

CHAPTER 16C

STATE PROCUREMENT

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16C.03 COMMISSIONER'S AUTHORITY; POWERS AND DUTIES.

[For text of subs 1 to 17, see M.S.2004]

Subd. 18. **Contracts with foreign vendors.** (a) The commissioner and other agencies to which this section applies and the legislative branch of government shall, subject to paragraph (d), cancel a contract for goods or services from a vendor or an affiliate of a vendor or suspend or debar a vendor or an affiliate of a vendor from future contracts upon notification from the commissioner of revenue that the vendor or an affiliate of the vendor has not registered to collect the sales and use tax imposed under chapter 297A on its sales in Minnesota or to a destination in Minnesota. This subdivision shall not apply to state colleges and universities, the courts, and any agency in the judicial branch of government. For purposes of this subdivision, the term "affiliate" means any person or entity that is controlled by, or is under common control of, a vendor through stock ownership or other affiliation.

(b) Beginning January 1, 2006, each vendor or affiliate of a vendor selling goods or services, subject to tax under chapter 297A, to an agency or the legislature must provide its Minnesota sales and use tax business identification number, upon request, to show that the vendor is registered to collect Minnesota sales or use tax.

(c) The commissioner of revenue shall periodically provide to the commissioner and the legislative branch a list of vendors who have not registered to collect Minnesota sales and use tax and who are subject to being suspended or debarred as vendors or having their contracts canceled.

(d) The provisions of this subdivision may be waived by the commissioner or the legislative branch when the vendor is the single source of such goods or services, in the event of an emergency, or when it is in the best interests of the state as determined by the commissioner in consultation with the commissioner of revenue. Such consultation is not a disclosure violation under chapter 270B.

History: *1Sp2005 c 3 art 5 s 1*

16C.06 ACQUISITIONS.

[For text of subs 1 to 4, see M.S.2004]

Subd. 5. **State as responder.** The head of an agency, in consultation with the requesting agency and the commissioner, may respond to a solicitation or request if the goods and services meet the needs of the requesting agency and provide the state with the best value. When an agency responds to a solicitation, all work product relating to the response is classified by section 13.591, subdivision 4.

[For text of subs 6 to 10, see M.S.2004]

History: *2005 c 163 s 51*

16C.064 COST-BENEFIT ANALYSIS.

(a) The commissioner or an agency official to whom the commissioner has delegated duties under section 16C.03, subdivision 16, may not approve a contract or purchase of goods or services in an amount greater than \$50,000,000 unless a cost-benefit analysis has been completed and shows a positive benefit to the public. The Management Analysis Division must perform or direct the performance of the analysis. Money appropriated for the contract or purchase must be used to pay for the analysis. A cost-benefit analysis must be performed for a project if an aggregation of contracts or purchases for a project exceeds \$50,000,000.

(b) All cost-benefit analysis documents under this section, including preliminary drafts and notes, are public data.

(c) If a cost-benefit analysis does not show a positive benefit to the public, the governor may approve a contract or purchase of goods or services if a cost-effectiveness study had been done that shows the proposed project is the most effective way to provide a necessary public good.

(d) This section applies to contracts for goods or services that are expected to have a useful life of more than three years. This section does not apply for purchase of goods or services for response to a natural disaster if an emergency has been declared by the governor. This section does not apply to contracts involving the Minnesota state colleges and universities, state buildings, or state highways.

(e) This section is repealed effective July 1, 2008.

History: 2005 c 156 art 2 s 21

16C.09 PROCEDURE FOR SERVICE CONTRACTS.

(a) Before entering into or approving a service contract, the commissioner must determine, at least, that:

(1) no current state employee is able and available to perform the services called for by the contract;

(2) the work to be performed under the contract is necessary to the agency's achievement of its statutory responsibilities and there is statutory authority to enter into the contract;

(3) the contract will not establish an employment relationship between the state or the agency and any persons performing under the contract;

(4) the contractor and agents are not employees of the state;

(5) the contracting agency has specified a satisfactory method of evaluating and using the results of the work to be performed; and

(6) the combined contract and amendments will not exceed five years without specific, written approval by the commissioner according to established policy, procedures, and standards, or unless otherwise provided for by law. The term of the original contract must not exceed two years, unless the commissioner determines that a longer duration is in the best interest of the state.

(b) For purposes of paragraph (a), clause (1), employees are available if qualified and:

(1) are already doing the work in question; or

(2) are on layoff status in classes that can do the work in question.

An employee is not available if the employee is doing other work, is retired, or has decided not to do the work in question.

(c) This section does not apply to an agency's use of inmates pursuant to sections 241.20 to 241.23 or to an agency's use of persons required by a court to provide:

(1) community service; or

(2) conservation or maintenance services on lands under the jurisdiction and control of the state.

History: 2005 c 136 art 13 s 1

16C.10 EXCEPTIONS TO THE SOLICITATION PROCESS:

[For text of subs 1 to 4, see M.S.2004]

Subd. 5. **Specific purchases.** The solicitation process described in this chapter is not required for acquisition of the following:

- (1) merchandise for resale purchased under policies determined by the commissioner;
- (2) farm and garden products which, as determined by the commissioner, may be purchased at the prevailing market price on the date of sale;
- (3) goods and services from the Minnesota correctional facilities;
- (4) goods and services from rehabilitation facilities and extended employment providers that are certified by the commissioner of employment and economic development, and day training and habilitation services licensed under sections 245B.01 to 245B.08;
- (5) goods and services for use by a community-based facility operated by the commissioner of human services;
- (6) goods purchased at auction or when submitting a sealed bid at auction provided that before authorizing such an action, the commissioner consult with the requesting agency to determine a fair and reasonable value for the goods considering factors including, but not limited to, costs associated with submitting a bid, travel, transportation, and storage. This fair and reasonable value must represent the limit of the state's bid; and
- (7) utility services where no competition exists or where rates are fixed by law or ordinance.

