



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873
Email: fiscal.bureau@legis.wisconsin.gov • Website: <http://legis.wisconsin.gov/lfb>

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Joint Committee on Finance

Paper #654

Construction Manager/General Contractor Pilot Program (Transportation -- State Highway Program)

[LFB 2015-17 Budget Summary: Page 449, #9]

CURRENT LAW

The Department of Transportation (DOT) must award bids to the lowest qualified bidder (a process often referred to as the design-bid-build model). During this process, the Department may contract with several different design consultants in addition to working with its own staff to develop a design for the bidding process. Following the submission of project bids, if the Department decides to award a contract, it is required by statute to select what it determines to be the lowest competent and responsible bidder.

GOVERNOR

Authorize the Department to engage in an alternative state highway project delivery and construction model through a construction manager/general contractor (CMGC) pilot program and provide \$225,000 SEG in 2015-16 and \$75,000 SEG in 2016-17 to fund the program. Specify that this authority would extend only to CMGC contracts awarded prior to July 1, 2019, and that the Department would be able to use a CMGC contract for no more than three highway improvement projects during this period.

Specify that the Department would be able to award a two-phase CMGC contract to a construction manager for preconstruction and construction services. Define a "construction manager" as a person in the business of providing construction services that is also qualified to supervise, manage, or otherwise participate in the engineering, design, or construction work for a highway improvement project. Under this provision, the Department would be able to award a CMGC contract based on qualifications, experience, best value, or any other combination of factors the Department considers appropriate. Require that before project design is 90%

complete, the construction manager would have to provide the Department with a proposal to construct the project. Specify that this proposal would have to include a guaranteed maximum price for project construction and a certification that at least 30% of the work for the construction phase would be performed by the construction manager. In addition, require the Department to obtain an independent cost estimate for the construction of the project. For the construction phase, specify that the Department would be able to enter into a construction contract with the construction manager pursuant to the submitted proposal or could instead opt to revert to the current law bidding process.

Amend current law such that any persons performing any work under the proposed CMGC contract process would be subject to the same statutory prevailing wage and hours of labor requirements that currently apply to highway projects awarded through competitive bidding. Persons in the employ of contractors, subcontractors, or agents, and other persons performing any work under such a contract would be subject to this provision. In addition, amend the statutes so that laws applying in the following areas to highway projects awarded through competitive bids would also apply to CMGC contracts: (a) the definition of subcontractor, supplier, or service provider as it relates to form of contracts, performance bonds, and remedy; (b) when an action may be taken on a performance and payment bond; and (c) the liability exemption for handling petroleum-contaminated soil under contracts with the Department.

Specify that these provisions would be initially applicable to contracts entered into on the general effective date of the bill.

DISCUSSION POINTS

Background and CMGC Process

1. As opposed to awarding contracts to the lowest, qualified bidder, the language in the bill would allow the Department, prior to July 1, 2019, to award no more than three, CMGC contracts for highway projects based on qualifications, experience, best value, or any other combination of factors the Department considers appropriate.

2. As of 2014, 12 states were using a CMGC process, including Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Michigan, Minnesota, New Mexico, Oregon, and Utah. Based on communications with several of these states regarding their CMGC programs, DOT indicates that users of this contracting process generally reported cost and time savings, particularly with regard to technical or more complex highway projects. For example, in the State of Oregon, cost savings equal to between \$8 million and \$10 million were reported due to a CMGC innovation that reused a portion of a bridge as a temporary bridge structure.

3. Under the current design-bid-build model, before the construction contract bidding and award process can take place, a design team must develop project designs so that the project can be let for bids. The current process does not involve a potential project construction manager. When this design and engineering phase is completed, projects are let for bid.

4. Although a similar, initial process would continue to occur under the CMGC model,

this provision would allow a construction manager to be selected and brought onboard during a project's preconstruction (design and engineering) phase. The construction manager would then be assigned to work with the design team during the early stages of design development on such projects and would be paid for these services under the initial, preconstruction phase of the contract. During this preconstruction phase, but before the project design is 90% complete, the CMGC contractor would be required to provide the Department with a proposal to construct the project that includes a guaranteed maximum price for project construction and a certification that at least 30% of the work for the construction phase would be performed by the construction manager. At this point, the Department would be required to obtain an independent project cost estimate. The Department could then decide to do one of the following: (a) award the construction manager the second phase of the contract for construction of the project; (b) revert to the design-bid-build process and bid the project out; or (c) decide not to proceed with the project. [The attachment provides a generic description of the CMGC and design-build models, adapted from material provided by the Federal Highway Administration.]

