

2003 SENATE BILL 347

December 17, 2003 – Introduced by Senators DARLING and PLALE, cosponsored by Representatives JESKEWITZ, HAHN, WASSERMAN, YOUNG, RICHARDS, GUNDRUM, ZEPNICK, GUNDERSON, TAYLOR, KRUG and STASKUNAS. Referred to Committee on Economic Development, Job Creation and Housing.

1 **AN ACT** *to amend* 200.47 (2) (a), 200.47 (2) (e) and 281.41 (1) (a); and *to create*
2 200.47 (2) (bm), 200.47 (2) (f) to (k) and 281.01 (3e) of the statutes; **relating to:**
3 authorizing the use of the design–build construction process for the Milwaukee
4 Metropolitan Sewerage District.

Analysis by the Legislative Reference Bureau

This bill authorizes the Milwaukee Metropolitan Sewerage District (MMSD) to let not more than five contracts for public construction using the design–build construction process, which is defined as a project delivery and procurement process for the design, construction, repair, renovation, installation, or demolition of a public works project under which a single entity is responsible for the professional design services and construction services related to the project. Under the bill, the design–build construction process may be used only for contracts, the estimated cost of which exceeds \$4,000,000.

If MMSD wishes to construct a public work using the design–build construction process, MMSD must use a two–stage selection process. Under the first stage, MMSD must publish a notice that includes a project statement that describes the project requirements, performance criteria, and design goals for the project, detailed submission requirements, selection procedures, selection criteria, the composition of the selection panel, and whether the district will offer a stipend to unsuccessful design–build teams and, if so, the amount of the stipend. If the public work is for the construction of underground facilities, MMSD must also prepare a geotechnical report, which must be issued as part of the first stage of the selection process.

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Following receipt of the bids, MMSD must select no more than three prospective design–build teams to participate in the second stage of the selection process. The selection of the finalist teams in the first stage of the process must be based on factors that include the background, experience, and qualifications of the members of the teams, and the statement of qualifications and the initial project approach proposal.

In the second stage of the selection process, MMSD must choose from among the finalist teams if MMSD determines that at least one of the finalists will be able to construct the public work in a way that is satisfactory to MMSD. MMSD must conduct interviews of each team, and each team must make a presentation. The criteria to be used in making a final selection may include the quality of the proposed design, the extent to which a proposal demonstrates compliance with the project statement, the amount of participation of a disadvantaged business, and the contract price for the project. If MMSD enters into a contract with one of the teams, that design–build team must obtain bonding for the construction–related portions of the contract to guarantee completion of the project.

If the public work involves the construction of underground facilities, the contract must have a differing site conditions clause. If the contractor discovers any of a number of physical conditions at the site that differ materially from the conditions stated in the contract or from conditions that are ordinarily encountered in work to which the contract applies, the contractor must promptly notify MMSD in writing. MMSD must then investigate the conditions. If MMSD agrees with the contractor’s assessment of the conditions and MMSD determines that the differing site conditions will increase or decrease the contractor’s costs or time spent to perform the work under the contract, MMSD must make an equitable adjustment to the contract.

Under current law, the Milwaukee County board may let a contract for the construction of a sheriff’s department training academy using the design–build construction process, although the process is not defined.

For further information see the *local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 200.47 (2) (a) of the statutes is amended to read:
2 200.47 **(2)** (a) Except for a contract awarded under pars. (f) to (k) and except
3 as provided in par. (b), all work done and all purchases of supplies and materials by
4 the commission shall be by contract awarded to the lowest responsible bidder
5 complying with the invitation to bid, if the work or purchase involves an expenditure

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1 of \$20,000 or more. If the commission decides to proceed with construction of any
2 sewer after plans and specifications for the sewer are completed and approved by the
3 commission and by the department of natural resources under ch. 281, the
4 commission shall advertise by a class 2 notice under ch. 985 for construction bids.
5 All contracts and the awarding of contracts are subject to s. 66.0901, except for a
6 contract awarded under pars. (f) to (k).

