

Regular Session, 2014

SENATE BILL NO. 680 (Substitute of Senate Bill No. 552 by Senator Adley)

BY SENATORS ADLEY AND GARY SMITH

PUBLIC CONTRACTS. Authorizes use of construction management at risk method for public contracts. (8/1/14)

1 AN ACT

2 To enact R.S. 38:2225.2.4, relative to public contracts; to authorize use of the construction  
3 management at risk method for public contracts; and to provide for related matters.

4 Be it enacted by the Legislature of Louisiana:

5 Section 1. R.S. 38:2225.2.4 is hereby enacted to read as follows:

6 **§2225.2.4. Construction management at risk**

7 **A.(1) Notwithstanding any other provision of law to the contrary, a**  
8 **public entity may use the construction management at risk project delivery**  
9 **method to contract for a project to construct public works as set forth in this**  
10 **Section.**

11 **(2) Purpose. This Section creates an alternative project delivery method,**  
12 **known as "construction management at risk", or "CMAR", for use by a public**  
13 **entity to award a contract to construct public works when deemed in the public**  
14 **interest, beneficial to the owner, and in accordance with the procedures in this**  
15 **Section. The following are reasons to use the CMAR delivery method:**  
16 **collaboration and cost control; concurrent execution of design and construction;**  
17 **a complex project with a tight time frame; owner, designer, and contractor with**

1 mutual project goals; risk identification controlled by owner; and minimization  
2 of the risk of construction and design disputes by using a collaborative process.

3 (3) CMAR shall not be used for any project that is estimated to cost less  
4 than twenty-five million dollars.

5 B. Definitions. When used in this Section, the following words and  
6 phrases have the meanings ascribed to them in this Section, unless the context  
7 indicates a different meaning:

8 (1) "Construction management at risk" or "CMAR" means a delivery  
9 method by which the owner uses a design professional, who is engaged by the  
10 owner for professional predesign or design services, or both. The owner  
11 contracts separately with a CMAR contractor to engage in the preconstruction  
12 phase. As specified in this Section, the same CMAR contractor may also provide  
13 construction services to build the project.

14 (2) "Construction management at risk contractor" or "CMAR  
15 contractor" means a person, sole proprietorship, partnership, corporation, or  
16 other legal entity, properly licensed, bonded, and insured, who does one or both  
17 of the following:

18 (a) Provides construction experience to the owner or its design  
19 professional during the preconstruction phase regarding the constructability of  
20 the project.

21 (b) May contract with the owner to assume the risk to construct the  
22 project for a guaranteed maximum price, without re-procurement.

23 (3) "Design professional" means an engineer, architect, or landscape  
24 architect who has secured a professional license from a Louisiana registration  
25 board as required by state law and who is selected by an owner in accordance  
26 with state law.

27 (4) "Owner" means a "public entity" as defined in R.S. 38:2211.

28 (5) "Selection review committee" means the committee appointed by the  
29 owner to review the request for qualifications, score the proposers, and

1 recommend award to a construction management at risk contractor. The  
2 committee shall consist of no more than five individuals as follows:

3 (a) One design professional in the discipline of but not involved in the  
4 project.

5 (b) One licensed contractor in the discipline of but not involved in the  
6 project.

7 (c) One representative of the owner.

8 (d) Two members at large.

9 (6) All other terms shall have the meanings as provided for in R.S.  
10 38:2211.

11 C. Any owner who determines to use the construction management at  
12 risk method shall indicate such intent in the request for qualifications to  
13 procure a CMAR contractor and the reasons it deems such method to be in the  
14 public interest and beneficial to the owner.

15 D. There shall be no challenge by any legal process to the choice of the  
16 successful construction manager at risk contractor except for fraud, bias for  
17 pecuniary or personal reasons not related to the taxpayers' interest, or  
18 arbitrary and capricious selection by the owner.

19 E. The owner shall select and contract with a design professional for  
20 design services in the manner provided for by law.

21 F. Request for qualifications, or RFQ, for construction management at  
22 risk contractor.

23 (1) A request for qualifications, or RFQ, to award a contract for a  
24 construction management at risk contractor for preconstruction and  
25 construction services shall be advertised in the official journal of the owner and,  
26 if one exists, on the Internet website of the owner. The RFQ shall be advertised  
27 at least two times within the thirty-day period prior to the deadline for receipt  
28 of responses.

