

By: Representative Bell (21st)

To: Accountability,
Efficiency, Transparency

HOUSE BILL NO. 1505
(As Sent to Governor)

1 AN ACT TO AMEND SECTION 31-7-13.2, MISSISSIPPI CODE OF 1972,
2 TO REVISE THE CONSTRUCTION MANAGER AT RISK METHOD OF PROJECT
3 DELIVERY TO PROVIDE THAT THE CONSTRUCTION MANAGER FOR PROJECTS FOR
4 INSTITUTIONS OF HIGHER LEARNING AND INDIVIDUAL COMMUNITY AND
5 JUNIOR COLLEGES SHALL NOT BE REQUIRED TO SOLICIT BIDS FOR
6 CONSTRUCTION ON THE PROJECT USING THE PUBLIC PURCHASING LAW; TO
7 PROVIDE HOW SUCH CONSTRUCTION MANAGER SHALL OBTAIN PROPOSALS FROM
8 CONTRACTORS AND VENDORS AND ENTER INTO CONTRACTS; AND FOR RELATED
9 PURPOSES.

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

11 **SECTION 1.** Section 31-7-13.2, Mississippi Code of 1972, is
12 amended as follows:

13 31-7-13.2 (1) When used in this section, "construction
14 manager at risk" means a method of project delivery in which a
15 construction manager guarantees a maximum price for the
16 construction of a project and in which the governing authority or
17 board, before using this method of project delivery, shall include
18 a detailed explanation of why using the construction manager at
19 risk method of project delivery for a particular project satisfies
20 the public need better than that traditional design-bid-build
21 method based on the following criteria:



22 (a) The use of construction manager at risk for the
23 project provides a savings in time or cost over traditional
24 methods; and

25 (b) The size and type of the project is suitable for
26 use of the construction management at risk method of project
27 delivery.

28 (2) When the construction manager at risk method of project
29 delivery is used:

30 (a) There may be a separate contract for design
31 services and a separate contract for construction services;

32 (b) The contract for construction services may be
33 entered into at the same time as a contract for the design
34 services or later;

35 (c) Design and construction of the project may be in
36 sequential or concurrent phases; and

37 (d) Finance, maintenance, operation, reconstruction or
38 other related services may be included for a guaranteed maximum
39 price.

40 (3) When procuring design professional services under a
41 construction manager at risk project delivery method, the agency
42 or governing authority shall procure the services of a design
43 professional pursuant to qualifications-based selection
44 procedures.



45 (4) Before the substantial completion of the design
46 documents, the agency or governing authority may elect to hire a
47 construction manager.

48 (5) When procuring construction management services under
49 the "at risk" model of this section, the agency or governing
50 authority shall follow the qualifications-based selection
51 procedures as outlined in subsection (10) of this section * * * to
52 identify and select the construction manager.

53 (6) The agency or governing authority may require the
54 architect or engineer and the construction manager, by contract,
55 to cooperate in the design, planning and scheduling, and
56 construction process. The contract shall not make the primary
57 designer or construction manager a subcontractor or joint-venture
58 partner to the other or limit the primary designer's or
59 construction manager's independent obligations to the agency or
60 governing authority.

61 (7) Notwithstanding anything to the contrary in this
62 chapter:

63 (a) Each project for construction under a construction
64 manager at risk contract shall be a specific, single project with
65 a minimum construction cost of Twenty-five Million Dollars
66 (\$25,000,000.00).

67 (b) Each project under a construction manager at risk
68 contract shall be a specific, single project. For the purposes of
69 this paragraph, "specific, single project" means a project that is



constructed at a single location, at a common location or for a common purpose.

(8) Agencies shall retain an independent architectural or engineering firm to provide guidance and administration of the professional engineering or professional architecture aspects of the project throughout the development of the scope, design, and construction of the project.

(9) The state shall, on an annual basis, compile and make public all proceedings, records, contracts and other public records relating to procurement transactions authorized under this section.

(10) For purposes of this section, the "qualifications-based selection procedure" shall include:

(a) Publicly announcing all requirements for construction management at risk, architectural, engineering, and land surveying services, to procure these services on the basis of demonstrated competence and qualifications, and to negotiate contracts at fair and reasonable prices after the most qualified firm has been selected.

(b) Agencies or governing authorities shall establish procedures to prequalify firms seeking to provide construction management at risk, architectural, engineering, and land surveying services or may use prequalification lists from other state agencies or governing authorities to meet the requirements of this section.



95 (c) Whenever a project requiring construction
96 management at risk, architectural, engineering, or land surveying
97 services is proposed for an agency or governing authority, the
98 agency or governing authority shall provide advance notice
99 published in a professional services bulletin or advertised within
100 the official state newspaper setting forth the projects and
101 services to be procured for not less than fourteen (14) days. The
102 professional services bulletin shall be mailed to each firm that
103 has requested the information or is prequalified * * *. The
104 professional services bulletin shall include a description of each
105 project and shall state the time and place for interested firms to
106 submit a letter of interest and, if required by the public notice,
107 a statement of qualifications.

