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CONFERENCE COMMITTEE REPORT ADOPTED -- NOT PRINTED
January 9, 2008

S. 282

Introduced by Senators Leatherman and Setzler

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Read the first time April 10, 2007.
A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 11-35-3005 SO AS TO AUTHORIZE CERTAIN PROJECT DELIVERY METHODS FOR STATE PROCUREMENTS RELATING TO INFRASTRUCTURE FACILITIES; BY ADDING SECTION 11-35-3015 SO AS TO SPECIFY THE SOURCE SELECTION METHODS FOR THE TYPES OF AUTHORIZED PROJECT DELIVERY METHODS; BY ADDING SECTION 11-35-3021 SO AS TO PROVIDE FOR SUBCONTRACTOR SUBSTITUTION; BY ADDING SECTION 11-35-3023 SO AS TO PROVIDE FOR PREQUALIFICATION ON STATE CONSTRUCTION; BY ADDING SECTION 11-35-3024 SO AS TO PROVIDE FOR CONTENTS OF A REQUEST FOR PROPOSALS AND EVALUATION FACTORS APPLICABLE TO CERTAIN PROJECT DELIVERY METHODS; BY ADDING SECTION 11-35-3035 SO AS TO PROVIDE FOR THE REQUIREMENT OF ERRORS AND OMISSIONS INSURANCE TO COVER CERTAIN SERVICES DELIVERED PURSUANT TO CERTAIN PROJECT DELIVERY METHODS; BY ADDING SECTION 11-35-3037 SO AS TO PROVIDE FOR OTHER FORMS OF SECURITY TO ENSURE PERFORMANCE; BY ADDING SECTION 11-35-3070 SO AS TO ALLOW THE GOVERNING BODY TO APPROVE NONMATERIAL CHANGE ORDERS; TO AMEND SECTION 11-35-310, AS AMENDED, RELATING TO DEFINITIONS FOR PURPOSES OF THE SOUTH CAROLINA CONSOLIDATED PROCUREMENT CODE, SO AS TO REDEFINE “CONSTRUCTION”; TO AMEND SECTION 11-35-1510, AS AMENDED, RELATING TO METHODS OF SOURCE SELECTION, SO AS TO PROVIDE FOR SELECTION METHODS IN CONNECTION WITH PROJECT DELIVERY METHODS; TO AMEND SECTION 11-35-1530, AS
AMENDED, RELATING TO COMPETITIVE SEALED PROPOSALS, SO AS TO REQUIRE COMPETITIVE SEALED PROPOSALS FOR CONTRACTS FOR CERTAIN PROJECT DELIVERY METHODS AND TO PROVIDE EXCEPTIONS; TO AMEND SECTION 11-35-2410, AS AMENDED, RELATING TO FINALITY OF DETERMINATIONS IN CONNECTION WITH COMPETITIVE SEALED BIDDING, SO AS TO INCLUDE REFERENCES TO CHOICE OF DELIVERY METHOD AND PREQUALIFICATION ON STATE CONSTRUCTION; TO AMEND SECTION 11-35-2910, AS AMENDED, RELATING TO CERTAIN SERVICES, SO AS TO INCLUDE DEFINITIONS PERTAINING TO THE VARIOUS AUTHORIZED PROJECT DELIVERY METHODS INCLUDING “DESIGN REQUIREMENTS”, “INDEPENDENT PEER REVIEWER SERVICE”, AND “INFRASTRUCTURE FACILITY”; TO AMEND SECTION 11-35-3010, AS AMENDED, RELATING TO ADMINISTRATION OF CONSTRUCTION CONTRACTING, SO AS TO SUBSTITUTE PROJECT DELIVERY METHOD FOR THE PROCESS AND “GOVERNMENTAL BODY” FOR “USING AGENCY”; TO AMEND SECTION 11-35-3020, AS AMENDED, RELATING TO CONSTRUCTION PROCUREMENT PROCEDURES, SO AS TO DELETE SOURCE SELECTION LANGUAGE, TO INCORPORATE NEW PROVISIONS ADDED IN EARLIER SECTIONS AND TO DELETE LANGUAGE Duplicative OF NEW PROVISIONS ADDED; TO AMEND SECTION 11-35-3030, AS AMENDED, RELATING TO BOND AND SECURITY SO AS TO PROVIDE THAT THE CONTRACT PRICE FOR PURPOSES OF A PAYMENT BOND OR PERFORMANCE BOND DOES NOT INCLUDE THE COST OF OPERATION, MAINTENANCE, AND FINANCE, AND TO ALLOW FOR NO SURETY DURING PRECONSTRUCTION OR DESIGN PHASES; TO AMEND SECTION 11-35-3210, AS AMENDED, RELATING TO APPLICABILITY AND POLICY IN CONNECTION WITH CERTAIN SERVICES, SO AS TO DELETE THE PROVISIONS REFERRING TO APPLICABILITY TO THOSE SERVICES; TO AMEND SECTION 11-35-3220, AS AMENDED, RELATING TO PROCUREMENT PROCEDURES, SO AS TO SUBSTITUTE “GOVERNMENTAL BODY” FOR “USING AGENCY”; TO AMEND SECTION 11-35-3230, AS AMENDED, RELATING TO SMALL ARCHITECT-ENGINEERING AND LAND SURVEYING CONTRACTS, SO AS TO SUBSTITUTE
“GOVERNMENTAL BODY” FOR “USING AGENCY”; TO AMEND SECTION 11-35-3245, AS AMENDED, RELATING TO PERFORMING OTHER WORK, SO AS TO LIMIT ITS APPLICATION TO PROCUREMENTS FOR CONSTRUCTION USING THE DESIGN-BID-BUILD PROJECT DELIVERY METHODS; TO AMEND SECTION 11-35-3310, AS AMENDED, RELATING TO INDEFINITE DELIVERY CONSTRUCTION CONTRACTS, SO AS TO ADD A CROSS REFERENCE; AND TO REPEAL SECTION 11-35-1825, RELATING TO PREQUALIFICATION OF CONSTRUCTION BIDDERS.

