STATE OF OKLAHOMA

1st Session of the 53rd Legislature (2011)

SUBCOMMITTEE RECOMMENDATION
FOR ENGROSSED
SENATE BILL NO. 185 By: Coates of the Senate

and

Liebmann of the House

SUBCOMMITTEE RECOMMENDATION

[Public Building Construction and Planning Act - authorizing use of best-value competitive proposals – project management - codification - effective date]

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 61 O.S. 2001, Section 202, as last amended by Section 27, Chapter 271, O.S.L. 2006 (61 O.S. Supp. 2010, Section 202), is amended to read as follows:

Section 202. As used in the Public Building Construction and Planning Act:

1. "Administrator" means the State Construction Administrator of the Construction and Properties Division of the Department of Central Services;

2. "Best value" means an optional contract award system which can evaluate and rank competitive performance proposals submitted by offerors to identify the proposal with the greatest value to the government;

3. "Construction" means the process of planning, acquiring, designing, building, equipping, altering, repairing, improving, maintaining, or demolishing any structure or appurtenance thereto including facilities, utilities, or other improvements to any real property but not including highways, bridges, airports, railroads, tunnels, sewers not related to a structure or appurtenance thereto, or dams;

~~3.~~ 4. "Construction administration" means a series of actions required of the State Construction Administrator, of other state agency employees, or, under a construction administration contract or contract provision, to ensure the full, timely, and proper performance of all phases of a construction project by all contractors, suppliers, and other persons having responsibility for project work and any guarantees or warranties pertaining thereto;

~~4.~~ 5. "Construction management" means a project delivery method based on an agreement whereby the owner acquires from a construction entity a series of services that include, but are not necessarily

limited to, design review, scheduling, cost control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration; "construction management" includes:

a. "agency construction management" whereby the construction entity provides services to the owner without taking on financial risks for the execution of the actual construction, and

b. "at-risk construction management" whereby the construction entity, after providing agency services during the ~~pre-construction~~ preconstruction period, takes on the financial obligation to carry out construction under a specified cost agreement;

~~5.~~ 6. "Consultant" means an individual or legal entity possessing the qualifications to provide licensed architectural, registered engineering, or registered land surveying services or possessing specialized credentials and qualifications as may be needed to plan or design for any construction or public work improvement project;

~~6.~~ 7. "Design-build" means a project delivery method whereby this state acquires both design and construction services in the same contract from a single legal entity, referred to as the design-builder, without the bid component of the traditional design-bid-build process;

~~7.~~ 8. "Department" means the Department of Central Services;

~~8.~~ 9. "Director" means the Director of the Department of Central Services;

~~9.~~ 10. "Division" means the Construction and Properties Division of the Department of Central Services;

~~10.~~ 11. "Energy performance index or indices" (EPI) means a number describing the energy requirements at the building boundary of a structure, per square foot of floor space or per cubic foot of occupied volume, as appropriate under defined internal and external ambient conditions over an entire seasonal cycle. As experience develops on the energy performance achieved with state construction, the indices (EPI) will serve as a measure of structure performance with respect to energy consumption;

~~11.~~ 12. "Life-cycle costs" means the cost of owning, operating, and maintaining the structure over the life of the structure. This may be expressed as an annual cost for each year of the facility's use;

~~12.~~ 13. "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring or disposing of supplies, services, or construction;

~~13.~~ 14. "Public improvement" means any beneficial or valuable change or addition, betterment, enhancement or amelioration of or upon any real property, or interest therein, belonging to a public agency, intended to enhance its value, beauty or utility or to adapt

it to new or further purposes. The term does not include the direct purchase of materials, provided that the materials are not purchased in increments for an amount of less than Twenty-five Thousand Dollars ($25,000.00) and used for the purposes of completing a single project, equipment or supplies by a public agency, or any personal property as defined in paragraphs 1 and 4 of subsection B of Section 430.1 of Title 62 of the Oklahoma Statutes;

~~14.~~ 15. "Shared savings financing" means the financing of energy conservation measures and maintenance services through a private firm which may own any purchased equipment for the duration of a contract. Such contract shall specify that the private firm will be recompensed either out of a negotiated portion of the savings resulting from the conservation measures and maintenance services provided by the private firm or, in the case of a cogeneration project, through the payment of a rate for energy lower than would otherwise have been paid for the same energy from current sources; and

~~15.~~ 16. "State agency" means an agency, board, commission, counsel, court, office, officer, bureau, institution, unit, division, body, or house of the executive or judicial branches of government of this state, whether elected or appointed, excluding only political subdivisions.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 202.2 of Title 61, unless there is created a duplication in numbering, reads as follows:

A. The Construction and Properties Division of the Department of Central Services may award contracts using Best Value Competitive Proposals.

