HB275

165809-1

By Representative Tuggle

RFD: State Government

First Read: 12-MAR-15
SYNOPSIS: This bill would give public owners new alternative means for procuring design and construction services for public works contracts by making available the construction manager/general contractor and design-build project delivery methods as additional options when determined by the awarding authority that these alternative project delivery methods potentially offer better value to taxpayers than the design-bid-build method.

In addition to the existing design-bid-build project delivery method, this bill would provide awarding authorities the alternatives of selecting a construction manager/general contractor or a design-builder, would specify that a construction manager/general contractor or a design-builder assumes the risk for construction, rehabilitation, renovation, alteration, or repair of a public works project at the contracted price, and would set forth the selection process for the CM/GC and
subcontractors necessary to complete a public works project by the construction manager/general contractor method and the selection process for the design-builder to complete a public works project by the design-build process. Furthermore, this bill would provide that prior experience as a construction manager/general contractor or a design-builder on a public project shall not be a criterion for qualification to be selected to submit a proposal on a construction manager/general contractor or design-build project.

Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, prohibits a general law whose purpose or effect would be to require a new or increased expenditure of local funds from becoming effective with regard to a local governmental entity without enactment by a 2/3 vote unless: it comes within one of a number of specified exceptions; it is approved by the affected entity; or the Legislature appropriates funds, or provides a local source of revenue, to the entity for the purpose.

The purpose or effect of this bill would be to require a new or increased expenditure of local funds within the meaning of the amendment. However,
the bill does not require approval of a local
governmental entity or enactment by a 2/3 vote to
become effective because it comes within one of the
specified exceptions contained in the amendment.

A BILL
TO BE ENTITLED
AN ACT

Relating to public works projects; to designate
existing Chapter 2, consisting of Sections 39-2-1 to 39-2-14,
inclusive, of Title 39, Code of Alabama 1975, as Article 1 and
add Articles 2 and 3, consisting of Sections 39-2-40 to
39-2-43 and 39-2-60 to 39-2-69, inclusive, to Chapter 2 of
Title 39, Code of Alabama 1975; to amend Sections 39-2-1 and
39-2-2, Code of Alabama 1975, to authorize the selection by an
awarding authority of a construction manager/general
contractor or a design-builder; to specify that a construction
manager/general contractor or a design-builder assumes the
risk for construction, rehabilitation, renovation, alteration,
or repair of a public works project; to provide for the
selection of the contractors and subcontractors for the
project by the construction manager/general contractor or a
design-builder; to exclude all contracts to be awarded by the
Alabama Department of Transportation, or a county or
municipality for the construction or maintenance of a public
road or highway, from Article 2 and Article 3 as created by
this act; to provide penalties; and in connection therewith
would have as its purpose or effect the requirement of a new
or increased expenditure of local funds within the meaning of
Amendment 621 of the Constitution of Alabama of 1901, now
appearing as Section 111.05 of the Official Recompilation of
the Constitution of Alabama of 1901, as amended.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. An article heading is added before
Section 39-2-1 of the Code of Alabama 1975, to read as
follows:

ARTICLE 1. GENERAL; DESIGN-BID-BUILD PUBLIC WORKS
CONTRACTS.

Section 2. Sections 39-2-1 and 39-2-2, as last
the Code of Alabama 1975, are amended to read as follows:

"§39-2-1.

"As used in this title, the following words shall
have the meanings ascribed to them as follows:

"(1) AWARDING AUTHORITY. Any governmental board,
commission, agency, body, authority, instrumentality,
department, or subdivision of the state, its counties and
municipalities. This term includes, but shall not be limited
to, the Department of Transportation, the State Building
Commission, the State Board of Education, and any other entity
contracting for public works. This term shall exclude the
State Docks Department and any entity exempted from the
competitive bid laws of the state by statute.

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"(2) CONSTRUCTION MANAGER/GENERAL CONTRACTOR
(CM/GC). A person that provides construction management and
general contractor services for an awarding authority for a
project, pursuant to Article 2, through the preconstruction
and construction phases of the project.

"(3) DESIGN-BUILDER. A person that performs or
provides design-build services for an awarding authority for a
project, pursuant to Article 3, through the preconstruction
(including the performance or provision of the design of the
project by licensed design professionals) and construction
phases of the project.

"(4) DESIGN PROFESSIONAL. A registered architect or
engineer, as appropriate, licensed in the State of Alabama.

"(5) FORCE ACCOUNT WORK. Work paid for by
reimbursing for the actual costs for labor, materials, and
equipment usage incurred in the performance of the work, as
directed, including a percentage for overhead and profit,
where appropriate.

