person's experience on any similar project;
 - b. The person's existing workload and available capacity;
 - c. The person's key personnel experience on any similar project;
 - d. The person's safety record;
 - e. The person's familiarity with the location of the public improvement;
 - f. The person's fees and expenses;
 - g. The person's compliance with state and federal law; and
 - h. Any reasonable information the selection committee deems necessary.
6. The selection committee shall evaluate each submission based on the qualification criteria under subsection 5 and shall include the numeric scoring of each criteria item on a weighted basis, with no item being weighted at more than twenty percent and no less than five percent. The weighting of the qualification criteria must be done in a manner to ensure no subjective bias and encourage the maximum participation of qualified construction managers at-risk.
7.
 - a. The selection committee shall review each proposal submitted and include the three highest ranked construction managers at-risk on a list of finalists. If fewer than three proposals were submitted, the governing body may resolicit for qualifications, interview any person that applied, or consider using another allowed delivery method. The selection committee shall recommend to the governing body the construction manager at-risk receiving the highest score on the evaluation criteria.
 - b. If a construction manager at-risk selected for a public improvement declines the appointment or is unable to reach agreement with the governing body concerning fees or terms of the contract, the governing body shall terminate negotiations with the construction manager at-risk and begin negotiations with the construction manager at-risk with the next highest score and continue that process until agreement is reached or the list of finalists is exhausted.
 - c. If the list of finalists is exhausted, the governing body shall request the selection committee to revise the request for qualifications and solicit new submissions. If the selection committee is unable to provide any constructive revision to the request for qualifications, the governing body shall select another allowed public improvement delivery method.
 - d. The governing body, upon reaching an agreement with a construction manager at-risk on compensation and contract terms for construction management planning and design services, shall enter a written contract with the construction manager at-risk for the services.
8. The governing body shall publish a notice of request for qualifications to enter a construction management at-risk contract under this section in a newspaper of general circulation in the county in which the public improvement is located and in a construction trade publication, electronic service, builders exchange, or other industry-recognized method in general circulation among the contractors, building manufacturers, and dealers in this state. The notice must be published for three consecutive weeks, with the first publication being at least twenty-one days before the date of opening of the request for qualifications. Upon written request, the governing body shall mail a copy of the invitation to any interested party.

Section 48-01.2-21 provides "after the governing body and the construction manager at-risk have finalized the contract for planning and design phase services and the process has progressed sufficiently to provide the construction manager at-risk the necessary project details, the governing body and the construction manager at-risk shall enter negotiations for a guaranteed maximum price and contract terms for the general construction of the public improvement. If the governing body is unable to negotiate a satisfactory contract with the highest qualified person on the list of finalists, the governing body shall terminate negotiations with that person. The governing body shall commence negotiations with the next most qualified person on the list in sequence until an agreement is reached or a determination is made to reject all persons on the list."

PUBLIC-PRIVATE PARTNERSHIPS

Chapter 48-02.1, enacted by the 1993 Legislative Assembly, provides for the development of infrastructure by private operators, notwithstanding any other provision of law. This chapter is currently interpreted to allow for the construction of facilities on state property without specific approval from the Legislative Assembly. A public-private partnership is generally defined as a collaboration between a government agency and a private-sector company that can be used to finance, build, and operate projects. Typically, a public-private partnership involves initial private capital financing for government projects or services, followed by the receipt of revenues from taxpayers or users for profit over the course of the public-private partnership contract. Section 48-02.1-02 allows private operators to "construct, improve, rehabilitate, own, lease, manage, and operate fee-based facilities. Private operators may mortgage, grant security interests in, and pledge their interests in, for a period not to exceed the length of the development agreement:

1. Fee-based facilities and their components;
2. Development, leases and concessions, and other related agreements; and
3. Income, profits, and proceeds of the fee-based facility."

Section 48-02.1-03 allows a public authority to "solicit or accept proposals from private operators for the constructing, improving, rehabilitating, operating, managing, and owning of a fee-based facility that will be situated in an area subject to the public authority's jurisdiction. After a hearing, the public authority may accept a proposal that it determines to be in the public interest. A public authority may negotiate and enter into a development agreement with any private operator."

Section 48-02.1-04 provides for the content of development agreements. A development agreement for a fee-based facility "may provide for private ownership of the facility without reversion of title; for operating the facility under lease or management contract; and for any form of ownership or operation considered advisable by the public authority. A development agreement may permit the private operator to:

1. Assemble funds from any available source, including federal, state, and local grants, bond revenues, contributions, and pledges; and
2. Incorporate related improvements into the fee-based facility, subject to requirements of state and federal law.