B. The Department of Central Services shall, pursuant to the Administrative Procedures Act, promulgate rules to effect procedures as necessary for the fulfillment of its responsibilities under this section.

SECTION 3. AMENDATORY 61 O.S. 2001, Section 202.1, as last amended by Section 28, Chapter 271, O.S.L. 2006 (61 O.S. Supp. 2010, Section 202.1), is amended to read as follows:

Section 202.1 A. The design-build and construction management project delivery methods shall not be used without the written approval of the Director of Central Services, or the Director's designee, when those projects are constructed for a state agency or by an act of the Legislature specifying design-build or at-risk construction management for a project. In all instances where the design-build project or at-risk construction management delivery method is authorized, construction administration shall be performed by the State Construction Administrator, the Administrator's designee or designees, or otherwise by contract or contract

provision approved by the Director of Central Services for construction administration by another party.

B. ~~Municipalities, counties, public trusts, or any other political subdivision in this state shall not be required to get approval of any other state agency in order to use design-build construction management or at risk construction management as a construction management delivery method. However, municipalities, counties, public trusts, and any other political subdivision shall be subject to all other provisions of the Public Building Construction and Planning Act.~~

~~C.~~ The design-build and construction management project delivery methods shall not be used for any project unless the project meets the criteria established by the administrative rules promulgated as required by this act. Such methods shall not be used unless there is a need for compressed construction time as required to respond to a natural disaster or other emergency situation affecting public health and safety, or all of the following criteria for designation are met:

1. The project benefits the public;

2. There is a need for cost control; and

3. The need exists for specialized or complex construction methods due to the unique nature of the project.

~~D.~~ C. The use of design-build and construction management project delivery methods shall not interfere or inhibit the

opportunity for subcontractors to openly and freely compete for subcontracts ~~pursuant to the Public Competitive Bidding Act of 1974~~.

~~E.~~ D. The provisions of ~~subsections~~ subsection A ~~and B~~ of this section shall not apply to projects by contract pursuant to an interagency agreement under Section 581 of Title 74 of the Oklahoma Statutes or to projects a state agency performs solely with the staff of the agency.

~~F. The State Construction Administrator shall file an annual report to the legislature summarizing cost information for each construction management project completed the preceding year.~~

~~G.~~ E. The Department of Central Services shall, pursuant to the Administrative Procedures Act, promulgate rules to effect procedures, processes and design-build/construction management fee guidelines necessary to the fulfillment of its responsibilities under this section.

~~H.~~ F. As used in the Public Building Construction and Planning Act, public trusts shall not include state beneficiary public trusts.

SECTION 4. AMENDATORY 61 O.S. 2001, Section 208.1, as last amended by Section 3, Chapter 277, O.S.L. 2003 (61 O.S. Supp. 2010, Section 208.1), is amended to read as follows:

Section 208.1 The Construction and Properties Division of the Department of Central Services may collect a reasonable fee for the purpose of providing or contracting for architectural, engineering,

and land surveying services to state agencies and from persons requesting plans and notification of solicitations issued by the Division. The Division may collect a reasonable fee for contract management ~~for a construction project~~ services. All fees collected in accordance with the provisions of this section shall be deposited in the "State Construction Revolving Fund" created in Section 208.2 of this title.

