

Senate Transportation and Safety Committee 1

Amendment No. 1 to SB0189

**Tracy
Signature of Sponsor**

AMEND Senate Bill No. 189*

House Bill No. 183

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 54, Chapter 1, is amended by adding the following language as a new Part 5:

54-1-501.

(a) This part shall be known and may be cited as the "Tennessee Department of Transportation Contracts for Construction Manager/General Contractor Services Pilot Program".

(b) This part provides a pilot program that allows the department to engage in an alternative procurement procedure for certain transportation projects performed by the department of transportation.

(c) It is the intent of the general assembly in enacting this part to provide a pilot program to test the utilization of a construction manager/general contractor ("CM/GC") method as a cost-effective and efficient option for constructing transportation projects.

(d) The construction manager/general contractor method allows the department to engage a construction manager during the design process to provide input on the design. During the design phase, the construction manager provides advice including, but not limited to, constructability review, scheduling, pricing, and phasing to assist the department to design a more efficient and well-designed project. The construction manager/general contractor may subsequently construct the project if the department and the CM/GC reach agreement on a guaranteed maximum price for construction.

54-1-502. As used in this part:

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(1) "Authorized contingency" means the contingency prepared and submitted by the CM/GC as part of the GMP, which is designed to cover costs that may result from incomplete design, unforeseen and unpredictable conditions, or uncertainties within the defined project scope which a prudent CM/GC would not have reasonably detected or anticipated during the discharge of CM/GC's pre-construction duties;

(2) "Commissioner" means the commissioner of transportation;

(3) "Construction manager/general contractor" or "CM/GC" means a business firm, separate from the project designer, that is able to provide pre-construction services during the design and development phase of a project;

(4) "Construction manager/general contractor method" or "CM/GC method" means a project delivery method in which a construction manager is procured to provide pre-construction services and the CM/GC may subsequently construct the project, or any part of the project, if the department and the firm reach agreement on a guaranteed maximum price;

(5) "Department" means the department of transportation;

(6) "Guaranteed maximum price" or "GMP" means the total dollar amount within which the CM/GC commits to complete construction of the project, including the CM/GC's direct costs, overhead, and profit, plus any authorized contingency. The GMP may be supplemented at a later date to cover additional costs arising from changes in the scope of work as the department may subsequently direct in writing; and

(7) "Pre-construction services" may include, but not be limited to, cost estimates, schedule analysis, sequencing of work, risk identification and mitigation, constructability reviews, evaluation of alternative construction options, assistance with various permits, coordination with public or private utility service providers, communication with third-party stakeholders and/or the public, development of a GMP, and any directly related or similar services as may be necessary or useful to assist the department with the design and development of a project to the construction phase.

54-1-503.

(a) Notwithstanding any other provision of law to the contrary, during the term of this pilot program, the commissioner may select up to a total of three (3) projects for the use of the CM/GC method of project delivery. The aggregate total construction costs of the pilot program projects shall not exceed two hundred million dollars (\$200,000,000). The first CM/GC project shall not exceed seventy million dollars (\$70,000,000) in construction costs, and no CM/GC project shall exceed one hundred million dollars (\$100,000,000) in construction costs.

(b) After the first project subject to the construction manager/general contractor method has begun, the department shall not initiate any other project using the CM/GC method until after a contract for construction of the first CM/GC project has been awarded.

(c) Before using the CM/GC method of project delivery, the commissioner shall send written notice to the chair of the transportation and safety committee of the senate and the chair of the transportation committee of the house of representatives. The written notice shall identify the project and the reasons for deciding to use the CM/GC method.

54-1-504. If the commissioner determines that the CM/GC method of procurement is appropriate for a project, the commissioner shall establish a multi-phase process as described

in subdivisions (1) - (4) to select the CM/GC that is the most responsive and responsible proposer.

(1) Phase 1 of the process is the appointment of the selection committee, as follows:

(A) For each request for proposal ("RFP") for CM/GC services, the commissioner shall appoint a selection committee to evaluate and score all responsive proposals in accordance with the procedures established in the RFP.

(i) The selection committee shall have a total of eight (8) members. The commissioner shall appoint five (5) department employees to the selection committee based on their qualifications and experience, including at least one (1) employee who is a licensed professional engineer in this state.

(ii) In addition, the commissioner shall appoint three (3) members who are not employees of the department, all of whom shall be residents of this state. At least one (1) member shall be appointed from and reside in each of the grand divisions of this state. At least one (1) of these three (3) members shall have a degree in banking, finance or accounting and a minimum of five (5) years of employment experience in a banking, finance or accounting position. Each of the other two (2) members shall have a minimum of ten (10) years of construction or highway engineering design experience, and at least one (1) of these two (2) members shall have a valid professional engineering license.

