

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 87th General Assembly
3 Regular Session, 2009
4

As Engrossed: H3/17/09

A Bill

HOUSE BILL 2091

5 By: Representative Dunn
6
7

For An Act To Be Entitled

9 AN ACT TO REESTABLISH FAIRNESS, TRANSPARENCY, AND
10 COMPETITION IN THE BIDDING PRACTICES FOR THE
11 CONSTRUCTION OF PUBLICLY FUNDED BUILDINGS,
12 INFRASTRUCTURE, AND FACILITIES; AND FOR OTHER
13 PURPOSES.
14
15

Subtitle

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17
18 TO REESTABLISH FAIRNESS, TRANSPARENCY,
19 AND COMPETITION IN THE BIDDING PRACTICES
20 FOR THE CONSTRUCTION OF PUBLICLY FUNDED
21 BUILDINGS, INFRASTRUCTURE, AND
22 FACILITIES.
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24

25 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
26

27 *SECTION 1. NOT TO BE CODIFIED. It is found and determined by the*
28 *General Assembly that it is in the best interest of the citizens of Arkansas*
29 *that all contracts for the construction of publicly funded buildings,*
30 *infrastructure, and facilities be awarded to the lowest responsible bidder in*
31 *a competitive process.*
32

33 *SECTION 2. Arkansas Code § 19-4-1415 is repealed.*
34 *~~19-4-1415. Projects exceeding five million dollars.~~*
35 *~~(a) In the event funds from any sources are provided to state agencies~~*
36 *~~for projects which exceed five million dollars (\$5,000,000), excluding the~~*



1 ~~cost of land, the provisions of this subchapter and all other provisions of~~
2 ~~the Arkansas Code governing construction of public facilities, including, but~~
3 ~~not limited to, the provisions of § 22-9-201 et seq., at the election of state~~
4 ~~agencies or the institutions of higher education set forth in subdivision~~
5 ~~(b)(5) of this section shall not be applicable to the projects if the~~
6 ~~selection and contracting process set forth in this section is followed.~~

7 ~~(b)(1) No contract for projects between the state agency and the~~
8 ~~construction manager, general contractor, architect, or engineer shall be~~
9 ~~entered into without first obtaining approval of Arkansas Building Authority~~
10 ~~and review by the Legislative Council.~~

11 ~~(2) The authority shall have involvement in the selection and~~
12 ~~contract process from the project inception.~~

13 ~~(3) There shall be separate contracts for design and~~
14 ~~construction services.~~

15 ~~(4) The authority shall have the authority to promulgate rules~~
16 ~~and regulations pertaining to the process for awarding and overseeing the~~
17 ~~contracts.~~

18 ~~(5) The Board of Trustees of the University of Arkansas and the~~
19 ~~Board of Trustees of Arkansas State University shall be exempt from review~~
20 ~~and approval by the authority and any regulations promulgated by it, provided~~
21 ~~that the institutions shall have adopted policies and procedures involving~~
22 ~~the awarding and oversight of the contracts for design and construction~~
23 ~~services.~~

24 ~~(6) All procedures pertaining to the contracts shall provide, to~~
25 ~~the extent practicable, substantial uniformity between these institutions~~
26 ~~with respect to the policies and procedures to be followed.~~

27 ~~(c)(1) For all projects contemplated or contracted for, the authority~~
28 ~~shall:~~

29 ~~(A) Review and approve the advertisement as stated in~~
30 ~~subsection (d) of this section, the scope of work, the site selection,~~
31 ~~funding review, and, to the extent available, all project drawings, plans,~~
32 ~~and specifications prior to any solicitation of proposals for the project;~~

33 ~~(B) Conduct on-site observations of the construction~~
34 ~~project on a regular basis and maintain project records; and~~

35 ~~(C)(i) Review and approve all contract amendments.~~

36 ~~(ii) State agencies shall submit a summary of all~~

1 ~~contract amendments to the Legislative Council;~~

2 ~~(2)(A) The institutions of higher education stated in~~
3 ~~subdivision (b)(5) of this section shall perform all duties and~~
4 ~~responsibilities stated in subdivision (c)(1) of this section under policies~~
5 ~~and procedures adopted by their governing boards.~~

