2019 SENATE BILL 770

January 30, 2020 - Introduced by Senators Petrowski and Fitzgerald, cosponsored by Representatives Nygren and Vos. Referred to Committee on Transportation, Veterans and Military Affairs.

AN ACT to repeal 84.062 (1) (k) and 84.062 (5) (a) 2. d.; to renumber 84.062 (6) (f); to renumber and amend 84.062 (2); to amend 84.062 (1) (m), 84.062 (5) (a) 2. h., 84.062 (5) (a) 2. i., 84.062 (5) (a) 2. k., 84.062 (5) (b) and 84.062 (6) (a) 11.; and to create 84.062 (1) (f), 84.062 (1) (j), 84.062 (1) (L), 84.062 (1) (p), 84.062 (2) (b), 84.062 (2) (c), 84.062 (2) (d), 84.062 (3), 84.062 (4), 84.062 (5) (a) 2. f., 84.062 (5) (c), 84.062 (5) (d), 84.062 (6) (a) 14., 84.062 (6) (b), 84.062 (6) (c), 84.062 (6) (d), 84.062 (6) (e), 84.062 (7), 84.062 (8), 84.062 (11), 84.062 (13) and 84.062 (14) of the statutes; relating to: requirements for design–build transportation projects, providing an exemption from emergency rule procedures, and granting rule–making authority.

Analysis by the Legislative Reference Bureau

This bill makes numerous changes to the design–build method that the Department of Transportation is currently authorized to use for projects.

Under current law, the design and construction of projects are generally two distinct phases. Under this method, often referred to as “design-bid-build,” DOT has broad authority to accomplish the design of a project. The construction of a project
must be executed by contract based on bids, with DOT awarding the contract to the lowest responsible bidder.

Under current law, DOT is also authorized to use a design-build method under which design, engineering, construction, and related services are procured through a single contract with a single entity capable of providing the services. Current law specifies the contents of requests for qualifications and requests for proposals solicited by DOT for design-build projects.

Under the bill, DOT must award six contracts for design-build projects every six years. The bill creates requirements for the evaluation of proposals and the awarding of design-build contracts. Under the bill, DOT must develop a design-build procurement manual. DOT must also prepare a report for the transportation projects commission and the legislature evaluating the success of the design-build program and the Joint Committee on Finance must make a recommendation as to whether the program should continue.

For further information see the state and 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:

SECTION 1. 84.062 (1) (f) of the statutes is created to read:
84.062 (1) (f) “Design professional” means a person registered under s. 443.03 or 443.04 or a firm, partnership, or corporation registered under s. 443.08.

SECTION 2. 84.062 (1) (j) of the statutes is created to read:
84.062 (1) (j) “Member” means a private legal entity that is a member of a consortium or joint venture that is a design-builder.

SECTION 3. 84.062 (1) (k) of the statutes, as created by 2019 Wisconsin Act 9, is repealed.

SECTION 4. 84.062 (1) (L) of the statutes is created to read:
84.062 (1) (L) “Project” means a project involving a highway improvement, as defined in s. 84.06 (1) (a).

SECTION 5. 84.062 (1) (m) of the statutes, as created by 2019 Wisconsin Act 9, is amended to read:
84.062 (1) (m) “Qualified responsible bidder” means a design-builder responding to a request for qualifications and that is certified by the technical review committee.

**SECTION 6.** 84.062 (1) (p) of the statutes is created to read:

84.062 (1) (p) “Technical review committee” means the committee appointed under sub. (3).

**SECTION 7.** 84.062 (2) of the statutes, as created by 2019 Wisconsin Act 9, is renumbered 84.062 (2) (a) and amended to read:

84.062 (2) (a) The department shall administer a program for design-build projects. The department may not designate a project as a design-build project unless the department is able to clearly define the scope of work.

**SECTION 8.** 84.062 (2) (b) of the statutes is created to read:

84.062 (2) (b) The department shall award 6 design-build contracts every 6 years, beginning on the effective date of this paragraph .... [LRB inserts date]. During each 6-year period, the department shall award at least one low bid design-build contract, one best value design-build contract, and one fixed price variable scope design-build contract and 3 additional contracts that may be any combination of low bid design-build, best value design-build, and fixed price variable scope design-build contracts. The combined cost of the 6 design-build contracts awarded under this paragraph in each 6-year period may not exceed $250,000,000 and the combined cost of all low bid design-build contracts awarded under this paragraph in each 6-year period may not exceed $25,000,000.