(2) Phase 2 of the process is the development and issuance of the request for proposals ("RFP"), as follows:

(A) The RFP used to solicit a CM/GC proposal shall be reviewed by the selection committee established under subdivision (1). Prior to the issuance of

the RFP, the selection committee shall approve the proposed RFP indicating that the RFP complies with the requirements in this part, in a closed meeting that is not open to the public and by a majority vote.

(B) For the purposes of the pilot program, the RFP shall not require prior experience with any particular project delivery method as a condition for submitting a responsive proposal. Further, the RFP shall not solicit information concerning prior experience with any particular contract delivery method, and the RFP shall not give any credit or preference for any particular contract delivery method experience in the scoring of any proposal. The RFP shall include, but not be limited to, the following:

(i) The procedures for submitting proposals and the criteria for evaluating qualifications and the relative weight for each criteria as indicated in the technical score matrix, which shall be attached to the RFP;

(ii) The form of the contract to be awarded for pre-construction services;

(iii) A listing of the types and scope of pre-construction services that will be required;

(iv) The scope of the intended construction work, with a requirement that the CM/GC, if awarded the construction contract, shall complete at least thirty percent (30%) of the negotiated construction cost of the entire project internally. The cost for pre-construction services shall not be considered part of the thirty percent (30%) but may be considered a specialty item;

(v) Any budget limits for the construction project and the pre-construction services;

(vi) The method of payment and structure of fees for the pre-construction services;

(vii) A requirement that the proposer submit relevant information regarding any licenses, registration and credentials that may be required to construct the project, including information on the revocation or suspension of any license, registration or credential. A Tennessee contractor's license shall not be required to submit a proposal or to be considered for award of a contract for pre-construction services; provided, however, that a Tennessee contractor's license shall be required prior to the execution of any contract for pre-construction services or to construct the project;

(viii) A requirement that the proposer submit evidence that establishes the entity has the capacity to obtain the required bonding and insurance for the project;

(ix) A requirement that the proposer submit information concerning any debarment or default from a federal, state or local government project within the past five (5) years;

(x) A requirement that the proposer provide information concerning the bankruptcy or receivership of any member of the entity including information concerning any work completed by a surety;

(xi) A requirement that the proposing firm provide evidence that the proposing firm has actual experience in the successful construction of other highway transportation projects, as well as the competency, capability and capacity to complete a project of similar size, scope or complexity; and further, the proposing firm may not rely on the

construction experience of a subcontractor or other team member for the purpose of meeting this requirement;

(xii) An affidavit that shall be signed by each proposer competing for a CM/GC contract affirming that the company, its agents, subcontractors and employees have not violated the prohibitions described in subdivisions (3)(F) and(3)(G); and

(xiii) A prohibition that excludes any person or firm that has received compensation for assisting the department in preparing the RFP from submitting a proposal in response to the RFP, or participating as a CM/GC team member.

(C) Once the selection committee has approved the RFP and determined that it complies with the requirements of this part, the RFP shall be published on the department's Internet web site, and may be advertised in a newspaper of general circulation in the region of the state where the work is to be performed and/or published in such other internet or print media of general circulation so as to afford an opportunity for qualified firms to be considered for award of the contract.

(3) Phase 3 of the process, which may be known as the "CM/GC Selection-Design Phase," is as follows:

(A) The department's RFP shall establish a procedure for the evaluation and selection of a CM/GC to perform pre-construction services and potentially construct the project. Members of the selection committee are to be instructed as to their responsibilities and duties, as established in this part, prior to their review or evaluation of the proposals.

(B) All proposals received by the department in response to the RFP, and any documents used by the selection committee to evaluate and score the

proposals, shall remain confidential and not subject to disclosure to any proposer or to the public until after the department issues a written notice of award as provided in subdivision (3)(E).

(C) The RFP may provide for the selection committee to make an initial review and evaluation of interested proposers through a request for qualifications (RFQ), with a more detailed proposal to be submitted by a selected list of proposers, and it may provide for interviews or presentations. The RFP may also provide for a process by which members of the selection committee, through a department employee identified in the RFP as a point of contact, may request and obtain information on technical matters to assist them in the evaluation of proposals.