SECTION 5. AMENDATORY Section 1, Chapter 418, O.S.L. 2008 (61 O.S. Supp. 2010, Section 213), is amended to read as follows:

Section 213. A. The purpose of this section is to promote effective energy and environmental standards for the construction, renovation, and maintenance of public buildings in this state which will improve the capacity of the state to design, build, and operate high-performance buildings thus creating new jobs, contributing to economic growth, and increasing energy independence. To accomplish the objectives of this section, the state shall adopt construction standards for public buildings that:

1. Optimize the energy performance of public buildings in the state;

2. Increase the demand for environmentally preferable building materials, finishes, and furnishings;

3. Reduce the dependence of the state on imported sources of energy through buildings that conserve energy and utilize local and renewable energy sources;

4. Protect and restore the natural resources of the state by avoiding development of inappropriate building sites;

5. Reduce the burden on municipal water supply and treatment by reducing potable water consumption;

6. Reduce waste generation and manage waste through recycling and diversion from landfill disposal;

7. Establish life-cycle cost analysis as the appropriate and most efficient analysis to determine the optimal performance level of a building project;

8. Ensure that the systems of each building project are designed, installed, and tested to perform according to the design intent and operational needs of the building through third-party postconstruction review and verification; and

9. Authorize the Department of Central Services to pursue ENERGY STAR designation from the United States Environmental Protection Agency to further demonstrate the energy independence of a public building project.

B. For purposes of this section:

1. "High-performance certification program" means a public building design, construction, and renovation standard which meets either the standards of the United States Green Building Council's

Leadership in Energy and Environmental Design Rating System (LEED) or the standards of the Green Building Initiative's Green Globes Rating System or the ANSI/ASHRAE/USGBC/IES "Standard for the Design of High-Performance Green Buildings (American National Standards Institute, American Society of Heating, Refrigerating and Air-Conditioning, U.S. Green Building Council and Illuminating Engineering Society) joint standard, and which:

a. is quantifiable, measurable, and verifiable as certified by an independent third party, except that compliance with Standard 189.1 may be certified by the architect and/or engineer of record for the public building project,

b. reduces the operating costs of public buildings by reducing the consumption of energy, water, and other resources,

c. results in the recovery of the increased initial capital costs attributable to compliance with the program over a time period by reducing long-term energy, maintenance, and operating costs,

d. improves the indoor environmental quality of public buildings for a healthier work environment,

e. encourages the use of products harvested, created, or mined within Oklahoma, regardless of product certification status, and

f. protects the environment of Oklahoma;

2. a. "Public building" means a facility that:

(1) is constructed or renovated in whole or in part with state funds or with funds guaranteed or insured by a state agency and the state funds constitute at least fifty percent (50%) of the project cost,

(2) contains ten thousand (10,000) or more gross square feet,

(3) includes a heating, ventilation, or air conditioning system, and

(4) has not entered the design phase prior to July 1, 2008.

b. A public building shall not include:

(1) a building constructed or renovated with funds from a public school in the state as defined in Section 1-106 of Title 70 of the Oklahoma Statutes, and

(2) a building constructed or renovated where the primary purpose of the building project is for the storage of archived documents;

3. "State agency" means any agency, board, commission, counsel, court, office, officer, bureau, institution, unit division, body, or house of the executive or judicial branches of state government,

whether elected or appointed. State agency shall include institutions within The Oklahoma State System of Higher Education. State agency shall not mean a public school district or technology center school district; and

4. "Substantial renovation" means any renovation of a public building the cost of which exceeds fifty percent (50%) of the replacement value of the facility.

C. The Department of Central Services shall adopt and update from time to time a high-performance certification program.

D. A state agency designing, constructing, or controlling the substantial renovation of a public building shall carry out the design, construction, or substantial renovation so as to achieve the highest performance certification attainable as certified by an independent third party pursuant to the high-performance certification program adopted by the Department pursuant to subsection C of this section. For purposes of this subsection, a certification is attainable if the increased initial costs of achieving the certification, including the time value of money, can be recouped from decreased operational costs within five (5) years.

E. If the state agency estimates that the increased initial costs of achieving certification will exceed five percent (5%) of the total cost of the design, construction, or substantial renovation project, the Department of Central Services shall

specifically examine the estimate before authorizing the design, construction or substantial renovation.

F. If a public building undergoing substantial renovation cannot achieve a high-performance certification due to either the historical nature of the building or because the increased costs of renovating the public building cannot be recouped from decreased operational costs within five (5) years, an accredited professional shall assert in writing that, as much as possible, the substantial renovation was executed in a manner that is consistent with the standards in the high-performance certification program adopted by the Department of Central Services.

