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10 Introduced by Senators Leatherman and Setzler

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A BILL

11 TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA,
12 1976, BY ADDING SECTION 11-35-3005 SO AS TO
13 AUTHORIZE CERTAIN PROJECT DELIVERY METHODS
14 FOR STATE PROCUREMENTS RELATING TO
15 INFRASTRUCTURE FACILITIES; BY ADDING SECTION
16 11-35-3015 SO AS TO SPECIFY THE SOURCE SELECTION
17 METHODS FOR THE TYPES OF AUTHORIZED PROJECT
18 DELIVERY METHODS; BY ADDING SECTION 11-35-3021
19 SO AS TO PROVIDE FOR SUBCONTRACTOR
20 SUBSTITUTION; BY ADDING SECTION 11-35-3023 SO AS
21 TO PROVIDE FOR PREQUALIFICATION ON STATE
22 CONSTRUCTION; BY ADDING SECTION 11-35-3024 SO AS
23 TO PROVIDE FOR CONTENTS OF A REQUEST FOR
24 PROPOSALS AND EVALUATION FACTORS APPLICABLE
25 TO CERTAIN PROJECT DELIVERY METHODS; BY ADDING
26 SECTION 11-35-3035 SO AS TO PROVIDE FOR THE
27 REQUIREMENT OF ERRORS AND OMISSIONS INSURANCE
28 TO COVER CERTAIN SERVICES DELIVERED PURSUANT
29 TO CERTAIN PROJECT DELIVERY METHODS; BY ADDING
30 SECTION 11-35-3037 SO AS TO PROVIDE FOR OTHER
31 FORMS OF SECURITY TO ENSURE PERFORMANCE; BY
32 ADDING SECTION 11-35-3070 SO AS TO ALLOW THE
33 GOVERNING BODY TO APPROVE NONMATERIAL
34 CHANGE ORDERS; TO AMEND SECTION 11-35-310, AS
35 AMENDED, RELATING TO DEFINITIONS FOR PURPOSES
36 OF THE SOUTH CAROLINA CONSOLIDATED
37 PROCUREMENT CODE, SO AS TO REDEFINE
38 "CONSTRUCTION"; TO AMEND SECTION 11-35-1510, AS
39 AMENDED, RELATING TO METHODS OF SOURCE
40 SELECTION, SO AS TO PROVIDE FOR SELECTION
41 METHODS IN CONNECTION WITH PROJECT DELIVERY
42 METHODS; TO AMEND SECTION 11-35-1530, AS

1 AMENDED, RELATING TO COMPETITIVE SEALED
2 PROPOSALS, SO AS TO REQUIRE COMPETITIVE SEALED
3 PROPOSALS FOR CONTRACTS FOR CERTAIN PROJECT
4 DELIVERY METHODS AND TO PROVIDE EXCEPTIONS; TO
5 AMEND SECTION 11-35-2410, AS AMENDED, RELATING
6 TO FINALITY OF DETERMINATIONS IN CONNECTION
7 WITH COMPETITIVE SEALED BIDDING, SO AS TO
8 INCLUDE REFERENCES TO CHOICE OF DELIVERY
9 METHOD AND PREQUALIFICATION ON STATE
10 CONSTRUCTION; TO AMEND SECTION 11-35-2910, AS
11 AMENDED, RELATING TO CERTAIN SERVICES, SO AS TO
12 INCLUDE DEFINITIONS PERTAINING TO THE VARIOUS
13 AUTHORIZED PROJECT DELIVERY METHODS
14 INCLUDING "DESIGN REQUIREMENTS", "INDEPENDENT
15 PEER REVIEWER SERVICE", AND "INFRASTRUCTURE
16 FACILITY"; TO AMEND SECTION 11-35-3010, AS
17 AMENDED, RELATING TO ADMINISTRATION OF
18 CONSTRUCTION CONTRACTING, SO AS TO SUBSTITUTE
19 PROJECT DELIVERY METHOD FOR THE PROCESS AND
20 "GOVERNMENTAL BODY" FOR "USING AGENCY"; TO
21 AMEND SECTION 11-35-3020, AS AMENDED, RELATING
22 TO CONSTRUCTION PROCUREMENT PROCEDURES, SO
23 AS TO DELETE SOURCE SELECTION LANGUAGE, TO
24 INCORPORATE NEW PROVISIONS ADDED IN EARLIER
25 SECTIONS AND TO DELETE LANGUAGE DUPLICATIVE
26 OF NEW PROVISIONS ADDED; TO AMEND SECTION
27 11-35-3030, AS AMENDED, RELATING TO BOND AND
28 SECURITY SO AS TO PROVIDE THAT THE CONTRACT
29 PRICE FOR PURPOSES OF A PAYMENT BOND OR
30 PERFORMANCE BOND DOES NOT INCLUDE THE COST OF
31 OPERATION, MAINTENANCE, AND FINANCE, AND TO
32 ALLOW FOR NO SURETY DURING PRECONSTRUCTION
33 OR DESIGN PHASES; TO AMEND SECTION 11-35-3210, AS
34 AMENDED, RELATING TO APPLICABILITY AND POLICY
35 IN CONNECTION WITH CERTAIN SERVICES, SO AS TO
36 DELETE THE PROVISIONS REFERRING TO
37 APPLICABILITY TO THOSE SERVICES; TO AMEND
38 SECTION 11-35-3220, AS AMENDED, RELATING TO
39 PROCUREMENT PROCEDURES, SO AS TO SUBSTITUTE
40 "GOVERNMENTAL BODY" FOR "USING AGENCY"; TO
41 AMEND SECTION 11-35-3230, AS AMENDED, RELATING
42 TO SMALL ARCHITECT-ENGINEERING AND LAND
43 SURVEYING CONTRACTS, SO AS TO SUBSTITUTE

1 “GOVERNMENTAL BODY” FOR “USING AGENCY”; TO
2 AMEND SECTION 11-35-3245, AS AMENDED, RELATING
3 TO PERFORMING OTHER WORK, SO AS TO LIMIT ITS
4 APPLICATION TO PROCUREMENTS FOR CONSTRUCTION
5 USING THE DESIGN-BID-BUILD PROJECT DELIVERY
6 METHODS; TO AMEND SECTION 11-35-3310, AS
7 AMENDED, RELATING TO INDEFINITE DELIVERY
8 CONSTRUCTION CONTRACTS, SO AS TO ADD A CROSS
9 REFERENCE; AND TO REPEAL SECTION 11-35-1825,
10 RELATING TO PREQUALIFICATION OF CONSTRUCTION
11 BIDDERS.