[For text of subd 6, see M.S.2004]

Subd. 7. **Reverse auction.** (a) For the purpose of this subdivision, "reverse auction" means a purchasing process in which vendors compete to provide goods or computer services at the lowest selling price in an open and interactive environment.

(b) The provisions of sections 13.591, subdivision 3, and 16C.06, subdivision 2, do not apply when the commissioner determines that a reverse auction is the appropriate purchasing process.

History: 2005 c 9 s 1; 2005 c 156 art 2 s 22

16C.137 MINIMIZING ENERGY USE; RENEWABLE FUELS.

Subdivision 1. **Goals and actions.** (a) Using 2005 as a baseline, the state of Minnesota shall reduce the use of gasoline by on-road vehicles owned by state departments by 25 percent by 2010 and by 50 percent by 2015, and the use of petroleum-based diesel fuel in diesel-fueled vehicles by ten percent by 2010 and 25 percent by 2015.

(b) To meet the goals established in paragraph (a), each state department must, whenever legally, technically, and economically feasible, subject to the specific needs of the department and responsible management of agency finances:

- (1) ensure that all new on-road vehicles purchased, excluding emergency and law enforcement vehicles:
 - (i) use "cleaner fuels" as that term is defined in section 16C.135, subdivision 1, clauses (1), (3), and (4); or
 - (ii) have fuel efficiency ratings that exceed 30 miles per gallon for city usage or 35 miles per gallon for highway usage, including but not limited to hybrid electric cars and hydrogen-powered vehicles;
- (2) increase its use of renewable transportation fuels, including ethanol, biodiesel, and hydrogen from agricultural products; and
- (3) increase its use of Web-based Internet applications and other electronic information technologies to enhance the access to and delivery of government informa-

tion and services to the public; and reduce the reliance on the department's fleet for the delivery of such information and services.

Subd. 2. SmartFleet Committee. (a) The commissioner of administration, or the commissioner's designee, shall chair a SmartFleet Committee consisting of representatives designated by the commissioners of the Pollution Control Agency, the Departments of Agriculture and Commerce, and other state departments that wish to participate. To ensure effective and efficient state participation, the SmartFleet Committee must assist state departments in implementing the requirements of this section, including providing information, guidance, sample policies and procedures, and technical and planning assistance.

(b) The SmartFleet Committee must evaluate the goals and directives established in this section by December 2006 and periodically thereafter. The committee may make recommendations to the governor and appropriate committees of the legislature for new or adjusted goals and directives, in light of the progress the state has made implementing this section, and of the availability of new or improved technologies.

(c) For the systematic and efficient monitoring of progress in implementing this section by the SmartFleet Committee, the Department of Administration shall implement a fleet reporting and information management system. Each department will use this management system to demonstrate its progress in complying with this section.

Subd. 3. Exclusion. Petroleum-based diesel fuel used in a vehicle which a department has retrofit to use ultra low sulfur diesel fuel and to add additional emissions control technologies is excluded when evaluating progress toward the reduction goals established in subdivision 1. This exclusion applies only to vehicles purchased before the model year in which the federal Environmental Protection Agency's new clean diesel emission reduction rules take effect.

History: *1Sp2005 c 1 art 1 s 6*

16C.143 ENERGY FORWARD PRICING MECHANISMS.

Subdivision 1. Definitions. The following definitions apply in this section:

(1) "energy" means natural gas, heating oil, propane, and any other energy source except electricity used in state facilities; and

(2) "forward pricing mechanism" means a contract or financial instrument that obligates a state agency to buy or sell a specified quantity of energy at a future date at a set price.

Subd. 2. Authority. Notwithstanding any other law to the contrary, the commissioner may use forward pricing mechanisms for budget risk reduction.

Subd. 3. Conditions. Forward pricing mechanism transactions must be made only under the following conditions:

(1) the quantity of energy affected by the forward pricing mechanism must not exceed 90 percent of the estimated energy use for the state agency for the same period, which shall not exceed 24 months; and

(2) a separate account must be established for each state agency using a forward pricing mechanism.

Subd. 4. Written policies and procedures. Before exercising the authority under this section, the commissioner must develop written policies and procedures governing the use of forward pricing mechanisms.

History: *2005 c 156 art 2 s 23*

16C.144 GUARANTEED ENERGY SAVINGS PROGRAM.

Subdivision 1. Definitions. The following definitions apply to this section.

(a) "Utility" means electricity, natural gas, or other energy resource, water, and wastewater.

(b) "Utility cost savings" means the difference between the utility costs after installation of the utility cost-savings measures pursuant to the guaranteed energy

savings agreement and the baseline utility costs after baseline adjustments have been made.

(c) "Baseline" means the preagreement utilities, operations, and maintenance costs.

(d) "Utility cost-savings measure" means a measure that produces utility cost savings or operation and maintenance cost savings.

(e) "Operation and maintenance cost savings" means a measurable difference between operation and maintenance costs after the installation of the utility cost-savings measures pursuant to the guaranteed energy savings agreement and the baseline operation and maintenance costs after inflation adjustments have been made. Operation and maintenance costs savings shall not include savings from in-house staff labor.

(f) "Guaranteed energy-savings agreement" means an agreement for the installation of one or more utility cost-savings measures that includes the qualified provider's guarantee as required under subdivision 2.

(g) "Baseline adjustments" means adjusting the utility cost-savings baselines annually for changes in the following variables:

- (1) utility rates;
- (2) number of days in the utility billing cycle;
- (3) square footage of the facility;
- (4) operational schedule of the facility;
- (5) facility temperature set points;
- (6) weather; and
- (7) amount of equipment or lighting utilized in the facility.

(h) "Inflation adjustment" means adjusting the operation and maintenance cost-savings baseline annually for inflation.

(i) "Lease purchase agreement" means an agreement obligating the state to make regular lease payments to satisfy the lease costs of the utility cost-savings measures until the final payment, after which time the utility cost-savings measures become the sole property of the state of Minnesota.

(j) "Qualified provider" means a person or business experienced in the design, implementation, and installation of utility cost-savings measures.