6 ~~(B) They shall submit a summary of all contract amendments~~
7 ~~to the Legislative Council.~~

8 ~~(d)(1) The selection procedures for the construction manager, general~~
9 ~~contractor, architect, or engineer shall provide for solicitation for~~
10 ~~qualified, licensed professionals to submit proposals.~~

11 ~~(2) The procedures shall assure the design and completion of the~~
12 ~~project in an expeditious manner while adhering to high standards of design~~
13 ~~and construction quality.~~

14 ~~(3) The state agency and each institution of higher education~~
15 ~~stated in subdivision (b)(5) of this section shall:~~

16 ~~(A) Publish notice of its intention to receive written~~
17 ~~proposals three (3) consecutive days in a newspaper of statewide~~
18 ~~distribution;~~

19 ~~(B) Allow a minimum of ten (10) working days for the~~
20 ~~professionals to send letters or resumes in response to newspaper~~
21 ~~advertisement; and~~

22 ~~(C) Provide additional means of notification, if any, as~~
23 ~~the state agency or institution of higher education stated in subdivision~~
24 ~~(b)(5) of this section shall determine is appropriate.~~

25 ~~(e)(1)(A) A preselection committee, which shall be composed of no more~~
26 ~~than three (3) members from the state agency and two (2) members from the~~
27 ~~authority shall review the proposals.~~

28 ~~(B) A preselection committee for institutions of higher~~
29 ~~education stated in subdivision (b)(5) of this section shall consist of at~~
30 ~~least three (3) members as determined by each of the institutions, and the~~
31 ~~members may be from the authority.~~

32 ~~(C) The preselection committee shall select a maximum of~~
33 ~~five (5) applicants and schedule interviews.~~

34 ~~(D) The state agency or an institution of higher education~~
35 ~~as stated in subdivision (b)(5) of this section shall notify the finalists of~~
36 ~~their status.~~

1 ~~(2)(A) The final selection committee shall be composed of the~~
2 ~~(3) three members from the state agency on the preselection committee.~~

3 ~~(B) The final interviews shall be held at the time and~~
4 ~~date as designated by the final selection committee.~~

5 ~~(C) Representatives of the authority may attend the final~~
6 ~~selection meeting, but shall not vote in the final selection process.~~

7 ~~(D) The final selection committee for institutions of~~
8 ~~higher education stated in subdivision (b)(5) of this section shall consist~~
9 ~~of at least three (3) members as determined by each of the institutions.~~

10 ~~(E) Members of a preselection committee may also serve as~~
11 ~~members of the final selection committee of the institutions.~~

12 ~~(F) In selecting a general contractor, construction~~
13 ~~manager, architect, or engineer, the state agency or institution of higher~~
14 ~~education as stated in subdivision (b)(5) of this section shall consider~~
15 ~~their established criteria which shall include, but are not limited to, the~~
16 ~~following:~~

17 ~~(i) The experience of the professional or~~
18 ~~professionals in similar projects;~~

19 ~~(ii) The record of the professional or professionals~~
20 ~~in timely completion of the projects with high quality workmanship; and~~

21 ~~(iii) Other similar matters to determine that the~~
22 ~~professional or professionals will complete the project within the time and~~
23 ~~budget and to the specifications set by the state agency or institution of~~
24 ~~higher education as stated in subdivision (b)(5) of this section.~~

25 ~~(3)(A) The final selection committee shall select or make a~~
26 ~~formal recommendation to its governing body of the professional or~~
27 ~~professionals which it determines to be in the best interest of the state.~~

28 ~~(B) Contracts for architectural, engineering, and land~~
29 ~~surveying professional consultant services shall be negotiated on the basis~~
30 ~~of demonstrated competence and qualifications for the type of services~~
31 ~~required and at fair and reasonable prices without the use of competitive~~
32 ~~bidding, and no rule or regulation shall inhibit the agency's authority to~~
33 ~~negotiate fees for the services.~~