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

SECTION 1. The General Assembly finds that:

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

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

SECTION 2. Subarticle 3, Article 9, Chapter 35, Title 11 of the 1976 Code is amended by adding:
“Section 11-35-3005. (1) The following project delivery methods are authorized for procurements relating to infrastructure facilities:

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

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

(a) approve as an alternative project delivery method any combination of design, construction, finance, and services for operations and maintenance of an infrastructure facility; and
(b) allow or require the governmental body to follow any of the additional procedures established by Section 11-35-3025.

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

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

(2) Design-bid-build:

(a) Design. Architect-engineer, construction management, and land surveying services. The qualifications based selection process in Section 11-35-3220 (Qualifications Based Selection Procedures) must be used to procure architect-engineer, construction management, and land surveying services, unless
those services are acquired in conjunction with construction using one of the project delivery methods provided in Section 11-35-3015 (3), (5), (6), (7), and (8).

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

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

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

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

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

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

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

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

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

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

(i) the listed subcontractor is not financially responsible;
(ii) the listed subcontractor’s scope of work did not include a portion of the work required in the plans and specifications, and the exclusion is not clearly set forth in the subcontractor’s original bid;
(iii) the listed subcontractor was listed as a result of an inadvertent clerical error, but only if that request is made within four working days of opening;
(iv) the listed subcontractor failed or refused to submit a performance and payment bond when requested by the prospective contractor after the subcontractor had represented to the prospective contractor that the subcontractor could obtain a performance and payment bond; and
(v) the listed subcontractor must be licensed and did not have the license at the time required by law;

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

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

d) upon mutual agreement of the contractor and subcontractor; and

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

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

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

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

Section 11-35-3023. (A) In accordance with this section and procedures published by the State Engineer, a governmental body
may limit participation in a solicitation for construction to only
those businesses, including potential subcontractors, that are
prequalified. The prequalification process may be used only with
the approval and supervision of the State Engineer’s Office. If
businesses are prequalified, the governmental body must issue a
request for qualifications. Adequate public notice of the request for
qualifications must be given in the manner provided in Section
11-35-1520(3). The request must contain, at a minimum, a
description of the general scope of work to be acquired, the
deadline for submission of information, and how businesses may
apply for consideration. The evaluation criteria must include, but
not be limited to, prior performance, recent past references on all
aspects of performance, financial stability, and experience on
similar construction projects. Using only the criteria stated in the
request for qualifications, businesses must be ranked from most
qualified to least qualified. The basis for the ranking must be
determined in writing. If fewer than two businesses are
prequalified, the prequalification process must be canceled. The
determination regarding how many offers to solicit is not subject to
review pursuant to Article 17 of this Code. Section 11-35-1520(4)
(Request for Qualifications) and Section 11-35-1530(4) (Request
for Qualifications) do not apply to a procurement of construction.