(k) "Engineering report" means a report prepared by a professional engineer licensed by the state of Minnesota summarizing estimates of all costs of installations, modifications, or remodeling, including costs of design, engineering, installation, maintenance, repairs, and estimates of the amounts by which utility and operation and maintenance costs will be reduced.

(l) "Capital cost avoidance" means money expended by a state agency to pay for utility cost-savings measures with a guaranteed savings agreement so long as the measures that are being implemented to achieve the utility, operation, and maintenance cost savings are a significant portion of an overall project as determined by the commissioner.

(m) "Guaranteed energy-savings program guidelines" means policies, procedures, and requirements of guaranteed savings agreements established by the Department of Administration.

Subd. 2. Guaranteed energy-savings agreement. The commissioner may enter into a guaranteed energy-savings agreement with a qualified provider if:

(1) the qualified provider is selected through a competitive process in accordance with the guaranteed energy-savings program guidelines within the Department of Administration;

(2) the qualified provider agrees to submit an engineering report prior to the execution of the guaranteed energy-savings agreement. The cost of the engineering report may be considered as part of the implementation costs if the commissioner enters into a guaranteed energy-savings agreement with the provider;

(3) the term of the guaranteed energy-savings agreement shall not exceed 15 years from the date of final installation;

(4) the commissioner finds that the amount it would spend on the utility cost-savings measures recommended in the engineering report will not exceed the amount to be saved in utility operation and maintenance costs over 15 years from the date of implementation of utility cost-savings measures;

(5) the qualified provider provides a written guarantee that the annual utility, operation, and maintenance cost savings during the term of the guaranteed energy-savings agreement will meet or exceed the annual payments due under a lease purchase agreement. The qualified provider shall reimburse the state for any shortfall of guaranteed utility, operation, and maintenance cost savings; and

(6) the qualified provider gives a sufficient bond in accordance with section 574.26 to the commissioner for the faithful implementation and installation of the utility cost-savings measures.

Subd. 3. Lease purchase agreement. The commissioner may enter into a lease purchase agreement with any party for the implementation of utility cost-savings measures in accordance with the guaranteed energy-savings agreement. The implementation costs of the utility cost-savings measures recommended in the engineering report shall not exceed the amount to be saved in utility and operation and maintenance costs over the term of the lease purchase agreement. The term of the lease purchase agreement shall not exceed 15 years from the date of final installation. The lease is assignable in accordance with terms approved by the commissioner of finance.

Subd. 4. Use of capital cost avoidance. The affected state agency may contribute funds for capital cost avoidance for guaranteed energy-savings agreements. Use of capital cost avoidance is subject to the guaranteed energy-savings program guidelines within the Department of Administration.

Subd. 5. Report. By January 15, 2007, the commissioner of administration shall submit to the commissioner of finance and the chairs of the senate and house of representatives capital investment committees a list of projects in the agency that have been funded using guaranteed energy savings, as outlined in this section, during the preceding biennium. For each guaranteed energy-savings agreement entered into, the commissioner of administration shall contract with an independent third party to evaluate the cost-effectiveness of each utility cost-savings measure implemented to ensure that such measures were the least-cost measures available. For the purposes of this section, "independent third party" means an entity not affiliated with the qualified provider, that is not involved in creating or providing conservation project services to that provider, and that has expertise (or access to expertise) in energy savings practices.

Subd. 6. [Repealed by amendment, 2005 c 156 art 2 s 24]

History: 2005 c 156 art 2 s 24

16C.16 DESIGNATION OF PROCUREMENTS FROM SMALL BUSINESSES.

Subdivision 1. Small business procurements. (a) The commissioner shall for each fiscal year ensure that small businesses receive at least 25 percent of the value of anticipated total state procurement of goods and services, including printing and construction. The commissioner shall divide the procurements so designated into contract award units of economically feasible production runs in order to facilitate offers or bids from small businesses.

(b) The commissioner must solicit and encourage Minnesota small businesses to submit responses or bids when the commissioner is entering into master contracts. If cost-effective, when entering into a master contract, the commissioner must attempt to negotiate contract terms that allow agencies the option of purchasing from small businesses, particularly small businesses that are geographically proximate to the entity making the purchase.

(c) In making the annual designation of such procurements the commissioner shall attempt (1) to vary the included procurements so that a variety of goods and services

produced by different small businesses are obtained each year, and (2) to designate small business procurements in a manner that will encourage proportional distribution of such awards among the geographical regions of the state. To promote the geographical distribution of awards, the commissioner may designate a portion of the small business procurement for award to bidders from a specified congressional district or other geographical region specified by the commissioner. The failure of the commissioner to designate particular procurements shall not be deemed to prohibit or discourage small businesses from seeking the procurement award through the normal process.

[For text of subs 2 to 12, see M.S.2004]

History: 2005 c 156 art 2 s 25

16C.23 SURPLUS PROPERTY ACQUISITION, DISTRIBUTION, AND DISPOSAL.

[For text of subs 1 to 6, see M.S.2004]

Subd. 6a. **Computers for schools.** The commissioner may transfer state surplus computers to Minnesota Computers for Schools for refurbishing and distribution to any school, school system, college, or university in Minnesota.

[For text of subd 7, see M.S.2004]

History: 2005 c 65 s 1

16C.231 SURPLUS PROPERTY.

Notwithstanding section 15.054 or 16C.23, the commissioner may sell a surplus gun used by a state trooper to the trooper who used the gun in the course of employment. The sale price must be the fair market value of the gun, as determined by the commissioner.

History: 2005 c 156 art 2 s 26

16C.26 COMPETITIVE BIDS.

[For text of subs 1 and 2, see M.S.2004]

Subd. 3. **Publication of notice; expenditures over \$25,000.** If the amount of an expenditure is estimated to exceed \$25,000, bids must be solicited by public notice in a manner designated by the commissioner. To the extent practical, this must include posting on a state Web site. For expenditures over \$50,000, the commissioner shall solicit sealed bids by providing notices to all prospective bidders known to the commissioner by posting notice on a state Web site at least seven days before the final date of submitting bids. All bids over \$50,000 must be sealed when they are received and must be opened in public at the hour stated in the notice. All original bids and all documents pertaining to the award of a contract must be retained and made a part of a permanent file or record and remain open to public inspection.

