Reprinted
February 4, 2014

SENATE BILL No. 261

DIGEST OF SB 261 (Updated February 3, 2014 4:23 pm - DI 75)

Citations Affected: IC 5-32.

Synopsis: Construction managers as constructors. Authorizes public agencies to employ construction managers as constructors for certain construction projects. Provides that the statute expires July 1, 2019.

Effective: July 1, 2014.

Hershman, Banks, Taylor

January 13, 2014, read first time and referred to Committee on Commerce, Economic Development & Technology.
January 27, 2014, amended, reported favorably — Do Pass.
February 3, 2014, read second time, amended, ordered engrossed.

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Second Regular Session 118th General Assembly (2014)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2013 Regular Session and 2013 First Regular Technical Session of the General Assembly.

SENATE BILL No. 261

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 5-32 IS ADDED TO THE INDIANA CODE AS A **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2014]:

ARTICLE 32. EMPLOYMENT OF CONSTRUCTION MANAGERS AS CONSTRUCTORS FOR PROJECTS

Chapter 1. General Provisions

Sec. 1. Except as provided in this article, the applicable public works statute applies to the construction projects of the particular public agency performed under this article.

Sec. 2. This article expires July 1, 2019.

Chapter 2. Definitions

Sec. 1. The definitions in this chapter apply throughout this article.

Sec. 2. "Applicable public works statute" refers to whichever of the following statutes is applicable to public works projects of the public agency:

(1) IC 4-13.6.
(2) IC 5-16.
(3) IC 36-1-12.
(4) Any other statute applicable to the public works projects of the public agency.

Sec. 3. "Architect" refers to a person registered under IC 25-4-1.

Sec. 4. "CMc" or "construction manager as constructor" means a person that provides CMc services.

Sec. 5. "CMc contract" refers to a contract for CMc services.

Sec. 6. "CMc services" includes the following:

(1) Preconstruction phase services, including advice during the preconstruction phase of the project as described in the RFP.

(2) Consultation, collaboration, project construction management, and other services as described in the RFP, regarding the construction during and after the design and construction phases. However, the CMc may not procure the project professional architectural and engineering design services. The public agency must directly contract for the services of the architect and engineer of record.

(3) Development of a construction schedule, estimated cost of construction, and analysis of qualifications of first tier subcontractors.

(4) Subject to the CMc contract, a guarantee of:

(A) the cost of the project; and

(B) the project schedule.

Sec. 7. "Engineer" refers to a person registered under IC 25-31-1.

Sec. 8. "Evaluation committee" refers to a group of individuals who are responsible for evaluating the responses of offerors to the RFP.

Sec. 9. "First tier subcontractor" refers to a subcontractor who contracts directly with the CMc.

Sec. 10. "GMP" refers to the guaranteed maximum price for the work as may be established in the CMc contract.

Sec. 11. "Offeror" refers to a person who submits a response to an RFP.

Sec. 12. "Person" refers to a natural person, a partnership, a limited liability company, or a corporation.

Sec. 13. (a) "Project" means the construction, remodeling, rehabilitation, or repair of buildings or other facilities owned by a

public agency as described in the RFP.

(b) The term does not include the construction, remodeling, rehabilitation, or repair of roads, highways, bridges, or potable water or wastewater infrastructure.

Sec. 14. "Public agency" has the meaning set forth in IC 5-30-1-11.

Sec. 15. "Request for proposals" or "RFP" refers to the process by which a public agency solicits persons to provide CMc services under this article.

Chapter 3. Request for Proposals

Sec. 1. If a public agency chooses to use the procedures set forth in this article when performing a public works project, the public agency shall select a CMc as provided in this chapter.

Sec. 2. (a) The public agency shall issue a request for proposals.

(b) Notice of a request for proposals shall be given as other notices are required to be given under the applicable public works statute.

Sec. 3. A request for proposals must include at least the following:

(1) A statement of the criteria, process, and procedures, which must include consideration of qualifications and fees, by which:

(A) an offeror will be evaluated;

(B) a CMc will be selected; and

(C) a CMc contract will be awarded.