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

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

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

(a) must include design requirements;
(b) must solicit proposal development documents; and
(c) may, if the governmental body determines that the cost
of preparing proposals is high in view of the size, estimated price,
and complexity of the procurement:
(i) prequalify offerors in accordance with Section 11-35-3023 by issuing a request for qualifications in advance of the request for proposals;
(ii) select, pursuant to procedures designated in the Manual for Planning and Execution of State Permanent Improvements, a short list of responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award before discussions and evaluations pursuant to Section 11-35-1530, if the number of proposals to be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or
(iii) pay stipends to unsuccessful offerors, if the amount of the stipends and the terms under which stipends are paid are stated in the Request for Proposals.

(3) Evaluation Factors. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain must:
(a) state the relative importance of (i) demonstrated compliance with the design requirements, (ii) offeror qualifications, (iii) financial capacity, (iv) project schedule, (v) price, or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements, and (vi) other factors, if any; and
(b) in circumstances designated in the Manual for Planning and Execution of State Permanent Improvements, require each offeror to identify an Independent Peer Reviewer whose competence and qualifications to provide that service must be an additional evaluation factor in the award of the contract.

(4) Unless excused by the State Engineer, the State Engineer’s Office shall oversee the evaluation process for a procurement of construction if factors other than price are considered in the evaluation of a proposal.”

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

“Section 11-35-3035. Regulations shall be promulgated that specify when a governmental body shall require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Section 11-35-3005 (1) (a), (d), (e) and (f).
Section 11-35-3037. The governmental body may require one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately or as one element of another project delivery method:

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

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

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

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

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

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

“(7) ‘Construction’ means the process of building, altering, repairing, remodeling, improving, or demolishing any public structure or building or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property. ‘Construction’ means the process of building, altering, repairing, remodeling, improving, or demolishing a public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of an existing public infrastructure facility, including structures, buildings, or real 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
Section 11-35-2910 of the 1976 Code, as last amended by Act 153 of 1997, is further amended to read:

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

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

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

(4) ‘Construction management services’ are those professional services associated with a system in which the governmental body directly contracts with a professional construction manager to provide that group of management activities required to plan,
schedule, coordinate, and manage the design and construction plan of a state project in a manner that contributes to the control of time, cost, and quality of construction as specified in the construction management contract, contract administration, project management, and other specified services provided in connection with the administration of a project delivery method defined in Section 11-35-3005 (Project delivery methods authorized).

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

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

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

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

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

(10) ‘Design requirements’ means the written description of the infrastructure facility to be procured pursuant to this article, including:

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

(b) the anticipated schedule, including start, duration, and completion; and
(c) estimated budgets, as applicable to the specific
procurement, for design, construction, operation, and maintenance.
The design requirements may, but need not, include drawings and
other documents illustrating the scale and relationship of the
features, functions, and characteristics of the project.

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

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

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

(14) ‘Proposal development documents’ means drawings and
other design related documents that are sufficient to fix and
describe the size and character of an infrastructure facility as to
architectural, structural, mechanical and electrical systems,
materials, and such other elements as may be appropriate to the
applicable project delivery method.”