Subd. 4. **Building and construction contracts; \$50,000 or less.** An informal bid may be used for building, construction, and repair contracts that are estimated at less than \$50,000. Informal bids must be authenticated by the bidder in a manner specified by the commissioner.

[For text of subs 5 and 6, see M.S.2004]

History: 2005 c 78 s 3,4; 2005 c 156 art 2 s 27,28

16C.28 CONTRACTS; AWARD.

[For text of subd 1, see M.S.2004]

Subd. 2. **Alterations and erasures.** A bid containing an alteration or erasure of any price contained in the bid which is used in determining the lowest responsible bid must be rejected unless the alteration or erasure is corrected in a manner that is clear and

authenticated by an authorized representative of the responder. An alteration or erasure may be crossed out and the correction printed in ink or typewritten adjacent to it and initialed by an authorized representative of the responder.

[For text of subs 3 to 5, see M.S.2004]

History: 2005 c 78 s 5; 2005 c 156 art 2 s 29

16C.32 DESIGN-BUILD, CONSTRUCTION MANAGER AT RISK, AND JOB ORDER CONTRACTING CONTRACTS.

Subdivision 1. **Definitions.** As used in sections 16C.32 to 16C.35, the following terms have the meanings given them, unless the context clearly indicates otherwise:

(1) "acceptance" means a formal resolution of the commissioner authorizing the execution of a design-build, construction manager at risk, or job order contracting contract;

(2) "agency" means any state officer, employee, board, commission, authority, department, or other agency of the executive branch of state government. Unless specifically indicated otherwise, as used in sections 16C.32 to 16C.35, agency also includes the Minnesota State Colleges and Universities;

(3) "architect" means an architect or landscape architect registered to practice under sections 326.02 to 326.15;

(4) "board" means the state Designer Selection Board, unless the estimated cost of the project is less than \$2,000,000, in which case the commissioner may act as the board;

(5) "Capitol Area Architectural and Planning Board" means the board established to govern the Capitol area under chapter 15B;

(6) "commissioner" means the commissioner of administration or the Board of Trustees of the Minnesota State Colleges and Universities, whichever controls a project;

(7) "construction manager at risk" means a person who is selected by the commissioner to act as a construction manager to manage the construction process, which includes, but is not limited to, responsibility for the price, schedule, and workmanship of the construction performed in accordance with the procedures of section 16C.34;

(8) "construction manager at risk contract" means a contract for construction of a project between a construction manager at risk and the commissioner, which contract shall include a guaranteed maximum price, construction schedule, and workmanship of the construction performed;

(9) "design-build contract" means a contract between the commissioner and a design-builder to furnish the architectural, engineering, and related design services as well as the labor, materials, supplies, equipment, and construction services for a project;

(10) "design and price-based proposal" means the proposal to be submitted by a design-builder in the design and price-based selection process, as described in section 16C.33, which proposal meets the requirements of section 16C.33, subdivision 7, paragraph (c), in such detail as required in the request for proposals;

(11) "design and price-based selection" means the selection of a design-builder as described in section 16C.33, subdivision 8;

(12) "design criteria package" means performance criteria prepared by a design criteria professional who shall be either an employee of the commissioner or shall be selected in compliance with section 16B.33, 16C.08, or 16C.095;

(13) "design criteria professional" means a person licensed under chapter 326, or a person who employs an individual or individuals licensed under chapter 326, required to design a project, and who is employed by or under contract to the commissioner to provide professional, architectural, or engineering services in connection with the preparation of the design criteria package;

(14) "guaranteed maximum price" means the maximum amount that a design-builder, construction manager at risk, or subcontractor will be paid pursuant to a contract to perform a defined scope of work;

(15) "guaranteed maximum price contract" means a contract under which a design-builder, construction manager, or subcontractor is paid on the basis of their actual cost to perform the work specified in the contract plus an amount for overhead and profit, the sum of which must not exceed the guaranteed maximum price set forth in the contract;

(16) "job order contracting" means a project delivery method that requests a limited number of bids from a list of qualified contractors, selected from a registry of qualified contractors who have been prescreened and who have entered into master contracts with the commissioner, as provided in section 16C.35;

(17) "past performance" or "experience" does not include the exercise or assertion of a person's legal rights;

(18) "person" includes an individual, corporation, partnership, association, or any other legal entity;

(19) "project" means an undertaking to construct, alter, or enlarge a building, structure, or other improvements, except highways and bridges, by or for the state or an agency;

(20) "qualifications-based selection" means the selection of a design-builder as provided in section 16C.33;

(21) "request for qualifications" means the document or publication soliciting qualifications for a design-build, construction manager at risk, or job order contracting contract as provided in sections 16C.33 to 16C.35;

(22) "request for proposals" means the document or publication soliciting proposals for a design-build or construction manager at risk contract as provided in sections 16C.33 and 16C.34; and

(23) "trade contract work" means the furnishing of labor, materials, or equipment by contractors or vendors that are incorporated into the completed project or are major components of the means of construction. Work performed by trade contractors involves specific portions of the project, but not the entire project.

Subd. 2. **Authority.** (a) Subject to limitations in sections 16B.31, subdivision 1; 16B.33, subdivision 1; 16C.16; and 16C.32 to 16C.34, and notwithstanding any other law to the contrary, the commissioner may:

(1) solicit and award a design-build contract on the basis of either a qualifications based or a design and price-based selection process provided in section 16C.33 if the conditions in paragraph (b) are met;

(2) select a construction manager at risk as provided in section 16C.34, and award a guaranteed maximum price contract for a construction manager at risk if the conditions of paragraph (c) are met; and

(3) select a contractor by a job order contracting delivery method as provided in section 16C.35.