12
13 Be it enacted by the General Assembly of the State of South
14 Carolina:

15
16 SECTION 1. The General Assembly finds that:

17
18 (1) it adopted a modified version of the 1979 ABA Model
19 Procurement Code for State and Local Governments when it
20 enacted 1981 Act No. 148. Since then, the ABA has revised its
21 recommended model by adopting the 2000 ABA Model
22 Procurement Code for State and Local Governments, which it
23 developed in cooperation with, among others, the National
24 Association of State Procurement Officials, the National Institute
25 of Governmental Purchasing, the American Consulting Engineers
26 Council, the Design Professionals Coalition, the Council on the
27 Federal Procurement of A/E Services, the Engineers Joint
28 Contracts Document Committee, and the National Society of
29 Professional Engineers. One of the primary goals of the revision
30 project was to encourage the competitive use of new forms of
31 project delivery in public construction procurement; and

32 (2) it is the intent of the General Assembly to facilitate the use
33 of these alternate forms of project delivery by adopting, as
34 modified herein, those portions of the new model code related to
35 Article 5 (Procurement of Infrastructure Facilities and Services) of
36 the model code. To that end, the relevant official comments to the
37 model code, and the construction given to the model code, should
38 be examined as persuasive authority for interpreting and
39 construing the new code provisions created by this act.

40
41 SECTION 2. Subarticle 3, Article 9, Chapter 35, Title 11 of the
42 1976 Code is amended by adding:

1 “Section 11-35-3005.(1) The following project delivery
2 methods are authorized for procurements relating to infrastructure
3 facilities:

- 4 (a) design-bid-build;
- 5 (b) construction management at-risk;
- 6 (c) operations and maintenance;
- 7 (d) design-build;
- 8 (e) design-build-operate-maintain; and
- 9 (f) design-build-finance-operate-maintain.

10 (2) In addition to those methods identified in item (1), the
11 board, by regulation, and the State Engineer, in accordance with
12 Section 11-35-3010, may:

13 (a) approve as an alternative project delivery method any
14 combination of design, construction, finance, and services for
15 operations and maintenance of an infrastructure facility; and

16 (b) allow or require the governmental body to follow any of
17 the additional procedures established by Section 11-35-3025.

18 (3) Participation in a report or study that is later used in the
19 preparation of design requirements for a project does not disqualify
20 a firm from participating as a member of a proposing team in a
21 construction management at-risk, design-build,
22 design-build-operate-maintain, or
23 design-build-finance-operate-maintain procurement unless the
24 participation provides the business with a substantial competitive
25 advantage. In the Manual for Planning and Execution of State
26 Permanent Improvements, the State Engineer may establish
27 guidance for the application of this item by governmental bodies.”

28
29 SECTION 3. Subarticle 3, Article 9, Chapter 35, Title 11 of the
30 1976 Code is amended by adding:

31
32 “Section 11-35-3015.(1) Scope. This section specifies the
33 source selection methods applicable to procurements for the
34 project delivery methods identified in Section 11-35-3005 (Project
35 delivery methods authorized), except as provided in Section
36 11-35-1550 (Small purchases), 11-35-1560 (Sole source
37 procurement), and 11-35-1570 (Emergency procurements).

38 (2) Design-bid-build:

39 (a) Design. Architect-engineer, construction management,
40 and land surveying services. The qualifications based selection
41 process in Section 11-35-3220 (Qualifications Based Selection
42 Procedures) must be used to procure architect-engineer,
43 construction management, and land surveying services, unless

1 those services are acquired in conjunction with construction using
2 one of the project delivery methods provided in Section
3 11-35-3015 (3), (5), (6), (7), and (8).

4 (b) Construction. Competitive sealed bidding, as provided
5 in Section 11-35-1520 (Competitive sealed bidding), must be used
6 to procure construction in design-bid-build procurements.

7 (3) Construction Management at-risk. Contracts for
8 construction management at-risk must be procured as provided in
9 either Section 11-35-1520 (Competitive sealed bidding) or Section
10 11-35-1530 (Competitive sealed proposals).

11 (4) Operations and Maintenance. Contracts for operations and
12 maintenance must be procured as set forth in Section 11-35-1510
13 (Methods of source selection).

14 (5) Design-build. Contracts for design-build must be procured
15 by competitive sealed proposals, as provided in Section
16 11-35-1530 (Competitive sealed proposals), except that the
17 regulations may describe the circumstances under which a
18 particular design-build procurement does not require the
19 submission of proposal development documents as required in
20 Section 11-35-3025(2)(b).

21 (6) Design-build-operate-maintain. Contracts for
22 design-build-operate-maintain must be procured by competitive
23 sealed proposals, as provided in Section 11-35-1530 (Competitive
24 sealed proposals).

25 (7) Design-build-finance-operate-maintain. Contracts for
26 design-build-finance-operate-maintain must be procured by
27 competitive sealed proposals, as provided in Section 11-35-1530
28 (Competitive sealed proposals).

29 (8) Other. Contracts for an alternate project delivery method
30 approved pursuant to Section 11-35-3005(2) must be procured by a
31 source selection method provided in Section 11-35-1510, as
32 specified by the authority approving the alternative project
33 delivery method.”

34

35 SECTION 4. Subarticle 3, Article 9, Chapter 35, Title 11 of the
36 1976 Code is amended by adding:

37

38 “Section 11-35-3021.(1) After notice of an award or intended
39 award has been given, whichever is earlier, the prospective
40 contractor identified in the notice may not substitute a business as
41 subcontractor in place of a subcontractor listed in the prospective
42 contractor’s bid or proposal, except for one or more of the
43 following reasons:

1 (a) upon a showing satisfactory to the governmental body by
2 the prospective contractor that:

3 (i) the listed subcontractor is not financially responsible;

4 (ii) the listed subcontractor's scope of work did not
5 include a portion of the work required in the plans and
6 specifications, and the exclusion is not clearly set forth in the
7 subcontractor's original bid;

8 (iii) the listed subcontractor was listed as a result of an
9 inadvertent clerical error, but only if that request is made within
10 four working days of opening;

11 (iv) the listed subcontractor failed or refused to submit a
12 performance and payment bond when requested by the prospective
13 contractor after the subcontractor had represented to the
14 prospective contractor that the subcontractor could obtain a
15 performance and payment bond; and

16 (v) the listed subcontractor must be licensed and did not
17 have the license at the time required by law;

18 (b) if the listed subcontractor fails or refuses to perform his
19 subcontract;

20 (c) if the work of the listed subcontractor is found by the
21 governmental body to be substantially unsatisfactory;

22 (d) upon mutual agreement of the contractor and
23 subcontractor; and

24 (e) with the consent of the governmental body for good
25 cause shown.

26 (2) The request for substitution must be made to the
27 governmental body in writing. This written request does not give
28 rise to a private right of action against the prospective contractor in
29 the absence of actual malice.

30 (3) If substitution is allowed, the prospective contractor, before
31 obtaining prices from another subcontractor, must attempt in good
32 faith to negotiate a subcontract with at least one subcontractor
33 whose bid was received before the submission of the prospective
34 contractor's offer. This section does not affect a contractor's
35 ability to request withdrawal of a bid in accordance with the
36 provisions of this code and the regulations promulgated pursuant to
37 it.

38 (4) This section applies to a procurement conducted using the
39 source selection methods authorized by Section 11-35-3015(2)(b),
40 (3), (5), (6), (7), and (8).