29 (2) The RFQ shall include the following as well as any other pertinent

1 information limited to the qualifications of a proposer that the owner  
2 determines a proposer may need to submit a response to an RFQ:

3 (a) The preconstruction scope of services.

4 (b) Submittal criteria for the project.

5 (c) Procurement grading criteria.

6 (d) Scoring methodology.

7 (e) Total fees and compensation payable to the CMAR contractor for  
8 preconstruction services.

9 (3) The RFQ may request that proposers include the following in  
10 response to the RFQ, as well as any other appropriate factors that would, in the  
11 opinion of the owner, demonstrate the capability of the proposer to perform the  
12 role of CMAR contractor:

13 (a) The proposer's surety.

14 (b) Construction methodologies previously used by the proposer on other  
15 projects.

16 (c) Extent to which the proposer intends to self-perform portions of the  
17 work, if applicable.

18 (d) Past performance of the proposer including timely completion of  
19 other public works projects of similar complexity and size.

20 (e) Proposed management and staffing for the project.

21 (f) The proposer's last safety record to include current experience  
22 modification rate, or EMR, recordable incident rate, or RIR, lost work time  
23 incident rate, or other data as required by the owner.

24 (g) The proposer's standard safety plan.

25 (4) Within ninety days after the deadline for responses to the RFQ, a  
26 selection review committee chosen by the owner and identified in the RFQ shall  
27 make a written recommendation to the owner as to which proposer should be  
28 awarded the contract. The results of the selection review committee, inclusive  
29 of its findings, grading, score sheets, and recommendations, shall be available

1 for review by all proposers and shall be deemed public records.

2 (5) If the benefits of using the CMAR method reduce as the design  
3 process progresses, the owner shall select the CMAR contractor either before,  
4 but not later than, when the design professional's design is not more than thirty  
5 percent complete.

6 G. After award and execution of the contract with the CMAR contractor,  
7 the following actions shall proceed:

8 (1) The design professional, in consultation with the CMAR contractor,  
9 shall proceed with design services.

10 (2) The owner shall obtain an opinion of probable cost of the project  
11 from both the CMAR contractor and the design professional when final design  
12 of the project is not more than sixty percent complete, and again when final  
13 design of the project is not more than ninety percent complete.

14 (3) The CMAR contractor shall provide to the owner a guaranteed  
15 maximum price for construction of the project, before or upon completion of  
16 the final design.

17 (4) If the owner and CMAR contractor are able to negotiate, and to  
18 establish and agree upon a guaranteed maximum price, or GMP, to render  
19 construction services for the project, and additionally, to agree upon  
20 constructability, construction phasing and sequencing, and the maximum  
21 number of contract days to complete the project, the owner may then award the  
22 contract for construction services to the CMAR contractor for the construction  
23 phase of the contract.

24 (5) Once a guaranteed maximum price is agreed upon, the owner may  
25 authorize the CMAR contractor to undertake construction services.  
26 Additionally, the owner may determine and authorize the CMAR contractor to  
27 undertake specific items of construction services prior to agreement upon a  
28 GMP for such items, provided such undertaking is for the benefit of the project  
29 and a GMP for the undertaking can be agreed upon between the owner and

1        CMAR contractor. Such items may benefit the project, including but not  
 2        limited to items that require a long lead time, may further the understanding  
 3        of unknown site conditions, or other items.

4                (6) If the owner and the CMAR contractor are not able to agree upon  
 5        constructability, construction phasing and sequencing, the GMP for the project,  
 6        the maximum number of contract days to complete the project, and to reach a  
 7        negotiated agreement, then the project shall be readvertised and publicly bid  
 8        utilizing the design-bid-build delivery method.

9                H. The provisions of this Section shall supersede any conflicting  
 10        provisions of any law, including but not limited to the requirements of Chapter  
 11        10 of this Title, but the provisions of such Chapter shall otherwise be applicable  
 12        to such contracts.

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The original instrument was prepared by Sharon F. Lyles. The following digest, which does not constitute a part of the legislative instrument, was prepared by Linda Nugent.

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#### DIGEST

Adley (SB 680)

Present law prohibits a construction manager or any other third-party consultant employed by a public entity from managing a construction project as a general contractor or acting in the role of the general contractor to oversee, direct, or coordinate individual trade contractors on behalf of the public entity, or accepting bids or itself bid on the public works or components of the public works with respect to which the manager or consultant is employed or contracted to manage or consult.