G. Any facility that is designed or newly constructed with state funds with less than five thousand (5,000) gross square feet that except for the size would be a public building subject to the high-performance certification program, any minor renovation of a public building, and any controlled maintenance of a public building shall, as much as possible, be executed in a manner that is consistent with the standards in the high-performance certification program adopted by the Department of Central Services.

H. A public building may be exempted from complying with this section upon a determination by the Department of Central Services that extenuating circumstances exist such as to preclude compliance with the high-performance certification program.

I. The Department of Central Services shall identify and seek to have any public building which has been designed, constructed, or renovated in accordance with the standards of the high-performance certification program designated as an ENERGY STAR building by the United States Environmental Protection Agency.

J. The Department of Central Services shall develop and implement a process to monitor and evaluate the energy and environmental benefits associated with designing, constructing, or renovating a public building in accordance with the standards of the high-performance certification program. The Department shall issue an annual report regarding program guidelines, monitoring and evaluation procedures, and the energy and environmental benefits related to the implementation of the high-performance certification program.

SECTION 6. AMENDATORY Section 1, Chapter 414, O.S.L. 2002, as amended by Section 33, Chapter 271, O.S.L. 2006 (61 O.S. Supp. 2010, Section 220), is amended to read as follows:

Section 220. A. Any political subdivision or board of education of a school district may use construction management as a project delivery method for the building, altering, repairing, improving, maintaining or demolishing any structure or appurtenance thereto, or any other improvement to real property owned by that political subdivision or school district. For purposes of this section "construction management" shall be defined as set forth in

Section 202 of this title and shall include both agency construction management and at-risk construction management.

B. A political subdivision or school district shall select a construction manager based on the professional qualifications and technical experience of the construction manager. Selection criteria shall include the experience of the candidate, past performance, and certification of the company or individuals within the company of their knowledge of recognized standards of construction, construction management and project management. Only firms recognized as qualified construction managers by the Construction and Properties Division of the Department of Central Services pursuant to Section 62 of this title, may be considered for selection as a construction manager by a political subdivision or school district. <u>The political subdivision or school district shall select the construction manager using a selection process substantially similar to that described by Section 62 of this title, including notification of eligible firms, screening of submittals and interviews to identify the best-qualified firm. Fees may not be discussed or requested until the first-ranked firm is invited for fee negotiations. Any person that is not a qualified construction manager that knowingly offers construction management services, or public official that knowingly retains a firm or individual not qualified as a construction manager, upon conviction, shall be guilty of a misdemeanor punishable by imprisonment in the county</u>

jail for not more than one (1) year, or by a fine of not more than One Thousand Dollars ($1,000.00), or by both such fine and imprisonment.

C. The construction management project delivery method may only be used for public construction contracts when the construction project meets the criteria established by Section 202.1 of this title~~, except that a political subdivision or school district shall not be required to obtain permission from the Director of Central Services~~.

D. When bids for a public construction project have been received from general contractors pursuant to the Public Competitive Bidding Act of 1974 and the lowest responsible bid is within the awarding agency's available funding, the awarding agency shall not reject all bids and award the project to a construction manager.

E. Construction management contracts, for both agency construction management and at-risk construction management, entered into by a political subdivision or school district pursuant to this section shall not be considered a public construction contract pursuant to Section 102 of ~~Title 61 of the Oklahoma Statutes~~ this title and shall not be subject to competitive bidding requirements as set forth in the Public Competitive Bidding Act of 1974.

F. All construction contracts or subcontracts for work to be performed for any political subdivision or school district pursuant to a construction management project delivery method shall be

awarded in accordance with the provisions of the Public Competitive Bidding Act of 1974. If a construction manager at-risk wishes to self-perform portions of the construction work to be performed, the construction manager at-risk may self-perform portions of the work provided the construction manager at-risk competitively bids the work under the same terms and conditions as the other bidders and the construction manager at-risk is the lowest responsible bidder for the construction subcontract. No work shall commence until the school district executes a written contract and the contractor and subcontractors submit bonds and proofs of insurance as required by the appropriate contract.

G. Except for subsection B of Section 202.1 of this title, public school systems and political subdivisions of this state are exempt from the provisions of Section 202.1 of this title.

SECTION 7. This act shall become effective January 1, 2012.

53-1-7285 LRB 03/28/11