41
42 Section 11-35-3023. (A) In accordance with this section and
43 procedures published by the State Engineer, a governmental body

1 may limit participation in a solicitation for construction to only
2 those businesses, including potential subcontractors, that are
3 prequalified. The prequalification process may be used only with
4 the approval and supervision of the State Engineer's Office. If
5 businesses are prequalified, the governmental body must issue a
6 request for qualifications. Adequate public notice of the request for
7 qualifications must be given in the manner provided in Section
8 11-35-1520(3). The request must contain, at a minimum, a
9 description of the general scope of work to be acquired, the
10 deadline for submission of information, and how businesses may
11 apply for consideration. The evaluation criteria must include, but
12 not be limited to, prior performance, recent past references on all
13 aspects of performance, financial stability, and experience on
14 similar construction projects. Using only the criteria stated in the
15 request for qualifications, businesses must be ranked from most
16 qualified to least qualified. The basis for the ranking must be
17 determined in writing. If fewer than two businesses are
18 prequalified, the prequalification process must be canceled. The
19 determination regarding how many offers to solicit is not subject to
20 review pursuant to Article 17 of this Code. Section 11-35-1520(4)
21 (Request for Qualifications) and Section 11-35-1530(4) (Request
22 for Qualifications) do not apply to a procurement of construction.

23 (B) In a design-bid-build procurement, the prequalification
24 process may be used only if the construction involved is unique in
25 nature, over ten million dollars in value, or involves special
26 circumstances, as determined by the State Engineer. In a
27 design-bid-build procurement, the minimum requirements for
28 prequalification must be published in the request for qualifications.
29 Offers must be sought from all businesses that meet the published
30 minimum requirements for prequalification.

31
32 Section 11-35-3024. (1) Applicability. In addition to the
33 requirements of Section 11-35-1530 (Competitive Sealed
34 Proposals), the procedures in this Section apply as provided in
35 items (2), (3), and (4) below.

36 (2) Content of Request for Proposals. A Request for Proposals
37 for design-build, design-build-operate-maintain, or
38 design-build-finance-operate-maintain:

- 39 (a) must include design requirements;
40 (b) must solicit proposal development documents; and
41 (c) may, if the governmental body determines that the cost
42 of preparing proposals is high in view of the size, estimated price,
43 and complexity of the procurement:

1 (i) prequalify offerors in accordance with Section
2 11-35-3023 by issuing a request for qualifications in advance of
3 the request for proposals;

4 (ii) select, pursuant to procedures designated in the
5 Manual for Planning and Execution of State Permanent
6 Improvements, a short list of responsible offerors who submit
7 proposals determined to be reasonably susceptible of being
8 selected for award before discussions and evaluations pursuant to
9 Section 11-35-1530, if the number of proposals to be short-listed is
10 stated in the Request for Proposals and prompt public notice is
11 given to all offerors as to which proposals have been short-listed;
12 or

13 (iii) pay stipends to unsuccessful offerors, if the amount of
14 the stipends and the terms under which stipends are paid are stated
15 in the Request for Proposals.

16 (3) Evaluation Factors. A Request for Proposals for
17 design-build, design-build-operate-maintain, or
18 design-build-finance-operate-maintain must:

19 (a) state the relative importance of (i) demonstrated
20 compliance with the design requirements, (ii) offeror
21 qualifications, (iii) financial capacity, (iv) project schedule, (v)
22 price, or life-cycle price for design-build-operate-maintain and
23 design-build-finance-operate-maintain procurements, and (vi)
24 other factors, if any; and

25 (b) in circumstances designated in the Manual for Planning
26 and Execution of State Permanent Improvements, require each
27 offeror to identify an Independent Peer Reviewer whose
28 competence and qualifications to provide that service must be an
29 additional evaluation factor in the award of the contract.

30 (4) Unless excused by the State Engineer, the State Engineer's
31 Office shall oversee the evaluation process for a procurement of
32 construction if factors other than price are considered in the
33 evaluation of a proposal."

34
35 SECTION 5. Subarticle 3, Article 9, Chapter 35, Title 11 of the
36 1976 Code is amended by adding:

37
38 "Section 11-35-3035. Regulations shall be promulgated that
39 specify when a governmental body shall require offerors to provide
40 appropriate errors and omissions insurance to cover architectural
41 and engineering services under the project delivery methods set
42 forth in Section 11-35-3005 (1) (a), (d), (e) and (f).
43

1 Section 11-35-3037. The governmental body may require one
2 or more of the following forms of security to assure the timely,
3 faithful, and uninterrupted provision of operations and
4 maintenance services procured separately or as one element of
5 another project delivery method:

6 (a) operations period surety bonds that secure the performance
7 of the contractor's operations and maintenance obligations;

8 (b) letters of credit in an amount appropriate to cover the cost
9 to the governmental body of preventing infrastructure service
10 interruptions for a period up to twelve months; and

11 (c) appropriate written guarantees from the contractor, or
12 depending upon the circumstances, from a parent corporation, to
13 secure the recovery of reprourement costs to the governmental
14 body if the contractor defaults in performance.”

15
16 SECTION 6. Subarticle 3, Article 9, Chapter 35, Title 11 of the
17 1976 Code is amended by adding:

18
19 “Section 11-35-3070. A governmental body may approve and
20 pay for amendments to architectural/engineering contracts and
21 change orders to construction contracts, within the governmental
22 body's certification, which do not alter the original scope or intent
23 of the project and which do not exceed the previously approved
24 project budget.”

25
26 SECTION 7. Section 11-35-310(7) of the 1976 Code is amended
27 to read:

28
29 ~~“(7) “Construction” means the process of building, altering,~~
30 ~~repairing, remodeling, improving, or demolishing any public~~
31 ~~structure or building or other public improvements of any kind to~~
32 ~~any public real property. It does not include the routine operation,~~
33 ~~routine repair or routine maintenance of existing structures,~~
34 ~~buildings, or real property. ‘Construction’ means the process of~~
35 building, altering, repairing, remodeling, improving, or
36 demolishing a public infrastructure facility, including any public
37 structure, public building, or other public improvements of any
38 kind to real property. It does not include the routine operation,
39 routine repair, or routine maintenance of an existing public
40 infrastructure facility, including structures, buildings, or real
41 property.”

SECTION 8. Section 11-35-1510 of the 1976 Code, as last amended by Act 376 of 2006, is further amended to read:

“Section 11-35-1510. Unless otherwise provided by law, all state contracts must be awarded by competitive sealed bidding, pursuant to Section 11-35-1520, except as provided in:

(1) Section 11-35-1250 (Authority to Contract for Auditing Services);

(2) Section 11-35-1260 (Authority to Contract for Legal Services);

(3) Section 11-35-1525 (Fixed Priced Bidding);

(4) Section 11-35-1528 (Competitive Best Value Bidding);

(5) Section 11-35-1529 (Competitive Online Bidding);

(6) Section 11-35-1530 (Competitive Sealed Proposals);

(7) Section 11-35-1540 (Negotiations After Unsuccessful Competitive Sealed Bidding);

(8) Section 11-35-1550 (Small Purchases);

(9) Section 11-35-1560 (Sole Source Procurements);

(10) Section 11-35-1570 (Emergency Procurements);

(11) Section 11-35-1575 (Participation in Auction or Bankruptcy Sale);

(12) (Reserved)

~~(13) Section 11-35-3020 (Construction Procurement Procedures)~~ Section 11-35-3015 (Source selection methods assigned to project delivery methods);

(14) Section 11-35-3220 (Architect Engineer, Construction Management and Land Surveying Services Procurement Procedures); and

(15) Section 11-35-3230 (Exception for Small Architect-Engineer and Land Surveying Services Contracts).”