(b) The commissioner may not utilize design-build contracts for more than five percent of its total projects let, by number, in each of the fiscal years 2006 and 2007, and ten percent of its total projects let, by number, in each fiscal year thereafter, that are funded in whole or in part with proceeds from the sale of state general obligation bonds; and

(c) The commissioner may not utilize construction manager at risk contracts for more than five percent of its total projects let, by number, in each of the fiscal years 2006 and 2007, and ten percent of its total projects let, by number, in each fiscal year thereafter, that are funded in whole or in part with proceeds from the sale of state general obligation bonds.

(d) Pursuant to section 16B.31, subdivision 4, if the project is within the Capitol area, the project shall comply with sections 15B.03, subdivision 3; 15B.08, subdivision 2; 15B.10; and 15B.15, subdivision 4.

(e) The commissioner shall, for each design-build or construction manager at risk contract, make a written determination, including specific findings, indicating whether use of the design-build or construction manager at risk procurement serves the public interest.

(f) The solicitation of requests for qualifications or proposals does not obligate the commissioner to enter into a design-build or construction manager at risk contract. In accordance with the stated criteria and subcriteria for evaluating qualifications or proposals, the commissioner may accept or reject any or all responses received as a result of the request. The solicitation for qualifications or proposals may be canceled at any time in the commissioner's sole discretion if it is considered to be in the public's best interest. If the commissioner rejects all responses or cancels the solicitation for proposals, the commissioner may resolicit a request for qualifications or proposals using the same or different requirements or request selection of a primary designer pursuant to section 16B.33, 16C.08, or 16C.095 and proceed with competitive bidding pursuant to sections 16C.25 to 16C.29.

Subd. 3. Report to the legislature. The commissioner shall report to the legislature by January 15, 2010, the number of projects and the total cost of those projects that were delivered under contracts authorized under subdivision 2.

History: 2005 c 78 s 6

16C.33 DESIGN-BUILD.

Subdivision 1. Conflict of interest. A board member may not participate in the review, discussion, or selection of a primary designer, a design-builder, or a firm in which the member has a financial interest.

Subd. 2. Design-builder licensing requirements. (a) Each design-builder must be, employ, or have as a partner, member, coventurer, or subcontractor, persons or a firm with persons who are duly licensed and registered to provide the services required to complete the project and do business in this state.

(b) A design-builder may contract with the commissioner to provide professional or construction services for which the design-builder is not itself licensed, registered, or qualified to perform, so long as the design-builder provides such services through subcontracts with duly licensed, registered, or otherwise qualified persons in accordance with this section.

(c) Nothing in this section or section 16C.32 is intended to limit or eliminate the responsibility or liability owed by an architect or engineer on a design-build project to the commissioner and third parties under existing law. The design service portion of a design-build contract is considered a service and not a product.

Subd. 3. Solicitation of qualifications or proposals. (a) Every user agency, except the Capitol Area Architectural and Planning Board, shall submit a written request for a design-builder for its project to the commissioner who shall forward the request to the board, consistent with section 16B.33, subdivision 3a. The University of Minnesota shall follow the process in subdivision 4 to select design-builders for projects that are subject to section 16B.33. The written request must include a description of the project, the total project cost, a description of any special requirements or unique features of the proposed project, and other information requested by the board which will assist the board in carrying out its duties and responsibilities set forth in this section.

(b) A request for qualifications or proposals soliciting design-builders shall be prepared for each design-build contract pursuant to subdivision 5 or 7. The request for qualifications or proposals shall contain, at a minimum, the following elements:

(1) the identity of the agency for which the project will be built and that will award the design-build contract;

(2) procedures for submitting qualifications or proposals, the criteria for evaluation of qualifications or proposals and the relative weight for each criterion and subcriterion, and the procedures for making awards according to the stated criteria and subcriteria, including a reference to the requirements of this section;

- (3) the proposed terms and conditions for the contract;
- (4) the desired qualifications of the design-builder and the desired or permitted areas of construction to be performed by named members of the design-build team, if applicable. The primary designer shall be a named member of the design-build team;
- (5) the schedule for commencement and completion of the project;
- (6) any applicable budget limits for the project;
- (7) the requirements for insurance and statutorily required performance and payment bonds;
- (8) the identification and location of any other information in the possession or control of the agency that the user agency determines is material, which may include surveys, soils reports, drawings or models of existing structures, environmental studies, photographs, or references to public records;
- (9) for a design-build design and price-based selection process, the request shall also include the design criteria package, including the performance and technical requirements for the project, and the functional and operational elements for the delivery of the completed project. The request shall also contain a description of the drawings, specifications, or other submittals to be included with the proposal, with guidance as to the form and level of completeness of the drawings, specifications or submittals that will be acceptable, and the stipend to be paid to the design-builders selected to submit the above described information; and
- (10) the criteria shall not impose unnecessary conditions beyond reasonable requirements to ensure maximum participation of qualified design-builders. The criteria shall not consider the collective bargaining status of the design-builder.

(c) Notice of requests for qualifications or proposals must be advertised in the State Register.

Subd. 4. University of Minnesota projects. (a) The University of Minnesota may elect to use the design-build method of project delivery for projects involving construction or major remodeling, as defined in section 16B.335, subdivision 1, with an estimated cost greater than \$2,000,000, in which case the University of Minnesota shall submit a written request for a design-builder to the commissioner of administration, who shall forward the request to the board, as provided in subdivision 3. For design-build projects undertaken by the University of Minnesota under this subdivision, the Board of Regents shall exercise the powers and duties of the commissioner granted in subdivisions 5, 6, 7, and 8.

(b) When the University of Minnesota undertakes any other project involving construction, renovation, repair, replacement, or rehabilitation, the Board of Regents may, in addition to any other method of project delivery available to the University of Minnesota, submit a written request for a design-builder to the commissioner of administration, who shall forward the request to the board, as provided in subdivision 3.