34 ~~(C) The final selection committee for the institutions of~~
35 ~~higher education as stated in subdivision (b)(5) of this section shall make a~~
36 ~~recommendation to its governing board or appropriate committee thereof of the~~

1 ~~professional or professionals which it determines to be in the best interest~~
2 ~~of the institution, and the governing board shall make the final decision and~~
3 ~~authorize the contract or contracts to be negotiated and awarded, unless it~~
4 ~~has delegated the action to a committee of the board.~~

5 ~~(f)(1) Construction contracts for the projects shall not be entered~~
6 ~~into without a payment and performance bond in the amount of the contract and~~
7 ~~any amendments thereto and shall provide for the manner in which the~~
8 ~~construction shall be managed and supervised.~~

9 ~~(2) All project architects and engineers shall be properly~~
10 ~~licensed in accordance with the Arkansas State Board of Architects and the~~
11 ~~Arkansas State Board of Engineers.~~

12 ~~(3) The construction manager or general contractor shall be~~
13 ~~properly licensed by the Arkansas Contractors Licensing Board.~~

14 ~~(4)(A) All subcontractors on the project shall be properly~~
15 ~~licensed by the Contractors Licensing Board.~~

16 ~~(B) Any person who is not considered a contractor under §~~
17 ~~17-25-101 et seq. may continue to perform subcontracting work under the~~
18 ~~provisions of this subchapter.~~

19 ~~(g)(1) To enable a state agency or an institution of higher education~~
20 ~~as stated in subdivision (b)(5) of this section to qualify under this~~
21 ~~section, the funds shall be paid to or for the benefit of the state agency or~~
22 ~~institution of higher education, or to a fund or foundation for the benefit~~
23 ~~of the state agency or institution of higher education.~~

24 ~~(2) The funds may be represented in whole or in part by a~~
25 ~~written pledge or commitment from a donor, provided that the state agency or~~
26 ~~institution of higher education shall assure itself of the financial~~
27 ~~stability of the donor to fulfill the pledge or commitment.~~

28 ~~(h) All projects constructed pursuant to this section, to the extent~~
29 ~~applicable, shall be in accordance and compliance with:~~

30 ~~(1) Section 17-38-101 et seq., regulating plumbers;~~

31 ~~(2) Section 17-33-101 et seq., regulating the heating,~~
32 ~~ventilation, air conditioning, and refrigeration industry;~~

33 ~~(3) The Fire Prevention Act, § 12-13-101 et seq.;~~

34 ~~(4) Section 12-80-101 et seq., regarding earthquake resistant~~
35 ~~design for public structure;~~

36 ~~(5) Americans with Disabilities Act Accessibility Guidelines, 28~~

1 ~~C.F.R. Part 36, Appx. A, adopted by the authority; and~~

2 ~~(6)(A) The minimum standards of the authority and criteria~~
3 ~~pertaining to projects constructed under this section.~~

4 ~~(B)(i) However, institutions of higher education as stated~~
5 ~~in subdivision (b)(5) of this section shall be exempt from these standards~~
6 ~~and criteria, provided that the institutions shall have adopted policies and~~
7 ~~procedures involving the awarding and oversight of contracts for projects~~
8 ~~under this section.~~

9 ~~(ii) It is the intention of this section that all~~
10 ~~procedures adopted by these institutions pertaining to the contracts shall~~
11 ~~provide, to the extent practicable, substantial uniformity between these~~
12 ~~institutions with respect to the policies and procedures to be followed.~~

13 ~~(iii) Notwithstanding anything in this subsection to~~
14 ~~the contrary, the provisions of §§ 19-4-1405(f), 19-4-1413, 19-11-801, 22-9-~~
15 ~~101, 22-9-103, 22-9-104, 22-9-213, 22-9-301 et seq., 22-9-401 et seq., 22-9-~~
16 ~~501 et seq., 22-9-601 et seq., and 22-9-701 et seq. shall remain in full~~
17 ~~force and effect and shall not be affected by this section.~~

18
19 SECTION 3. Arkansas Code § 14-58-1001 is repealed.