"(6) LIFE CYCLE COSTS. The total cost of
ownership over the extended life of a public works project,
taking into consideration the costs of construction,
operation, and maintenance, less any value obtained from
salvage and quantifiable environmental benefits, or the sum of
all recurring and one-time (non-recurring) costs over the full
life span or a specified period of a good, service, structure,
or system, including purchase price, installation costs,
operating costs, maintenance and upgrade costs, and remaining
(residual or salvage) value at the end of ownership or its useful life.

"(4) (7) PERSON. Natural persons, partnerships, limited liability companies, corporations, and other legal entities.

"(5) (8) PUBLIC PROPERTY. Real property which the state, county, municipality, or awarding authority thereof owns or has a contractual right to own or purchase, including easements, rights-of-way, or otherwise.

"(6) (9) PUBLIC WORKS. The construction, installation, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, curbs, gutters, side walls, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, installed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.

"§39-2-2.

"(a) Before entering into any contract for a public works involving an amount in excess of fifty thousand dollars ($50,000), the awarding authority shall advertise for sealed bids. If the awarding authority is the state or a county, or an instrumentality thereof, it shall advertise for sealed bids at least once each week for three consecutive weeks in a newspaper of general circulation in the county or counties in which the improvement or some part thereof, is to be made. If
the awarding authority is a municipality, or an instrumentality thereof, it shall advertise for sealed bids at least once in a newspaper of general circulation published in the municipality where the awarding authority is located. If no newspaper is published in the municipality, the awarding authority shall advertise by posting notice thereof on a bulletin board maintained outside the purchasing office and in any other manner and for the length of time as may be determined. In addition to bulletin board notice, sealed bids shall also be solicited by sending notice by mail to all persons who have filed a request in writing with the official designated by the awarding authority that they be listed for solicitation on bids for the public works contracts indicated in the request. If any person whose name is listed fails to respond to any solicitation for bids after the receipt of three such solicitations, the listing may be canceled. With the exception of the Department of Transportation, for all public works contracts involving an estimated amount in excess of five hundred thousand dollars ($500,000), awarding authorities shall also advertise for sealed bids at least once in three newspapers of general circulation throughout the state. The advertisements shall briefly describe the improvement, state that plans and specifications for the improvement are on file for examination in a designated office of the awarding authority, state the procedure for obtaining plans and specifications, state the time and place in which bids shall be received and opened, and identify whether
prequalification is required and where all written
prequalification information is available for review. All bids
shall be opened publicly at the advertised time and place. No
public work as defined in this chapter involving a sum in
excess of fifty thousand dollars ($50,000) shall be split into
parts involving sums of fifty thousand dollars ($50,000) or
less for the purpose of evading the requirements of this
section.

"(b)(1) An awarding authority may let contracts for
public works involving fifty thousand dollars ($50,000) or
less with or without advertising or sealed bids.

"(2) An awarding authority may enter into a contract
for public works if an advertisement for sealed bids for the
contract was submitted by the awarding authority to a
newspaper and the newspaper only publish the advertisement for
two weeks if the authority can provide proof that it in good
faith submitted the advertisement to the newspaper with
instructions to publish the notice in accordance with the
provisions of this section.

"(c) All contracts for public works entered into in
violation of this title shall be null, void, and violative of
public policy. Anyone who willfully violates this article
concerning public works shall be guilty of a Class C felony.

"(d)(1) Excluded from the operation of this title
shall be contracts with persons who shall perform only
architectural, engineering, construction management, program
management, or project management services in support of the
public works and who shall not engage in actual construction,
repair, renovation, or maintenance of the public works with
their own forces, by contract, subcontract, purchase order,
lease, or otherwise.

(2) Except as otherwise provided in Article 2 or
Article 3, subsection (a) of this section, Section 39-2-3,
subsections (a) and (d) of Section 39-2-4, and Sections
39-2-5, 39-2-6, and 39-2-11 do not apply to a contract for a
public works project that is let using the CM/GC method
provided in Article 2 or using the design-build method
provided in Article 3. In addition, subsection (f) of this
section shall not apply to a contract for a public works
project that is let using the design-build method provided in
Article 3. Except as otherwise provided in Article 2 and
Article 3, the remaining provisions of this article shall
apply to the CM/GC method and the design-build method.

(e) In case of an emergency affecting public
health, safety, or convenience, as declared in writing by the
awarding authority, setting forth the nature of the danger to
the public health, safety, or convenience which would result
from delay, contracts may be let to the extent necessary to
meet the emergency without public advertisement. The action
and the reasons for the action taken shall immediately be made
public by the awarding authority upon request.

(f) No awarding authority may specify in the plans
and specifications for the improvement the use of materials,
products, systems, or services by a sole source unless all of
the following requirements are met:

"(1) Except for contracts involving the
construction, reconstruction, renovation, or replacement of
public roads, bridges, and water and sewer facilities, the
awarding authority can document to the satisfaction of the
State Building Commission that the sole source product,
material, system, or service is of an indispensable nature for
the improvement, that there are no other viable alternatives,
and that only this particular product, material, system, or
service fulfills the function for which it is needed.