(c) For projects for which the University of Minnesota requests a design-builder, the University of Minnesota may use either the design-build qualifications-based selection process under subdivision 5 or the design-build design and price-based selection process under subdivision 7. The board shall score proposals in accordance with subdivision 5 or 7, as applicable, and narrow the selection to the two highest scoring proposers for recommendation to the Board of Regents. The Board of Regents shall make the final selection and shall notify the board of the selection. Meeting records or written evaluations that document the final selection are public records.

(d) The University of Minnesota may not utilize design-build contracts for more than five percent of its total projects let, by number, in each of the fiscal years 2006 and 2007, and ten percent of its total projects let, by number, in each fiscal year thereafter, that are funded in whole or in part with proceeds from the sale of state general obligation bonds.

Subd. 5. Design-build qualifications-based selection process. In a design-build qualifications-based selection process, the following shall apply:

(a)(1) the commissioner shall establish procedures for determining the appropriate content of each request for qualifications, the weighted criteria and subcriteria to be used to evaluate the design-builders, and the procedures for evaluating qualifications in an open, competitive, and objective manner; (2) the criteria and subcriteria shall include, but are not limited to, the proposer's experience as a constructor or primary designer, including capacity of key personnel, technical competence and capability to perform, the past performance of the proposer and its employees, its safety record and compliance with state and federal law, and availability to and familiarity with the project locale; (3) the commissioner may include in the request for qualifications criteria a requirement that the proposer include the overhead and fee that the design-builder proposes to charge for its construction services; and (4) the commissioner shall issue a request for qualifications that includes the information as described in subdivision 3.

(b) After obtaining and evaluating qualifications from each design-builder, in accordance with the weighted criteria and subcriteria and procedures set forth in the request for qualifications, the board shall select a short list of at least three and no more than five proposals. The board must receive at least three proposals from design-builders or the commissioner shall either:

(1) solicit new proposals;

(2) revise the request for qualifications and thereafter solicit new proposals using the revised request for qualifications; or

(3) request selection of a primary designer pursuant to section 16B.33, 16C.08, or 16C.095 and proceed with competitive bidding pursuant to sections 16C.25 to 16C.29.

(c) The board shall conduct formal interviews with the short list of proposers, but shall not disclose any proprietary or confidential information contained in one proposal to another proposer.

(d) The board shall select the design-builder that scores the highest on the evaluation criteria and subcriteria. The commissioner shall make the award to the design-builder who scores the highest score pursuant to the weighted criteria and subcriteria as determined by the board, unless the commissioner rejects all proposals or proceeds pursuant to paragraphs (f) and (g). In the case of the Minnesota State Colleges and Universities, the board shall narrow the selection to the two design-builders that score the highest on the evaluation criteria and subcriteria for recommendation to the respective commissioner, and the commissioner shall make the final selection and shall notify the board of the selection.

(e) The commissioner shall conduct fee and contract negotiations with the selected design-builder and shall enter into the contract consistent with subdivision 6.

(f) If the selected design-builder declines the appointment or is unable to reach agreement with the commissioner on the terms of the contract, the commissioner may, within 60 days after the first selection, request the board to make another selection.

(g) If the board fails to make a selection and forward its recommendation to the commissioner within 60 days of the request for a second selection, the commissioner may appoint a design-builder without the recommendation of the board.

(h) If a project for which a design-builder has been selected by the board becomes inactive, lapses, or changes as the result of a project phasing, insufficient appropriations, or other reasons, the commissioner may, if the project is reactivated, retain the same design-builder to complete the project.

Subd. 6. Design-build qualifications-based acceptance by commissioner. The contract between the commissioner and the design-builder selected under subdivision 5 shall require the following:

(a) The design-builder shall develop design documents of the project for review and approval by the commissioner prior to project bidding.

(b) The design-builder shall competitively bid all trade contract work for the project from a list of qualified firms, subject to availability of such qualified firms for the specific work. The list of qualified firms shall be based upon an open, competitive,

and objective prequalification process in which the selection criteria includes, in addition to the proposed price, the firm's experience as a constructor or primary designer, including capacity of key personnel, technical competence, capability to perform, the past performance of the firm and its employees, including its safety record and compliance with state and federal law, availability to and familiarity with the project locale, and other considerations as defined by the design-builder and the commissioner. The design-builder and the commissioner shall jointly determine the composition of the list of qualified firms. The criteria shall not impose unnecessary conditions beyond reasonable requirements to ensure maximum participation of qualified contractors.

(c) With the approval of the commissioner, the design-builder may name either or both a mechanical and electrical subcontractor or subcontractors as a named member of the design-builder's team, and if either or both a mechanical and electrical subcontractor or subcontractors is so named, the design-builder is not required to competitively bid the mechanical or electrical trade contract work. A named mechanical or electrical subcontractor member of a design-builder's team shall competitively bid all subcontracted portions of the mechanical or electrical subcontractor's work from a list of qualified firms. Such qualified firms shall be determined as described in paragraph (b). The commissioner and the design-builder shall agree to a list of labor, materials, and equipment that shall be competitively bid.

(d) With the commissioner's approval or request, team members of the design-builder, including the design-builder, may also submit bids for trade contract work.

(e) Either or both the mechanical or electrical subcontractor or subcontractors who are named subcontractor members of the design-builder's team shall enter into guaranteed maximum price contracts with the design-builder.

(f) The design-builder and the commissioner shall enter into a guaranteed maximum price contract.

Subd. 7. Design-build design and price-based proposals. (a) In a design and price-based selection process the following shall apply:

(1) selection must be based on best value, which includes an evaluation of price and design, and may include other criteria including, but not limited to, the proposer's experience as a constructor or primary designer;

(2) the commissioner shall establish procedures for determining the appropriate content of each request for qualifications, and the weighted criteria and subcriteria to be used to evaluate the design-builders including, but not limited to, the proposer's experience as a constructor or primary designer, including capacity of key personnel, technical competence, capability to perform and the past performance of the proposer and its employees, its safety record and compliance with state and federal law, quality and past performance, and the procedures for evaluating qualifications in an open, competitive, and objective manner; and

(3) the commissioner shall issue a request for qualifications that includes the information as described in subdivision 3.