**SECTION 9.** 84.062 (2) (c) of the statutes is created to read:

84.062 (2) (c) For each project designated under par. (a), the department shall solicit requests for qualifications, requests for proposals, and cost proposals as
provided in this section and, subject to sub. (7) (c) and (d), let each project by contract to a qualified responsible bidder.

**Section 10.** 84.062 (2) (d) of the statutes is created to read:

84.062 (2) (d) No more than 6 months following the completion of a design-build project designated under this subsection, the department shall prepare a report, with input from the design-builder and the technical review committee, detailing the project, the decision to designate the project as a design-build project, the type of design-build contract let, and recommendations for statutory changes, if any. The department shall provide this report to the transportation projects commission, the joint committee on finance, and the senate and assembly standing committees having jurisdiction over transportation matters. The senate and assembly standing committees having jurisdiction over transportation matters shall schedule a hearing on the report not more than 30 days following distribution of the report by the chief clerks of the senate and the assembly. This paragraph does not apply to projects awarded after December 31, 2026.

**Section 11.** 84.062 (3) of the statutes is created to read:

84.062 (3) TECHNICAL REVIEW COMMITTEE. (a) The secretary shall appoint 5 individuals to a technical review committee to evaluate proposals submitted under this section. The committee shall consist of the following:

1. Three employees of the department.

2. Two individuals who are not employees of the department and who are chosen in compliance with a memorandum of understanding entered into by the department with a state association of architectural, engineering, or design companies and a state association of transportation construction companies.
(b) The secretary may not appoint to the technical review committee any person associated, as defined in s. 19.42 (2), with a design-builder. No person appointed to the technical review committee may review proposals under this section when the proposed project could benefit the appointee or the appointee’s immediate family, as defined in s. 19.42 (7).

(c) A person appointed to the technical review committee is an agent of the department under s. 895.46.

(d) Except as otherwise provided in this section, all records of the technical review committee are open to public inspection and copying under s. 19.35 (1).

SECTION 12. 84.062 (4) of the statutes is created to read:

84.062 (4) Selection. The department shall solicit design–build proposals in 2 phases. In the first phase, the department shall solicit requests for qualifications under sub. (5) and requests for proposals under sub. (6). The technical review committee shall certify responsible bidders as provided in sub. (5) (c) and shall score technical proposals as provided in sub. (6) (b). In the 2nd phase, the department shall solicit cost proposals and the technical review committee shall evaluate cost proposals as provided in sub. (7).

SECTION 13. 84.062 (5) (a) 1. a. of the statutes, as created by 2019 Wisconsin Act 9, is amended to read:

84.062 (5) (a) 1. a. The design and construction experience of the design-builder or member, personnel, and contractors who will manage the design, engineering, and construction aspects of the project. The department may not require a level of experience that will unreasonably restrict competition.

SECTION 14. 84.062 (5) (a) 2. d. of the statutes, as created by 2019 Wisconsin Act 9, is repealed.
SECTION 15. 84.062 (5) (a) 2. f. of the statutes is created to read:

84.062 (5) (a) 2. f. The design-builder or a member has been in business for at least 12 months.

SECTION 16. 84.062 (5) (a) 2. h. of the statutes, as created by 2019 Wisconsin Act 9, is amended to read:

84.062 (5) (a) 2. h. The design-builder can provide information to the technical review committee upon request about ownership, management, and control of the design-builder.

SECTION 17. 84.062 (5) (a) 2. i. of the statutes, as created by 2019 Wisconsin Act 9, is amended to read:

84.062 (5) (a) 2. i. The design-builder or a member has not been debarred from any government contracts and has not been found to have committed tax avoidance or evasion in any jurisdiction in the previous 10 years.

SECTION 18. 84.062 (5) (a) 2. k. of the statutes, as created by 2019 Wisconsin Act 9, is amended to read:

84.062 (5) (a) 2. k. No design professional employed by the design-builder or a member who is assigned to the design-build project and no design professional that the design-builder will contract with for the design-build project has been disciplined in any jurisdiction in the previous 5 years under a license that is currently in use.

SECTION 19. 84.062 (5) (b) of the statutes, as created by 2019 Wisconsin Act 9, is amended to read:

84.062 (5) (b) The office department shall advertise the request for qualifications.