"(2) The sole source specification has been
recommended by the architect or engineer of record as an
indispensable item for which there is no other viable
alternative.

"(3) All information substantiating the use of a
sole source specification, including the recommendation of the
architect or engineer of record, shall be documented and made
available for examination in the office of the awarding
authority at the time of advertisement for sealed bids.

"(g) In the event of a proposed public works
project, acknowledged in writing by the Alabama Homeland
Security Department as (1) having a direct impact on the
security or safety of persons or facilities and (2) requiring
confidential handling for the protection of such persons or
facilities, contracts may be let without public advertisement
but with the taking of informal bids otherwise consistent with
the requirements of this title and the requirements of maintaining confidentiality. Records of bidding and award shall not be disclosed to the public, and shall remain confidential.

"(h) If a pre-bid meeting is held, the pre-bid meeting shall be held at least seven days prior to the bid opening except when the project has been declared an emergency in accordance with subsection (e).

"(i) The awarding authority may not offer a contract for bidding unless confirmation of any applicable grant has been received and any required matching funds have been secured by or are available to the awarding authority."

Section 3. Article 2, consisting of Sections 39-2-40 to 39-2-43, inclusive, is added to Chapter 2 of Title 39, Code of Alabama 1975, to read as follows:

ARTICLE 2. CONSTRUCTION MANAGER/GENERAL CONTRACTOR PUBLIC WORKS CONTRACTS.

§39-2-40.

In addition to the methods provided in Article 1 and Article 3 for awarding a public works contract, any contract for public works which, based on the awarding authority's preliminary budget or the awarding authority's design professional's estimate, involves an amount in excess of fifteen million dollars ($15,000,000) in anticipated construction costs, may be let by an awarding authority pursuant to the CM/GC method set forth in this article; provided, however, no contract for public works, regardless of
amount, to be awarded by the Department of Transportation, or to be awarded by a county or municipality for the construction or maintenance of a public road or highway, may be let pursuant to the CM/GC method. Construction costs shall include all costs necessarily incurred in the proper performance of the construction of the public work including without limitation all permitting, management, supervisory, labor, subcontract, materials, equipment, and temporary facilities costs and any items which become permanently affixed or connected to the public work, but shall not include other project or program costs such as the cost of land acquisition or any items such as furniture or equipment which do not become permanently affixed or connected to the public work. Before an awarding authority proceeds with a CM/GC project, the awarding authority with the involvement of its design professional shall declare in writing why the CM/GC project delivery system is the preferred method for the particular project. The written statement shall identify the specific potential benefits to the public which the awarding authority reasonably believes will result from the use of the CM/GC delivery method and may include, without limitation, improvements in the quality, schedule, or cost of the particular project and shall be signed by the awarding authority's design professional. The written statement shall also state the funds available for the project. The written statement shall be prepared and made available on request before proceeding with the CM/GC prequalification and it must
be included in the advertisement requesting submission of qualifications and proposals required by Section 39-2-42(a).

§39-2-41.

For the purposes of this article, the following terms shall have the following meanings:

(1) CM/GC SERVICES. Services provided by a person that:

   a. Provides construction management services for a specific, single project throughout the preconstruction and construction phases or for any portion thereof. For the purposes of this article, a specific, single project is a project that is constructed at a single location or at a common location so long as for a single project.

   b. During the construction phase, acts as a general contractor in accordance with the CM/GC contract.

   c. Performs or provides for the performance of the work on the project and guarantees the maximum cost of the project.

(2) CONSTRUCTION MANAGEMENT SERVICES. Services provided by a construction manager, which may include, but are not necessarily limited to, design/constructability review, preparation and coordination of bid packages, scheduling, cost control, value engineering, preconstruction services, construction administration, and construction services.

§39-2-42.