(b) After obtaining and evaluating qualifications from each design-builder, in accordance with the weighted criteria and subcriteria and procedures set forth in the request for qualifications, the board shall select a short list of three proposers. The board must receive at least three proposals from design-builders or the commissioner shall either:

(1) solicit new proposals;

(2) revise the request for qualifications and thereafter solicit new proposals using the revised request for qualifications; or

(3) request selection of a primary designer pursuant to section 16B.33, 16C.08, or 16C.095 and proceed with competitive bidding pursuant to sections 16C.25 to 16C.29.

(c) The commissioner shall issue a request for proposals to the selected design-builders. The submitted proposals shall consist of, at a minimum, the following elements:

(1) preliminary plans and specifications and other information in sufficient detail to describe the character, quality, and scope of the project;

(2) a design and construction critical path schedule;

(3) the price at which the design-builder will complete all design and construction requested in the proposal for the project if selected; and

(4) other materials the board determines are necessary to fix the design, schedule, and cost of the project.

(d) Proposals must be sealed and may not be opened until the expiration of the time established for making proposals as set forth in the request for proposals.

(e) Proposals must identify the primary designer and the primary construction contracting entity that are members of the design-builder's team.

(f) The amount and type of design services requested by the board shall not be exceeded by those submitting proposals. Proposals exceeding the amount and type of design services requested by the board may be rejected by the board. Unless compensated in excess of the minimum stipend for their effort, design-builders must not be required to submit detailed architectural or engineering design or construction documents as part of the proposal.

(g) Except as described in paragraph (h), the commissioner shall award to each design-builder that submits a responsive design-build proposal under this subdivision, a stipend in an amount of not less than 0.3 percent of the commissioner's estimated cost of design and construction. If the request for proposals requires extensive design services beyond preliminary plans and specifications as requested as part of the proposal, the stipend shall be adjusted to an amount commensurate with the amount of design services requested for each proposal.

(h) No stipend shall be awarded to the design-builder selected to complete the project.

(i) For projects where the design-builder accepts the stipend offered by the board, the commissioner shall be deemed the owner of the design, subject to the rights of the proposer to such design for publication and use in other projects. However, the use of the design in its totality, or near totality, by the commissioner is prohibited.

(j) The commissioner may require each design-builder to submit with its proposal a cash deposit, letter of credit in a form acceptable to the commissioner, or bid bond not to exceed five percent of the maximum cost of the design-builder's proposal. If the proposal is accepted but the design-builder fails, without good cause to execute the design-build contract, the deposit or bond is forfeited in an amount not to exceed the difference between the proposal in question and the next highest proposal.

Subd. 8. Design-build design and price-based selection process. (a) The board shall review submissions as described in subdivision 7; conduct formal interviews with all three proposers but not allow the disclosure of any price, proprietary, or confidential information contained in one proposal to another proposer; and select the proposal that scores the highest based on the weighted evaluation criteria and subcriteria, except for projects under the control of Minnesota State Colleges and Universities. The commissioner shall make the award to the design-builder who scores the highest score pursuant to the weighted criteria and subcriteria as determined by the board, unless the commissioner rejects all proposals or proceeds pursuant to paragraph (c) or (d). For Minnesota State Colleges and Universities projects, the board shall narrow the selection to the two highest scoring proposers for recommendation to the commissioner, and the commissioner shall review the submissions as described in subdivision 7; conduct formal interviews with both proposers recommended by the board, but not allow the disclosure of any price, proprietary, or confidential information contained in one proposal to another proposer; and select the proposal that scores the highest based on the commissioner's application of the weighted evaluation criteria and subcriteria; and shall notify the board of the selection.

(b) After a proposal is accepted, the commissioner is deemed the owner of the design, subject to the rights of the proposer to such design for publication and use in other projects.

(c) After a proposal is accepted, the commissioner and the design-builder shall enter into a fixed-price contract.

(d) If the design-builder selected for a project declines the appointment or is unable to reach agreement with the commissioner concerning the terms of the contract, the commissioner may, within 60 days after the first selection, request the board to make another selection.

(e) If the design-builder selected for a project, prior to executing a design-build contract, replaces either the primary designer or the primary construction contracting entity, the commissioner shall notify the board of the replacement and request the board to either approve the new design-builder or to select another design-builder.

(f) If the board fails to make a second selection as described in paragraph (d) or (e) and forward its recommendation to the commissioner within 60 days of the commissioner's request for a second selection, the commissioner may appoint a design-builder to the project without the recommendation of the board.

History: 2005 c 78 s 7.

16C.34 CONSTRUCTION MANAGER AT RISK.

Subdivision 1. Solicitation of qualifications. (a) Every user agency, except the Capitol Area Architectural and Planning Board, shall submit a written request for proposals for a construction manager at risk for its project to the commissioner. The written request for proposals must include a description of the project, the estimated cost of completing the project, a description of any special requirements or unique features of the proposed project, and other information which will assist the commissioner in carrying out its duties and responsibilities set forth in this section.

(b) The commissioner may include in the request for qualifications criteria a requirement that the proposer include the overhead and fee that the construction manager at risk proposes to charge for its services.

(c) A request for qualifications shall be prepared for each construction manager at risk contract as provided in this section. The request for qualifications shall contain, at a minimum, the following elements:

(1) the identity of the agency for which the project will be built and that will award the construction manager at risk contract;

(2) procedures for submitting qualifications, the criteria and subcriteria for evaluation of qualifications and the relative weight for each criteria and subcriteria, and the procedures for making awards in an open, competitive, and objective manner, and according to the stated criteria and subcriteria, including a reference to the requirements of this section;

(3) the terms and conditions for the contract;

(4) the qualifications that the construction manager at risk shall be desired to have;

(5) a schedule for commencement and completion of the project;

(6) any applicable budget limits for the project;

(7) requirements for insurance, statutorily required performance and payment bonds;

(8) identification and location of any other information in the possession or control of the agency that the user agency determines is material, which may include surveys, soils reports, drawings or models of existing structures, environmental studies, photographs, or references to public records; and

(9) criteria shall not impose unnecessary conditions beyond reasonable requirements to ensure maximum participation of construction managers at risk. The criteria shall not consider the collective bargaining status of the construction manager at risk.