A development agreement may also include grants of title, easements, rights of way, and leasehold estates that are necessary to the fee-based facility. In addition, a development agreement may authorize the private operator to charge variable-rate fees based on time of day, characteristics of services, or other factors and measurement methods considered significant by the public authority for the particular facility."

Section 48-02.1-06 limits the term of a lease for public facilities constructed under a public-private partnership to no more than 50 years. Section 48-02.1-09 establishes mandatory provisions that must be included in a public-private partnership development agreement, including:

1. That the plans and specifications for the fee-based facility satisfy the public authority's standards of construction for infrastructure of the same functional classification;
2. For fee-based facilities to be incorporated into the existing infrastructure, that any applicable department or authority review and approve the facility to the same extent as it would for a similar publicly constructed facility;
3. That, after public notice, the private operator manage and operate a fee-based facility in cooperation with the applicable public authority and subject to any bylaws that the public authority and the private operator may from time to time mutually agree upon;

4. That the fee-based facility be subject to regular safety inspections by the applicable public authority;
5. That the anticipated fees, rental income, and revenues from the operation of the facility, or other sources of funding, or any combination thereof, be sufficient to pay the maintenance and operation costs for the facility, and principal of and interest on any evidence of indebtedness to finance the facility; and
6. Any other provisions negotiated by the parties.

PRIOR CONSIDERED LEGISLATION

Senate Bill No. 2203 (2015) would have amended Section 48-01.2-06 to allow the governing body to solicit single prime bids instead of multiple prime bids for projects under \$5 million. This bill failed to pass in the Senate.

Senate Bill No. 2190 (2017) would have amended Section 48-01.2-06 to provide increased authority to the governing body to accept single prime bids. This bill was passed by the Senate but failed to pass in the House.

House Bill No. 1288 (2023), as amended by the Senate, would have added provisions to agency construction management procurement procedures to require the fee to be charged by each person interviewed to be the selection committee's primary consideration, unless the committee provides written rationale substantiating a decision to the contrary. The Senate version of the bill also added a requirement that public-private partnerships follow the bid process provided under Chapter 48-01.2 prior to soliciting or accepting proposals from private operators. These provisions were removed during conference committee and replaced with this study.

PRIOR STUDIES

The 2005-06 Interim Industry, Business, and Labor Committee studied public improvement contracts and issues relating to use of multiple bids versus single prime bids, construction management, professional liability and indemnification, and design-build delivery systems pursuant to House Bill No. 1260 (2005). The committee received testimony from representatives of a construction industry working group that was formed to address the issues presented in the study. Representatives of the American Council of Engineering Companies of North Dakota, the North Dakota Chapter of the American Institute of Architects, the North Dakota Association of Builders, the North Dakota Society of Professional Engineers, the Associated General Contractors of North Dakota, the National Electrical Contractors Association, and the North Dakota Plumbing, Heating, and Mechanical Contractors Association, as well as representatives of various state and local government agencies, participated in discussions throughout the interim to develop a proposal to present to the committee.

The committee considered a bill draft that would have revised numerous statutory provisions with respect to bidding and public improvement contracts. The bill draft would have repealed various statutory provisions relating to bidding and public improvement contracts and reorganized those provisions under a new chapter in the Century Code.

The committee also considered a bill draft that incorporated the revised statutory provisions relating to bidding and public improvement contracts and included provisions allowing state and local government governing bodies to use the construction management at-risk delivery method for the construction of public improvements. Proponents of the bill draft testified that the bill draft addressed many of the issues that have been areas of contention among the various construction industry groups for years. Although the members of the industry working group were not able to reach consensus on the design-build delivery method, representatives of the working group stated that great progress had been made during the interim and that the representatives of the various industry groups would attempt to continue to work together to address common concerns.

The committee recommended and the 2007 Legislative Assembly passed House Bill No. 1033 to revise statutory provisions relating to bidding and public improvement contracts and to allow state and local governments to use the construction management at-risk delivery method.

PROPOSED STUDY PLAN

The following is a proposed study plan for the committee's consideration:

1. Receive information from the Office of Management and Budget regarding infrastructure development and construction management procurement procedures.
2. Receive comments from other state entities regarding infrastructure development and construction management procurement procedures.
3. Receive comments from political subdivisions regarding infrastructure development and construction management procurement procedures.
4. Receive comments from industry representatives regarding infrastructure development and construction management procurement procedures.
5. Receive comments from interested persons regarding infrastructure development and construction management procurement procedures.
6. Develop recommendations and any bill drafts necessary to implement the recommendations.
7. Prepare a final report for submission to the Legislative Management.

ATTACH:1