108 (d) The agency or governing authority shall evaluate
109 the firms submitting letters of interest and other prequalified
110 firms, taking into account qualifications. The agency or
111 governing authority may consider, but shall not be limited to,
112 considering:

- 113 (i) Ability of professional personnel;
- 114 (ii) Past record and experience;
- 115 (iii) Performance data on file;
- 116 (iv) Willingness to meet time requirements;
- 117 (v) Location;
- 118 (vi) Workload of the firm; and



(vii) Any other qualifications-based factors as the agency or governing authority may determine in writing are applicable.

The agency or governing authority may conduct discussions with and require public presentations by firms deemed to be the most qualified regarding their qualifications, approach to the project and ability to furnish the required services.

(e) The agency or governing authority shall establish a committee to select firms to provide construction management at risk, architectural, engineering, and land surveying services. A selection committee may include at least one (1) public member nominated by a statewide association of the profession affected. The public member may not be employed or associated with any firm holding a contract with the agency or governing authority nor may the public member's firm be considered for a contract with that agency or governing authority while serving as a public member of the committee. In no case shall the agency or governing authority, before selecting a firm for negotiation under paragraph (f) of this subsection (10), seek formal or informal submission of verbal or written estimates of costs or proposals in terms of dollars, hours required, percentage of construction cost, or any other measure of compensation.

(f) On the basis of evaluations, discussions, and any presentations, the agency or governing authority shall select no less than three (3) firms that it determines to be qualified to



144 provide services for the project and rank them in order of
145 qualifications to provide services regarding the specific project.
146 The agency or governing authority shall then contact the firm
147 ranked most preferred to negotiate a contract at a fair and
148 reasonable compensation. If fewer than three (3) firms submit
149 letters of interest and the agency or governing authority
150 determines that one (1) or both of those firms are so qualified,
151 the agency or governing authority may proceed to negotiate a
152 contract under paragraph (g) of this subsection (10).

153 (g) The agency or governing authority shall prepare a
154 written description of the scope of the proposed services to be
155 used as a basis for negotiations and shall negotiate a contract
156 with the highest qualified firm at compensation that the agency or
157 governing authority determines in writing to be fair and
158 reasonable. In making this decision, the agency or governing
159 authority shall take into account the estimated value, scope,
160 complexity, and professional nature of the services to be
161 rendered. In no case may the agency or governing authority
162 establish a maximum overhead rate or other payment formula
163 designed to eliminate firms from contention or restrict
164 competition or negotiation of fees. If the agency or governing
165 authority is unable to negotiate a satisfactory contract with the
166 firm that is most preferred, negotiations with that firm shall be
167 terminated. The agency or governing authority shall then begin
168 negotiations with the firm that is next preferred. If the agency



or governing authority is unable to negotiate a satisfactory contract with that firm, negotiations with that firm shall be terminated. The agency or governing authority shall then begin negotiations with the firm that is next preferred. If the agency or governing authority is unable to negotiate a satisfactory contract with any of the selected firms, the agency or governing authority shall reevaluate the construction management at risk, architectural, engineering, or land surveying services requested, including the estimated value, scope, complexity, and fee requirements. The agency or governing authority shall then compile a second list of not less than three (3) qualified firms and proceed in accordance with the provisions of this section. A firm negotiating a contract with an agency or governing authority shall negotiate subcontracts * * * at compensation that the firm determines in writing to be fair and reasonable based upon a written description of the scope of the proposed services.

(11) (a) Except as otherwise provided in this section, the construction manager selected by the agency or governing authority to provide construction management at risk services shall solicit bids for construction on the project pursuant to Section 31-7-13. The construction manager shall be entitled to enter into contracts for construction with the lowest and best bidders, as determined in consultation with the agency or governing authority. Before soliciting bids or entering into any such contract, the construction manager, in consultation with the agency or governing



194 authority, may prequalify any contractors or vendors seeking to
195 submit a bid on the project, taking into account defined
196 qualifications which may include, but not be limited to, the
197 following:

198 (i) Past experience and performance record on
199 projects of similar size and scope;

200 (ii) Current financial status and ability to
201 provide acceptable payment and performance bonds and meet defined
202 insurance requirements;

203 (iii) Current workload and backlog of committed
204 work for the period scheduled for the project under consideration;

205 (iv) Safety record to include prior citations and
206 fines if applicable;

207 (v) History of legal disputes or performance
208 defaults;

209 (vi) Identification and experience of project
210 personnel and required manpower;

211 (vii) Plan for and ability to meet the applicable
212 project schedule; and

213 (viii) Any other qualification-based factors as
214 the agency, governing authority or construction manager may
215 determine are applicable.

