

**SENATE SUBSTITUTE AMENDMENT 1,
TO 2003 SENATE BILL 347**

January 28, 2004 – Offered by Senator DARLING.

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 substitute amendment 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 substitute amendment, the design–build construction process may be used only for contracts, the estimated cost of which exceeds \$4,000,000, and the combined total cost of all five contracts may not exceed \$60,000,000.

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.

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 conceptual 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.

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

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. “Conceptual project approach proposal” means a written statement that
20 outlines the design–build team’s understanding of the project, identifies the permit
21 requirements of the project, and describes which general tasks will be performed by
22 each member of the design–build team.

23 2. “Design–build construction process” means a project delivery and
24 procurement process for the design, construction, repair, renovation, installation, or

1 demolition of a public works project under which a single entity is responsible for the
2 professional design services and construction services related to the project.

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

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

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

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

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

1 whether the commission will offer a stipend to unsuccessful prospective
2 design–build teams and, if so, the amount of the stipend.

3 2. Following receipt of the statement of qualifications and the conceptual
4 project approach proposal, the commission shall select no more than 3 prospective
5 design–build teams to participate in the final stage of the selection process. The
6 selection of teams under this subdivision shall be based on factors that include the
7 background, experience, and qualifications of the members of the teams; the amount
8 of participation of disadvantaged businesses; the financial and surety capacity of the
9 teams; the statement of qualifications and the conceptual project approach proposal;
10 and the past performance and available resources of the teams. The commission
11 selection panel that selects the teams under this subdivision for the final selection
12 process under subd. 3. shall include a professional engineer, as defined in s. 443.01
13 (7), who is a faculty member at a Wisconsin university or college that has been
14 accredited by the Accreditation Board for Engineering and Technology, and the
15 municipal engineer, or his or her designee, of the municipality where the majority
16 of the public work is to be located, and may include commissioners or design and
17 construction professionals who work for the commission or are hired by the
18 commission to assist in the selection.

19 3. The commission shall make a final selection from among the teams selected
20 under subd. 2. if the commission determines that at least one of the teams selected
21 as a finalist under subd. 2. will be able to construct the public work in a way that is
22 satisfactory to the commission. The final selection shall be made following
23 interviews and presentations from the finalists, based on criteria that are published
24 as a class 1 notice under ch. 985. The notice shall state the weight that is given to
25 each criterion. The criteria to be used in making a final selection under this

1 subdivision shall include the quality of the proposed design, the construction
2 approach to be used to complete the project, the extent to which a proposal
3 demonstrates compliance with the project statement described under subd. 1., the
4 amount of participation of disadvantaged businesses, the proposed management
5 plan for the project, and the contract price for the project.

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

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

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

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

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

1 4. If the district receives written notification under subd. 3., it shall promptly
2 investigate the conditions. If the district agrees with the contractor that the
3 conditions differ materially in one or more of the ways described under subd. 3. and
4 the district determines that the differences will cause an increase or decrease in the
5 contractor's costs or the time required to perform any part of the work under the
6 contract, the district shall make an equitable adjustment and modify the contract in
7 writing.

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

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

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

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

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