(a) A CM/GC shall be selected after advertising in accordance with the procedure provided in subsection (a) of
Section 39-2-2 (other than the requirement for sealed bids) and prequalification conducted by the awarding authority or its agent in accordance with the procedures provided in subsections (b), (c), and (e) of Section 39-2-4. The final selection must be made from among those who prequalify. The CM/GC must be properly licensed prior to submitting for prequalification. Those who prequalify are then eligible to submit competitive proposals to the awarding authority or its agent. The criteria to be used for prequalification and the content of the request for competitive proposals, including the criteria for final selection, shall be prepared with the involvement and participation of the awarding authority's design professional, or design professionals, who shall be retained by the awarding authority for observation of construction requirements as required by law. Nothing herein is intended to nor shall it be construed as to require or permit an awarding authority to contract with a design professional, at any tier, on any basis other than a qualifications-based selection process. The final selection of those CM/GCs who prequalify to submit competitive proposals shall be based upon the awarding authority's written findings and conclusions regarding the CM/GC's qualifications and responsibility including, without limitation, specific evaluations regarding the CM/GC's demonstrated competence on similar projects, experience specifically relating to similar projects, financial ability, past performance, relevant safety record, proposed personnel and methodology for the project,
and other specific factors that demonstrate the capability of
the CM/GC to perform the subject project; provided, however,
that prior experience as a construction manager/general
contractor on a public project shall not be a criterion for
prequalification to submit a competitive proposal. If the
awarding authority contracts with an agent to conduct the
prequalification or the receipt and review of competitive
proposals, the agent, including a subsidiary thereof or any
entity under any degree of common ownership with the agent, is
not eligible to perform the CM/GC work on the project or work
as a subcontractor, at any tier, on the project. Following the
awarding authority's establishment of a list of those persons
which prequalify, but sufficiently in advance of the
submission of competitive proposals for all prequalified
persons to respond, the awarding authority shall provide in
writing to all prequalified persons the criteria upon which
the competitive proposals shall be scored and the percentage
valuation that will be assigned to each element in the final
selection criteria and shall state the date for submission of
the competitive proposals so that those submitting competitive
proposals know how each criterion shall be weighted. The
criteria are left to the awarding authority's and design
professional's discretion but shall be compiled to enable the
awarding authority to make an informed selection of the CM/GC
best qualified for the particular needs of the project and may
include but are not necessarily limited to: the CM/GC's
experience with similar types of construction; the CM/GC's
proposed project management team including their prior experience with similar types of construction and scope of services provided; the CM/GC's experience with other public works projects; the CM/GC's other projects in progress and ability to perform additional work; the CM/GC's prior schedule performance, proposed schedule for the project and possible schedule improvements for the project; the CM/GC's prior cost control performance, proposed cost control procedures for the project, and proposed cost savings and value engineering; the CM/GC's prior or current work in the location of the project; the CM/GC's quality assurance and quality control programs and performance and any proposals to add or improve quality; the CM/GC's proposed methodology for achieving woman-owned business enterprise, minority-owned business enterprise, and disadvantaged-owned business enterprise goals, if any; and the CM/GC's financial condition, insurability and bonding capacity. The competitive proposals shall respond to the criteria established by the awarding authority, and they shall be scored by the awarding authority and its design professional under a qualifications based analysis. The awarding authority shall then review the proposals and rank them from first to last and shall prepare in writing the ranking together with the score for each competitive proposal received indicating the score each criterion received and a written narrative describing the basis for the selection and the ranking. The awarding authority is not required to make its ranking or final selection of CM/GC based solely on lowest
price, or any component of price or fee. The awarding
authority shall then enter into negotiations with the CM/GC
having the highest ranked competitive proposal to finalize the
terms of a CM/GC contract.

(b) Pursuant to a CM/GC contract, the person
providing CM/GC services may self-perform portions of a
project provided the aggregate total cost of all the work the
CM/GC plans to self-perform, not including the general
conditions items, does not exceed 10 percent of the guaranteed
maximum price (at the time the final contract is awarded).

General conditions costs are those costs incurred by the CM/GC
for work that is necessary to perform the project but does not
become an integral or permanent part of the finished project.
General conditions costs shall include preconstruction
services. For purposes of determining the aggregate total cost
of self-performed work, the total cost shall include all costs
reasonably necessary for the proper performance of the
self-performed work including, without limitation, the total
sum of all labor, materials, tools, equipment, trade
supervision, layout, taxes, and bond and insurance premium
(when and if required). In addition, for purposes of
compliance with the 10 percent limitation, work subcontracted
to a separate entity in which the CM/GC has any ownership
interest or is under common ownership with the CM/GC shall be
considered self-performed work. Notwithstanding the foregoing
10 percent limitation, the CM/GC may self-perform additional
work on the project in the event a subcontractor or
subcontractors is terminated for default, is deemed by the CM/GC to be non-performing or underperforming some portion of the subcontract scope of work, or is otherwise not materially complying with the subcontract requirements such as to require the CM/GC to supplement the subcontractor's work by self-performing some portion of the subcontractor's scope of work, or if there are no subcontractors who bid or submit proposals for some portion of the work. If all bids or proposals received for a particular scope of work to be subcontracted exceed the proposed budget for that work, the CM/GC shall negotiate with the lowest bidder or proposer to attempt to obtain a price at or below the proposed budget amount. If the CM/GC is unable to negotiate a price within the proposed budget amount, then the CM/GC may, at its option and discretion, perform that scope of work itself or apply savings or contingency amounts from another line item in the proposed budget sufficient to bring the work within the proposed budget amount.

(c) A person providing CM/GC services is subject to all licensing, insurance, and bonding requirements for public works projects in Alabama.

§39-2-43.