SECTION 9. Section 11-35-1530(1) of the 1976 Code, as amended by Act 376 of 2006, is further amended to read:

“(1) Conditions for Use. If a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section. ~~Subject to the requirements of Section 11-35-3220, the board may provide by regulation that it is either not practicable or not advantageous to the State to procure specified types of supplies, services,~~

~~information technology, or construction by competitive sealed bidding. The board may provide by regulation that it is either not practicable or not advantageous to the State to procure specified types of supplies, services, information technology, or construction by competitive sealed bidding. Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 9 of this Code must be entered into by competitive sealed proposals, except as otherwise provided in Sections 11-35-1550 (Small purchases), 11-35-1560 (Sole source procurements), and 11-35-1570 (Emergency procurements)."~~

SECTION 10. Section 11-35-2410(A) of the 1976 Code, as last amended by Act 376 of 2006, is further amended to read:

“(A) The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: Section 11-35-1520(7) (Competitive Sealed Bidding: Correction or Withdrawal of Bids; Cancellation of Awards), Section 11-35-1520(11) (Competitive Sealed Bidding: Request for Qualifications), Section 11-35-1525(1) (Competitive Fixed Price Bidding: Conditions for Use), Section 11-35-1528(1) (Competitive Best Value Bidding: Conditions for Use), Section 11-35-1528(8) (Competitive Best Value Bidding: Award), Section 11-35-1529(1) (Competitive Online Bidding: Conditions for Use), Section 11-35-1530(1) (Competitive Sealed Proposals, Conditions for Use), Section 11-35-1530(4) (Competitive Sealed Proposals: Request for Qualifications), Section 11-35-1530(7) (Competitive Sealed Proposals, Selection and Ranking of Prospective Offerors), Section 11-35-1530(9) (Competitive Sealed Proposals Award), Section 11-35-1540 (Negotiations After Unsuccessful Competitive Sealed Bidding), Section 11-35-1560 (Sole Source Procurement), Section 11-35-1570 (Emergency Procurement), Section 11-35-1710 (Cancellation of Invitation for Bids or Requests for Proposals), Section 11-35-1810(2) (Responsibility of Bidders and Offerors, Determination of Nonresponsibility), Section 11-35-1825 (Prequalification of Construction Bidders), Section 11-35-1830(3) (Cost or Pricing Data, Cost or Pricing Data Not Required), Section 11-35-2010 (Types and Forms of Contracts), Section 11-35-2020 (Approval of Accounting System), Section 11-35-2030(2) (Multi-Term Contracts, Determination Prior to Use), Section 11-35-3010(1) (Choice of project delivery method), Section

1 11-35-3020(2)(d) (Construction Procurement Procedures:
2 Negotiations after Unsuccessful Competitive Sealed Bidding),
3 Section 11-35-3023 (Prequalification on State Construction),
4 Section 11-35-3220(5) (Procurement Procedure, Selection and
5 Ranking of the Five Most Qualified), Section 11-35-4210(7) (Stay
6 of Procurement During Protests, Decision to Proceed), and Section
7 11-35-4810 (Cooperative Use of Supplies, Services, or Information
8 Technology).”
9

10 SECTION 11. Section 11-35-2910 of the 1976 Code, as last
11 amended by Act 153 of 1997, is further amended to read:
12

13 “Section 11-35-2910. (1) ‘Architect-engineer and land
14 surveying services’ are those professional services associated with
15 the practice of architecture, professional engineering, land
16 surveying, landscape architecture, and interior design pertaining to
17 construction, as defined by the laws of this State, as well as
18 incidental services that members of these professions and those in
19 their employ may logically or justifiably perform, including
20 studies, investigations, surveys, evaluations, consultations,
21 planning, programming conceptual designs, plans and
22 specifications, cost estimates, inspections, shop drawing reviews,
23 sample recommendations, preparation of operating and
24 maintenance manuals, and other related services.

25 (2) ~~“Construction” means the process of building, altering,~~
26 ~~repairing, remodeling, improving, or demolishing any public~~
27 ~~structure or building or other public improvements of any kind to~~
28 ~~any public real property. It does not include the routine operation,~~
29 ~~routine repair, or routine maintenance of existing structures,~~
30 ~~buildings, or real property. ‘Construction manager agent’ means a~~
31 business that has been awarded a separate contract with the
32 governmental body to provide construction management services
33 but not construction.

34 (3) ‘Construction manager at-risk’ means a business that has
35 been awarded a separate contract with the governmental body to
36 provide both construction management services and construction
37 using the construction management at-risk project delivery
38 method. A contract with a construction manager at-risk may be
39 executed before completion of design.

40 (4) ‘Construction management services’ are those professional
41 services associated with a system in which the governmental body
42 directly contracts with a professional construction manager to
43 provide that group of management activities required to plan,

1 ~~schedule, coordinate, and manage the design and construction plan~~
2 ~~of a state project in a manner that contributes to the control of~~
3 ~~time, cost, and quality of construction as specified in the~~
4 ~~construction management contract; contract administration, project~~
5 ~~management, and other specified services provided in connection~~
6 ~~with the administration of a project delivery method defined in~~
7 ~~Section 11-35-3005 (Project delivery methods authorized).~~

8 (5) 'Construction management at-risk' means a project
9 delivery method in which the governmental body awards separate
10 contracts, one for architectural and engineering services to design
11 an infrastructure facility and the second to a construction manager
12 at-risk for both construction of the infrastructure facility according
13 to the design and construction management services.

14 (6) 'Design-bid-build' means a project delivery method in
15 which the governmental body sequentially awards separate
16 contracts, the first for architectural and engineering services to
17 design an infrastructure facility and the second for construction of
18 the infrastructure facility according to the design.

19 (7) 'Design-build' means a project delivery method in which
20 the governmental body enters into a single contract for design and
21 construction of an infrastructure facility.

22 (8) 'Design-build-finance-operate-maintain' means a project
23 delivery method in which the governmental body enters into a
24 single contract for design, construction, finance, maintenance, and
25 operation of an infrastructure facility over a contractually defined
26 period. Money appropriated by the State is not used to pay for a
27 part of the services provided by the contractor during the contract
28 period.

29 (9) 'Design-build-operate-maintain' means a project delivery
30 method in which the governmental body enters into a single
31 contract for design, construction, maintenance, and operation of an
32 infrastructure facility over a contractually defined period. All or a
33 portion of the money required to pay for the services provided by
34 the contractor during the contract period are either appropriated by
35 the State before the award of the contract or secured by the State
36 through fare, toll, or user charges.

