

2014 -- S 2344 SUBSTITUTE A

LC004107/SUB A

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2014

A N A C T

RELATING TO PUBLIC PROPERTY AND WORKS

Introduced By: Senators Lombardi, McCaffrey, Lombardo, Conley, and Jabour

Date Introduced: February 12, 2014

Referred To: Senate Finance

It is enacted by the General Assembly as follows:

1 SECTION 1. Sections 37-2-27.1, 37-2-27.2, 37-2-27.3 and 37-2-27.4 of the General  
2 Laws in Chapter 37-2 entitled "State Purchases" are hereby amended to read as follows:

3 **37-2-27.1. Procurement of construction manager at-risk services -- Written**  
4 **determination.** -- (a) Prior to procuring construction manager at-risk services the chief  
5 purchasing officer must sign a written determination documenting the following:

6 (1) That in accordance with ~~section 37-2-18,~~ the factors set forth in subsection (c) below,  
7 the a general contractor ~~selected as the lowest responsive bidder based on a lump sum, fixed fee~~  
8 ~~contract~~ method of construction management as provided under § 37-2-18 is not practicable for  
9 the construction of the project ~~and or~~ will not result in the best value for the state;

10 (2) That the using agency has clearly identified in writing why the use of construction  
11 management at-risk ~~services~~ method of construction management as defined under § 37-2-7(30)  
12 is appropriate for the building project;

13 (3) That the building project has an estimated construction value of five million dollars  
14 (\$5,000,000) or more;

15 (4) That the using agency has in place written procedures to ensure fairness in  
16 competition, evaluation and reporting of results at every stage in the procurement process;

17 (5) That the using agency has the capacity, a detailed plan, and procedures in place to  
18 effectively procure and manage construction management at-risk services for the ~~specific~~ project  
19 and has procured the services of a qualified owner's program manager ~~pursuant to chapter 37-2~~

1 [for the project, as set forth in § 37-2-7\(32\)](#); and

2 (6) That the using agency has a detailed, written plan with clearly identified procedures  
3 to monitor and approve all reimbursable costs [for the project](#).

4 The chief purchasing officer shall file copies of the written determination with the  
5 president of the senate, the speaker of the house, the senate fiscal advisor and the house fiscal  
6 advisor no later than three (3) business days after executing the written determination.

7 (b) Notwithstanding any other provision to the contrary, including any provision  
8 exempting any entity from the requirements of this chapter, the chief executive officer of a public  
9 corporation as defined in ~~subdivision §~~ 35-20-5(4) or the chief executive officer of a ~~quasi~~-public  
10 agency [as defined in § 37-2-7\(16\)](#), prior to procuring construction manager at-risk services, shall  
11 sign a written determination documenting the following:

12 (1) That in accordance with ~~section 37-2-18~~, [the factors set forth in subsection \(c\) below](#),  
13 ~~a the~~ general contractor ~~selected as the lowest responsive bidder based on a lump-sum, fixed-fee~~  
14 ~~contract~~ [method of construction management](#) is not practicable for the construction of the project  
15 ~~and or~~ will not result in the best value for the ~~state~~ [public corporation or the public agency](#);

16 (2) Why the use of construction management at-risk ~~services~~ [method of construction](#)  
17 [management](#) is appropriate for the building project;

18 (3) That the building project has an estimated construction value of five million dollars  
19 (\$5,000,000) or more;

20 (4) That ~~there is~~ [the public corporation or public agency has](#) in place written procedures  
21 to ensure fairness in competition, evaluation and reporting of results at every stage in the  
22 procurement process;

23 (5) That the [public](#) corporation or ~~quasi~~-public agency has the capacity, a detailed plan,  
24 and procedures in place to effectively procure and manage construction management at-risk  
25 services for the ~~specific~~ project and has procured the services of a qualified owner's program  
26 manager, ~~as set forth in subdivision 37-2-7(32)~~ [for the project as set forth in § 37-2-7\(32\)](#); and

27 (6) That there is a detailed, written plan with clearly identified procedures to monitor and  
28 approve all reimbursable costs [for the project](#).

29 The chief executive officer shall file copies of the written determination with the  
30 president of the senate, the speaker of the house, the senate fiscal advisor, and the house fiscal  
31 advisor no later than three (3) business days after executing the written determination.