SECTION 20. 84.062 (5) (c) of the statutes is created to read:
84.062 (5) (c) The technical review committee shall certify at least 2 but not
more than 5 design-builders as qualified responsible bidders. If the department does
not receive at least 2 responses to the request for qualifications or if the technical
review committee certifies only one design-builder as a qualified responsible bidder,
the department may re-advertise or cancel the project.

**SECTION 21.** 84.062 (5) (d) of the statutes is created to read:

84.062 (5) (d) In making determinations under this subsection, the technical
review committee may not consider whether a design-builder or member exercised
legal rights specified in statute or rule or under a contract with the department.

**SECTION 22.** 84.062 (6) (a) 11. of the statutes, as created by 2019 Wisconsin Act
9, is amended to read:

84.062 (6) (a) 11. Amount of stipend, if any.

**SECTION 23.** 84.062 (6) (a) 14. of the statutes is created to read:

84.062 (6) (a) 14. A requirement that the design-builder perform not less than
30 percent of the construction services under the contract with labor provided by
employees of the design-builder or member and equipment owned or rented by the
design-builder or member.

**SECTION 24.** 84.062 (6) (b) of the statutes is created to read:

84.062 (6) (b) The technical review committee shall evaluate each technical
proposal, which may include a confidential interview, and shall assign points in
accordance with the request for proposals and subject to all of the following:

1. For a project that will be awarded as either a low bid design-build contract
or a fixed price variable scope design-build contract, the technical review committee
shall determine whether technical proposals are responsive to the request for
proposals without ranking or scoring the proposals.
2. For a project that will be awarded as a best value design-build contract, the technical review committee shall determine whether technical proposals are responsive to the request for proposals and score each responsive technical proposal as required by the request for proposals. The technical review committee may award not more than 20 percent of the points awarded to a technical proposal based on the design-builder’s qualifications and ability to design, contract, and deliver the project in accordance with any deadline established in the request for proposals. The technical review committee may award a technical proposal not less than 25 percent and not more than 60 percent of the maximum number of combined points that may be awarded to a technical proposal and cost proposal.

SECTION 25. 84.062 (6) (c) of the statutes is created to read:

84.062 (6) (c) The department shall allow design-builders to include alternative technical concepts and value engineering changes in their proposals by describing the process for submission and evaluation of alternative technical concepts and value engineering changes in the request for proposals.

SECTION 26. 84.062 (6) (d) of the statutes is created to read:

84.062 (6) (d) The technical review committee may not consider a proposal responsive unless the proposal includes a conceptual design, critical path method, bar schedule of the work to be performed or similar schematic, design plans and specifications, technical reports, and all other information required by the request for proposals. The technical review committee may not consider any price or fee included in the technical proposal.

SECTION 27. 84.062 (6) (e) of the statutes is created to read:

84.062 (6) (e) The department shall notify the design-builder for each proposal that is determined to be responsive under par. (b) that the design-builder may
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submit a cost proposal under par. (7). The department shall reject all proposals that are determined to be nonresponsive under par. (b).

SECTION 28. 84.062 (6) (f) of the statutes, as created by 2019 Wisconsin Act 9, is renumbered 84.062 (7) (f).

SECTION 29. 84.062 (7) of the statutes is created to read:

84.062 (7) COST PROPOSALS. (a) Design-builders notified under sub. (6) (e) may submit a cost proposal and the proposal shall include a fixed cost of design, engineering, and construction services prepared by a design professional that contains all design, engineering, construction, and quality assurance and quality control costs of the project.

(b) The technical review committee may open cost proposals only after the technical proposals have been reviewed as provided in sub. (6). At the time and place specified in the request for proposals, the technical review committee shall open cost proposals, read the proposals aloud, and, for a project that will be awarded as a best value design-build contract, make public the committee’s scoring of the technical proposals.

(c) Following a review of cost proposals, the department may issue a notice of intent to award a contract, subject to all of the following:

1. For a low bid design-build contract, the contract shall be awarded to the qualified responsible bidder that submitted a responsive technical proposal and also submitted the lowest responsive cost proposal.

2. For a fixed price variable scope design-build contract, the contract shall be awarded to the qualified responsible bidder that submitted a responsive technical proposal and that submitted a responsive cost proposal that provides the maximum
amount of services for the maximum fixed price set by the department or for an
amount that is less than the maximum fixed price.

