

Senate File 2364

H-8202

1 Amend Senate File 2364, as amended, passed, and reprinted by
2 the Senate, as follows:

3 1. By striking everything after the enacting clause and
4 inserting:

5 <DIVISION I

6 PUBLIC CONSTRUCTION BIDDING DEFINITIONS

7 Section 1. Section 26.2, subsection 3, paragraph b,
8 subparagraph (5), Code 2020, is amended to read as follows:

9 (5) Construction or repair or maintenance work performed
10 for a city utility under chapter 388 when such work is
11 performed by its employees or when such work relates to
12 existing utility infrastructure or to establishing connections
13 to existing utility systems.

14 (6) Construction or repair or maintenance work performed
15 for a rural water district under chapter 357A by its employees.

16 DIVISION II

17 ALTERNATIVE PROJECT DELIVERY CONTRACTS

18 Sec. 2. NEW SECTION. 26.17 **Alternative project delivery**
19 **contracts.**

20 1. As used in this section, unless the context otherwise
21 requires:

22 a. "*Alternative project delivery contract*" means either a
23 design-build or construction manager-at-risk contract.

24 b. "*Bridging criteria professional*" means a person,
25 corporation, partnership, or other legal entity that is
26 employed by or contracted by a government entity to assist
27 the government entity in the development of project design
28 criteria, requests for proposals, and any additional services
29 requested by the government entity to represent its interests
30 in relation to a project and who meets either of the following
31 requirements:

32 (1) Is duly licensed to practice architecture within the
33 state and can demonstrate specific knowledge of the project
34 type where alternative project delivery services are being
35 sought.

1 (2) Is duly licensed as a professional engineer within the
2 state and can demonstrate specific knowledge of the project
3 type where alternative project delivery services are being
4 sought.

5 *c. "Construction manager-at-risk"* means a sole
6 proprietorship, partnership, corporation, or other legal entity
7 that acts as a consultant to the government entity in the
8 development and design phases and then assumes the risk for
9 the construction, rehabilitation, alteration, or repair of a
10 project at the contracted fixed or guaranteed maximum price,
11 similar to a general contractor during the construction phase.
12 A project using a construction manager-at-risk does not include
13 the construction, reconstruction, or improvement of a highway,
14 bridge, or culvert.

15 *d. "Design-build"* means a project delivery method subject to
16 a two or three-phase selection process for which the design and
17 construction services are furnished under one contract.

18 *e. "Design-build contract"* means a contract between
19 a government entity and a design-builder to furnish the
20 architecture of record, engineering of record, and related
21 services as required for a given public project, and to
22 furnish the labor, materials, and other construction services
23 for the same public project. A design-build contract may be
24 conditioned upon subsequent refinements in scope and price, and
25 may permit the government entity to make changes in the scope
26 of the project without invalidating the design-build contract.

27 *f. "Design-build project"* means the design, construction,
28 alteration, addition, remodeling, or improvement of any
29 buildings, infrastructure, or facilities under contract with a
30 government entity. *"Design-build project"* does not include a
31 project for the construction, reconstruction, or improvement of
32 a highway, bridge, or culvert.

33 *g. "Design-builder"* means any individual, partnership,
34 joint venture, or corporation subject to a best-value or
35 qualification-based selection that offers to provide or

1 provides design services and general contracting services
2 through a design-build contract in which services within
3 the scope of the practice of professional architecture or
4 engineering are performed respectively by a licensed architect
5 or licensed engineer and in which services within the scope of
6 general contracting are performed by a general contractor or
7 other legal entity that furnishes architecture or engineering
8 services and construction services either directly or through
9 subcontracts or joint ventures.

10 *h. "Design bridging criteria package"* means the
11 performance-oriented program, scope, design, and performance
12 specifications for the design-build project sufficient to
13 permit a design-builder to prepare a response to a government
14 entity's request for proposals for a design-build project.

15 *i. "Government entity"* means the same as *"governmental*
16 *entity"* defined in section 26.2 including, for the purpose of
17 this section, the state board of regents.

18 *j. "Proposal"* means an offer by a design-builder in response
19 to a request for proposals to enter into a design-build
20 contract.

21 *k. "Request for proposals"* means the document by which
22 a government entity solicits proposals for a design-build
23 contract.

24 *1. "Stipend"* means a payment to a design-builder who did not
25 score the highest number of points at the conclusion of phase
26 three of the best-value selection process to defray the cost of
27 participating in phase two of the selection process, and for
28 the use of any intellectual properties obtained.