(a) Within 30 days after ranking the competitive proposals, the awarding authority shall notify in writing the CM/GC having the highest ranked competitive proposal for the purpose of entering into a CM/GC contract. The letter of intent to award the project issued by the awarding authority
shall describe the services to be performed and the proposed compensation.

(b) Within 30 days of receipt of the awarding authority's letter of intent, the CM/GC shall present to the awarding authority a proposed date by which the guaranteed maximum price shall be agreed upon together with staffing costs for the CM/GC, other proposed general conditions costs, and the fee for CM/GC services. The awarding authority may accept, reject, or continue to negotiate with the CM/GC to reach a contract agreement; however, if the negotiation is not completed within 90 days after issuance of the awarding authority's letter of intent to award, the awarding authority and CM/GC must agree in writing to an extension of time.

(c) If the awarding authority is unable to negotiate a satisfactory contract with the initially selected CM/GC, the awarding authority shall terminate negotiations with the CM/GC and withdraw the letter of intent to award. If the awarding authority decides to proceed with the public works project, the awarding authority shall issue a letter of intent to the next highest ranked CM/GC and proceed as outlined above until an acceptable agreement on contract terms is reached. This process may proceed with respect to each prequalified CM/GC in the order in which the CM/GC was ranked by the awarding authority. However, if the awarding authority is unable to award a contract to a CM/GC within 120 days of ranking the competitive proposals, all proposals shall expire unless at least one ranked CM/GC agrees in writing to a stipulated
extension of time for consideration of its proposal. Alternatively, if at any point before contracting with the CM/GC the awarding authority decides it is in the project's or the public's best interest, it may choose to let a contract for the project in accordance with Article 1 or Article 3 or it may cancel the project.

(d) Once the awarding authority reaches an agreement on contract terms with the CM/GC selected, the awarding authority and CM/GC shall enter a written contract for the specific, single project advertised and negotiated. The contract shall be written by the awarding authority with the involvement of its design professional using as the basis for the contract either an industry standard form developed for a CM/GC project or a form for a CM/GC project used or promulgated by the state.

(e) The CM/GC shall contract with subcontractors for all work which the CM/GC does not intend to self-perform as follows:

(1) For the selection of subcontractors whose contract is not expected to exceed fifty thousand dollars ($50,000) in amount, the CM/GC shall have sole discretion in the manner, method, and conditions of selection. The project shall not be divided into subcontracts of less than fifty thousand dollars ($50,000) for the purpose of evading the prequalification selection process or any other provisions of this title.
(2) Other than subcontractors awarded in accordance with (1) above or (3) below, for all subcontracts greater than fifty thousand dollars ($50,000) the CM/GC shall prequalify all subcontractors and shall solicit lump sum bids from the subcontractors who prequalify. Based on its review and analysis of the bids received, the CM/GC shall identify the subcontractors it intends to contract with on a lump sum basis and shall submit the list to the awarding authority.

Additional subcontractors may be added to the list as they are identified by the CM/GC. The awarding authority may object to the use of particular subcontractors; provided, however, if the awarding authority's rejection of a particular subcontract results in additional cost or time or both, the CM/GC may be entitled to an increase in the contract time or GMP or both.

(3) The CM/GC may desire to select certain subcontractors before the scope of work is defined well enough for subcontractors to submit lump sum bids. In such case, the subcontractor may be selected solely on the basis of the subcontractor's qualifications. The CM/GC shall prequalify all such subcontractors using a prequalification procedure which is consistent with the requirements in Section 39-2-4. The list of prequalified subcontractors shall be submitted to the awarding authority and the design professional by the CM/GC. Within 10 days of receipt of the list of subcontractors, the awarding authority may provide comments on or reject the selection of any proposed subcontractors based upon a past experience, prior or current legal dispute the awarding
authority may have with a subcontractor or for other reasonable cause; provided, however, should the awarding authority's rejection of any proposed subcontractor result in additional cost or time that exceeds the awarded contract amount, the CM/GC may be entitled to compensation for any such additional costs or time that resulted from the substitution of a proposed subcontractor. The CM/GC shall then receive competitive proposals from the subcontractors who have prequalified. Prior to the submission of competitive proposals, the CM/GC shall establish the criteria upon which the competitive proposals shall be scored. Each criterion shall be assigned a percentage of the total score and shall be submitted to the awarding authority and its design professional for approval. After approval by the awarding authority but sufficiently in advance of the submission of proposals, the CM/GC shall provide the criteria and percentage valuation that will be assigned to each element to the subcontractors submitting competitive proposals and shall state the date for submission of the competitive proposals. The competitive proposals shall respond to the criteria upon which the CM/GC's selection shall be based. The CM/GC shall rank the proposals received from first to last and shall submit in writing to the awarding authority the ranking together with the score for each competitive proposal indicating the score each criterion received and a written narrative describing the basis for the selection and the ranking. Based on the competitive proposals ranking, the CM/GC
shall select the subcontractors with whom it intends to perform the project. The CM/GC shall not be required to base its selection of subcontractors solely on lowest price, or any component of price or fee; however, if price, or any component thereof, is used as a selection criterion for any particular subcontractor, the CM/GC shall provide the awarding authority, in writing, reasonable cause for choosing a subcontractor not having the lowest price.