Proposed law authorizes an owner who is a public entity to use the construction management at risk or CMAR project delivery method to contract for public works.

Proposed law defines the "construction management at risk", or "CMAR", method to mean a delivery method by which the owner uses a design professional, who is engaged by the owner for professional predesign or design services, or both. The owner contracts separately with a CMAR contractor to engage in the preconstruction phase. As specified in proposed law, the same CMAR contractor may also provide construction services to build the project.

Proposed law defines "CMAR contractor" as a person, sole proprietorship, partnership, corporation or other legal entity, properly licensed, bonded, and insured, who may assume the risk to construct the project for a guaranteed maximum price or who provides construction experience to the owner or its design professional during the preconstruction phase regarding the constructability of the project, or both.

Proposed law defines "design professional" as an engineer, architect, or landscape architect who has secured a professional license from a Louisiana registration board as required by state law and who is selected by an owner in accordance with state law.

Proposed law defines "selection review committee" to mean the committee appointed by the owner to review the request for qualifications, score the proposers, and recommend award to a CMAR contractor. The committee shall consist of no more than five individuals as follows:

- (1) One design professional in the discipline of but not involved in the project.
- (2) One licensed contractor in the discipline of but not involved in the project.
- (3) One representative of the owner.
- (4) Two members at large.

Proposed law defines "owner" as a public entity as defined in R.S. 38:2211.

Proposed law requires an owner who determines to use the CMAR method to indicate such intent in the RFQ to procure a CMAR contractor and the reasons it deems such method to be in the public interest and beneficial to the owner.

Proposed law prohibits challenges by any legal process to the choice of the successful CMAR contractor except for fraud, bias for pecuniary or personal reasons not related to the taxpayers' interest, or arbitrary and capricious selection by the owner.

Proposed law requires an owner to select and contract with a design professional for design services in the manner provided for by law.

Proposed law requires advertisement of the RFQ to award a contract for CMAR services in the owner's official journal, and on the owner's Internet website, if available. The RFQ shall be advertised at least two times within the 30 day period prior to the deadline for receipt of responses.

Proposed law lists specific items the owner shall include in the RFQ. Allows the owner to include other listed items in the RFQ. Requires review and grading of proposals by a review committee identified in the RFQ. Provides that the review committee results, inclusive of its findings, grading, score sheets and recommendations are available for review by all proposers and shall be deemed public records.

Proposed law requires the review committee to make its recommendations to the owner within 90 days after the deadline for submission of responses to the RFQ. Requires the proposer recommended by the committee as the CMAR contractor to work with the owner's design professional for the project on constructability and construction phasing and sequencing prior to the owner's award to construct the project.

Proposed law requires the owner to select the CMAR contractor either before, but not later than, when the design professional design is not more than 30% complete if the benefits of the CMAR method reduce as the design process progresses.

Proposed law requires the owner to obtain an opinion of probable cost from the design professional and the CMAR contractor when final project design is not more than 60% and again when final design is not more than 90% complete.

Proposed law requires the CMAR contractor to provide the owner a guaranteed maximum price, or GMP, before or upon completion of final design.

Proposed law provides that, if the owner and CMAR contractor are able to negotiate, establish, and agree upon such GMP for rendering construction services for the project, the owner may authorize the CMAR contractor to undertake construction services. Further provides that an owner may determine and authorize a CMAR contractor to undertake

specific items provided such undertaking is beneficial to the project, including but not limited to items that require a long lead time, further understanding of unknown site conditions, or other issues.

Proposed law requires the owner to readvertise and publicly bid utilizing the design-bid-build delivery method when the owner and the CMAR contractor do not reach a negotiated agreement.

Proposed law provisions do not supersede any conflicting provisions of any law, including but not limited to the requirements of Chapter 10 of Title 38, but the provisions of such Chapter shall otherwise apply to such contracts.

Effective August 1, 2014.

(Adds R.S. 38:2225.2.4)

Summary of Amendments Adopted by Senate

Senate Floor Amendments to engrossed bill

1. Removes the requirement that the two members at large on the selection review committee be from the general public.
2. Legislative Bureau technical amendments.