37 (10) 'Design requirements' means the written description of the
38 infrastructure facility to be procured pursuant to this article,
39 including:

40 (a) required features, functions, characteristics, qualities, and
41 properties that are required by the State;

42 (b) the anticipated schedule, including start, duration, and
43 completion; and

1 (c) estimated budgets. as applicable to the specific
2 procurement, for design, construction, operation, and maintenance.
3 The design requirements may, but need not, include drawings and
4 other documents illustrating the scale and relationship of the
5 features, functions, and characteristics of the project.

6 (11) 'Independent peer reviewer services' are additional
7 architectural and engineering services that a governmental body
8 shall acquire, as designated in the Manual for Planning and
9 Execution of State Permanent Improvement, in design-build,
10 design-build-operate-maintain, or
11 design-build-finance-operate-maintain procurements. The function
12 of the independent peer reviewer is to confirm that the key
13 elements of the professional engineering and architectural design
14 provided by the contractor are in conformance with the applicable
15 standard of care. If a governmental body elects not to contract with
16 the independent peer reviewer proposed by the successful offeror,
17 the independent peer reviewer must be selected through
18 competitive sealed proposals.

19 (12) 'Infrastructure facility' means a building; structure; or
20 networks of buildings, structures, pipes, controls, and equipment,
21 or portion thereof, that provide transportation, utilities, public
22 education, or public safety services. Included are government
23 office buildings; public schools; courthouses; jails; prisons; water
24 treatment plants, distribution systems, and pumping stations;
25 wastewater treatment plants, collection systems, and pumping
26 stations; solid waste disposal plants, incinerators, landfills, and
27 related facilities; public roads and streets; highways; public
28 parking facilities; public transportation systems, terminals, and
29 rolling stock; rail, air, and water port structures, terminals, and
30 equipment.

31 (13) 'Operations and Maintenance' means a project delivery
32 method in which the governmental body enters into a single
33 contract for the routine operation, routine repair, and routine
34 maintenance of an infrastructure facility.

35 (14) 'Proposal development documents' means drawings and
36 other design related documents that are sufficient to fix and
37 describe the size and character of an infrastructure facility as to
38 architectural, structural, mechanical and electrical systems,
39 materials, and such other elements as may be appropriate to the
40 applicable project delivery method."

41
42 SECTION 12. Section 11-35-3010 of the 1976 Code, as last
43 amended by Act 153 of 1997, is further amended to read:

1
2 “Section 11-35-3010. (1) Selection of Method. The project
3 delivery method of construction contracting administration used
4 for a state construction project ~~by a using agency shall~~ must be
5 ~~determined to be~~ that method which is most advantageous to the
6 State and ~~will result~~ results in the most timely, economical, and
7 successful completion of the construction project. The ~~using~~
8 ~~agency governmental body~~ shall select, in accordance with
9 regulations of the board, the appropriate project delivery method of
10 ~~construction contracting administration~~ for a particular project and
11 shall state in writing the facts and considerations ~~which led~~ leading
12 to the selection of that particular method.

13 (2) State Engineer’s Office Review. The ~~using agency~~
14 ~~governmental body~~ shall submit its written report stating the facts
15 and considerations ~~which led~~ leading to the selection of the
16 particular project delivery method of construction contracting
17 ~~administration~~ to the ~~state engineer’s office~~ State Engineer’s
18 Office for its review.

19 (3) Approval or Disagreement by State Engineer’s Office. The
20 ~~state engineer’s office shall have~~ State Engineer’s Office has ten
21 days to review the data submitted by the ~~using agency~~
22 ~~governmental body~~ to determine its position with respect to the
23 particular project delivery method of construction contracting
24 ~~administration~~ recommended for approval by the ~~using agency~~
25 ~~governmental body~~, and to notify the ~~using agency governmental~~
26 ~~body~~ of its decision in writing. If the ~~state engineer’s office~~ State
27 Engineer’s Office disagrees with the project delivery method
28 selected, it may contest ~~such~~ it by submitting the matter to the
29 board for decision. Written notification by the ~~state engineer’s~~
30 ~~office~~ State Engineer’s Office to the ~~using agency governmental~~
31 ~~body~~ of its intention to contest the project delivery method selected
32 ~~shall must~~ include ~~the~~ its reasons ~~therefor~~. The board shall hear
33 ~~any such contests~~ the contest at its next regularly scheduled
34 meeting ~~subsequent to~~ after notification of the ~~using agency~~
35 ~~governmental body~~. If the board rules in support of the ~~state~~
36 ~~engineer’s office~~ State Engineer’s Office position, the ~~using~~
37 ~~agency governmental body~~ shall receive written notification of the
38 decision. If the board rules in support of the ~~using agency~~
39 ~~governmental body~~, the ~~using agency shall~~ governmental body
40 must be notified in writing and ~~thereby~~ by that writing be
41 authorized to use that project delivery method of construction
42 ~~contracting administration~~ as previously recommended by the

1 ~~using agency governmental body~~ on the particular construction
2 project.”

3
4 SECTION 13. Section 11-35-3020 of the 1976 Code, as last
5 amended by Act 376 of 2006, is further amended to read:

6
7 “Section 11-35-3020. ~~(1) Source—Selection. All state~~
8 ~~construction contracts must be awarded by competitive sealed~~
9 ~~bidding pursuant to the procedures set forth in Section 11-35-1520,~~
10 ~~subject to the exceptions enumerated in subsection (2) of this~~
11 ~~section and except as provided in Sections 11-35-1550,~~
12 ~~11-35-1560, and 11-35-1570. Competitive sealed proposals as~~
13 ~~provided in Section 11-35-1530 must not be used, except in cases~~
14 ~~and in accordance with criteria as may be authorized and~~
15 ~~prescribed by regulation of the board.~~

16 (2) Exceptions in Competitive Sealed Bidding Procedures.
17 The process of competitive sealed bidding as required by
18 ~~subsection (1)~~ Section 11-35-3015(2)(b) must be performed in
19 accordance with the procedures outlined in Article 5 of this code
20 subject to the following exceptions:

21 (a) Invitation for Bids. ~~Instead of Section 11-35-1520(2),~~
22 ~~Section 11-35-1520(3), and Section 11-35-1520(4), invitations for~~
23 ~~bids for each state construction project subject to subsection (1)~~
24 ~~must be made in the following manner. Each using agency must~~
25 ~~be governmental body is~~ responsible for developing a formal
26 invitation for bids for each state construction project ~~subject to~~
27 ~~subsection (1).~~ The invitation must include, but not be limited to,
28 all contractual terms and conditions applicable to the procurement.
29 A copy of each invitation for bids must be filed with the State
30 Engineer’s Office and must be advertised formally in an official
31 state government publication. The manner in which this official
32 state government publication must be published, the content of the
33 publication itself, the frequency of the publication, the method of
34 subscription to the publication, and the manner by which the
35 publication is distributed must be established by regulation of the
36 board.