(f) All contracts for public works entered into in violation of this title shall be null, void, and violative of public policy. Anyone who willfully violates this article concerning public works shall be guilty of a Class C felony.

(g) All proceedings, records, proposals, contracts, and other documents relating to the contracting for public works under this article shall be public records. Upon request of an interested citizen, the awarding authority shall make available for inspection any and all such documents.

Section 4. Article 3, consisting of Sections 39-2-60 to 39-2-69, inclusive, is added to Chapter 2 of Title 39, Code of Alabama 1975, to read as follows:

ARTICLE 3. DESIGN BUILD PUBLIC WORKS CONTRACTS.

$39-2-60.

In addition to the methods provided in Articles 1 and 2 for awarding a public works contract, any contract for public works which, based on the awarding authority's preliminary budget or design professional's estimate, involves an amount in excess of fifteen million dollars ($15,000,000)
in design and construction costs, may be let pursuant to the
design-build method set forth in this article; provided,
however, no contract for public works, regardless of amount,
to be awarded by the Department of Transportation, or to be
awarded by a county or municipality for the construction or
maintenance of a public road or highway, may be let pursuant
to the design-build method. The design and construction costs
shall include all costs necessarily incurred in the proper
performance of a complete design and the proper performance of
construction including without limitation all permitting,
management, supervisory, labor, subcontract, materials,
equipment, and temporary facilities costs and any items which
become permanently affixed or connected to the public work,
but shall not include other project or program costs such as
the cost of land acquisition or any items such as furniture or
equipment which do not become permanently affixed or connected
to the public work. Before an awarding authority may proceed
with a design-build project, the awarding authority with the
involvement of its design professional, or design
professionals, shall declare in writing why the design-build
project delivery system is the preferred method for the
particular project, it shall be signed by the awarding
authority's design professional, or design professionals, and
it must be included in the advertisement requesting submission
of qualifications and proposals required by Section 39-2-2(a).
The written statement shall also state the funds available for
the project.
§39-2-61. For the purposes of this article, the following terms shall have the following meanings:

(1) DESIGN-BUILD SERVICES. Services performed or provided by a design-builder that:

a. Performs or provides the project design and construction management services for a specific, single project throughout the design, preconstruction and construction phases. For the purposes of this article, a specific, single project is a project that is constructed at a single location or at a common location so long as for a single project.

b. During the design phase, performs or provides the project design which must be performed by a full team of licensed design professionals representing the engineering and architectural disciplines required by the needs of the specific project. Nothing herein, however, is intended to nor shall it be construed as to require or permit the design-builder to contract with design professionals, at any tier, on any basis other than a qualifications-based selection.

c. During the construction phase, acts as a general contractor in accordance with the design-build contract. Services may include, without limitation, scheduling, cost control, value engineering, evaluation, preconstruction services, construction administration (provided that the observation of construction requirements are performed by the
licensed design professionals of record as required by law), and construction services pursuant to a single contract.

d. Performs or provides both the design and construction of the work on the project either for a lump sum or for a guaranteed maximum cost for the project.

§39-2-62.

(a) The awarding authority shall engage a licensed design professional in the design-build team prequalification and selection process. The design professional shall include a full, professional design team that includes all major engineering disciplines involved in the proposed project. The design professional and its full professional team shall be retained by the awarding authority for observation of construction requirements as required by law and until the project is completed and accepted by the awarding authority. The design professional, with the involvement of its full professional team, shall: develop a scope of work that defines the project and the awarding authority's requirements; be involved in the preparation of the prequalification criteria and final selection criteria; be involved in the evaluation and scoring of the prequalification and final selection criteria; and provide technical reviews, project oversight and other technical project administration services to the awarding authority for the duration of the project. The design professional and its full professional team shall also assist the awarding authority in developing the proposed budget for the project. The awarding authority may use in-house design
professionals, but if the awarding authority contracts with an
agent, the agent must be selected as set forth in Section
41-16-72(3). If the awarding authority contracts with an
agent, the agent, including a subsidiary thereof or any entity
under common ownership with the agent, is not eligible to
perform or provide the design-build work on the project,
including performing work as a subcontractor, or
subconsultant, at any tier, to the design-builder.

