WEST VIRGINIA CODE CHAPTER 5 ARTICLE 22B

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§5-22B-1. Short title; applicability of article.

This act shall be known as the Government Construction Management At-Risk Contracts Act. The provisions of this article may be used to select construction managers at-risk for authorized public construction projects as set forth in this article. Notwithstanding the provisions of §5-22-1 *et seq*. and §5-22A-1 *et seq*. of this code, construction management at-risk contracts shall be awarded pursuant to the provisions of this article: *Provided*, That a construction management at-risk contract shall not be authorized for a construction project of less than $20 million in estimated total cost.

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§5-22B-2. Definitions.

The following terms shall have the following meaning:

"Best value" means a selection process in which proposals contain both pricing and performance components, an award is based upon a combination of pricing and performance considerations to determine the offer deemed most advantageous and of the greatest value to the state spending authority.

"Construction fee" means a combination of home office overhead and profit for services provided during the construction phase of the project, as defined in the contract documents.

"Construction management at-risk contract" means a contract by which a construction manager:

(1) Assumes the legal responsibility to deliver a construction project within a contracted price;

(2) Acts as a construction consultant to the state and/or its subdivision during the design development phase of the project when the state and/or its subdivisions architect or engineer designs the project; and

(3) Is the builder during the construction phase of the project;

"Construction manager" means the legal entity that proposes to enter into a construction management at-risk contract pursuant to this article;

"General conditions" means materials, services, and equipment necessary to perform the work but that are not incorporated into the project as defined in the contract documents;

"Letter of interest" means a statement indicating interest to enter into a construction management at-risk contract for a public project pursuant to this article;

"Lowest qualified responsible bidder" shall have the same meaning as that term is used in §5-22-1(b) of this code;

"Preconstruction fee" means a combination of home office overhead and profit for services provided during the preconstruction phase of the project, as defined in the contract documents;

"Proposal" means an offer in response to a request for proposals by a construction manager to enter into a construction management at-risk contract for a project pursuant to the provisions of this article;

"Request for qualifications" means the documentation or publication by which a state and/or its subdivisions solicits letters of interest detailing a firm's qualifications for a specific

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project;

"Request for proposals" means the documentation by which a state and/or its subdivisions solicits proposals;

"The state and/or its subdivisions" means the state of West Virginia, every political subdivision thereof, every administrative entity that includes such a subdivision, all municipalities, and all county boards of education.

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§5-22B-3. Authorization of construction management at-risk contracts for public construction projects.

(a) Notwithstanding any other provision of this code to the contrary, the state and/or its subdivisions who comply with the provisions of this article may solicit and execute a construction management at-risk contract.

(b) The execution of a construction management at-risk contract between the state and/or its subdivisions and a construction manager is optional. The use of a construction management at-risk contract is at the discretion of the state and/or its subdivisions. If the state and/or its subdivisions opt not to execute a construction management at-risk contract the provisions of §5-22-1 *et seq*. of this code shall apply to the selection and management of the bidding process of the project.

(c) Prior to entering into a construction management at-risk contract, the state and/or its subdivisions shall adopt policies for utilization of a construction management at-risk contract. The policies shall require that such contracts include, at a minimum, the following:

(1) Procedures for the preparation and content of requests for qualifications and requests for proposals;

(2) Procedures for preparing and submitting proposals;

(3) Procedures for evaluating proposals in accordance with §5-22B-12 of this code;

(4) Procedures for negotiations between the state and/or its subdivisions and the construction managers submitting proposals prior to the acceptance of a proposal if any such negotiations are contemplated; and

(5) Procedures for filing and acting on formal protests relating to the solicitation or execution of construction management at-risk contracts.

(d) The state and/or its subdivisions may require supplemental conditions to a construction management at-risk agreement and any modifications to the agreement will be communicated to all parties prior to the execution of the contract.

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§5-22B-4. Construction management at-risk contract required procedures.

(a) The state and/or its subdivisions shall utilize a two-step process for every construction manager at-risk project. The first phase shall be the qualifications phase and the second shall be a request for proposal phase. For each construction manager at-risk project, it shall be the responsibility of the state and/or its subdivisions to:

(1) Identify the qualifications criteria required for the project in accordance with subsection (b) of this section and determine how the qualifications criteria shall be evaluated in the qualifications phase of the selection;

(2) Identify if there are any minimum or mandatory technical requirements for the project; and

(3) Establish a process for maintaining records of decisions made at all stages of the selection process.