37 (b) Bid Acceptance. Instead of Section 11-35-1520(6), the
38 following provision applies. Bids must be accepted
39 unconditionally without alteration or correction, except as
40 otherwise authorized in this code. The ~~using agency governmental~~
41 ~~body’s~~ invitation for bids must set forth all requirements of the bid
42 including, but not limited to:

1 (i) ~~The using agency governmental body~~, in consultation
2 with the architect-engineer assigned to the project, shall identify by
3 specialty in the invitation for bids all subcontractors, who are
4 expected to perform work for the prime contractor to or about the
5 construction when those subcontractors' contracts are each
6 expected to exceed three percent of the prime contractor's total
7 base bid. In addition, the ~~using agency governmental body~~, in
8 consultation with the architect-engineer assigned to the project,
9 may identify by specialty in the invitation for bids ~~any~~
10 ~~subcontractors~~ a subcontractor who ~~are~~ is expected to perform
11 work which is vital to the project. The determination of which
12 subcontractors are included in the list provided in the invitation for
13 bids is not protestable pursuant to Section 11-35-4210 or another
14 provision of this code. A bidder in response to an invitation for
15 bids shall set forth in his bid the name of only those subcontractors
16 to perform the work as identified in the invitation for bids. If the
17 bidder determines to use his own employees to perform a portion
18 of the work for which he would otherwise be required to list a
19 subcontractor and if the bidder is qualified to perform that work
20 under the terms of the invitation for bids, the bidder shall list
21 himself in the appropriate place in his bid and not subcontract that
22 work except with the approval of the ~~using agency governmental~~
23 body for good cause shown.

24 (ii) Failure to complete the list provided in the invitation
25 for bids renders the bidder's bid unresponsive.

26 (iii) ~~A prime contractor whose bid is accepted may not~~
27 ~~substitute a person as subcontractor in place of the subcontractor~~
28 ~~listed in the original bid, except for one or more of the following~~
29 ~~reasons:~~

30 (aa) ~~upon a showing satisfactory to the governmental~~
31 ~~body by the contractor that a subcontractor who was listed is not~~
32 ~~financially responsible;~~

33 (bb) ~~upon a showing satisfactory to the governmental~~
34 ~~body by the contractor that the scope of work bid by a listed~~
35 ~~subcontractor did not include a portion of the work required in the~~
36 ~~plans and specifications, and the exclusion is not clearly set forth~~
37 ~~in the listed subcontractor's original bid;~~

38 (cc) ~~upon a showing satisfactory to the governmental~~
39 ~~body made by the contractor within four working days of the bid~~
40 ~~opening that the subcontractor was listed as a result of an~~
41 ~~inadvertent clerical error;~~

42 (dd) ~~upon a showing satisfactory to the governmental~~
43 ~~body by the contractor that the listed subcontractor failed or~~

1 ~~refused to submit a performance and payment bond when~~
2 ~~requested by the prime contractor after the subcontractor had~~
3 ~~represented to the prime contractor that he could obtain a~~
4 ~~performance and payment bond;~~

5 ~~(ee) upon a showing satisfactory to the governmental~~
6 ~~body by the contractor that the listed subcontractor is required to~~
7 ~~be licensed and does not have the license by the time it is required~~
8 ~~by law;~~

9 ~~(ff) when the listed subcontractor fails or refuses to~~
10 ~~perform his subcontract;~~

11 ~~(gg) when the work of the listed subcontractor is found~~
12 ~~by the governmental body to be substantially unsatisfactory;~~

13 ~~(hh) upon mutual agreement of the contractor and~~
14 ~~subcontractor;~~

15 ~~(ii) with the consent of the governmental body for good~~
16 ~~cause shown.~~

17 ~~(iv) The request for substitution must be made to the~~
18 ~~governmental body in writing. This written request does not give~~
19 ~~rise to a private right of action against the prime contractor in the~~
20 ~~absence of actual malice.~~

21 ~~(v) Where substitution is allowed, the prime contractor,~~
22 ~~before obtaining prices from another subcontractor, shall attempt~~
23 ~~in good faith to negotiate a subcontract with at least one~~
24 ~~subcontractor whose bid was received before the submission of the~~
25 ~~prime contractor's bid. This section does not affect a contractor's~~
26 ~~ability to request withdrawal of a bid in accordance with the~~
27 ~~provisions of this code and the regulations promulgated pursuant to~~
28 ~~it.~~

29 ~~(iiiiv) The using agency governmental body shall send all~~
30 ~~responsive bidders a copy of the bid tabulation within ten working~~
31 ~~days following the bid opening.~~

32 (c) Instead of Section 11-35-1520(10) the following
33 provisions apply: :

34 (i) Unless there is a compelling reason to reject bids as
35 prescribed by regulation of the board, notice of an intended award
36 of a contract to the lowest responsive and responsible bidder
37 whose bid meets the requirements set forth in the invitation for
38 bids must be given by posting the notice at a location that is
39 specified in the invitation for bids. The invitation for bids and the
40 posted notice must contain a statement of the bidder's right to
41 protest pursuant to Section 11-35-4210(1) and the date and
42 location of posting must be announced at bid opening. In addition
43 to posting notice, the using agency governmental body promptly

1 shall send all responsive bidders a copy of the notice of intended
2 award and of the bid tabulation. The mailed notice must indicate
3 the posting date and must contain a statement of the bidder's right
4 to protest pursuant to Section 11-35-4210(1).

5 (ii) After ten days' notice is given, the ~~using agency~~
6 governmental body may enter into a contract with the bidder
7 named in the notice in accordance with the provisions of this code
8 and of the bid solicited. The procurement officer must comply
9 with Section 11-35-1810.

10 (iii) If, at bid opening, only one bid is received and
11 determined to be responsive and responsible and within the ~~using~~
12 agency governmental body's construction budget, award may be
13 made without the ten-day waiting period.

14 (d) Negotiations after Unsuccessful Competitive Sealed
15 Bidding. Instead of Section 11-35-1540, the following provisions
16 apply:

17 (1) ~~When (i)~~ If bids received pursuant to an invitation for
18 bids exceed available funds, and it is determined in writing by the
19 ~~using agency~~ governmental body that circumstances do not permit
20 the delay required to resolicit competitive sealed bids, and the base
21 bid, less any deductive alternates, does not exceed available funds
22 by an amount greater than ten percent of the construction budget
23 established for that portion of the work, a contract may be
24 negotiated pursuant to this section with the lowest responsible and
25 responsive bidder. The ~~using agency~~ governmental body may
26 change the scope of the work to reduce the cost to be within the
27 established construction budget but may not reduce the cost below
28 the established construction budget more than ten percent without
29 a written request by the agency and the written approval of the
30 chief procurement officer based on the best interest of the State.