(b) A design-builder shall be selected after
advertising in accordance with the procedure provided in
subsection (a) of Section 39-2-2 (other than the requirement
for sealed bids) and two-step prequalification and selection
process conducted by the awarding authority or its agent in
accordance with the procedure provided in subsections (b),
(c), and (e) of Section 39-2-4 and Section 41-16-72(3),
respectively. The final selection must be made from among
those who prequalify. The design-builder and the design
professional whom the design-builder intends to be the lead
design professional of record for the project must be properly
licensed as required by law prior to submitting for
prequalification. Those who prequalify may then submit
competitive proposals to the awarding authority or its agent
as directed by the awarding authority.

(c) An awarding authority wishing to undertake a
design-build project shall prepare a written request for
qualifications from potential design-builders. At a minimum,
accordance with the advertising requirements set forth in subsection (a) of Section 39-2-2 (other than the requirement for sealed bids) and shall be widely disseminated to the professional community in a full and open manner. The request for qualifications shall include the scope of work prepared by the awarding authority's design professional and its full professional team describing the specific requirements and nature of the project; the prequalification criteria and the percentage valuation that will be assigned to each criterion; and shall state the date for submission of the prequalification submittal. In addition, the request for qualifications shall state the stipulated proposal fee which the awarding authority intends to pay, if any, to each of the prequalified design-builders who are selected and submit final qualification proposals. The selection of the design-builders who prequalify to submit competitive proposals shall be based upon the awarding authority's written findings and conclusions regarding the design-builder's qualifications and responsibility, including without limitation, specific findings regarding the (1) the design-builder's full professional team of licensed design professionals and their respective specialized expertise, capabilities, and technical competence with similar types of construction and the scope of services provided on similar previous projects; (2) proposed project team including the name and qualifications of the project team members; (3) the design-builder's proposed project management team's record of past performance and prior
experience with similar projects and types of construction including quality of work, ability to meet schedules, cost control and contract administration; (4) the design-builder's quality assurance and quality control programs and prior performance; (5) the design-builder's other projects in progress and ability to perform additional work; (6) resources available to perform the work, including any specialized services within the specified time limits for the project; (7) the design-builder's responsibility, competency, experience, safety record, financial condition, insurability and bonding capacity; (8) availability to and familiarity with the project locale; (9) the design-builder's experience with other public works projects; provided, however, prior experience as a design-builder on a public project shall not necessarily be a criterion for qualification to submit a final proposal provided the design-builder has prior design-build experience on private projects and construction experience on projects of similar size and scope.

(d) From the prequalification data submitted, the awarding authority and its design professional, with the involvement of its full professional team, shall then review the prequalification data submitted and shall prequalify up to five potential design-builders from whom to request competitive proposals. While the awarding authority and design professional may prequalify fewer than five potential design-builders, a minimum of three design-builders must be prequalified to proceed with the design-builder selection.
process. The awarding authority shall prepare written findings and conclusions regarding the awarding authority's assessment of the qualifications of each design-builder who responds to the request for qualifications.

(e) Following the awarding authority's establishment of a list of those design-builders who prequalify, but at least 45 days in advance of the submission of final proposals, the awarding authority shall provide in writing to all prequalified design-builders the criteria upon which the competitive proposals shall be scored and the percentage valuation that will be assigned to each element in the final selection criteria and shall state the date for submission of the competitive proposals so that those submitting competitive proposals know how each criterion shall be weighted. The awarding authority shall also include the minimum score required for a competitive proposal to be technically acceptable. The final qualification criteria are left to the awarding authority and awarding authority's design professional's, with the involvement of its full professional team, discretion but shall be related to the specific project requirements. The criteria shall be compiled to enable the awarding authority to make an informed selection of the design-builder best qualified for the particular needs of the project and may include but are not necessarily limited to: (1) the design-builder's project design concepts; (2) proposed design approach and technical solutions; (3) proposed project management approach; (4) proposed project team members
including key personnel, project team organization, project
team management and assignment of specific project
responsibilities; (5) proposed project enhancements including
design approach, schedule improvements, added quality or
proposed cost savings for the project; (6) proposed project
schedule including significant project milestones and (7) the
design-builder's proposed methodology for achieving
woman-owned business enterprise, enterprise of small business,
as defined in Section 25-10-3, minority-owned business
enterprise, and disadvantaged-owned business enterprise goals,
if any. Each prequalified design-builder shall also submit a
sealed proposal with the proposed lump sum or guaranteed
maximum price. The awarding authority shall not open the
sealed proposal until after the final proposals have been
scored.

(f) The final proposals shall respond to the
criteria upon which the awarding authority's selection shall
be based, and they shall be scored based on the awarding
authority's analysis of each potential design-builder's
proposal. Proposals that do not meet the minimum score
established by the awarding authority shall not be technically
acceptable and the design-builder shall not be eligible for
award. The awarding authority shall then open and score the
sealed proposals of the responsive proposals. The awarding
authority shall then rank the technically acceptable proposals
from first to last, based on the total cumulative score. The
awarding authority is not required to make its final ranking
based solely on lowest price or any component of price. The awarding authority shall maintain a written record of the ranking together with the score for each proposal received indicating the score each criterion received and a written narrative describing the basis for the selection and the ranking.