7 **SECTION 2.** 200.47 (2) (bm) of the statutes is created to read:

8 200.47 (2) (bm) The design–build team selected by the commission under par.
9 (g) 3. shall advertise the work to be performed, other than design services or work
10 that is to be performed by the design–build team itself, which involves an
11 expenditure of \$20,000 or more, as a class 2 notice under ch. 985. Publicly, the
12 design–build team shall open the bids, review the bids, and award the contract to the
13 lowest responsible bidder. The commission shall at all times have access to the bids.

14 **SECTION 3.** 200.47 (2) (e) of the statutes is amended to read:

15 200.47 (2) (e) Paragraphs (a) to (d) do not apply to contracts awarded under s.
16 200.49. Paragraphs (f) to (k) do apply to contracts awarded under s. 200.49.

17 **SECTION 4.** 200.47 (2) (f) to (k) of the statutes are created to read:

18 200.47 (2) (f) In this subsection:

19 1. “Design–build construction process” means a project delivery and
20 procurement process for the design, construction, repair, renovation, installation, or
21 demolition of a public works project under which a single entity is responsible for the
22 professional design services and construction services related to the project.

23 2. “Design–build team” means a single entity that is responsible for a project
24 that is undertaken using a design–build construction process.

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1 3. “Disadvantaged business” means a business that meets the eligibility
2 criteria under s. 84.076 (1) (b) or is a small business with a gross income in the 12
3 months preceding the submission of a statement of qualifications as described in par.
4 (g) 1. of not more than \$2,500,000.

5 4. “Professional design services” means design services provided by an entity
6 that includes at least one architect, as defined in s. 443.01 (1), at least one
7 professional engineer, as defined in s. 443.01 (7), and any other professionals licensed
8 by this or any other state that are required by the commission.

9 (g) If the commission wishes to construct a public work under par. (k) using the
10 design–build construction process, the commission shall, subject to par. (h), use a
11 selection process that contains the following procedures:

12 1. The commission shall issue a request for a statement of qualifications and
13 an initial project approach proposal from prospective design–build teams by
14 publishing a class 1 notice under ch. 985. The notice shall include a project statement
15 that describes the project requirements, performance criteria, and project design
16 goals; detailed submission requirements; selection procedures; selection criteria,
17 including consideration of disadvantaged businesses; site information; an outline of
18 specifications for the project; a budget for the project; a project schedule; the
19 composition of the selection panel; the approximate amount of the bond, consistent
20 with ss. 779.14 to 779.17, that the commission will require under par. (i); and
21 whether the commission will offer a stipend to unsuccessful prospective
22 design–build teams and, if so, the amount of the stipend.

23 2. Following receipt of the statement of qualifications and the initial project
24 approach proposal, the commission shall select no more than 3 prospective
25 design–build teams to participate in the final stage of the selection process. The

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1 selection of teams under this subdivision shall be based on factors that include the
2 background, experience, and qualifications of the members of the teams; the amount
3 of participation of disadvantaged businesses; the financial and surety capacity of the
4 teams; the statement of qualifications and the initial project approach proposal; and
5 the past performance and available resources of the teams. The commission
6 selection panel that selects the teams under this subdivision for the final selection
7 process under subd. 3. shall include a professional engineer, as defined in s. 443.01
8 (7), who is a faculty member at a Wisconsin university or college that has been
9 accredited by the Accreditation Board for Engineering and Technology, and the
10 municipal engineer, or his or her designee, of the municipality where the majority
11 of the public work is to be located, and may include commissioners or design and
12 construction professionals who work for the commission or are hired by the
13 commission to assist in the selection.

14 3. The commission shall make a final selection from among the teams selected
15 under subd. 2. if the commission determines that at least one of the teams selected
16 as a finalist under subd. 2. will be able to construct the public work in a way that is
17 satisfactory to the commission. The final selection shall be made following
18 interviews and presentations from the finalists, based on criteria that are published
19 as a class 1 notice under ch. 985. The notice shall state the weight that is given to
20 each criterion. The criteria to be used in making a final selection under this
21 subdivision shall include the quality of the proposed design, the construction
22 approach to be used to complete the project, the extent to which a proposal
23 demonstrates compliance with the project statement described under subd. 1., the
24 amount of participation of disadvantaged businesses, the proposed management
25 plan for the project, and the contract price for the project.