(b) Prior to the announcement of the qualifications phase, the state and/or its subdivisions shall establish criteria for the evaluation of a firm's qualifications subject to the provisions of §5-22B-12 of this code. The state and/or its subdivisions shall include the following as part of its qualifications criteria:

(1) Competence to perform the required management services as indicated by the technical training, education, and experience of the construction manager at-risk's personnel, especially the technical training, education, and experience of the construction manager at-risk's employees who would be assigned to perform the services;

(2) Ability in terms of workload and the availability of qualified personnel, equipment, and facilities to perform the required management services competently and expeditiously, and experience working on similar types of projects;

(3) Past performance as reflected by the evaluation of previous clients with respect to factors such as control of costs, quality of work, dispute resolution, administration of subcontractors, and meeting of deadlines;

(4) Financial responsibility including evidence of the capability to provide a surety letter; and

(5) Other qualifications that are consistent with the scope and needs of the project including, but not limited to, knowledge of the local area and working relationships with local subcontractors and suppliers.

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§5-22B-5. Evaluation committee.

(a) The state and/or its subdivisions shall convene an evaluation committee. The composition of the committee is at the discretion of the state and/or its subdivisions; however, the composition of the committee shall not consist of enough members of a public body to constitute a quorum. The state and/or its subdivisions may permit the project's architectural or professional design firm if selected, or other independent advisors to support the evaluation committee or advise it on technical and pricing issues. The architectural or professional design firm or independent advisors shall not participate as a voting member of the committee.

(b) Membership on the evaluation committee may include, but is not required to include:

(1) Procurement officer: Who is responsible for the procurement and ensuring compliance with relevant laws and policies;

(2) Technical and administrative personnel: Members with technical and administrative expertise;

(3) User department staff: Members from the department that will use the product or service;

(4) Specialists: Members with expertise in specific areas, such as finance, database design, or business; and

(5) Other knowledgeable people: Individuals from the organization who can bring special expertise to the process.

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§5-22B-6. Request for qualifications phase.

(a) Following the determination of qualifications and establishment of the evaluation team, the state and/or its subdivisions shall prepare a request for qualifications for construction manager at-risk contract proposals in accordance with the provisions of this article. The request for qualifications shall describe the project in sufficient detail to permit a construction manager to submit a letter of interest detailing their qualifications.

(b) The request for qualifications shall be:

(1) Published as a Class II legal advertisement in compliance with the provisions of §59-3-1 et seq. of this code for at least 30 days prior to the deadline for receiving letters of interest; and

(2) Sent by first-class mail to any construction manager upon request.

(c) The state and/or its subdivisions shall answer any questions from interested firms in writing and make all questions and answers available to all interested firms.

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§5-22B-7. Prequalified firms.

(a) When the state and/or its subdivisions receive responses to the request for qualifications, the evaluation committee shall evaluate the responses based on the information submitted to the state and/or its subdivisions in response to a request for qualifications and select no fewer than three firms that it considers most qualified to provide the required services: *Provided*, That the evaluation committee shall select fewer than three firms when it determines in writing that fewer than three qualified construction managers at risk are available. The firms selected in the qualifications phase shall be referred to as the "prequalified firms" in the request for proposal phase.

(b) Prior to the submission of proposals, the state and/or its subdivisions may meet individually with each prequalified listed firm to permit them to clarify any ambiguities in the qualifications of the prequalified firm and allow the prequalified firm to ask questions regarding the proposal requirements.

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§5-22B-8. Request for proposal phase.

(a) The second phase shall be the request for proposals. Following the selection of prequalified firms, the state and/or its subdivisions shall prepare a request for proposal for construction manager at-risk contract proposals. The request for proposal shall consist of two portions.

(1) Pricing criteria: As part of its preparation for the pricing component of the request for proposal phase, the state and/or its subdivisions shall establish pricing criteria which shall contain the following components:

(A) Preconstruction fee;

(B) Construction fee; and

(C) General conditions.