(g) If the sealed proposal of the first-ranked design-builder is within the awarding authority's proposed budget, then the awarding authority shall proceed with entering into a design-build contract with the successful design-builder. If the sealed proposal from the first ranked design-builder is not within the awarding authority's proposed budget, the awarding authority shall proceed to the second-ranked design-builder. If the sealed proposal of the second-ranked design-builder is not within the awarding authority's proposed budget, then the awarding authority shall proceed to the sealed proposal of the third-ranked design-builder. If the sealed proposal of the third-ranked design-builder is not within the awarding authority's proposed budget, then the awarding authority may proceed in order to the fourth-ranked and fifth-ranked design-builders' proposals, respectively. If none of the sealed proposals are within the awarding authority's proposed budget, then the awarding authority shall reject all proposals. The awarding authority may then let the contract for the project pursuant to Article 1 or Article 2 or may cancel the project; however, the awarding authority may not proceed under the design-build
method described in this section without revising the project scope and project budget and starting with the advertisement of a new request for prequalification. In addition, any of the criteria provided in any previous qualification and selection process may not be considered if the project is re-advertised.

§39-2-63.

A person, corporation, or entity providing design-build services is subject to all licensing, insurance, and bonding requirements for public works projects in Alabama.

§39-2-64.

(a) Within 30 days of opening the sealed proposal from the successful design-builder, the awarding authority, shall enter a written design-build contract, prepared by the awarding authority with the involvement of its design professional, with the design-builder for design-build services. As the basis for the contract, the awarding authority shall use an industry standard form developed for design-build projects or a form for a design-build project used or promulgated by the state. The design-builder's final proposal, including the proposed design concept, proposed schedule, proposed project team members, and guaranteed maximum price shall be incorporated into the award of the design-build contract. The awarding authority shall have the right to terminate the design-build contract for failure to comply substantially with the final proposal and accepted price.
(b) After award of the design-build contract and in accordance with the proposed project schedule, the design-builder shall present the final design to the awarding authority and the awarding authority's design professional, with full involvement of its full professional team, for approval. Within 30 days of receiving the final design, the awarding authority and the awarding authority's design professional, with full involvement of its full professional team, must provide written comments to the design-builder and the awarding authority must either approve or reject the final design. The design-builder must have the awarding authority's written approval of the final design before proceeding with any construction. If the design-builder proposes that the project will be constructed in phases, then the design-builder must present the final design for each phase of the work and must have the awarding authority's written approval of each proposed phase before the design-builder can proceed with the proposed phase of construction.

(c) The awarding authority shall have the right to terminate the design-build contract if the design-builder cannot provide a final design that substantially complies with the accepted final proposal and the project requirements. §39-2-65.

The design-builder shall be responsible for complying with all applicable laws, codes and regulations. The awarding authority shall not be responsible for the design-builder's failure to comply.
§39-2-66.

Within 90 days after the awarding authority publishes the rankings of the competitive proposals, each prequalified design-builder who submitted a responsive, competitive proposal shall be paid the proposal fee which the competitive proposal criteria stipulated, if any. If the awarding authority elects to pay a stipulated proposal fee, the amount shall be set forth in the request for qualifications. The awarding authority's design professional shall review the proposal requirements and shall recommend to the awarding authority the amount of the fee based on the design professional's opinion of the required effort. The proposal fee shall not be paid to the successful design-builder nor shall the proposal fee be paid to any proposer whose proposal was not technically acceptable as determined by the awarding authority and its design professional.


All proceedings, records, proposals, contracts, and other documents relating to the contracting for public works under this article shall be public records. Upon request of an interested citizen, the awarding authority shall make available for inspection any and all such documents.

§39-2-68.

All contracts for public works entered into in violation of this article shall be null, void, and violative
of public policy. Anyone who willfully violates this article concerning public works shall be guilty of a Class C felony.

§39-2-69.

The Attorney General, a bona fide unsuccessful or disqualified bidder or proposer on a CM/GC or a design-build project, or any interested citizen may maintain an action to enjoin the letting or execution of any public works contract in violation of or contrary to the provisions of this title or any other statute and may enjoin payment of any public funds under any such contract. In the case of a successful action brought by a bidder or proposer on a CM/GC or design-build project, reasonable bid or proposal preparation costs shall be recoverable by that bidder or proposer. The action shall be commenced within 45 days of the contract award.

Section 5. Although this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds, the bill is excluded from further requirements and application under Amendment 621, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, because the bill defines a new crime or amends the definition of an existing crime.

Section 6. This act shall become effective on October 1, 2016, following its passage and approval by the Governor, or its otherwise becoming law.