5. Generally, DOT indicates that it would plan to use the three CMGC contracts in cases where the following factors exist: (a) project design activities are no more than 30% complete; (b) there is an opportunity for phased construction to allow for the possibility of early project completion; (c) project technical or site requirements are of a moderate to high degree of complexity; (d) there is a high potential impact to the public from user delays; and (e) where innovation could save project time or costs. In these instances, the Department indicates that the CMGC model may allow for more efficient and cost-effective delivery of projects, especially when specialized equipment or expertise is required.

6. In addition to the design-bid-build and CMGC processes, there is a distinct contracting process, frequently called the "design-build" model. Under the design-build model, contractors are responsible for construction and design costs based on an initial bid, through which the contractor provides a guaranteed maximum price for the project. This initial bid is generally provided before any substantial project design has been completed. As would be the case for CMGC general contractors, contractors under the design-build model are generally responsible for cost overruns for items included within the scope of the original guaranteed maximum contract price.

7. However, in contrast to the design-build model, under the CMGC model, a general contractor would have participated in the project design process to the point of near completion, prior to providing a guaranteed maximum price for the project. This additional information could result in lower risk for the contractor and, in theory, could result in a lower guaranteed maximum price for the project. For example, the CMGC contractor would likely face many fewer unknowns related to project right of way and utility risks, which must be factored in to a design-build bid price. But, because a CMGC general contractor could still "lose" the construction phase of the contract if DOT were to revert to the design-build bidding process, in theory, the net effect of these factors could result in project savings in the form of a lower, guaranteed maximum price than would result from the Department's typical bidding process.

8. The Department would likely experience higher up-front design costs for the CMGC process because it would need to pay the CMGC contractor for work performed as part of the

design team. Typically, the cost of highway project design is approximately 10% to 15% of the cost of construction. DOT believes that project savings resulting from this process would more than offset these added design costs.

9. Given the concerns related to growing highway program costs, slow transportation fund revenue growth, and the fact that other states have already implemented CMGC processes, some may argue that the Department should have the opportunity to explore contracting options that could yield project savings. Therefore, the Committee could decide to provide the Department with the authority recommended by the Governor in the bill, which would allow the Department to engage in up to three CMGC projects in the next two biennia. [Alternative #A1]

10. Others may contend that any process other than the current, low-bid process could result in the selection of contractors at a higher price than would otherwise be the case. Supporters of this position have suggested that any innovation that would help contractors save money or time would already be implicit in their bid price. For instance, it could be argued that a contractor with specialized expertise or knowledge would use this advantage to produce a more favorable bid price in order to out-bid their competitors.

11. Two possible counterarguments to this position are: (a) collaboration between the contractor and design team early in the preconstruction process on more complex or technical projects could lead to additional cost savings; and (b) there may be cases where a higher-cost, but technically superior alternative, developed through the CMGC model would be preferable due to the anticipated transportation system user delays that could occur under a project plan developed through the current law, design-bid-build process.

12. Some may argue that transparency in the bidding process could be an issue under the CMGC model proposed by the Department. Because a contract could be awarded based on qualifications, experience, best value, or any other combination of factors the Department considers appropriate, it could be difficult to ascertain why one firm was awarded a contract while others were not. In contrast, the current law, lowest-competent bidder model, provides a measure for awarding contracts that is generally based on bid price. [It should be noted that under current law, there are instances in which DOT may not award a contract to the low bidder, for reasons such as a lack of firm capacity or an inability to meet the financial liability requirements.]

13. Some have also contended that an extensive, future use of the CMGC model could impact the pool of bidders for highway construction contracts, as some contractors do not have CMGC experience and would therefore be disadvantaged in competing for CMGC contracts. If this contracting model were to continue in the long term, it could be argued that the CMGC usage could result in a smaller number of firms in the market, which could eventually increase bid price through reduced competition. In light of this and other concerns, the Committee could decide that maintaining the current process is desirable and delete the provision. [Alternative #A3]

14. In relation to these concerns, the provision in the bill would only establish a pilot program of limited scope and duration, which, in the absence of additional statutory authority, would allow the Department to gain experience with the CMGC model, without making a lasting change to the current project delivery method.

Funding

15. DOT would use the funding requested (\$225,000 in 2015-16 and \$75,000 in 2016-17) to hire a consultant to help the Department develop a framework and guidelines to develop a CMGC selection process. Generally, the consultant would work with the Department to develop criteria for project selection, a procurement process, and an independent cost estimating process.