(2) Performance criteria: As part of its preparation for the technical component of the proposal phase, the state and/or its subdivisions shall establish performance criteria which may include an evaluation of a firm's proposed:

(A) Schedule;

(B) Approach to the work, including any anticipated self-performed work;

(C) Work sequencing;

(D) Performance history;

(E) Approaches to performance specifications when used;

(F) Plan for anticipated procurement difficulties;

(G) Plan for additional considerations which may include technical design, technical approach, quality of proposed personnel, and management plan.

(b) Once the evaluation committee has selected the prequalified firms, the state and/or its subdivisions shall prepare a request for proposals for each construction management at-risk contract in accordance with the provisions of this article. At least 30 days prior to the deadline for receiving and opening proposals, notice of the request shall be published as a Class II legal advertisement in compliance with the provisions of §59-3-1 *et seq*. of this code; and sent by first-class mail to any construction manager upon request.

(c) The request for proposals shall contain, at a minimum, the following elements:

(1) The identity of the state and/or its subdivision for which the project will be built and the name of the state agency or subdivision that will execute the contract;

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(2) The proposed terms and conditions of the construction manager at-risk contract, including any terms and conditions that are subject to further negotiation. The proposed general terms and conditions shall be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in West Virginia. The proposed terms and conditions may set forth an initial determination of the manner by which the construction manager selects any subcontractor;

(3) Any bonds and insurance required by law or as may be additionally required by the state and/or its subdivisions;

(4) General information about the project which will assist the state and/or its subdivisions in its selection of the construction manager, including a project statement that contains information about the scope and nature of the project, the project site, and the project schedule;

(5) The criteria for evaluation of proposals;

(6) Estimated construction budget; and

(7) A description of any other information the state and/or its subdivisions may require.

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§5-22B-9. Proposal format.

A proposal submitted by a firm in response to a request for proposal as set out in this article shall be submitted in the following format:

(1) Signed cover page;

(2) Offeror profile;

(3) Staffing plan and key personnel;

(4) Similar project examples from prior 10 years;

(5) Conflict of interest statement;

(6) Proof of insurance;

(7) Cost summary which shall include reconstruction costs, construction fees, and general conditions;

(8) Additional attachments from the request for proposal that require input from offeror (if any);

(9) Surety letter demonstrating the bond capacity of the construction manager; and

(10) West Virginia contractor license.

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§5-22B-10. Determination of best value.

(a) The evaluation committee shall interview each prequalified firm that submits a proposal. The purpose of the interview is to allow each prequalified firm an opportunity to clarify and respond to questions related to its proposal. The state and/or its subdivisions may provide a list of questions to the short-listed firms in advance of each interview. The interview will not be scored or included in the scoring of the proposal. Should a state and/or its subdivisions find any major discrepancy or irregularity in the proposal, the state and/or its subdivisions shall notify the affected firm in writing to address the concern at the interview and require the firm to provide its response in writing no later than the date of the interview. This interview may be done in person or electronically.

(b) The evaluation committee shall evaluate each proposal utilizing the criteria established by the state and/or its subdivisions and as set out in this article.

(c) The committee shall rank the prequalified firms based on the final evaluation of each proposal to determine the best value.

(d) The state and/or its subdivisions shall announce the firm determined to be the best value and shall enter into negotiations for a construction management contract.

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§5-22B-11. Evaluation of proposals; selection of construction managers.

(a) The state and/or its subdivisions shall evaluate proposals for a construction management at-risk contract in accordance with the provisions of this article.

(b) The state and/or its subdivisions shall evaluate and rank each proposal on the basis of best meeting the criteria in the request for proposals and taking into consideration the recommendation of the evaluation committee pursuant to the provisions of this article.

(c) The state and/or its subdivisions shall attempt to negotiate a construction management at-risk contract with the highest ranked construction manager and may execute a construction management at-risk contract after negotiations. The negotiations shall include a final determination of the manner by which the construction manager selects each subcontractor. If the state and/or its subdivisions are unable to negotiate a satisfactory contract with the highest ranked construction manager, the state and/or its subdivisions may terminate negotiations with that construction manager. Only after negotiations have been terminated with the highest ranked construction manager may the state and/or its subdivisions undertake negotiations with the second highest ranked construction manager and may execute a construction management at-risk contract after negotiations. Only after negotiations have been terminated with the second highest ranked construction manager may the state and/or its subdivisions undertake negotiations with the third highest ranked construction manager, if any, and may execute a construction management at-risk contract after negotiations.