216 (b) The construction manager, in consultation with the
217 agency or governing authority, shall publish the defined
218 qualifications that shall be considered in the prequalification



219 process at least two (2) weeks in advance of any prequalification
220 of contractors or vendors seeking to submit a bid on the project.
221 Publication shall be in a regular newspaper published in the
222 county or municipality in which the agency or governing authority
223 is located. The agency or governing authority shall also post the
224 defined prequalification requirements on its website.

225 (c) The failure of a bidder to provide information in a
226 timely and complete manner in response to any prequalification
227 process may result in the disqualification of such bidder in the
228 discretion of the agency, governing authority, and construction
229 manager.

230 (d) Except as otherwise provided in Section 25-61-9,
231 confidential and proprietary information furnished by a bidder
232 pursuant to this section shall not be disclosed outside of the
233 agency, governing authority, or construction manager without the
234 prior written consent of the bidder. The bidder shall identify
235 and label any information considered to be confidential and
236 proprietary at the time of submission of the same to the agency,
237 governing authority, or construction manager.

238 (12) The provisions of this section shall not affect any
239 procurement by the Mississippi Transportation Commission.

240 (13) The provisions of subsection (11) of this section shall
241 not apply to procurements by existing or future Mississippi
242 Institutions of Higher Learning ("IHL") or their related entities,
243 joint ventures, or subsidiaries governed by or in connection with



the named institutions. The provisions of this subsection (13) shall apply to procurements by existing or future Mississippi Institutions of Higher Learning ("IHL") or their related entities, joint ventures or subsidiaries governed by or in connection with the named institutions.

(a) The construction manager shall be permitted to obtain proposals from contractors or vendors, with such proposals being based on the qualifications and criteria set forth in paragraph (b) of this subsection, for contracts for the various scopes of work for the project, and the construction manager shall not be required to follow the public bid process of Section 31-7-13 for such contracts.

(b) The construction manager selected by the agency or governing authority to provide construction management at risk services shall obtain proposals from contractors or vendors for construction of the project on terms that the construction management firm, in consultation with the agency or governing authority, deems to be fair and reasonable based upon a written description of the scope of the proposed work or services. The construction manager shall then be entitled to enter into contracts for construction with contractors or vendors that the construction manager deems to be the preferred contractor or vendor, taking into account various qualifications and criteria which may include, but not be limited to, the following:



(i) Cost of the work or services to be performed or supplied by the contractor or vendor to the construction manager;

(ii) Past experience and performance record on projects of similar size and scope;

(iii) Current financial status and ability to provide acceptable payment and performance bonds and meet defined insurance requirements;

(iv) Current workload and backlog of committed work for the period scheduled for the project under consideration;

(v) Safety record to include prior citations and fines if applicable;

(vi) History of legal disputes or performance defaults;

(vii) Identification and experience of project personnel and required manpower;

(viii) Plan for and ability to meet the applicable project schedule; and

(ix) Any other factors as the agency, governing authority or construction manager may determine are applicable.

(c) The construction manager, in consultation with the agency or governing authority, shall publish the above defined qualifications and criteria that shall be considered in the process for selecting contractors and vendors that will contract with the construction manager to construct the project at least



four (4) weeks in advance of any award of contract to such contractors or vendors. Publication shall be in a regular newspaper published in the county or municipality in which the agency or governing authority is located. The agency or governing authority shall also post the defined prequalification requirements on its website.

(d) The failure of a contractor or vendor to provide information requested by the construction manager or the agency or governing authority in a timely and complete manner in connection with the selection process may result in the disqualification of such contractor or vendor from being considered for a contract, as determined in the discretion of the agency, governing authority, and construction manager.

(e) Except as otherwise provided in Section 25-61-9, confidential and proprietary information furnished by construction manager or a contractor or vendor pursuant to this section shall not be disclosed outside of the agency, governing authority or construction manager without the prior written consent of all parties. The construction manager, contractor, or vendor shall identify and label any information considered to be confidential and proprietary at the time of submission of the same to the agency, governing authority, or construction manager.

(f) The construction manager selected by the agency or governing authority shall not be required to submit a proposed guaranteed maximum price for the construction of a project, or for



318 a phase or component of the project, until after the construction
319 manager obtains the contemplated proposals from potential
320 contractors and/or vendors for that project, phase, or component,
321 and the agency or governing authority has issued a completed set
322 of construction drawings and specifications for the project,
323 phase, or component.

324 (g) Nothing in this section prevents a construction
325 manager or its affiliates from self-performing construction work
326 on a project so long as the construction manager or affiliate
327 submits a proposal for a specific scope of work, as would other
328 contractors or vendors, and the proposals are reviewed by the
329 agency or governing authority, deemed to be fair and reasonable as
330 compared to other proposals for the same or similar scope of work,
331 and an award to the construction manager or its affiliate is
332 determined to be in the overall best interests of the project as a
333 whole. However, a construction manager or its affiliates shall
334 only be allowed to self-perform construction work on not more than
335 fifteen percent (15%) of the project.

336 **SECTION 2.** This act shall take effect and be in force from
337 and after its passage.