20 ~~14-58-1001. Projects exceeding two million dollars.~~

21 ~~(a) In the event funds from any sources for a municipal project other~~
22 ~~than revenues derived from a performance based efficiency project exceed two~~
23 ~~million dollars (\$2,000,000), excluding the cost of land, the provisions of~~
24 ~~this subchapter and all other provisions of the Arkansas Code of 1987~~
25 ~~Annotated governing construction of public facilities, including, but not~~
26 ~~limited to, the provisions of § 22-9-201 et seq. at the election of~~
27 ~~municipalities shall not be applicable to the project if the selection and~~
28 ~~contracting process set forth in this section is followed.~~

29 ~~(b)(1) The selection procedures for the construction manager, general~~
30 ~~contractor, architect, or engineer shall provide for solicitation for~~
31 ~~qualified, licensed professionals to submit proposals.~~

32 ~~(2) The procedures shall assure the design and completion of the~~
33 ~~project in an expeditious manner while adhering to high standards of design~~
34 ~~and construction quality.~~

35 ~~(3) A municipality shall:~~

36 ~~(A) Publish notice of its intention to receive written~~

1 ~~proposals three (3) consecutive days in a newspaper of local distribution;~~

2 ~~(B) Allow a minimum of ten (10) working days from the~~
3 ~~first date of publication for the professionals to send letters or resumes in~~
4 ~~response to the newspaper advertisement; and~~

5 ~~(C) Provide additional means of notification, if any, as~~
6 ~~the municipality shall determine is appropriate.~~

7 ~~(e)(1)(A) A preselection committee which shall be composed of at least~~
8 ~~three (3) members from the municipality shall review the proposals.~~

9 ~~(B) The preselection committee shall select a maximum of~~
10 ~~five (5) applicants and schedule interviews.~~

11 ~~(C) The municipality shall notify the finalists of their~~
12 ~~status.~~

13 ~~(2)(A) The final selection committee shall be composed of the~~
14 ~~members on the preselection committee.~~

15 ~~(B) The final interviews shall be held at the times and~~
16 ~~dates designated by the final selection committee.~~

17 ~~(C) In selecting a general contractor, construction~~
18 ~~manager, architect, or engineer, the municipality shall consider established~~
19 ~~criteria, which shall include, but not be limited to, the following:~~

20 ~~(i) The experience of the professional or~~
21 ~~professionals in similar projects;~~

22 ~~(ii) The record of the professional or professionals~~
23 ~~in timely completion of the projects with high quality workmanship; and~~

24 ~~(iii) Other similar matters to determine that the~~
25 ~~professional or professionals will complete the project within the time and~~
26 ~~budget and to the specifications set by the municipality.~~

27 ~~(3)(A) The final selection committee shall make a formal~~
28 ~~recommendation to its governing body of the professional or professionals~~
29 ~~whom it determines to be in the best interest of the municipality.~~

30 ~~(B)(i) Contracts for architectural, engineering, and land~~
31 ~~surveying professional consultant services shall be negotiated on the basis~~
32 ~~of demonstrated competence and qualifications for the type of services~~
33 ~~required and at fair and reasonable prices without the use of competitive~~
34 ~~bidding.~~

35 ~~(ii) No rule or regulation shall inhibit a~~
36 ~~municipality's authority to negotiate fees for the services.~~

1 ~~(d)(1) Construction contracts for the projects shall not be entered~~
2 ~~into without a payment and performance bond in the amount of the contract and~~
3 ~~any amendments thereto and shall provide for the manner in which the~~
4 ~~construction shall be managed and supervised.~~

5 ~~(2) All project architects and engineers shall be properly~~
6 ~~licensed in accordance with the Arkansas State Board of Architects and the~~
7 ~~Arkansas State Board of Engineers.~~

8 ~~(3) The construction manager or general contractor shall be~~
9 ~~properly licensed by the Contractors Licensing Board.~~