3. For a best value design–build contract, the contract shall be awarded to the
qualified responsible bidder with the highest adjusted score, which shall be
calculated by adding the bidder’s technical proposal score to the bidder’s cost
proposal score. The technical review committee shall award the lowest qualified
responsible bidder the maximum number of points that may be awarded to a cost
proposal under the request for proposals, but not less than 40 percent and not more
than 75 percent of the maximum number of combined points that shall be awarded
to a technical proposal and cost proposal. For each remaining qualified responsible
bidder, the technical review committee shall calculate the score for the cost proposal
by reducing the maximum number of points that may be awarded to the cost proposal
by 1 percent for each percentage point by which the cost proposal exceeds the lowest
cost proposal.

(d) Following a review of cost proposals, the department may reject all
proposals. If the department rejects all proposals or does not execute a contract after
issuing an intent to award a contract under par. (c), the department may reissue the
request for proposals and allow only the qualified responsible bidders originally
notified under sub. (6) (e) to submit new proposals. The department shall pay a
reasonable stipulated fee to each design–builder that provides a responsive but
unsuccessful proposal in response to the reissued request for proposals. If the
reissued request for proposals specifies a maximum fixed price, the department may
not award a stipend to a design–builder whose proposal exceeds that price.
(e) Not less than 5 working days prior to executing a design-build contract, the
department shall provide notice to each unsuccessful qualified responsible bidder
that a notice of intent to award a contract has been issued.

SECTION 30. 84.062 (8) of the statutes is created to read:

84.062 (8) CONTRACT AWARD. (a) In this subsection:

1. “Construction services” means work necessary to construct a project,
   including trucking services and materials purchased regardless of whether the
   materials are installed by the design-builder.

2. “Specialty services” means work related to sanitary sewer systems, water
   main systems, staking, electrical, landscaping and erosion control, traffic control,
   signing, pavement marking, fencing, and other work identified by the department.

(b) No later than 10 days following the issuance of a notice of intent to award
a design-build contract, the department shall verify that the design-builder will
perform not less than 30 percent of the construction services under the contract with
labor provided by employees of the design-builder or member and equipment owned
or rented by the design-builder or member.

(c) The design-builder shall submit to the department in the form prescribed
by the department documentation of the construction services the design-builder or
members will perform and the dollar value of the services.

(d) The department shall calculate the percentage of total construction services
identified in the contract to be performed by the design-builder or members by
subtracting the value of specialty services to be performed from the total contract
amount and dividing the dollar value of construction services to be performed by the
design-builder or members by the difference. If the value of construction services
to be performed by the design-builder or members is less than 30 percent of the value
of all construction services required under the contract, the department shall cancel
the contract award.

**SECTION 31.** 84.062 (11) of the statutes is created to read:

84.062 (11) **STIPULATED FEE.** (a) The department shall award a stipulated fee
of not less than three-tenths of 1 percent of the department’s estimated cost of design
and construction as follows:

1. To each qualified responsible bidder that provides a responsive but
   unsuccessful proposal when the department issues a notice of intent to award a
   contract. If the request for proposals specifies a maximum fixed price, the
department may not award a fee to a proposal that exceeds the maximum fixed price.

2. To all qualified responsible bidders that provide a responsive proposal, if the
department does not issue a notice of intent to award a contract.

3. To all qualified responsible bidders if the department cancels the solicitation
   before the technical review committee reviews technical proposals.

(b) The department shall pay the fee to each qualified responsible bidder under
par. (a) no later than 90 days after the department issues a notice of intent to award
a contract, determines that it will not issue a notice of intent to award a contract, or
cancels the solicitation.

(c) In consideration for paying the fee, the department may use work product
contained in an unsuccessful proposal in connection with any proposed or awarded
design–build project without making any additional compensation to the
design-builder. If an unsuccessful design-builder waives the stipulated fee, the
department may not use work product in the design-builder’s unsuccessful proposal.

**SECTION 32.** 84.062 (13) of the statutes is created to read:
84.062 (13) APPEALS. (a) Any person aggrieved and directly affected by a
decision of the department to issue a request for qualifications or a request for
proposals under this section shall be entitled to judicial review of the decision as
provided in ch. 227, subject to the procedural requirements of s. 227.53 (1). A person
shall be considered a person aggrieved and directly affected by a decision of the
department if any of the following applies to a request for qualifications or a request
for proposals issued by the department under this section:

1. The request does not include qualifications, requirements, or other items
required under this section.

2. The request does not comply with procedural requirements under this
section.

3. The request contains material errors or omissions.

4. The request contains material discrepancies, deficiencies, or ambiguities
that prevent a person from submitting a responsive proposal.