29 *2.* Notwithstanding any other law to the contrary, a
30 government entity shall be authorized to enter into an
31 alternative project delivery contract.

32 *3.* Construction manager-at-risk contracts.

33 *a.* A government entity shall publicly disclose its intent to
34 use the construction manager-at-risk method and its selection
35 criteria at least one week prior to publishing the request

1 for proposals and request for statements of qualifications.
2 The government entity shall publish its request for proposals
3 and statements of qualifications. Before or concurrently
4 with selecting a construction manager-at-risk, the government
5 entity shall select or designate an engineer or architect
6 who shall prepare the construction documents for the project
7 and who shall comply with all state laws, as applicable. If
8 the engineer or architect is not a full-time employee of the
9 government entity, the government entity shall select the
10 engineer or architect on a basis of demonstrated competence and
11 qualifications. The government entity's engineer or architect
12 for a project may not serve, alone or in combination with
13 another, as the construction manager-at-risk. This paragraph
14 does not prohibit a government entity's engineer or architect
15 from providing customary construction-phase services under
16 the engineer's or architect's original professional service
17 agreement in accordance with applicable licensing laws.

18 *b.* The government entity may provide or contract for,
19 independently of the construction manager-at-risk, inspection
20 services, testing of construction materials, engineering, and
21 verification of testing services necessary for acceptance of
22 the project by the government entity.

23 *c.* The government entity shall select the construction
24 manager-at-risk in a two-phase process.

25 (1) Phase one. The government entity shall prepare a
26 request for statements of qualifications for the first phase.
27 The request shall include general information on the project
28 site, project scope, schedule, selection criteria, the time
29 and place for receipt of statements of qualifications, and
30 other information that may assist the government entity in its
31 selection of a construction manager-at-risk. The selection
32 criteria may include the construction manager-at-risk's
33 experience, past performance, safety record, proposed personnel
34 and methodology, and other appropriate factors that demonstrate
35 the capability of the construction manager-at-risk. The

1 government entity shall not request fees or prices in phase
2 one.

3 (2) Phase two. In phase two, the government entity
4 shall issue a request for proposals. The government entity
5 may request that no more than five nor fewer than two
6 construction managers-at-risk, selected solely on the basis
7 of qualifications, provide additional information, including
8 the construction manager-at-risk's project proposal, proposed
9 fee, its price for fulfilling the general conditions, and its
10 distribution plan for sharing any cost savings after completion
11 of said project. Qualifications shall account for a minimum
12 of forty percent of the evaluation. Cost shall account for a
13 maximum of sixty percent of the evaluation.

14 *d.* For each phase, the government entity shall receive,
15 publicly open, and read aloud the names of the construction
16 managers submitting proposals or statements of qualifications,
17 respectively. Within forty-five days after the date of opening
18 the proposals or statements of qualification submissions, the
19 government entity or its representative shall evaluate and rank
20 each proposal or statement of qualifications submission in
21 relation to the criteria set forth in the applicable request.

22 *e.* The government entity or its representative shall
23 select the construction manager-at-risk that submits the
24 proposal that offers the best value for the government entity
25 based on the published selection criteria and on its ranking
26 evaluation. The government entity or its representative
27 shall first attempt to negotiate a contract with the selected
28 construction manager-at-risk. If the government entity or its
29 representative is unable to negotiate a satisfactory contract
30 with the selected construction manager-at-risk, the government
31 entity or its representative shall, formally and in writing,
32 end negotiations with that construction manager-at-risk and
33 proceed to negotiate with the next construction manager-at-risk
34 in the order of the selection ranking until a contract
35 is reached or negotiations with all ranked construction

1 managers-at-risk end.

2 *f.* The selected construction manager-at-risk shall publicly
3 advertise and receive bids or proposals from trade contractors
4 or subcontractors for the performance of all major elements of
5 the work other than the minor work that may be included in the
6 general conditions. A construction manager-at-risk submits
7 its sealed bid or sealed proposal in the same manner as all
8 other trade contractors or subcontractors. All sealed bids
9 or proposals shall be submitted at the time and location as
10 specified in the advertisement for bids or proposals and shall
11 be publicly opened and the identity of each bidder and their
12 bid amount shall be read aloud.