32 [\(c\) When evaluating the procurement of construction manager at-risk services, the factors](#)  
33 [which may be considered in determining whether the general contractor method of construction](#)  
34 [management is not practicable or will not result in the best value for the state , public corporation,](#)

1 or public agency shall include:

2 (1) Whether specifications can be prepared that permit award on the basis of either the  
3 lowest bid or the lowest evaluated bid price;

4 (2) Whether the available sources, the time and place of performance, and other relevant  
5 circumstances exist as are appropriate for the use of competitive sealed bidding;

6 (3) The complexity of the project, including the existing or proposed infrastructure or  
7 structures, required demolition or abatement, adjacency to other structures or abutters, site  
8 constraints, building systems, uniqueness of design elements, or environmental implications;

9 (4) The size, scope, and estimated cost of the project;

10 (5) The adequacy of available documentation regarding the existing site, buildings or  
11 structures, abutter infrastructure, buildings, or structures, or other documentation of as-built  
12 conditions;

13 (6) Phasing or logistical challenges arising out of the need to maintain existing  
14 occupancy, continue existing operations, provide phased occupancy, or achieve more favorable  
15 project financing terms;

16 (7) The anticipated impact of fast tracked design and construction on project cost or  
17 schedule;

18 (8) Potential to achieve optimal minority or woman business enterprise or other  
19 subcontractor or vendor participation required in accordance with any applicable state or federal  
20 laws;

21 (9) The amount and type of financing available for the project, including whether the  
22 budget is fixed and the source of funding, for example, general or special appropriation, federal  
23 assistance monies, general obligation bonds or revenue bonds;

24 (10) The administration or implementation of procedures required to comply with  
25 applicable regulations or statutes; and

26 (11) Mitigating the potential claims against the state arising from the inherent risks  
27 associated with factors noted in subdivisions (3) through (10) of this subsection.

28 (d) The provisions of §§ 37-2-27.1 through 37-2-27.5 shall not apply to highway or heavy  
29 construction projects that are procured by either the Rhode Island department of transportation, a  
30 public corporation, a public agency, or any city or town in Rhode Island.

31 **37-2-27.2. Procurement of construction manager at-risk services -- Owner's**  
32 **program manager. --** (a) In order to bring the experience and knowledge necessary to maximize

33 the benefits of the construction manager at-risk ~~services~~ method of construction management, a  
34 using agency shall procure an owner's program manager as set forth in subdivision 37-2-7(32)

1 prior to procuring a construction manager at-risk. The owner's program manager shall have at  
2 least seven (7) years experience in the construction and supervision of the construction of  
3 buildings of similar size and complexity. The owner's program manager shall not have been  
4 employed during the preceding year by the design firm, the construction management at-risk  
5 firm, and/or the subcontractors associated with the project.

6 (b) Notwithstanding any other provision of this section or of the general or public laws to  
7 the contrary, including any provision exempting any entity from the requirements of this chapter,  
8 all public corporations as defined in ~~subdivision~~ § 35-20-5(4) and ~~quasi~~-public agencies as  
9 defined in § 37-2-7(16), shall be subject to and shall comply with the terms of this section.

10 ~~37-2-27.3. Procurement of construction manager at-risk services -- Technical review~~  
11 ~~subcommittee~~ Procurement of construction manager at-risk services -- Technical review

12 committee. -- (a) When procuring a construction manager at-risk, services for a using agency,  
13 other than a public corporation or a public agency, a technical review ~~subcommittee~~ committee of  
14 ~~the architectural, engineering and consulting selection committee, as set forth in sections 37-2-59~~  
15 ~~--37-2-63,~~ shall be appointed by the chief purchasing officer ~~created~~ to evaluate the statements of  
16 qualifications, performance data and cost proposals submitted and any other relevant information.  
17 The technical review ~~subcommittee~~ committee shall be comprised of five (5) members with one  
18 member from the division of legal services at the department of administration, one member from  
19 the department of administration with experience in the ~~procurement of construction manager at-~~  
20 ~~risk services~~ construction of capital projects, ~~the owner's program manager,~~ one member from the  
21 division of purchases, and no more than two (2) members from the using agency. The using  
22 agency's owner's program manager shall advise and assist the technical review committee as  
23 necessary. The members of a technical review committee of a public corporation or a public  
24 agency shall be determined in accordance with their own policies and procedures.

25 (b) Prior to opening the cost or pricing data, the technical review ~~subcommittee~~  
26 committee shall prequalify at least two (2) firms as professionally and technically qualified. If  
27 unable to prequalify two (2) firms, then the technical review ~~subcommittee~~ committee may either  
28 re-advertise the request for proposals or may ~~complete the project through the procurement of a~~  
29 ~~general contractor~~ recommend to the chief purchasing officer that the general contractor method  
30 of construction management be utilized on the project. If the technical review committee is  
31 unable to prequalify at least two (2) firms after the second advertising of the request for proposals  
32 for construction manager at-risk services, ~~the using agency shall complete the project through the~~  
33 ~~procurement of a general contractor~~ then the chief purchasing officer shall require the using  
34 agency to utilize the general contractor method of construction management for the project.