(d) Notice of requests for qualifications must be advertised in the State Register.

Subd. 2. **Construction manager at risk selection process.** In a construction manager at risk selection process, the following shall apply:

(a)(1) Upon receipt of a written request from a user agency for a construction manager at risk for its project, the commissioner shall create a selection committee composed of a minimum of three persons, at least one of whom has construction industry expertise; (2) the selection committee shall establish procedures for determining the appropriate content of each request for qualifications, the weighted criteria and subcriteria to be used to score the proposals of the construction managers at risk, and shall establish procedures for evaluating qualifications in an open, competitive, and objective manner; and (3) the commissioner shall issue a request for qualifications that includes the information as described in subdivision 1.

(b) In accordance with the criteria and procedures set forth in the request for qualifications, the selection committee shall evaluate the construction manager at risk's experience as a constructor, including, but not limited to, capacity of key personnel, technical competence, capability to perform, the past performance of the construction manager at risk and its employees, its safety record and compliance with state and federal law, availability to and familiarity with the project locale, and other appropriate facts submitted by the construction manager at risk in response to the request for qualifications. The commissioner must receive at least three proposals from construction managers or the commissioner may either (1) solicit new proposals; (2) request the selection committee to revise the request for qualifications and thereafter solicit new proposals using the revised request for qualifications; (3) select another allowed procurement method; or (4) reject all proposals.

(c)(1) The selection committee shall review the proposers' qualifications and create a short list of three to five proposals of construction managers at risk; (2) the commissioner shall issue a request for proposal requiring fee and expense proposals and other information as desired from the short-listed construction managers at risk; (3) the selection committee shall conduct formal interviews with the short-listed construction managers at risk but shall not disclose any proprietary or confidential information contained in one proposal to another proposer; and (4) the selection committee shall recommend the construction manager at risk achieving the highest score on the evaluation criteria as described in subdivision 1, paragraph (b).

(d) The board shall select the primary designer as described in section 16B.33 or in the case of the commissioner, section 16C.08 or 16C.095.

Subd. 3. **Construction manager at risk contract.** (a) The commissioner shall conduct contract negotiations with the recommended construction manager at risk.

(b) If the construction manager at risk selected for the project declines the appointment or is unable to reach agreement with the commissioner concerning the fee or terms of the contract, the commissioner shall, within 60 days after the first selection, request the selection committee to make another recommendation.

(c) If the selection committee fails to make a second recommendation and forward it to the commissioner within 60 days of the commissioner's request for a second recommendation, the commissioner may select a construction manager at risk without the recommendation of the selection committee.

(d) The primary designer selected by the board shall develop various design documents for review and approval by the commissioner.

(e) The construction manager at risk shall competitively bid all trade contract work for the project from a list of qualified firms, subject to availability of such qualified firms for the specific work. The list of qualified firms shall be based upon an open, competitive, and objective prequalification process in which the selection criteria includes the firm's experience as a constructor, including capacity of key personnel, technical competence, capability to perform, the past performance of the firm and its employees, including its safety record and compliance with state and federal law, availability to and familiarity with the project locale, and other considerations as defined by the construction manager at risk and the commissioner. The construction

manager at risk and the commissioner shall jointly determine the composition of the list of qualified firms. The criteria shall not impose unnecessary conditions beyond reasonable requirements to ensure maximum participation of qualified contractors. With the commissioner's approval or request, the construction manager at risk may also submit bids for trade contract work.

(f) The construction manager at risk and the commissioner shall enter into a guaranteed maximum price contract for the project.

History: 2005 c 78 s 8

16C.35 JOB ORDER CONTRACTING.

Subdivision 1. **Authority.** The commissioner may undertake construction utilizing job order contracting for projects that do not exceed a construction cost of \$250,000.

Subd. 2. **Job order contracting request for qualifications.** (a) The commissioner is authorized to issue a request for qualifications that includes the criteria that will be used for the projects, provided that these criteria do not unduly restrict competition, nor impose conditions beyond reasonable requirements to ensure maximum participation of all qualified contractors, and does not relate to the collective bargaining status of the contractor.

(b) The request for qualifications must be publicized in a manner designated by the commissioner that ensures open and unrestricted access for any potential responder. To the extent practical, this must include posting on a state Web site. To the extent practical, the commissioner must give notice to representatives of targeted group businesses designated under section 16C.16.

Subd. 3. **Qualified contractors.** (a) The commissioner shall review the responses to the request for qualifications and determine responder's ability to enter into the master contract that will be utilized for the projects. The commissioner shall establish a list of qualified contractors based on the proposers' ability to enter into a master contract as described in the request for qualifications.

(b) The commissioner shall enter into master contracts with all qualified contractors.

(c) The commissioner shall establish procedures to allow firms to submit qualifications at least annually to allow placement on the list of contractors qualified to enter into a master contract.

Subd. 4. **Construction services bidding.** The commissioner shall request bids for construction services for any project using job order contracting from qualified contractors as follows:

(1) for construction projects up to a maximum cost of \$50,000, the commissioner shall request a minimum of two bids;

(2) for construction projects with a cost greater than \$50,000, but less than or equal to \$100,000, the commissioner shall request a minimum of three bids;

(3) for construction projects with a cost greater than \$100,000 but less than or equal to \$250,000, the commissioner shall request a minimum of four bids.

Subd. 5. **Qualified contractor selection.** The commissioner shall select the contractor who submits the lowest price bid for the construction services proposed.

Subd. 6. **Reasonable distribution of bid requests among qualified contractors.** The commissioner in requesting bidding for projects using job order contracting as described in this section shall develop a system to ensure a reasonable opportunity for all qualified contractors to bid on construction services on a periodic basis.

History: 2005 c 78 s 9