13 *g.* The construction manager-at-risk and the government
14 entity or its representative shall review all trade contractor,
15 subcontractor, or construction manager-at-risk bids or
16 proposals in a manner that does not disclose the contents of
17 the bid or proposal during the selection process to a person
18 not employed by the construction manager-at-risk, engineer,
19 architect, or government entity involved with the project. If
20 the construction manager-at-risk submitted bids or proposals,
21 the government entity shall determine if the construction
22 manager-at-risk's bid or proposal offers the best value for the
23 government entity. After all proposals have been evaluated and
24 clarified, the award of all contracts shall be made public.

25 *h.* If the construction manager-at-risk reviews, evaluates,
26 and recommends to the government entity a bid or proposal from
27 a trade contractor or subcontractor but the government entity
28 requires another bid or proposal to be accepted, the government
29 entity shall compensate the construction manager-at-risk by
30 a change in price, time, or guaranteed maximum cost for any
31 additional cost and risk that the construction manager-at-risk
32 may incur because of the government entity's requirement that
33 another bid or proposal be accepted.

34 *i.* If a selected trade contractor materially defaults in the
35 performance of its work or fails to execute a contract with a

1 construction manager-at-risk after being selected in accordance
2 with this subsection, the construction manager-at-risk may
3 itself, without advertising, fulfill the contract requirements
4 or select a replacement trade contractor to fulfill the
5 contract requirements.

6 4. In soliciting proposals for a design-build contract,
7 a government entity shall determine the scope and level of
8 detail required to permit design-builders to submit proposals
9 in accordance with the request for proposals given the nature
10 of the project.

11 5. *a.* A bridging criteria professional may be retained by
12 the government entity as the government entity's representative
13 to advise the government entity on design-build matters. The
14 use of the bridging criteria professional shall be strictly
15 to guide and administer the government's needs through the
16 process. The bridging criteria professional shall have
17 demonstrated sufficient previous experience in rules and
18 procedures specific to the design-build process. The bridging
19 criteria professional shall, along with the government
20 entity, be authorized to make recommendations or influence
21 the acceptance of any material, process, or procedure used
22 during the design and construction processes in accordance
23 with the criteria established for the project for the purpose
24 of evaluating compliance of the work. The bridging criteria
25 professional may be employed or contracted by the government
26 entity to act on behalf of the government entity for the sole
27 purpose of administrative procedures and may not be connected
28 in any means to the design-build team. The duration of
29 bridging criteria professional services, prior to the issuance
30 of a design-build contract, may begin when establishing
31 the government entity's program requirements through design
32 development if the complexity of the project with the
33 governmental entity merits this level of bridging information.

34 *b.* The design bridging criteria package developed by the
35 bridging criteria professional, which may include preliminary

1 designs for the project, may extend to the design development
2 level of detail, including design expectations, capacity,
3 durability, standards, ingress and egress requirements,
4 international building code considerations, performance
5 requirements, the government entity's operational expectations,
6 requirements for interior and exterior spaces, material and
7 building system quality standards, and design and construction
8 schedule timelines. Longevity of materials and system
9 performance requirements shall be identified in the design
10 bridging criteria package to identify materials and systems
11 that have the potential to exceed the length of time the
12 project is funded. The design bridging criteria package may
13 include site development requirements, description of the
14 site, surveys, soil and environmental information concerning
15 the site, provisions for utilities, storm water retention
16 and disposal, parking requirements, requirements related
17 to applicable local laws, local permitting requirements,
18 preliminary designs for the project or portions thereof, and
19 other criteria for the intended use of the project.

20 6. A government entity shall publicly disclose its intent to
21 solicit proposals for a design-build contract and its project
22 design bridging criteria package in the same manner that it
23 would post notice for the competitive bidding process in
24 section 26.3.

25 7. In soliciting proposals for a design-build contract, a
26 government entity shall establish in the request for proposals
27 a time, place, and other specific instructions for the receipt
28 of proposals. Proposals not submitted in strict accordance
29 with the instructions may be subject to rejection. Minor
30 irregularities may be waived by the government entity.

31 8. A request for proposals shall be prepared for each
32 design-build contract and shall contain, at minimum, the
33 following elements:

34 a. The procedures to be followed for submitting proposals,
35 the criteria for evaluating proposals and their relative

1 weight, and the procedure for making awards.

2 *b.* The proposed terms and conditions for the design-build
3 contract, if available.

4 *c.* The design bridging criteria package.

