



2011 SENATE BILL 366

January 5, 2012 - Introduced by Senators WANGGAARD, ZIPPERER and TAYLOR, cosponsored by Representatives STRACHOTA, SPANBAUER and ENDSLEY. Referred to Committee on Judiciary, Utilities, Commerce, and Government Operations.

1 **AN ACT to amend** 16.855 (1), 16.855 (2) (intro.), 16.855 (13) (a), 16.855 (14) (a)
2 and 16.855 (15); and **to create** 16.855 (14) (ae) and 16.855 (14) (am) to (aq) of
3 the statutes; **relating to:** state building contracting and construction
4 procedures and granting rule-making authority.

Analysis by the Legislative Reference Bureau

This bill makes changes in state building contracting and construction procedures.

Currently, with certain exceptions, contracts for construction work on state construction projects that cost more than \$50,000 must be let by contract to the lowest responsible bidder and must be preceded by public notice and a public bidding process. Wisconsin-based bidders are accorded a preference over bidders whose home governments grant them a preference in making governmental purchases. With certain exceptions, if bids are required to be solicited and the estimated cost of a project exceeds \$185,000, the Department of Administration (DOA) must solicit single and separate bids on each portion of the work that DOA designates. DOA must attempt to ensure that 5 percent of the total amount expended for construction work in each fiscal year is awarded to minority-owned businesses. Contractors must be granted certain progress payments while a project is underway. With certain exceptions, if the estimated cost of a project exceeds \$185,000, the project is subject to approval of the Building Commission.

The bill permits DOA either to: 1) solicit both single and separate bids on any division of the work it designates; or 2) solicit only single bids on all divisions of the

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work that DOA designates. The bill also permits DOA to utilize another contracting procedure to construct any project called "construction-manager-at-risk contracting." Under the construction-manager-at-risk contracting procedure, DOA hires a construction manager to provide preconstruction services and to manage the construction process. The construction manager must solicit bids for all work on a project unless the manager submits a bid for a portion of the work. The bill also requires the construction manager to award all contracts to the lowest qualified responsible bidder unless the construction manager and DOA agree that it is in the best interest of the state to contract with a subcontractor other than the lowest bidder. In addition, the bill requires the construction manager to submit progress payment requests to DOA, to pay each subcontractor the amount to which the subcontractor is entitled within seven days after the prime contractor receives payment for work performed, and to limit the amount of any retainage to the proportionate share of the retainage that is attributable to the subcontractor's division of the work. The bill also permits DOA to prescribe, by rule, additional contracting procedures not specified in current law or in the bill that DOA may utilize for any project.

The bill provides the following when DOA uses a contracting procedure in which it solicits only single bids on all divisions of the work on a project (single prime contracting): 1) the prime contractor must submit to DOA the names of the subcontractors that are proposed to be retained; 2) DOA must require the prime contractor to solicit bids from subcontractors who will perform any division of the work on the project designated by DOA and to award each subcontract to the lowest qualified responsible bidder; 3) the prime contractor must submit progress payment requests to DOA and must pay the subcontractors for their proportionate share of the work within seven days after a payment is received from DOA; and 4) retainages from subcontractors must be limited to their proportionate share of the work. In addition, the bill provides that when DOA uses the single prime contracting procedure to construct a project, DOA must ensure that each subcontractor has access to the elements of the project information available to the prime contractor that are required for the subcontractor to effectively participate in the project.

Under all of the proposed new contracting procedures, as well as any other procedures prescribed by DOA, DOA must advertise for and solicit bids on all or any portion of the work it designates and comply with all other laws governing construction procedures, except that DOA may provide, by rule, that any of these laws do not apply to a specific project that is constructed using the construction-manager-at-risk procedure, and except that, as currently provided, the Building Commission may waive compliance with any of these laws for construction of a specific project.

Currently, with certain exceptions, a bidder on a contract for a state project need not submit with its bid a list of the subcontractors to be used on the project, but DOA may require a list of the subcontractors to be submitted before the contract is awarded. This bill permits DOA to require each bidder on a state project to submit with its bid a list of its subcontractors to be used on the project. The bill also directs DOA to require each bidder to solicit bids from subcontractors who will perform any

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division of the work on a project designated by DOA and to award each subcontract to the lowest qualified responsible bidder.