(D) Upon completion of the evaluation process, each member of the selection committee shall independently review and score the proposals. Each member shall score the proposals pursuant to the scoring matrix that the department provides in the RFP and based on the RFP's evaluation criteria. The scores will be tallied and averaged according to the procedure established in the RFP; provided, however, that the scores of the two (2) selection committee members giving the highest and lowest scores on a proposal shall be excluded when computing the average score for each proposal. Upon completion of the scoring, the proposals will be ranked in order of the highest aggregate score to the lowest aggregate score. The proposer whose proposal receives the highest aggregate score will be considered the best-evaluated proposer.

(E) The proposals shall be submitted in rank order to the commissioner. The commissioner may either accept the selection committee's recommendation of the best-evaluated proposer, or the commissioner may reject all proposals and proceed with construction of the project through any lawful method for procuring

a construction services contract. The department shall send all proposers a written notice of award to the best-evaluated proposer, or a written notice that all proposals have been rejected. If the department issues a written notice of award, the notice shall include a copy of the scores from each member of the selection committee for each RFP proposal.

(F) Throughout the selection process:

(i) The members of the selection committee shall not communicate with each other concerning their review or evaluation of the proposals.

(ii) Any entity that submits a proposal in response to the RFP, as well as their employees, agents and subcontractors, shall not communicate with any member of the selection committee, or with any employee or official of the department, concerning the review or evaluation of any proposal, except that a proposer may communicate with those department employees who are specifically listed in the RFP as appropriate points of contact. Any proposer's failure to comply with this restriction shall render said proposer's RFP response ineligible for selection.

(iii) To confirm that no member of the selection committee has been improperly influenced, prior to reviewing the RFP responses, each committee member must affirmatively complete an affidavit indicating that such member has not discussed the proposals or such member's review of the same with any other selection committee member, with any department employee other than those listed in the RFP as an appropriate point of contact, or with any of the proposers, their agents, employees or subcontractors.

(iv) Each member of the selection committee shall also be required to complete an affidavit stating that such member is not aware of having any conflict of interest, financial or otherwise, regarding the member's ability to fairly evaluate all proposals.

(G) Entities competing for a CM/GC contract are also prohibited from offering or paying a contingency fee of any type that is directly tied to specific actions or work designed to help the proposer obtain a contract through the CM/GC RFP process. The selected CM/GC firm shall complete an affidavit affirming this information before being awarded a contract. Falsely affirming that a contingency fee, associated with the CM/GC RFP process, was neither offered nor paid shall be grounds for debarment of the proposer under official compilation Rules and Regulations of the State of Tennessee, Chapter 1680-5-1, governing suspension and debarment for department contractors.

(4) Phase IV of the process, which may be known as the "CM/GC Selection-Construction Phase," is as follows:

(A) Once the design has been completed, or has been sufficiently developed to allow the CM/GC to prepare a proposed guaranteed maximum price for construction of the project, or a part of the project, the department shall conduct the steps described in subdivision (4)(B) before proceeding with any construction of the project.

(B) The department shall:

(i) Prepare and compile the contract plans, specifications, special provisions, and other requirements which will comprise the contract for construction of the project;

(ii) Prepare a detailed construction cost estimate to evaluate the appropriate price for construction of the project as designed; and

(iii) If directed by the commissioner, have an independent third-party estimator prepare a detailed construction cost estimate to confirm the appropriate price for construction of the project as designed.

(C) The department's detailed construction cost estimate, and any construction cost estimate prepared by an independent third-party estimator, shall not be disclosed to the CM/GC, and shall remain confidential and not subject to public disclosure until after award of the contract for construction of the project.

(D) The contract shall require the CM/GC to self-perform a portion of the construction work comprising at least thirty percent (30%) of the total cost for construction, excluding specialty items. The cost for pre-construction services shall not be considered part of the thirty percent (30%) but may be considered a specialty item.

(E) Based on the contract plans, specifications, special provisions, and other contract terms and conditions compiled by the department, the CM/GC shall prepare a guaranteed maximum price, including any authorized contingency, for construction of the project. When completed, the CM/GC's proposed GMP shall be submitted to the department for review. The CM/GC's proposed GMP shall otherwise remain confidential and not subject to public disclosure until after award of the contract for construction of the project.

(F) The department shall compare the CM/GC's proposed GMP with its own confidential construction estimate, and with any construction estimate prepared by an independent third-party estimator. If the GMP does not exceed the department's estimate, or the independent third-party estimate, by more than ten percent (10%), the commissioner may, but is not required to, award the contract for construction of the project to the CM/GC.

(G) If the commissioner rejects the proposed GMP, the department may continue to conduct contract discussions with the CM/GC to develop an acceptable GMP for the project as designed. Alternatively, the department may direct the CM/GC to provide additional pre-construction services as needed to assist in the further development of contract plans, terms, or specifications for the purpose of repeating the Phase IV process steps established in this subdivision (4).