5 *d.* A description of the drawings, specifications, or other
6 information to be submitted with the proposal, with guidance
7 as to the form and level of completeness of the drawings,
8 specifications, or other information that will be acceptable.

9 *e.* A schedule for planned commencement and completion of the
10 design-build contract, if available.

11 *f.* Budget limits for the design-build contract, if any.

12 *g.* Requirements including any available ratings for
13 performance bonds, payment bonds, and insurance, if any.

14 *h.* If using a three-phase, best-value selection process, the
15 amount of the stipend that will be available.

16 *i.* Any other information that the government entity in
17 its discretion chooses to request including but not limited
18 to surveys, soil reports, drawings of existing structures,
19 environmental studies, photographs, references to public
20 records, or affirmative action and minority business enterprise
21 requirements consistent with state and federal law.

22 9. A government entity seeking to enter a design-build
23 contract shall solicit design-build proposals either by
24 using a three-phase, best-value process or a two-phase,
25 qualifications-based process.

26 *a.* When solicitations require a three-phase, best-value
27 selection process, the process shall be conducted as follows:

28 (1) Phase one. Request for statements of qualifications of
29 design-builders.

30 (a) The government entity shall review submitted statements
31 of the qualifications and assign points to each in accordance
32 with this section and as set out in the instructions of the
33 request for qualifications.

34 (b) All design-builders shall submit a statement of
35 qualifications that shall include but not be limited to:

1 (i) Demonstrated ability to perform projects comparable in
2 design, scope, and complexity.

3 (ii) References of owners for whom design-build projects,
4 construction projects, or design projects have been performed.

5 (iii) Qualifications of personnel who will manage the
6 design and construction aspects of the project.

7 (iv) The names and qualifications of the primary design
8 consultants and the primary trade contractors with whom the
9 design-builder proposes to subcontract or joint venture. The
10 design-builder may not replace an identified contractor,
11 subcontractor, design consultant, or subconsultant without the
12 written approval of the government entity.

13 (c) The government entity shall evaluate the qualifications
14 of all the design-builders who submitted statements of
15 qualifications in accordance with the instructions of the
16 request for qualifications. Qualified design-builders
17 selected by the government entity may proceed to phase two
18 of the selection process. The evaluation shall narrow the
19 number of qualified design-builders submitting statements of
20 qualifications to not fewer than two nor more than five. Under
21 no circumstances shall price or fees be a part of the request
22 for statements of qualifications criteria. Design-builders may
23 be interviewed in either phase one or phase two of the process.
24 Points assigned in phase one of the evaluation process shall
25 not carry forward to phase two or phase three of the process.
26 All qualified design-builders shall be ranked on points given
27 in phases two and three only.

28 (d) Once no fewer than two and no more than five qualified
29 design-builders have been selected, the government entity shall
30 issue its request for proposals and provide the design-builders
31 a specified amount of time in which to concurrently assemble
32 phase two and phase three proposals.

33 (2) Phase two. Solicitation of technical proposals,
34 including conceptual design for the project.

35 (a) A design-builder shall submit its design for the project

1 to the level of detail required for the proposal along with
2 such other information the government entity requests, which
3 may include a schedule, qualifications, and experience.

4 (b) The ability of the design-builder to meet the schedule
5 for completing a project as specified by the government entity
6 may be considered as an element of evaluation in phase two.

7 (c) Under no circumstances shall the design proposal
8 contain any reference to the cost of the proposal.

9 (d) The submitted designs shall be evaluated and assigned
10 points in accordance with the requirements of the request for
11 proposals. Phase two shall account for not less than forty
12 percent and no more than sixty percent of the total point score
13 as specified in the request for proposals.

14 (3) Phase three. Proposal of construction costs.

15 (a) The government entity shall invite the selected
16 design-builders to participate in phase three. The
17 design-builders shall provide a fixed cost of design and
18 construction. The proposal shall be accompanied by bid
19 security and any other items, such as statements of minority
20 participation, as required by the request for proposals.

21 (b) Cost proposals shall be submitted in accordance with
22 the instructions in the request for proposals. The government
23 entity shall reject any proposal that is not submitted within
24 the required time frame. Phase three shall account for not
25 less than forty percent and no more than sixty percent of the
26 total point score as specified in the request for proposals.