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

1 **SECTION 1.** 16.855 (1) of the statutes, as affected by 2011 Wisconsin Act 32, is
2 amended to read:

3 16.855 (1) The department shall let by contract to the lowest qualified
4 responsible bidder all construction work when the estimated construction cost of the
5 project exceeds \$50,000, except for construction work authorized under s. 16.858 and
6 except as provided in sub. (10m) or (14) (am) or s. 13.48 (19). If a bidder is not a
7 Wisconsin firm and the department determines that the state, foreign nation or
8 subdivision thereof in which the bidder is domiciled grants a preference to bidders
9 domiciled in that state, nation or subdivision in making governmental purchases,
10 the department shall give a preference over that bidder to Wisconsin firms, if any,
11 when awarding the contract, in the absence of compelling reasons to the contrary.
12 The department may enter into agreements with states, foreign nations and
13 subdivisions thereof for the purpose of implementing this subsection.

14 **SECTION 2.** 16.855 (2) (intro.) of the statutes, as affected by 2011 Wisconsin Act
15 32, is amended to read:

16 16.855 (2) (intro.) Except as provided in subs. (10) and (14) (ae), (am), and (ao)
17 and except for projects authorized under s. 16.858, whenever the estimated
18 construction cost of a project exceeds \$50,000, or if less and in the best interest of the
19 state, the department shall:

20 **SECTION 3.** 16.855 (13) (a) of the statutes is amended to read:

SENATE BILL 366**SECTION 3**

1 16.855 (13) (a) ~~A~~ The department may require each bidder to submit a list of
2 the major subcontractors shall not be required to be submitted, as designated by the
3 department in its solicitation documents, for work to be performed with the bidder's
4 bid. The Except as provided in sub. (14) (ae) 2., the department may also require the
5 each prime contractor to submit in writing the names of prospective subcontractors
6 for the department's approval before the award of a contract to the prime contractor.
7 The department shall require each bidder to solicit bids from subcontractors who will
8 perform any division of the work on a project designated by the department and to
9 award each subcontract to the lowest qualified responsible bidder.

10 **SECTION 4.** 16.855 (14) (a) of the statutes is amended to read:

11 16.855 (14) (a) If a project requires prior approval of the building commission
12 under s. 13.48 (10) (a) ~~and~~ or bids are required to be solicited under sub. (2), the
13 department ~~shall take~~ may solicit both single bids and separate bids on any division
14 of the work that it designates. ~~If a project does not require prior approval of the~~
15 ~~building commission under s. 13.48 (10) (a) and bids are required to be solicited under~~
16 ~~sub. (2), the department may take single bids or separate bids on any division of the~~
17 ~~work that it designates~~ or may solicit only single bids on all divisions of the work.
18 If the department awards contracts by the division of work, the department shall
19 award the contracts according to the division of work selected for bidding. Except
20 as provided in pars. (am) and (ao) and sub. (10m) (am), the department shall award
21 all contracts to the lowest qualified responsible bidder or bidders that result in the
22 lowest total construction cost for the project.

23 **SECTION 5.** 16.855 (14) (ae) of the statutes is created to read:

24 16.855 (14) (ae) 1. In this paragraph:

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1 a. “Base bid” means the bid of a prime contractor for all work to be performed
2 on a project submitted in accordance with the solicitation, excluding any alternatives
3 or options.

4 b. “Single prime contracting” means a contracting procedure in which the
5 department solicits only single bids on all divisions of the work on a project.

6 2. If the department elects to use single prime contracting for the construction
7 of a project, the department shall set forth the divisions of the work in the
8 solicitation. The department shall also enforce the following requirements:

9 a. Each bidder shall submit in writing the names of the subcontractors who are
10 proposed to be retained to perform services required under the base bid for each
11 division of the work specified by the department together with the amount to be paid
12 by the prime contractor to each subcontractor. No modification may be made in the
13 submission unless the department permits a modification. The department may
14 permit a modification after the opening of bids but prior to execution of the contract
15 with the prime contractor.

16 b. The prime contractor shall submit progress payment requests to the
17 department for each period designated by the department and upon receiving each
18 progress payment shall pay each subcontractor for its division of the work in
19 accordance with s. 16.528 (2m).

20 c. In making payments to each subcontractor, the prime contractor shall limit
21 the amount of any retainage to the proportionate share of the retainage under sub.
22 (19) that is attributable to the subcontractor’s division of the work.

23 d. The prime contractor shall pay each subcontractor no later than 7 days after
24 the prime contractor receives payment the amount to which the subcontractor is

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1 entitled, including any retainage, when the work contracted to that subcontractor is
2 completed to the satisfaction of the department.

3 3. If the department elects to use single prime contracting for the construction
4 of a project, the department shall ensure that each subcontractor has access to the
5 elements of the project information available to the prime contractor that are
6 required for the subcontractor to effectively participate in execution of the project.