1 (c) ~~The technical review subcommittee shall draft and evaluate the request for proposals~~  
2 ~~used to procure the construction manger at risk.~~ The department of administration's division of  
3 capital projects, in conjunction with the division of purchases, shall assist the using agency in  
4 drafting the request for proposals used to procure the construction manager at-risk services,  
5 provided that such assistance is not mandatory for a public corporation or a public agency, which  
6 may develop the request for proposals without such assistance.

7 (1) If federal restrictions do not prohibit the consideration of cost in the selection  
8 process, then the request for proposals shall require that the proposals submitted itemize the  
9 following:

10 (i) The fee for pre-construction services;

11 (ii) The fee for construction services with the profit and overhead separately itemized;  
12 and

13 (iii) The estimated cost of the general conditions.

14 (2) The request for proposals shall include a standardized contract for construction  
15 manager at-risk services in a form acceptable to the chief purchasing officer. Firms responding to  
16 the request for proposals shall submit proposed changes to the contract language in writing as part  
17 of their proposal. The technical review ~~subcommittee~~ committee shall consider the favorability to  
18 the state of any proposed changes to the standardized contract as a criteria for evaluating and  
19 ranking the firms.

20 (3) The technical review subcommittee may conduct written or oral ~~discussions~~  
21 negotiations concerning proposed changes to the standardized contract with all offerors  
22 determined in writing to be reasonably susceptible to being selected for award. Any ~~discussions~~  
23 negotiations conducted must be clearly memorialized through the detailed documentation of the  
24 decisions made and the reasons for those decisions.

25 (4) The technical review ~~subcommittee~~ committee shall submit its ~~final recommendation~~  
26 written recommendations of eligible construction management at-risk firms to the chief  
27 purchasing officer. ~~for selection to the architectural, engineering and consultant services selection~~  
28 ~~committee, as set forth in sections 37-2-59—37-2-63.~~

29 (5) ~~The chief purchasing officer must determine through signature that all the terms of the~~  
30 ~~contract are fair and reasonable to the state.~~ The chief purchasing officer shall issue a written  
31 determination selecting a construction management at-risk firm for the project which includes  
32 findings that all the terms of the proposed contract are fair and reasonable to the state.

33 (6) The construction management at-risk firm selected for the project may not be  
34 reimbursed or paid for any services provided prior to the execution of the contract ~~through~~

1 ~~signature~~ by the chief purchasing officer, a representative of the using agency, and a  
2 representative of the construction manager at-risk firm and the issuance of a purchase order.

3 (d) The ~~technical review subcommittee~~ chief purchasing officer shall negotiate the  
4 guaranteed maximum price as an amendment to the contract executed pursuant to subsection (c)  
5 of this section when the design documents are no less than sixty percent (60%) complete. The  
6 guaranteed maximum price shall represent the maximum amount to be paid by the using agency  
7 for the building project, including the cost of the work, the general conditions and the fee payable  
8 to the construction management at-risk firm.

9 (1) The guaranteed maximum price shall itemize:

10 (i) The amount of any construction ~~manger~~ manager at-risk contingency;

11 (ii) The amount of the general conditions;

12 (iii) Any fees, including fees incurred prior to the guaranteed maximum price;

13 (iv) Each allowance with a statement of its basis;

14 (v) A breakdown of costs by trade;

15 (vi) The dates for substantial and final completion upon which the guaranteed maximum  
16 price is based;

17 (vii) A schedule of applicable alternates and the unit prices; and

18 (viii) The drawings, specifications and other information on which the price is based.

19 (2) The chief purchasing officer ~~must determine through signature~~ shall issue a written  
20 determination that all the terms of the guaranteed maximum price amendment are fair and  
21 reasonable to the state.

22 (3) The project may not proceed to the construction phase without the execution of the  
23 guaranteed maximum price amendment to the contract ~~through signature~~ by the chief purchasing  
24 officer, a representative of the using agency, and a representative of the construction management  
25 at-risk firm and issuance of an approved change order; provided, nevertheless, the chief  
26 purchasing officer may authorize the commencement of preliminary investigatory, site, or other  
27 construction if the chief purchasing officer issues a written determination that such preliminary  
28 construction is advantageous to and in the best interest of the state, public corporation, or public  
29 agency, and the remaining requirements for the commencement of construction set forth above  
30 are satisfied as it relates to the proposed preliminary construction.