31 (2) ~~When (ii)~~ If the lowest base bid received pursuant to
32 an invitation for bids exceeds approved available funds and the
33 ~~using agency~~ governmental body is able to identify additional
34 funds for the project, as certified by the appropriate fiscal officers,
35 in the amount of the difference between the lowest base bid and
36 the approved available funds for the project, the ~~using agency~~
37 governmental body shall submit its request to use ~~such~~ those
38 additional funds to the board and the Joint Bond Review
39 Committee in accordance with Sections 2-47-40 and 2-47-50."

40
41 SECTION 14. Section 11-35-3030(1)-(3) of the 1976 Code, as
42 last amended by Act 376 of 2006, is further amended to read:
43

1 “Section 11-35-3030.(1) Bid Security.

2 (a) Requirement for Bid Security. Bid security is required
3 for all competitive sealed bidding for construction contracts in a
4 design-bid-build procurement in excess of fifty thousand dollars
5 and other contracts as may be prescribed by the State Engineer’s
6 Office. Bid security is a bond provided by a surety company
7 meeting the criteria established by the regulations of the board or
8 otherwise supplied in a form that may be established by regulation
9 of the board.

10 (b) Amount of Bid Security. Bid security must be in an
11 amount equal to at least five percent of the amount of the bid at a
12 minimum.

13 (c) Rejection of Bids for Noncompliance with Bid Security
14 Requirements. When the invitation for bids requires security,
15 noncompliance requires that the bid be rejected except that a
16 bidder who fails to provide bid security in the proper amount or a
17 bid bond with the proper rating must be given one working day
18 from bid opening to cure the deficiencies. If the bidder is unable
19 to cure these deficiencies within one working day of bid opening,
20 his bid must be rejected.

21 (d) Withdrawal of Bids. After the bids are opened, they
22 must be irrevocable for the period specified in the invitation for
23 bids. If a bidder is permitted to withdraw its bid before bid
24 opening pursuant to Section 11-35-1520(78) action must not be
25 had against the bidder or the bid security.

26 (2) Contract Performance Payment Bonds.

27 (a) When Required-Amounts. ~~When a construction contract~~
28 ~~is awarded pursuant to Section 11-35-3020, the~~ The following
29 bonds or security must be delivered to the ~~using agency~~
30 governmental body and become binding on the parties upon the
31 execution of the contract for construction:

32 (i) a performance bond satisfactory to the State, executed
33 by a surety company meeting the criteria established by the board
34 in regulations, or otherwise secured in a manner satisfactory to the
35 State, in an amount equal to one hundred percent of the portion of
36 the contract price specified in the contract that does not include the
37 cost of operation, maintenance, and finance;

38 (ii) a payment bond satisfactory to the State, executed by a
39 surety company meeting the criteria established by the board in
40 regulations, or otherwise secured in a manner satisfactory to the
41 State, for the protection of all persons supplying labor and material
42 to the contractor or its subcontractors for the performance of the
43 construction work provided for in the contract. The bond must be

1 in an amount equal to one hundred percent of the portion of the
2 contract price that does not include the cost of operation,
3 maintenance, and finance.

4 (iii) in the case of a construction contract valued at fifty
5 thousand dollars or less, the ~~using agency governmental body~~ may
6 waive the requirements of (i) and (ii) above, ~~provided that if the~~
7 ~~using agency governmental body~~ has protected the State.

8 (iv) in the case of a construction manager at-risk contract,
9 the solicitation may provide that bonds or security are not required
10 during the project's preconstruction or design phase, if
11 construction does not commence until the requirements of (i) and
12 (ii) above have been satisfied.

13 (b) Authority to Require Additional Bonds. ~~Subsection Item~~
14 (2) does not limit the authority of the board to require a
15 performance bond or other security in addition to these bonds, or
16 in circumstances other than specified in subitem (a) of that
17 ~~subsection item~~ in accordance with regulations promulgated by the
18 board.

19 (c) Suits on Payment Bonds--Right to Institute. ~~Every~~ A
20 person who has furnished labor, material, or rental equipment to a
21 bonded contractor or his subcontractors for the work specified in
22 the contract, and who has not been paid in full for it before the
23 expiration of a period of ninety days after the day on which the last
24 of the labor was done or performed by the person or material or
25 rental equipment was furnished or supplied by the person for
26 which the claim is made, has the right to sue on the payment bond
27 for the amount, or the balance of it, unpaid at the time of institution
28 of the suit and to prosecute the action for the sum or sums justly
29 due the person. A remote claimant has a right of action on the
30 payment bond only upon giving written notice to the contractor
31 within ninety days from the date on which the person did or
32 performed the last of the labor or furnished or supplied the last of
33 the material or rental equipment upon which the claim is made,
34 stating with substantial accuracy the amount claimed as unpaid and
35 the name of the party to whom the material or rental equipment
36 was furnished or supplied or for whom the labor was done or
37 performed. The written notice to the bonded contractor must be
38 served personally or served by mailing the notice by registered or
39 certified mail, postage prepaid, in an envelope addressed to the
40 bonded contractor at any place the bonded contractor maintains a
41 permanent office for the conduct of its business, or at the current
42 address as shown on the records of the Department of Labor,
43 Licensing and Regulation. The aggregate amount of a claim

1 against the payment bond by a remote claimant may not exceed the
2 amount due by the bonded contractor to the person to whom the
3 remote claimant has supplied labor, materials, rental equipment, or
4 services, unless the remote claimant has provided notice of
5 furnishing labor, materials, or rental equipment to the bonded
6 contractor. The written notice to the bonded contractor must be
7 served personally or sent by fax or by electronic mail or by
8 registered or certified mail, postage prepaid, to the bonded
9 contractor at any place the bonded contractor maintains a
10 permanent office for the conduct of its business, or at the current
11 address as shown on the records of the Department of Labor,
12 Licensing and Regulation. After receiving the notice of furnishing
13 labor, materials, or rental equipment, payment by the bonded
14 contractor may not lessen the amount recoverable by the remote
15 claimant. The aggregate amount of claims on the payment bond
16 may not exceed the penal sum of the bond.

17 A suit under this section must not be commenced after the
18 expiration of one year after the last date of furnishing or providing
19 labor, services, materials, or rental equipment.

20 For purposes of this section, 'bonded contractor' means the
21 contractor or subcontractor furnishing the payment bond, and
22 'remote claimant' means a person having a direct contractual
23 relationship with a subcontractor of a bonded contractor, but no
24 expressed or implied contractual relationship with the bonded
25 contractor.

26 (d) Suits on Payment Bonds--Where and When Brought.
27 Every suit instituted upon a payment bond must be brought in a
28 court of competent jurisdiction for the county or circuit in which
29 the construction contract was to be performed; except that a suit
30 must not be commenced after the expiration of one year after the
31 day on which the last of the labor was performed or material was
32 supplied by the person bringing suit. The obligee named in the
33 bond need not be joined as a party in the suit.

34 (3) Bonds Forms and Copies. (a) Bond Forms. The board
35 shall promulgate by regulation the form of the bonds required by
36 this section.

37 (b) Certified Copies of Bonds. A person may request and
38 obtain from the ~~using agency~~ governmental body a certified copy
39 of a bond upon payment of the cost of reproduction of the bond
40 and postage, if any. A certified copy of a bond is prima facie
41 evidence of the contents, execution, and delivery of the original."