5. The request indicates a bias against or preference for a specific
design-builder.

6. The request exceeds the department’s authority.

(b) Any person aggrieved and directly affected by a decision of the department
to issue a notice of intent to award a contract under this section shall be entitled to
judicial review of the decision as provided in ch. 227, subject to the procedural
requirements of s. 227.53 (1). A person shall be considered a person aggrieved and
directly affected by a decision of the department if any of the following applies to a
notice of intent to award a contract under this section:

1. The design-builder that received the notice of intent to award a contract was
improperly certified as a qualified responsible bidder.
2. A mathematical error was made in scoring any of the proposals that resulted in an improper intent to award a contract.

3. There is evidence of collusion or fraud involving either the design-builder who received the notice of intent to award a contract or a member of the technical review committee.

4. There is evidence of bias of a member of the technical review committee.

5. There is evidence that a member of the technical review committee has a conflict of interest because the committee member, a member of his or her immediate family, as defined in s. 19.42 (7), or any organization or business with which the member is associated, as defined in s. 19.42 (2), may benefit from the intent to award a contract.

6. The technical proposal or cost proposal submitted by the design-builder who received the notice of intent to award a contract is not responsive to the request for proposals, contains conditions or qualifications not provided for in the request for proposals, or does not assign costs to all services identified in the technical proposal or is otherwise materially unbalanced.

(c) If the department prevails upon judicial review, following any protest and appellate court proceedings, the department shall be entitled to recover all costs and charges included in the final order or judgment, excluding attorney fees. Upon payment of costs and charges by the protester, the bond shall be returned. If the protesting party prevails, the protesting party shall be entitled to recover from the department all costs and charges included in the final order or judgment, excluding attorney fees. The entire amount of the bond shall be forfeited if the hearing officer determines that a protest was filed for a frivolous or improper purpose, including but
not limited to the purpose of harassing, causing unnecessary delay, or causing
needless cost for the department or parties.

SECTION 33. 84.062 (14) of the statutes is created to read:

84.062 (14) DELIVERABLES. (a) No later than 9 months after the effective date
of this section .... [LRB inserts date], the department shall prepare a report that
establishes a program structure for delivering projects as required under this
subsection. The report shall specify the types of highway improvement projects to
be considered and procedures and timelines for the bid process. The department may
not designate a highway improvement project as a design–build project prior to the
completion of the report.

(b) The department shall prepare a design–build procurement manual that
incorporates the requirements under this subsection and any applicable
requirements under federal law.

(c) No later than December 31, 2027, the department shall submit a report to
the transportation projects commission, the joint committee on finance, and the
senate and assembly standing committees having jurisdiction over transportation
matters summarizing observations of the process utilized for alternative project
delivery methods and describing the effectiveness of the alternative project delivery
methods contracting procedures. The report shall include discussion on scope of
work, history of projects selected, evaluation criteria, selection process, contract
administration, work progression, and time and cost comparisons between the
traditional contracting method and alternative delivery methods, claims, and
changes.

(d) No later than 6 months after receipt of the report required under par. (c),
the joint committee on finance shall determine whether the alternative project
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delivery program was successful in providing the department with additional tools that allow innovation, reduced project completion time, cost certainty, or reduced cost or other advantages or benefits and shall make a recommendation to the legislature as to whether the program should continue.

SECTION 34. Nonstatutory provisions.

(1) Emergency rules relating to alternative project delivery. The department of transportation may use the procedure under s. 227.24 to promulgate emergency rules under s. 84.062 (5) to (7) for the period before the date on which permanent rules under s. 84.062 (5) to (7) take effect. Notwithstanding s. 227.24 (1) (c) and (2), emergency rules promulgated under this subsection remain in effect until the first day of the 25th month beginning after the effective date of the emergency rule, the date on which the permanent rules take effect, or the effective date of the repeal of the emergency rule, whichever is earlier. Notwithstanding s. 227.24 (1) (a) and (3), the department of transportation is not required to provide evidence that promulgating a rule under this subsection as emergency rules is necessary for the preservation of public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

(END)