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1 (h) 1. If the public work is the construction of underground facilities, the district
2 shall prepare a geotechnical report that shall be issued along with a request for a
3 statement of qualifications and an initial project approach proposal as described
4 under par. (g) 1. A design–build team may use the geotechnical report in the
5 preparation of its statement of qualifications and initial project approach proposal.
6 If a design–build team believes that additional geotechnical studies or tests are
7 needed to prepare its bid, it may arrange for such studies or tests at its own expense.

8 2. A contract for a public work described under subd. 1. shall contain a differing
9 site conditions clause, which may include compliance dates and requirements. The
10 clause shall be either in substantial conformity with the Federal Acquisition
11 Regulations on Differing Site Conditions under 48 CFR 52.236–2, or with the
12 provisions of subds. 3. to 5.

13 3. If the contractor discovers any of the following, the contractor shall promptly
14 notify the district in writing before such conditions are disturbed:

15 a. Subsurface or latent physical conditions at the site that differ materially
16 from those indicated in the contract.

17 b. Unknown physical conditions at the site, of an unusual nature, which differ
18 materially from those that are ordinarily encountered and generally recognized as
19 inherent in the work to which the contract applies.

20 4. If the district receives written notification under subd. 3., it shall promptly
21 investigate the conditions. If the district agrees with the contractor that the
22 conditions differ materially in one or more of the ways described under subd. 3. and
23 the district determines that the differences will cause an increase or decrease in the
24 contractor’s costs or the time required to perform any part of the work under the

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1 contract, the district shall make an equitable adjustment and modify the contract in
2 writing.

3 5. No claim for a differing site condition may be allowed if the contractor does
4 not comply with the written notice requirement under subd. 3.

5 (i) If the commission selects a design–build team under par. (g) 3. and enters
6 into a contract for the construction of the project, the design–build team shall obtain
7 bonding, in an amount specified by the commission for the construction–related
8 portions of the contract that is consistent with ss. 779.14 to 779.17, to guarantee
9 completion of the project according to the terms of the contract.

10 (j) All drawings, specifications, and other information submitted in a statement
11 of qualifications and an initial project approach proposal remain the property of the
12 design–build team that submitted the proposal, and may not be disclosed by the
13 commission to any person, except that this provision does not apply to the
14 design–build team that is selected under par. (g) 3. once the team and the commission
15 enter into a contract for the construction of the project.

16 (k) 1. Not more than 5 contracts for public construction under sub. (1) may be
17 let using the design–build construction process.

18 2. The estimated cost of each of the contracts described under subd. 1. shall
19 exceed \$4,000,000.

20 **SECTION 5.** 281.01 (3e) of the statutes is created to read:

21 281.01 (3e) “Design–build construction process” has the meaning given in s.
22 200.47 (2) (f) 1.

23 **SECTION 6.** 281.41 (1) (a) of the statutes is amended to read:

24 281.41 (1) (a) Except as provided under sub. (2), every owner, within the time
25 prescribed by the department, shall file with the department a certified copy of

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1 complete plans of a proposed system or plant or extension thereof, in scope and detail
2 satisfactory to the department, and, if required, of existing systems or plants, and
3 any other information concerning maintenance, operation, and other details that the
4 department requires, including the information specified under s. 281.35 (5) (a), if
5 applicable. Owners contracting for a system, plant, or extension under the
6 design-build construction process shall submit to the department performance
7 objectives and preliminary designs in a form that is satisfactory to the department,
8 rather than complete plans. Material changes with a statement of the reasons shall
9 be likewise submitted. Before plans are drawn, a statement concerning the
10 improvement may be made to the department and the department may, if requested,
11 outline generally what it will require. Upon receipt of the plans for approval, the
12 department or its authorized representative shall notify the owner of the date of
13 receipt.

14 (END)