(2) Information about how the GMP may be established as part of the contract.

(3) A description of the insurance requirements for the CMc.

Sec. 4. Each offeror selected to meet with the evaluation committee, based on the evaluation committee's review of the RFP responses, must be given an equal opportunity to meet and communicate with the evaluation committee.

Sec. 5. A summary of the evaluation committee's evaluation of each offeror is subject to disclosure under IC 5-14-3, but only after the CMc contract has been awarded.

Sec. 6. If the public agency determines to proceed with the project, the public agency shall enter into negotiations with the offeror whose proposal has been selected by the evaluation committee considering:

(1) the responses to the RFP;

(2) any interviews with selected offerors; and

(3) evaluation of fees.

Sec. 7. A CMc may perform a part of the work only if:

(1) the public agency approves of the CMc's performance of the work;

(2) the CMc is the lowest responsive and responsible bidder; and

(3) the CMc only performs such work that equals not more than ten percent (10%) of the total value of the project.

Chapter 4. CMc Contract

Sec. 1. After the public agency has selected an offeror to be the CMc, the public agency and that offeror may negotiate the final terms and conditions of the contract for CMc services for the project.

Sec. 2. (a) Subject to this article, the CMc contract must require the CMc to provide payment and performance bonds in an amount not less than the estimated construction costs of the project or the GMP, as provided by the RFP.

(b) Construction may not be performed until the CMc has provided the bonds for that construction as required in the RFP and IC 5-32-6.

Sec. 3. A CMc contract must describe the details of any adjustment of compensation or other incentives negotiated between the public agency and the CMc.

Sec. 4. A CMc contract may describe whether the CMc and the public agency agree to any cost overrun or delay damages or early completion incentives.

Sec. 5. Changes in the contract for CMc services may be made as provided in the CMc contract.

Sec. 6. A public agency or CMc may terminate the CMc contract before the GMP has been determined, if the RFP provides for a GMP.

Sec. 7. (a) If any of the following occur, the public agency may proceed as described in subsection (b):

(1) The CMc contract is terminated under section 6 of this chapter.

(2) The public agency and the selected offeror are unable to reach agreement on a CMc contract.

(3) The selected offeror does not provide the required bonds as provided in the RFP or this article.

(b) If any of the events described in subsection (a)(1), (a)(2), or (a)(3) occur, the public agency may do any of the following:

(1) Negotiate a contract with another offeror.

(2) Award contracts and complete the project under any other

applicable public works statute.

(3) Terminate the project.

Sec. 8. A CMc contract may describe if and when the GMP will be determined. If a GMP is established, the contract must describe all clarifications and assumptions on which the GMP is based.

Chapter 5. CMc Award of First Tier Subcontracts

Sec. 1. The CMc shall comply with all notice, bidding, construction, and contract administration requirements relating to public works contracts that the public agency must comply with under the applicable public works statutes.

Sec. 2. A first tier subcontract shall be awarded to the lowest responsive and responsible bidder for that contract.

Sec. 3. Each bidder must submit under oath as a part of the bid a statement of the following information:

(1) The bidder's professional experience.

(2) The bidder's proposed plan for performing the work.

(3) The equipment and personnel available for the performance of the work.

(4) The bidder's current financial status.

(5) The bidder's best estimate of the cost of each item of work to be performed, including a breakdown of all labor and materials required to complete the work.

Sec. 4. Once a bidder is selected, the CMc's contract with that bidder must include terms and conditions that are designed to accomplish the work at the lowest possible cost to the public agency.

Sec. 5. (a) Except as provided in subsection (b), a bid is a public record subject to public inspection under IC 5-14-3.

(b) A bid is not subject to inspection and copying under IC 5-14-3 until a contract has been awarded or the solicitation of bids has been canceled.