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

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

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

(3) Approval or Disagreement by State Engineer’s Office. The state engineer’s office State Engineer’s Office has ten days to review the data submitted by the using agency governmental body to determine its position with respect to the particular project delivery method of construction contracting administration recommended for approval by the using agency governmental body, and to notify the using agency governmental body of its decision in writing. If the state engineer’s office State Engineer’s Office disagrees with the project delivery method selected, it may contest such it by submitting the matter to the board for decision. Written notification by the state engineer’s office State Engineer’s Office to the using agency governmental body of its intention to contest the project delivery method selected shall must include the its reasons therefor. The board shall hear any such contests the contest at its next regularly scheduled meeting subsequent to after notification of the using agency governmental body. If the board rules in support of the state engineer’s office State Engineer’s Office position, the using agency governmental body shall receive written notification of the decision. If the board rules in support of the using agency governmental body, the using agency shall governmental body must be notified in writing and thereby by that writing be authorized to use that project delivery method of construction contracting administration as previously recommended by the
using agency governmental body on the particular construction project.”

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

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

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

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

(b) Bid Acceptance. Instead of Section 11-35-1520(6), the following provision applies. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The using agency governmental body’s invitation for bids must set forth all requirements of the bid including, but not limited to:
(i) The using agency governmental body, in consultation with the architect-engineer assigned to the project, shall identify by specialty in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors’ contracts are each expected to exceed three percent of the prime contractor’s total base bid. In addition, the using agency governmental body, in consultation with the architect-engineer assigned to the project, may identify by specialty in the invitation for bids any subcontractors who are expected to perform work which is vital to the project. The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 11-35-4210 or another provision of this code. A bidder in response to an invitation for bids shall set forth in his bid the name of only those subcontractors to perform the work as identified in the invitation for bids. If the bidder determines to use his own employees to perform a portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform that work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract that work except with the approval of the using agency governmental body for good cause shown.

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

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

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

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

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

(dd) upon a showing satisfactory to the governmental body by the contractor that the listed subcontractor failed or
refused to submit a performance and payment bond when requested by the prime contractor after the subcontractor had represented to the prime contractor that he could obtain a performance and payment bond;

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

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

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

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

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

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

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

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

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

(i) Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location that is specified in the invitation for bids. The invitation for bids and the posted notice must contain a statement of the bidder’s right to protest pursuant to Section 11-35-4210(1) and the date and location of posting must be announced at bid opening. In addition to posting notice, the using agency governmental body promptly
shall send all responsive bidders a copy of the notice of intended award and of the bid tabulation. The mailed notice must indicate the posting date and must contain a statement of the bidder’s right to protest pursuant to Section 11-35-4210(1).

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

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

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

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

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

SECTION 14. Section 11-35-3030(1)-(3) of the 1976 Code, as last amended by Act 376 of 2006, is further amended to read:
(a) Requirement for Bid Security. Bid security is required for all competitive sealed bidding for construction contracts in a design-bid-build procurement in excess of fifty thousand dollars and other contracts as may be prescribed by the State Engineer’s Office. Bid security is a bond provided by a surety company meeting the criteria established by the regulations of the board or otherwise supplied in a form that may be established by regulation of the board.
(b) Amount of Bid Security. Bid security must be in an amount equal to at least five percent of the amount of the bid at a minimum.
(c) Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected except that a bidder who fails to provide bid security in the proper amount or a bid bond with the proper rating must be given one working day from bid opening to cure the deficiencies. If the bidder is unable to cure these deficiencies within one working day of bid opening, his bid must be rejected.
(d) Withdrawal of Bids. After the bids are opened, they must be irrevocable for the period specified in the invitation for bids. If a bidder is permitted to withdraw its bid before bid opening pursuant to Section 11-35-1520(78), action must not be had against the bidder or the bid security.
(2) Contract Performance Payment Bonds.
(a) When Required—Amounts. When a construction contract is awarded pursuant to Section 11-35-3020, the following bonds or security must be delivered to the using agency and become binding on the parties upon the execution of the contract for construction:
(i) a performance bond satisfactory to the State, executed by a surety company meeting the criteria established by the board in regulations, or otherwise secured in a manner satisfactory to the State, in an amount equal to one hundred percent of the portion of the contract price specified in the contract that does not include the cost of operation, maintenance, and finance;
(ii) a payment bond satisfactory to the State, executed by a surety company meeting the criteria established by the board in regulations, or otherwise secured in a manner satisfactory to the State, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond must be
in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance.