16. The majority of the costs for the initial work would be incurred for consultant labor developing the CMGC process framework and guidelines for the Department's use of this process. Additional consultant labor would be required for project management and outreach to the highway construction industry, as well as for organizing and facilitating meetings between the Department and the industry. The total value of the contract, award of which is pending the Committee's decision with respect to provision of CMGC authority, is anticipated to be \$304,600.

17. Relative to Alternatives #A1 or #A2, which would provide the Department with the CMGC authority, the Committee could decide to provide funding for this purpose [Alternative #B1] or could decide that the Department should pay for the development of this process from its existing resources. [Alternative #B2]

Other Issues

18. The administration provided an erratum with regard to the language in the bill. The modification provided by the administration would, as intended by the Department, specify that for the design and engineering phase of the CMGC process, the Department may enter into a contract with a construction manager based on qualifications, experience, best value, or any other combination of factors the Department considers appropriate. Under the language in the bill, this provision would apply to CMGC contracts generally, rather than for the "the design and engineering phase." According to the administration, DOT believes that this modification would clarify the "two-phase aspect of the CMGC process." It should be noted that because of other provisions in the bill, DOT would be able to enter into a construction contract with the CMGC contractor pursuant to the construction manager's provision of a guaranteed maximum price.

19. If the Committee provides DOT with the authority described under Alternatives #A1 or #A2, it could require the Department to deliver a report with regard to the CMGC pilot program to the Committee and to the standing committees on transportation in each house of the Legislature. [Alternative #C1] This report would include project descriptions, cost-related information, and a recommendation from the Department with regard to the future use of this contracting method.

ALTERNATIVES

A. CMGC Process

1. Approve the Governor's recommendation and authorize the Department to engage in an alternative state highway project delivery and construction model through a construction manager/general contractor (CMGC) pilot program. Specify that this authority would extend only to

CMGC contracts awarded prior to July 1, 2019, and that the Department would be able to use a CMGC contract for no more than three highway improvement projects during this period.

2. Approve the Governor's recommendation, as modified in the administration's budget erratum, and authorize the Department to engage in an alternative state highway project delivery and construction model through a construction manager/general contractor (CMGC) pilot program. As intended by the administration, modify the language in the bill to reflect that for the initial contract for the design and engineering phase of the CMGC process, the Department may enter into a contract with a construction manager based on qualifications, experience, best value, or any other combination of factors the Department considers appropriate.

3. Delete provision.

B. Funding

1. Provide \$225,000 in 2015-16 and \$75,000 in 2016-17 to fund the Department's use of a consultant for CMGC program development.

2. Delete provision (if Alternatives #A1 or #A2 are adopted, funding would have to be provided from base level resources).

ALT B2	Change to Bill
SEG	- \$300,000

C. Pilot Program Reporting

1. Require the Department to deliver a report on the CMGC pilot program to the Committee and to the standing committees on transportation in each house of the Legislature. Specify that this report must contain the following for each project: (a) a description of the project; (b) a narrative describing why the Department chose to use the CMGC process for this project; (c) the guaranteed maximum price provided by the CMGC contractor; (d) a list of innovations and any related time or cost savings generated by the CMGC process; (e) the independent bid price received for the project; and (f) final project cost information that includes line items for design and engineering costs, as well as for project construction costs. Specify that the report must also include a recommendation from the Department as to whether or not additional CMGC authority should be provided. Specify that this report would have to be delivered no later than three months following the completion of the final CMGC project authorized under this provision.

2. Take no action.

Prepared by: John Wilson-Tepeli
Attachment

ATTACHMENT

Alternative Project Delivery Method Descriptions (Adapted from Federal Highway Program Administration Documents)

Construction Manager/General Contractor .The CMGC project delivery method consists of two phases: design and construction. When the owner considers the design to be complete or near completion (generally between 60% and 90% complete), the construction manager then has an opportunity to bid on the project based on the design and schedule. If the owner, designer, and an independent cost estimator agree that the contractor has submitted a fair price, the owner issues a construction contract, and the construction manager then becomes the general contractor. The contractor acts as the consultant during the design process and can offer constructability and pricing feedback on design options and can identify risks based on the contractor's established means and methods.

Design-Build. The design-build project delivery system combines the design and construction phases of a project into a single contract, generally for a guaranteed maximum price. Under this model, construction can begin while project design plans are still being developed. A design-build contract can be awarded on either a "low-bid" or "best-value" basis. While low-bid is used for most traditional contracts, best-value selection permits the consideration of additional factors, such as experience, qualifications, innovation, technical approach, quality control methods, and project management.