



State of Wisconsin  
2009 - 2010 LEGISLATURE

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**SENATE SUBSTITUTE AMENDMENT 1,  
TO 2009 SENATE BILL 298**

April 9, 2010 – Offered by COMMITTEE ON ETHICS REFORM AND GOVERNMENT OPERATIONS.

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

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***Analysis by the Legislative Reference Bureau***

This substitute amendment 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 \$40,000 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 \$150,000, 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 \$150,000, the project is subject to approval of the Building Commission.

The substitute amendment 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 work that DOA designates. The substitute amendment also permits DOA to utilize another contracting procedure to construct any project called “construction-manager-at-risk contracting” for any project having an estimated cost of \$40,000,000 or more. Under the construction-manager-at-risk contracting procedure, DOA hires a construction manager to provide pre-construction 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 substitute amendment also permits DOA to prescribe, by rule, additional contracting procedures not specified in current law or in the substitute amendment that DOA may utilize for any project.

The substitute amendment provides the following when DOA uses a contracting procedure in which it solicits only single bids on all divisions of the work (single prime contracting): 1) the prime contractor must submit to DOA the names of the subcontractors that are proposed to be retained; 2) the prime contractor must provide proof to DOA of each proposed subcontractor’s ability to obtain a bond that guarantees performance of its division of the work subject to criteria set by DOA; 3) the prime contractor must submit progress payment requests to DOA and must promptly pay the subcontractors for their proportionate share of the work when a payment is received from DOA; and 4) retainages from subcontractors must be limited to their proportionate share of the work. In addition, the substitute amendment 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 substitute amendment 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.

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

1           **SECTION 1.** 16.855 (2) (intro.) of the statutes is amended to read:

1           16.855 (2) (intro.) Except as provided in subs. (10) and (14) (ae), (am), and (ao)  
2 and except for projects authorized under s. 16.858, whenever the estimated  
3 construction cost of a project exceeds \$40,000, or if less and in the best interest of the  
4 state, the department shall:

5           **SECTION 2.** 16.855 (13) (a) of the statutes is amended to read:

6           16.855 (13) (a) ~~A~~ The department may require each person who submits a bid  
7 to provide a list of the major subcontractors shall not be required to be submitted,  
8 as designated by the department in its solicitation documents, for work to be  
9 performed with the person's bid. The ~~Except as provided in sub. (14) (ae) 2., the~~  
10 department may also require the each prime contractor to submit in writing the  
11 names of prospective subcontractors for the department's approval before the award  
12 of a contract to the prime contractor.

13           **SECTION 3.** 16.855 (14) (a) of the statutes is amended to read:

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

1           **SECTION 4.** 16.855 (14) (ae) of the statutes is created to read:

2           16.855 (14) (ae) 1. In this paragraph:

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

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

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

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

18          b. For each subcontractor that is enumerated by the prime contractor, the  
19          prime contractor shall provide to the department proof of the subcontractor’s ability  
20          to obtain a bond that guarantees performance of its division of the work subject to  
21          criteria set by the department.

22          c. The prime contractor shall submit progress payment requests to the  
23          department for each period designated by the department and upon receiving each  
24          progress payment shall pay each subcontractor for its division of the work promptly.

1           d. In making payments to each subcontractor, the prime contractor shall limit  
2 the amount of any retainage to the proportionate share of the retainage under sub.  
3 (19) that is attributable to the subcontractor's division of the work.

4           e. The prime contractor shall promptly pay each subcontractor for any  
5 retainage when the work contracted to that subcontractor is completed to the  
6 satisfaction of the department.

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

11           **SECTION 5.** 16.855 (14) (am) to (aq) of the statutes are created to read:

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

22           2. As an alternative to the procedures under par. (a), the department may  
23 utilize construction-manager-at-risk contracting to construct a project having an  
24 estimated cost of \$40,000,000 or more. The department shall prescribe, by rule, the  
25 specific procedures to be used by the department for projects constructed using

1 construction-manager-at-risk contracting. A rule promulgated under this  
2 subdivision may provide that any provision of this section does not apply to a project  
3 constructed in accordance with the procedures prescribed in the rule.

4 3. When the department elects to utilize construction-manager-at-risk  
5 contracting to construct a project, the construction manager shall solicit bids on all  
6 work on the project in the manner prescribed under this subsection unless the  
7 construction manager elects to submit a bid to perform a portion of the work. In that  
8 case, the department shall solicit bids for that portion of the work in accordance with  
9 procedures prescribed by rule.

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

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

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

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

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