27 (c) Proposals for phase two and phase three shall be
28 submitted concurrently at the time and place specified in the
29 request for proposals, but in separate envelopes or other means
30 of submission. The phase three cost proposals shall be opened
31 and read aloud only after phase two design proposals have been
32 evaluated and assigned points, ranked in order, and posted.
33 Cost proposals shall be opened and read aloud at the time and
34 place specified in the request for proposals. At the same time
35 and place, the evaluation team shall make public its scoring

1 of phase two. Cost proposals shall be evaluated in accordance
2 with the requirements of the request for proposals.

3 (d) If the government entity determines that it is not in
4 the best interest of the government entity to proceed with the
5 project pursuant to the proposal offered by the design-builder
6 with the highest total number of points, the government entity
7 shall reject all proposals. In this event, all design-builders
8 with lower point totals in phases two and three shall receive
9 a stipend and the responsive design-builder with the highest
10 point total shall receive an amount equal to two times the
11 stipend. If the government entity decides to award the
12 project, the responsive design-builder with the highest point
13 total shall be awarded the contract.

14 (e) As an inducement to qualified design-builders, the
15 government entity shall pay a stipend, the amount of which
16 shall be established in the request for proposals, to each
17 design-builder who submitted a proposal but was not accepted.
18 Such stipend shall be no less than one-half of one percent
19 of the total project budget. Upon payment of the stipend to
20 such a design-builder, the government entity shall acquire
21 a nonexclusive right to use the design submitted by the
22 design-builder, and the design-builder shall have no further
23 liability for the use of the design by the government entity in
24 any manner. If the design-builder desires to retain all rights
25 and interests in the design proposed, the design-builder shall
26 forfeit the stipend.

27 *b.* When solicitations require a two-phase,
28 qualifications-based selection process, the process shall be
29 conducted as follows:

30 (1) Phase one. Request for statements of qualifications of
31 design-builders.

32 (a) The government entity must prepare a request for
33 statements of qualifications. The request shall include
34 general information on the project site, project scope,
35 schedule, selection criteria, the time and place for receipt

1 of statements of qualifications, and other information
2 that may assist the government entity in its selection of a
3 design-builder.

4 (b) The government entity shall state the selection
5 criteria in the request for statements of qualifications. The
6 selection criteria may include the design-builder's experience,
7 past performance, safety record, proposed personnel and
8 methodology, and other appropriate factors that demonstrate the
9 capability of the design-builder.

10 (c) Selection criteria will be ranked and assigned points
11 for each category. Point assignments shall be included as a
12 part of the request for statements of qualifications.

13 (d) The government entity shall not request fees or prices
14 in phase one. Any submissions with disclosed fees or prices
15 will be disqualified and removed from consideration.

16 (2) Phase two. Negotiations.

17 (a) Negotiations shall be conducted, beginning with the
18 design-builder ranked first. If a contract satisfactory
19 and advantageous to the government entity can be negotiated
20 at a price considered fair and reasonable and pursuant to
21 contractual terms and conditions acceptable to the government
22 entity, the award shall be made to that design-builder.

23 (b) In the event that a contract cannot be negotiated
24 with the design-builder ranked first, negotiations with that
25 design-builder shall be formally terminated. The government
26 entity shall conduct negotiations with the next-highest-ranked
27 design-builder and continue this process until a contract can
28 be negotiated that meets the terms of subparagraph division (a)
29 of this subparagraph.

30 Sec. 3. Section 262.34, subsection 1, Code 2020, is amended
31 to read as follows:

32 1. a. When the estimated cost of construction, repairs,
33 or improvement of buildings or grounds under charge of the
34 state board of regents, including construction, renovation, or
35 repairs by a private party of a property to be lease-purchased

1 by the board, exceeds one hundred thousand dollars, the board
2 shall advertise for bids for the contemplated improvement or
3 construction and shall let the work to the lowest responsible
4 bidder. However, if in the judgment of the board bids received
5 are not acceptable, the board may reject all bids and proceed
6 with the construction, repair, or improvement by a method as
7 the board may determine. All plans and specifications for
8 repairs or construction, together with bids on the plans or
9 specifications, shall be filed by the board and be open for
10 public inspection. All bids submitted under **this section** shall
11 be accompanied by a deposit of money, a certified check, or a
12 credit union certified share draft in an amount as the board
13 may prescribe.

14 b. The state board of regents may proceed with a
15 construction, repair, or improvement by using an alternative
16 project delivery contract in accordance with the provisions of
17 section 26.17.>

18 2. Title page, by striking lines 1 through 5 and inserting
19 <An Act relating to public construction bidding.>

HUNTER of Polk