10 ~~(4)(A) All subcontractors on the project shall be properly~~
11 ~~licensed by the Contractors Licensing Board.~~

12 ~~(B) Any person who is not considered a contractor under §~~
13 ~~17-25-101 et seq. may continue to perform subcontracting work under the~~
14 ~~provisions of this subchapter.~~

15 ~~(e) The funds may be represented in whole or in part by a written~~
16 ~~pledge or commitment from a donor, provided that the municipality shall~~
17 ~~assure itself of the financial stability of the donor to fulfill the pledge~~
18 ~~or commitment.~~

19 ~~(f)(1) All projects constructed pursuant to this section, to the~~
20 ~~extent applicable, shall be in accordance and compliance with:~~

21 ~~(A) Section 17-38-101 et seq., regulating plumbers;~~

22 ~~(B) Section 17-33-101 et seq., regulating the heating,~~
23 ~~ventilation, air conditioning, and refrigeration industry;~~

24 ~~(C) The Fire Prevention Act, § 12-13-101 et seq.;~~

25 ~~(D) Section 12-80-101 et seq., regarding earthquake~~
26 ~~resistant design for public structure;~~

27 ~~(E) Americans with Disabilities Act Accessibility~~
28 ~~Guidelines, 28 C.F.R. pt. 36, App. A, adopted by the authority; and~~

29 ~~(F) The minimum standards of the authority and criteria~~
30 ~~pertaining to projects constructed under this section.~~

31 ~~(2) Notwithstanding anything in this section to the contrary,~~
32 ~~the provisions of §§ 19-11-801, 22-9-101, 22-9-103, 22-9-104, and 22-9-213, §~~
33 ~~22-9-301 et seq., § 22-9-401 et seq., § 22-9-501 et seq., § 22-9-601 et seq.,~~
34 ~~§ 22-9-701 et seq., and all competitive bidding statutes shall remain in full~~
35 ~~force and effect and not be affected hereby.~~

36 ~~(3) This section shall not authorize a design build project~~

1 ~~contract.~~

2
3 SECTION 4. Arkansas Code § 19-11-801 is amended to read as follows:
4 19-11-801. Policy - Definitions.

5 (a) It is the policy of the State of Arkansas that state agencies
6 ~~shall~~ follow the procedures stated in this section, except that competitive
7 bidding shall not be used for the procurement of the professional services of
8 legal, architectural, engineering, construction management, and land
9 surveying ~~professional consultant services~~ if:

10 (1) State agencies not exempt from review and approval of the
11 Arkansas Building Authority ~~shall~~ follow procedures established by the
12 authority for the procurement of the professional services of architectural,
13 engineering, land surveying, and construction management services; and

14 (2) Institutions of higher education exempt from review and
15 approval of the authority ~~shall~~ follow procedures established by their
16 governing boards for the procurement of architectural, engineering, land
17 surveying, and construction management ~~professional consultant~~ services.

18 (b) It is the policy of the State of Arkansas and its political
19 subdivisions that political subdivisions shall follow the procedures stated
20 in this section, except that competitive bidding shall not be used for the
21 procurement of the professional services of legal, financial advisory,
22 architectural, engineering, construction management, and land surveying
23 ~~professional consultant services~~.

24 (c) For purposes of this subchapter, a political subdivision of the
25 state may elect to not use competitive bidding for other professional
26 services not listed in subsection (b) of this section with a two-thirds (2/3)
27 vote of the political subdivision's governing body.

28 (d)(1) As used in this section, "construction management" means a
29 project delivery method based on an agreement in which a state agency,
30 political subdivision, public school district, or institution of higher
31 education acquires from a construction entity a series of services that
32 ~~include, but are not limited to,~~ without limitation design review,
33 scheduling, cost control, value engineering, constructability evaluation,
34 preparation and coordination of bid packages, and construction
35 administration.