7 **SECTION 6.** 16.855 (14) (am) to (aq) of the statutes are created to read:

8 16.855 (14) (am) 1. In this paragraph, “construction-manager-at-risk
9 contracting” means a contracting procedure in which a person is selected by the
10 department to act as a construction manager for a project; to provide preconstruction
11 services during the design phase of the project; and to manage the construction
12 process, which includes, but is not limited to, supervision of public notice and bidding
13 for construction work on the project, contracting for construction work required to
14 be performed on the project, compliance with all terms and conditions of applicable
15 collective bargaining agreements, if any, and assumption of responsibility for the
16 project’s cost, completion schedule, and workmanship of construction.

17 2. As an alternative to the procedures under par. (a), the department may
18 utilize construction-manager-at-risk contracting to construct a project. The
19 department shall prescribe, by rule, the specific procedures to be used by the
20 department for projects constructed using construction-manager-at-risk
21 contracting. A rule promulgated under this subdivision may provide that any
22 provision of this section does not apply to a project constructed in accordance with
23 the procedures prescribed in the rule.

24 3. When the department elects to utilize construction-manager-at-risk
25 contracting to construct a project, the construction manager shall solicit bids on all

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1 work on the project in the manner prescribed under this subsection unless the
2 construction manager elects to submit a bid to perform a portion of the work. In that
3 case, the department shall solicit bids for that portion of the work in accordance with
4 procedures prescribed by rule. The department shall also enforce the following
5 requirements:

6 a. Within a reasonable time after the construction manager receives bids, the
7 construction manager shall provide tabulations of all bids received and subcontract
8 award results to the department and the department shall make the tabulations
9 available for public inspection.

10 b. The construction manager shall award all contracts to the lowest qualified
11 responsible bidder unless the construction manager recommends to the department
12 and the department concurs that it is in the best interest of the state to contract with
13 a subcontractor other than the lowest bidder.

14 c. The construction manager shall provide subcontract forms of agreement with
15 the bidding documents.

16 d. The construction manager shall submit progress payment requests to the
17 department for each period designated by the department and upon receiving each
18 progress payment shall pay each subcontractor for its division of the work in
19 accordance with s. 16.528 (2m).

20 e. In making payments to each subcontractor, the construction manager shall
21 limit the amount of any retainage to the proportionate share of the retainage under
22 sub. (19) that is attributable to the subcontractor's division of the work.

23 f. The construction manager shall pay each subcontractor no later than 7 days
24 after the prime contractor receives payment the amount to which the subcontractor

SENATE BILL 366**SECTION 6**

1 is entitled, including any retainage, when the work contracted is completed to the
2 satisfaction of the department.

3 (an) The department may prescribe, by rule, additional contracting procedures
4 not enumerated in this subsection that the department may utilize to construct any
5 project that requires approval of the building commission under s. 13.48 (10) (a).

6 (ao) On any project constructed under a procedure identified in or prescribed
7 under par. (ae), (am), or (an), the department shall comply with all provisions of this
8 section unless the building commission waives compliance under s. 13.48 (19), or a
9 rule promulgated under par. (am) provides for an alternative procedure.

10 (ap) The department shall define, by rule:

11 1. Any specific contracting procedures not specified in par. (ae) that prime
12 contractors must use when the department elects under par. (a) to solicit only single
13 bids on all divisions of the work on a project to provide protections to major
14 subcontractors.

15 2. The specific contracting procedures identified in or authorized to be
16 prescribed under pars. (am) and (an) and how they will be applied to construction
17 projects.

18 3. The criteria that will be applied to the selection of the contracting procedure
19 that will be utilized by the department on a particular project.

20 4. The selection process that the department will use to select a contractor for
21 any contracting procedure to be utilized on a project other than the procedures
22 identified in par. (a).

23 5. The procedures that the department will use to solicit bids for any portion
24 of the work on a project in which the construction manager at risk for the project
25 elects to submit a bid to perform the portion of the work.

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1 (aq) The department may define, by rule, the criteria that will be applied to the
2 selection of a contracting procedure for a project when the building commission
3 waives any provision of this section to permit the use of innovative types of design
4 and construction processes under s. 13.48 (19).

5 **SECTION 7.** 16.855 (15) of the statutes is amended to read:

6 16.855 (15) The department shall promulgate rules to implement the
7 advertising and award of contracts under sub. (1).

8 **SECTION 8. Initial applicability.**

9 (1) The treatment of section 16.855 (1), (2) (intro.), (13) (a), (14) (a), (ae), and
10 (am) to (aq), and (15) of the statutes first applies with respect to contracts for services
11 or construction work entered into on the effective date of this subsection.

12

(END)