42

1 SECTION 15. Section 11-35-3210, as last amended by Act 153
2 of 1997, is further amended to read:

3
4 “Section 11-35-3210. (1) ~~Applicability. — Architect-engineer,~~
5 ~~construction management, and land surveying services shall be~~
6 ~~procured as provided in Section 11-35-3220 except as authorized~~
7 ~~by Sections 11-35-1560, 11-35-1570, and 11-35-3230.~~

8 (2) Policy. It is the policy of this State to announce publicly all
9 requirements for architect-engineer, construction management, and
10 land surveying services and to negotiate contracts for such services
11 on the basis of demonstrated competence and qualification for the
12 particular type of services required and at fair and reasonable
13 prices.”

14
15 SECTION 16. Section 11-35-3220(1), (7), (8), and (9) of the
16 1976 Code, as last amended by Act 376 of 2006, is further
17 amended to read:

18
19 “Section 11-35-3220. (1) Agency Selection Committee. ~~Each~~
20 ~~using agency~~ A governmental body shall establish its own
21 architect-engineer, construction management, and land surveying
22 services selection committee, referred to as the agency selection
23 committee, ~~that~~ which must be composed of those individuals
24 ~~whom~~ the agency head determines to be qualified to make an
25 informed decision as to the most competent and qualified firm for
26 the proposed project. The head of the ~~using agency~~ governmental
27 body or his qualified responsible designee shall sit as a permanent
28 member of the agency selection committee for the purpose of
29 coordinating and accounting for the committee’s work. To assist
30 an agency selection committee in the selection of firms to be
31 employed for significant or highly technical projects and to
32 facilitate prompt selections, the agency selection committee may
33 invite the State Engineer or his designee to sit as a nonvoting
34 member of the committee.

35 (7) Negotiation of Contract. The governing body of the ~~using~~
36 ~~agency~~ governmental body or its designee shall negotiate a
37 contract for services with the most qualified person or firm at a
38 compensation that is fair and reasonable to the State. If the
39 governing body of the ~~using agency~~ governmental body or its
40 designee is unable to negotiate a satisfactory contract with this
41 person or firm, negotiations must be terminated formally.
42 Negotiations must commence in the same manner with the second
43 and then the third most qualified until a satisfactory contract is

1 negotiated. If an agreement is not reached with one of the three,
2 additional persons or firms in order of their competence and
3 qualifications must be selected after consultation with the agency
4 selection committee, and negotiations must be continued in the
5 same manner until agreement is reached.

6 (8) State Engineer's Office Review. The head of the ~~using~~
7 ~~agency~~ governmental body shall submit the following documents
8 to the State Engineer's Office for its review:

9 (a) the written report of the agency selection committee,
10 listing the persons or firms that responded to the invitation to
11 submit information and enumerating the reasons of the committee
12 for selecting the particular ones to be interviewed;

13 (b) the written ranking report of the agency selection
14 committee and all data substantiating the determinations made in
15 that report; and

16 (c) the tentative contract between the ~~using—agency~~
17 governmental body and the selected person or firm.

18 (9) Approval or Disagreement by State Engineer's Office. The
19 State Engineer's Office has ten days to review the data submitted
20 by the agency selection committee, and to determine its position
21 with respect to the particular person or firm recommended for
22 approval by the agency. If the State Engineer's Office disagrees
23 with the proposal, it may contest the proposal by submitting the
24 matter to the board for decision. In the event of approval, the State
25 Engineer's Office shall notify immediately in writing the ~~using~~
26 ~~agency~~ governmental body and the person or firm selected of the
27 award and authorize the ~~using—agency~~ governmental body to
28 execute a contract with the selected person or firm. In the event of
29 disagreement, the State Engineer's Office immediately shall notify
30 the ~~using—agency~~ governmental body in writing of its intention to
31 contest the ranking and the reasons for it. All contract negotiations
32 by the governing body must be suspended pending a decision by
33 the board concerning a contested ranking. The board shall hear
34 contests at its next regularly scheduled meeting after notification of
35 the ~~using—agency~~ governmental body. If the board rules in support
36 of the State Engineer's Office position, the ~~using—agency~~
37 governmental body shall submit the name of another person or
38 firm to the State Engineer's Office for consideration, selected in
39 accordance with the procedures prescribed in this section. If the
40 board rules in support of the ~~using—agency~~ governmental body, the
41 ~~using—agency~~ governmental body must be notified in writing and
42 authorized to execute a contract with the selected person or firm.”
43

1 SECTION 17. Section 11-35-3230(4) of the 1976 Code, as last
2 amended by Act 376 of 2006, is further amended to read:

3

4 “(4) Splitting of Larger Projects Prohibited. ~~An agency~~ A
5 governmental body may not break a project into small projects for
6 the purpose of circumventing the provisions of Section 11-35-3220
7 and this section.”

8

9 SECTION 18. Section 11-35-3245 of the 1976 Code, as last
10 amended by Act 376 of 2006, is further amended to read:

11

12 “Section 11-35-3245. (a) An architect or engineer performing
13 design work, or construction manager performing construction
14 management services, both as described in Section 11-35-2910(1)
15 and (3), under a contract awarded pursuant to the provisions of
16 Section 11-35-3220 or Section 11-35-3230, may not perform other
17 work, by later amendment or separate contract award, on that
18 project as a contractor or subcontractor either directly or through a
19 business in which he or his architectural engineering or
20 construction management firm has greater than a five percent
21 interest.

22 (b) For purposes of this section, safety compliance and other
23 incidental construction support activities performed by the
24 construction manager are not considered work performed as a
25 contractor or subcontractor. If the construction manager performs
26 or is responsible for safety compliance and other incidental
27 construction support activities, and these support activities are in
28 noncompliance with the provisions of Section 41-15-210, then the
29 construction management firm is subject to all applicable fines and
30 penalties.

31 (c) This section applies only to procurements for construction
32 using the design-bid-build project delivery methods.”

33

34 SECTION 19. Section 11-35-3310(1) of the 1976 Code, as last
35 amended by Act 153 of 1997, is further amended to read:

36

37 (1) General Applicability. Indefinite delivery contracts may be
38 awarded on an as-needed basis for construction services pursuant
39 to the procedures ~~set forth~~ in Section ~~11-35-3020~~ 11-35-3015(2)(b)
40 and for architectural-engineering and land surveying services
41 pursuant to Section 11-35-3220.”

42

43 SECTION 20. Section 11-35-1825 of the 1976 Code is repealed.

1
2 SECTION 21. This act takes effect upon approval by the
3 Governor and applies to solicitations issued on or after January 1,
4 2008.
5
6 /s/Sen. Nikki G. Setzler /s/Rep. W. Brian White
7 /s/Sen. Thomas C. Alexander /s/Rep. Tracy R. Edge
8 /s/Sen. Michael L. Fair /s/Rep. Douglas Jennings, Jr.
9 On Part of the Senate. On Part of the House.
10 ----XX----
11