36 (2) "Construction management" includes, ~~but is not limited to:~~

1 without limitation

2 ~~(A)(i) "Agency "agency construction management", in which~~
 3 ~~a public school district selects a construction manager to serve as an agent~~
 4 ~~for the purpose of providing administration and management services.~~

5 ~~(ii)(3) The construction manager shall not hold subcontracts for~~
 6 ~~the project or provide project bonding for the project, unless publicly~~
 7 ~~advertised and bid.~~

8 ~~(B) "At risk construction management", in which the~~
 9 ~~construction entity, after providing agency services during the~~
 10 ~~preconstruction period, serves as the general contractor and the following~~
 11 ~~conditions are met:~~

12 ~~(i) The construction manager provides a maximum~~
 13 ~~guaranteed price;~~

14 ~~(ii) The public school district holds all trade~~
 15 ~~contracts and purchase orders; and~~

16 ~~(iii) The portion of the project not covered by the~~
 17 ~~trade contracts is bonded and guaranteed by the construction manager; and~~

18 ~~(C)(i) "General contractor construction management", in~~
 19 ~~which the construction entity, after providing agency services during the~~
 20 ~~preconstruction period, serves as the general contractor.~~

21 ~~(ii) The general contractor shall hold all trade~~
 22 ~~contracts and purchase orders and shall bond and guarantee the project.~~

23 (4)(A) The construction manager or an affiliated company or
 24 business enterprise shall not receive remuneration on the project other than
 25 its fee for professional services unless the project is publicly advertised
 26 and bid.

27 (B) As used in this subdivision (d)(4) "affiliated
 28 company" includes without limitation a company or business enterprise that
 29 has ownership or officers in common with the construction manager.

30 (e) As used in this subchapter:

31 ~~(1) "Political "political subdivision" means counties, school~~
 32 ~~districts, cities of the first class, cities of the second class, and~~
 33 ~~incorporated towns; and~~

34 ~~(2) "Other professional services" means professional services~~
 35 ~~not listed in subsection (b) of this section as defined by a political~~
 36 ~~subdivision with a two thirds (2/3) vote of its governing body.~~

1
2 SECTION 5. Arkansas Code § 19-11-804 is amended to read as follows:
3 19-11-804. Selection.

4 (a) The state agency or political subdivision shall select three (3)
5 qualified firms.

6 (b) The state agency or political subdivision shall then select the
7 firm considered the best-qualified and capable of performing the desired work
8 and negotiate a contract for the project with the firm selected for the
9 professional services identified in § 19-11-801(a).

10
11 SECTION 6. Arkansas Code § 19-11-807 is repealed.

12 ~~19-11-807. Design build construction.~~

13 ~~(a) As used in this section:~~

14 ~~(1) "Design build" means a project delivery method in which the~~
15 ~~school district acquires both design and construction services in the same~~
16 ~~contract from a single legal entity, referred to as the "design builder",~~
17 ~~without competitive bidding;~~

18 ~~(2)(A) "Design builder" means any individual, partnership, joint~~
19 ~~venture, corporation, or other legal entity that is appropriately licensed in~~
20 ~~the State of Arkansas and that furnishes the necessary design services, in~~
21 ~~addition to the construction of the work, whether by itself or through~~
22 ~~subcontracts, including, but not limited to, subcontracts for architectural~~
23 ~~services, landscape architectural services, and engineering services.~~

24 ~~(B) Architectural services, landscape architectural~~
25 ~~services, and engineering services shall be performed by an architect,~~
26 ~~landscape architect, or engineer licensed in the State of Arkansas.~~

27 ~~(C) Construction contracting shall be performed by a~~
28 ~~contractor qualified and licensed under Arkansas law; and~~

29 ~~(3) "Design build contract" means the contract between the~~
30 ~~school district and a design builder to furnish the architecture,~~
31 ~~engineering, and related services as required and to furnish the labor,~~
32 ~~materials, and other construction services for the same project.~~

33 ~~(b)(1) Any school district may use design build construction as a~~
34 ~~project delivery method for building, altering, repairing, improving,~~
35 ~~maintaining, or demolishing any structure, or any improvement to real~~
36 ~~property owned by the school district.~~