31 (4) ~~If the technical review subcommittee is unable to obtain a guaranteed maximum price~~  
32 ~~amendment that is fair and reasonable to the state or if the construction management at-risk firm~~  
33 ~~is unable to provide all necessary bonds within five (5) days of the execution of the amendment,~~  
34 ~~the contract shall be terminated in writing and the project shall be completed through the~~

1 ~~procurement of a general contractor.~~ If the chief purchasing officer is unable to obtain a  
2 guaranteed maximum price amendment that is fair and reasonable to the state or if the  
3 construction management at-risk firm is unable to provide all necessary bonds within ten (10)  
4 days of the execution of the amendment, then the chief purchasing officer may terminate the  
5 construction management at-risk contract and:

6 (i) Negotiate a new construction management at-risk contract and guaranteed maximum  
7 price agreement with the next most qualified construction management at-risk firm as determined  
8 by the technical review committee; or

9 (ii) Order that the project shall be completed through the utilization of the general  
10 contractor method of construction management.

11 (e) No provision of this section is intended to require a party to breach a contract  
12 disclosed to the using agency and executed prior to the award of the ~~CMAR~~ construction manager  
13 at-risk contract.

14 **37-2-27.4. Procurement of construction manager at-risk services -- Bidding of**

15 **subcontracts.** -- (a) In order to promote transparency and the fair and equitable treatment of all  
16 persons who deal with the procurement system, when using the construction manager at-risk  
17 ~~(CMAR) delivery~~ method of construction management on a project, all subcontract work and  
18 subcontractors, equipment, and material purchases shall be procured pursuant to the following:

19 (1) All potential vendors shall be prequalified as a responsible ~~bidder or offeror~~ bidders  
20 or offerors as defined in ~~subdivision §~~ 37-2-15(6);

21 (2) ~~All subcontract work and equipment and material purchases shall be procured~~  
22 ~~through the Rhode Island vendor information program (RIVIP);~~ The construction management at-  
23 risk firm shall be provided with access to the Rhode Island Vendor Information Program  
24 ("RIVIP") and/or the relevant portion of the program or information thereon in such direct or  
25 indirect manner as the director of the department of administration may determine for the purpose  
26 of issuing solicitations to pre-qualified vendors for subcontracts, equipment, and materials  
27 necessary for the project. The construction manager at-risk shall use the RIVIP for solicitation of  
28 bids for all subcontractors, equipment, and material necessary for the project;

29 (3) All bids shall be opened in public at the time and place designated in the ~~invitation~~  
30 solicitation for bids and each bid, together with the name of the bidder, shall be recorded and an  
31 abstract made available for public inspection;

32 (4) ~~The three (3) lowest responsive bids, as defined in subdivision 37-2-15(7), shall be~~  
33 ~~forwarded to the CMAR who~~ The construction manager at-risk shall evaluate the ~~bids~~ bid  
34 proposals and conduct further negotiations with vendors where appropriate;

1 (5) Prior to the awarding of a ~~bid~~ project-related contract by the construction manager at-  
2 risk, the using agency shall provide its written approval ~~of the final award~~;

3 (6) The ~~final award shall be awarded~~ construction manager at-risk shall award all  
4 project-related contracts with reasonable promptness after approval by the using agency.

5 (b) When using the construction manager at-risk ~~(CMAR) delivery~~ method of  
6 construction management, all subcontract work, ~~and~~ equipment, and material purchases shall be  
7 memorialized by the construction management at-risk firm and the using agency through ~~the~~  
8 detailed documentation of the decisions made and the reasons for those decisions.

9 (c) All bid documents, bid abstracts and documents referring to the bid process shall be  
10 public in accordance with the provisions of chapter 38-2, the Access to Public Records Act. The  
11 burden to identify trade secrets, commercial or financial information, or other records not subject  
12 to public disclosure pursuant to chapter 38-2 shall rest with the bidder or offeror.

13 Any person or entity denied the right to inspect records may appeal the denial in  
14 accordance with the provisions of chapter 38-2, the Access to Public Records Act.

15 (d) No provision of this section is intended to require a party to breach a contract  
16 disclosed to the using agency and executed prior to the award of the ~~CMAR~~ construction  
17 management at-risk contract.

18 SECTION 2. This act shall take effect upon passage.

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EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF  
A N A C T  
RELATING TO PUBLIC PROPERTY AND WORKS

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1           This act would amend the provisions of the written determination of procurement of  
2 construction manager at-risk services by delineating those conditions or situations when  
3 competitive sealed bidding is not practicable or will not result in the best values for the state.

4           This act would take effect upon passage.

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