Chapter 6. Bonds

Sec. 1. The CMc shall execute a payment bond to the public agency, approved by the public agency, in an amount equal to the GMP, if established, or the proposed construction cost. The payment bond must be conditioned for payment by the CMc, the CMc's successors and assigns, and by the first tier subcontractors, their successors and assigns, of all indebtedness that may accrue to any person for any labor or service performed, materials furnished, or service rendered in the project. The bond by its terms must be conditioned to directly inure to the benefit of subcontractors, laborers, suppliers of materials, and those

performing service who have furnished or supplied labor, material, or service for the project.

Sec. 2. (a) The CMc shall furnish proof of its ability to obtain a valid performance bond that is acceptable to the public agency in an amount equal to the GMP, if established, or the proposed construction cost.

(b) The CMc shall furnish the bond at the time of an early release construction package or when the GMP is determined and provided to the public agency.

(c) If the bond is acceptable to the public agency, the performance bond may provide for incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the GMP, if established, or the proposed construction cost. The surety on the bond shall not be released for a period of one (1) year after final settlement with the CMc. A change, modification, omission, or addition in and to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the proceedings preliminary to the letting and awarding of the CMc contract does not in any way affect or operate to release or discharge the surety.

COMMITTEE REPORT

Madam President: The Senate Committee on Commerce, Economic Development and Technology, to which was referred Senate Bill No. 261, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 2, line 17, after "phases." insert "**However, the CMc may not procure the project professional architectural and engineering design services. The public agency must directly contract for the services of the architect and engineer of record.**".

Page 2, line 19, delete "quality analysis." and insert "**analysis of qualifications of first tier subcontractors.**".

Page 2, line 40, delete "a road, highway, or bridge unless" and insert "**roads, highways, bridges, or potable water or wastewater infrastructure.**".

Page 2, delete lines 41 through 42.

Page 3, delete lines 1 through 2.

Page 3, line 9, delete "A" and insert "**If a public agency chooses to use the procedures set forth in this article when performing a public works project, the**".

Page 4, line 6, delete "if" and insert "**as**".

Page 5, between lines 33 and 34, begin a new paragraph and insert:

"**Sec. 5. (a) Except as provided in subsection (b), a bid is a public record subject to public inspection under IC 5-14-3.**

(b) A bid is not subject to inspection and copying under IC 5-14-3 until a contract has been awarded or the solicitation of bids has been canceled.".

and when so amended that said bill do pass.

(Reference is to SB 261 as introduced.)

BUCK, Chairperson

Committee Vote: Yeas 7, Nays 0.

SENATE MOTION

Madam President: I move that Senate Bill 261 be amended to read as follows:

Page 3, between lines 41 and 42, begin a new paragraph and insert:

"**Sec. 7. A CMc may perform a part of the work only if:**

(1) the public agency approves of the CMc's performance of the work;

(2) the CMc is the lowest responsive and responsible bidder; and

(3) the CMc only performs such work that equals not more than ten percent (10%) of the total value of the project.".

(Reference is to SB 261 as printed January 28, 2014.)

HERSHMAN

SENATE MOTION

Madam President: I move that Senate Bill 261 be amended to read as follows:

Page 1, between lines 9 and 10, begin a new paragraph and insert:

"**Sec. 2. This article expires July 1, 2019.**".

(Reference is to SB 261 as printed January 28, 2014.)

HERSHMAN

SENATE MOTION

Madam President: I move that Senate Bill 261 be amended to read as follows:

Page 4, delete lines 41 through 42, begin a new paragraph and insert:

"**Sec. 1. The CMc shall comply with all notice, bidding, construction, and contract administration requirements relating to public works contracts that the public agency must comply with under the applicable public works statutes.**

Sec. 2. A first tier subcontract shall be awarded to the lowest responsive and responsible bidder for that contract.".

Page 5, delete lines 1 through 2.

Page 5, line 3, delete "2" and insert "**3**".

Page 5, delete lines 13 through 31.
Page 5, line 32, delete "the lowest and best" and insert "**a**".

(Reference is to SB 261 as printed January 28, 2014.)

HERSHMAN