(H) If the CM/GC and the commissioner are unable to reach agreement on the GMP, the commissioner may proceed with construction of the project through the low bid procurement process.

54-1-505.

(a) A proposer who participated in the CM/GC RFP process may protest the award of a CM/GC contract to the commissioner. The protest shall be submitted in writing within seven (7) calendar days after the proposer knows or should have known of the facts giving rise to the protest. In the case of a pending award, a stay of award may be requested. The commissioner or the commissioner's designee has the authority to settle and resolve a protest.

(b) Upon receipt of the "notice of award" letter which will be sent to all proposers by email, facsimile or mail prior to awarding the contract to the recommended proposer, the proposers shall have seven (7) calendar days to review the procurement file and to file a protest. In no event shall any protest be allowed, however, more than seven (7) calendar days after the proposer knew or should have known of the facts giving rise to the protest. If no protest letter with a protest bond is received in accordance with the requirements described in this subsection, then the department shall proceed with the award. The protest procedures and protest bond requirements are as follows:

(1) The protester shall deliver by mail or hand delivery an original protest letter, manually signed in ink, with a protest bond to the commissioner within seven (7) calendar days after the proposer knew or should have known of the facts giving rise to the protest. The protest letter shall include the solicitation number, the reason or reasons for the protest, and the signature of an attorney or protesting party indicating that the signer has read the document, and that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation.

(2) The protest, and any review or appeal thereof, shall be based exclusively on the written record of the CM/GC procurement process described in § 54-1-504(2) and (3), unless there are specific factual allegations that, in the course of evaluating or scoring the proposals, the selection committee or a member thereof has engaged in unlawful conduct or conduct so arbitrary and capricious as to amount to an illegality, in which case evidence outside the written record may be submitted.

(3) The protest bond shall be in the amount of five percent (5%) of the department's estimate of the total project cost.

(4) If the protest is not resolved by mutual agreement, the protester may request that the matter be considered at a meeting with the state protest committee created in § 4-56-103. The protester shall be required to submit a letter of appeal to the commissioner of general services and the commissioner of transportation requesting a meeting with the state protest committee within seven

(7) calendar days from the date of the final determination letter provided by the commissioner or the commissioner's designee. In the event that a letter of appeal is not received within the seven (7) calendar days, the department shall proceed with an award.

(5) If the protester submits a letter of appeal to the state protest committee within the seven (7) calendar days, the state protest committee shall hold a protest meeting and make a final determination in writing to the protester and the commissioner.

(6) The department shall hold the protest bond for at least eleven (11) calendar days after the date of the final determination by the commissioner or the commissioner's designee. If the protester appeals the commissioner's final determination to the state protest committee, the protest bond shall be held until the commissioner is instructed by the state protest committee to either keep the bond or return it to the protester. The protester shall be notified in writing of the decision to keep the protest bond or shall be sent the protest bond by certified mail; provided, however, the bond may only be retained if the commissioner determines that there is substantial evidence in the record to establish that the protest was brought or pursued in bad faith, or that the protest does not state on its face a valid basis for protest.

(7) A decision rendered by the state protest committee may be appealed by filing a petition for a writ of certiorari with the chancery court of Davidson County within sixty (60) days of the state protest committee's final decision.

54-1-506. After the protest period has expired, and the contract for pre-construction services has been awarded, the department's procurement files shall be subject to public inspection pursuant to § 10-7-504(a)(7), and the department shall within five (5) business days after the protest period has expired, provide any unsuccessful proposer with a debriefing on the

selection process. The debriefing shall be provided within the earliest mutually convenient time after award of the contract. The debriefing shall be limited to discussion of the strengths and weaknesses of the proposal submitted by the unsuccessful proposer and shall not include specific discussion of any other firm's competing proposal.

54-1-507. The department may establish agency policies and/or promulgate rules and regulations in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, in furtherance of the provisions of this part.

54-1-508. This part shall terminate on July 1, 2019, unless re-enacted or extended by the general assembly prior to such date. It is the legislative intent that any such legislative proposals to re-enact or extend this part be referred to the transportation and safety committee of the senate and the transportation committee of the house of representatives. No later than February 1, 2019, the department shall submit a detailed report to the transportation and safety committee of the senate and the transportation committee of the house of representatives containing relevant data that shall include, but not be limited to, the estimated actual cost of each project upon completion, the estimated and actual time of completion, and the number and value of any change orders for the project.

SECTION 2. For the purpose of promulgating rules and regulations, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes this act shall take effect July 1, 2014, the public welfare requiring it.