(d) If the state and/or its subdivisions are unable to negotiate a satisfactory contract with any of the prequalified and ranked construction managers, the state and/or its subdivisions may either revise the request for proposals and solicit new proposals or cancel the construction management at-risk process.

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§5-22B-12. Criteria for evaluation.

(a) The evaluation committee shall evaluate proposals taking into consideration the criteria set out in this section with the maximum percentage of total points for evaluation which may be assigned to each criterion as set forth in this section. The following criteria shall be evaluated, when applicable:

(1) The financial resources of the construction manager to complete the project, 10 percent;

(2) The ability of the proposed personnel of the construction manager to perform, 20 percent;

(3) The character, integrity, reputation, judgment, experience, and efficiency of the construction manager, 20 percent;

(4) The quality of performance on previous projects, 20 percent;

(5) The ability of the construction manager to perform within the time specified, 10 percent;

(6) The previous and existing compliance of the construction manager with laws relating to the contract, 10 percent; and

(7) Such other information as may be secured having a bearing on the selection, 10 percent.

(b) The records of the evaluation committee in evaluating proposals and making recommendations shall be considered public records for purposes of §29B-1-1 *et seq*. of this code.

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§5-22B-13. Amendments to construction management at-risk contract after acceptance.

A construction management at-risk contract may be conditioned upon later refinements in scope and price and may permit the state and/or its subdivisions in agreement with the construction manager to make changes in the project without invalidating the contract. Later refinements to a contract pursuant to the provisions of this section shall not exceed the scope of the project statement contained in the request for proposals.

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§5-22B-14. Public records.

(a) Records that are maintained by the state and/or its subdivisions during the qualifications phase and proposal phase are public, to the extent permitted by §29B-1-1 *et seq*. of this code, and shall be available for inspection only after the announcement of the state and/or its subdivisions set forth in §5-22B-10(d) of this code.

(b) Nothing in this article affects a state and/or its subdivisions' right to accept or reject any or all proposals in whole or in part.

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§5-22B-15. No effect on bonding and insurance requirements.

Nothing contained within the provisions of this article shall be construed to limit or reduce existing statutory or regulatory requirements regarding bonding or insurance.

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§5-22B-16. Specialty maintenance projects.

(a) The state and/or its subdivisions shall not use a construction management at-risk contract for a construction project with locations on parcels of land which are not contiguous except for specialty maintenance projects.

(b) For purposes of this section:

(1) A specialty maintenance project is a construction project for the maintenance of an existing facility with a specialty contractor, including, but not limited to, an electrical contractor or plumbing contractor; and

(2) Parcels are considered contiguous if they would be contiguous but for the existence of a public road.

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§5-22B-17. Rulemaking.

The Division of Purchasing shall propose rules for legislative approval in accordance with the procedures of §29A-3-1 *et seq*. of this code to develop standardized forms for use in construction management at-risk contracting. These forms shall include:

(1) An offeror required information form;

(2) A signed contract form; and

(3) A conflict of interest statement form.

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§5-22B-18. Reporting.

The Division of Purchasing shall report to the Joint Committee on Government and Finance by December 31, 2025, and annually thereafter until the provisions of this article have no further force or effect on the usage of the provisions of this article including, but not limited to:

(1) The number of contracts processed as a construction manager at-risk contract during that year;

(2) The number of contracts that could have been processed as a construction manager at-risk contract but were processed instead pursuant to the provisions of §5-22-1 *et seq*. of this code;

(3) A list of state entities or subdivisions of the state that have awarded contracts pursuant to the provisions of this article;

(4) Any suggested changes to this article to make the process of construction manager at-risk contracts more useful and effective; and

(5) Any other information that the Division of Purchasing finds informative and probative.

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§5-22B-19. Sunset date.

This article shall have no further force or effect and no construction manager at risk contract shall be authorized on or after July 1, 2030, unless further reenacted by the Legislature.

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