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

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

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

(c) Suits on Payment Bonds--Right to Institute. Every person who has furnished labor, material, or rental equipment to a bonded contractor or his subcontractors for the work specified in the contract, and who has not been paid in full for it before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by the person or material or rental equipment was furnished or supplied by the person for which the claim is made, has the right to sue on the payment bond for the amount, or the balance of it, unpaid at the time of institution of the suit and to prosecute the action for the sum or sums justly due the person. A remote claimant has a right of action on the payment bond only upon giving written notice to the contractor within ninety days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material or rental equipment upon which the claim is made, stating with substantial accuracy the amount claimed as unpaid and the name of the party to whom the material or rental equipment was furnished or supplied or for whom the labor was done or performed. The written notice to the bonded contractor must be served personally or served by mailing the notice by registered or certified mail, postage prepaid, in an envelope addressed to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. The aggregate amount of a claim
against the payment bond by a remote claimant may not exceed the
amount due by the bonded contractor to the person to whom the
remote claimant has supplied labor, materials, rental equipment, or
services, unless the remote claimant has provided notice of
furnishing labor, materials, or rental equipment to the bonded
contractor. The written notice to the bonded contractor must be
served personally or sent by fax or by electronic mail or by
registered or certified mail, postage prepaid, to the bonded
contractor at any place the bonded contractor maintains a
permanent office for the conduct of its business, or at the current
address as shown on the records of the Department of Labor,
Licensing and Regulation. After receiving the notice of furnishing
labor, materials, or rental equipment, payment by the bonded
contractor may not lessen the amount recoverable by the remote
claimant. The aggregate amount of claims on the payment bond
may not exceed the penal sum of the bond.

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

For purposes of this section, ‘bonded contractor’ means the
contractor or subcontractor furnishing the payment bond, and
‘remote claimant’ means a person having a direct contractual
relationship with a subcontractor of a bonded contractor, but no
expressed or implied contractual relationship with the bonded
contractor.

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

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

(b) Certified Copies of Bonds. A person may request and
obtain from the charging governmental body a certified copy
of a bond upon payment of the cost of reproduction of the bond
and postage, if any. A certified copy of a bond is prima facie
evidence of the contents, execution, and delivery of the original.”
SECTION 15. Section 11-35-3210, as last amended by Act 153 of 1997, is further amended to read:


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

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

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

(7) Negotiation of Contract. The governing body of the using agency governmental body or its designee shall negotiate a contract for services with the most qualified person or firm at a compensation that is fair and reasonable to the State. If the governing body of the using agency governmental body or its designee is unable to negotiate a satisfactory contract with this person or firm, negotiations must be terminated formally. Negotiations must commence in the same manner with the second and then the third most qualified until a satisfactory contract is [282]
negotiated. If an agreement is not reached with one of the three, additional persons or firms in order of their competence and qualifications must be selected after consultation with the agency selection committee, and negotiations must be continued in the same manner until agreement is reached.

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

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

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

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

(9) Approval or Disagreement by State Engineer’s Office. The State Engineer’s Office has ten days to review the data submitted by the agency selection committee, and to determine its position with respect to the particular person or firm recommended for approval by the agency. If the State Engineer’s Office disagrees with the proposal, it may contest the proposal by submitting the matter to the board for decision. In the event of approval, the State Engineer’s Office shall notify immediately in writing the using agency governmental body and the person or firm selected of the award and authorize the using agency governmental body to execute a contract with the selected person or firm. In the event of disagreement, the State Engineer’s Office immediately shall notify the using agency governmental body in writing of its intention to contest the ranking and the reasons for it. All contract negotiations by the governing body must be suspended pending a decision by the board concerning a contested ranking. The board shall hear contests at its next regularly scheduled meeting after notification of the using agency governmental body. If the board rules in support of the State Engineer’s Office position, the using agency governmental body shall submit the name of another person or firm to the State Engineer’s Office for consideration, selected in accordance with the procedures prescribed in this section. If the board rules in support of the using agency governmental body, the using agency governmental body must be notified in writing and authorized to execute a contract with the selected person or firm.”
SECTION 17. Section 11-35-3230(4) of the 1976 Code, as last amended by Act 376 of 2006, is further amended to read:

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

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

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

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

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

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

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

SECTION 20. Section 11-35-1825 of the 1976 Code is repealed.
SECTION 21. This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008.


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