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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2010

A N A C T

RELATING TO PUBLIC PROPERTY AND WORKS -- STATE PURCHASES

Introduced By: Senators Sheehan, Sosnowski, C Levesque, Blais, and E O'Neill

Date Introduced: February 11, 2010

Referred To: Senate Government Oversight

It is enacted by the General Assembly as follows:

1 SECTION 1. Section 37-2-7 of the General Laws in Chapter 37-2 entitled "State
2 Purchases" is hereby amended to read as follows:

3 **37-2-7. Definitions.** -- The words defined in this section have the meanings set forth
4 below whenever they appear in this chapter, unless the context in which they are used clearly
5 requires a different meaning or a different definition is prescribed for a particular section, group
6 of sections, or provision:

7 (1) "Business" means any corporation, partnership, individual, sole proprietorship, joint
8 stock company, joint venture, or any other legal entity through which business is conducted.

9 (2) "Change order" means a written order signed by the purchasing agent or contractor
10 directing or allowing the contractor to make changes which the changes clause of the contract
11 authorizes the purchasing agent or contractor to order without the consent of the contractor or
12 purchasing agent.

13 (3) "Chief purchasing officer" shall mean: (i) for a state agency, the director of the
14 department of administration, and (ii) for a public agency, the executive director or the chief
15 operational officer of the agency.

16 (4) "Construction" means the process of building, altering, repairing, improving, or
17 demolishing any public structures or building, or other public improvements of any kind to any
18 public real property. It does not include the routine maintenance or repair of existing structures,
19 buildings, or real property performed by salaried employees of the state of Rhode Island in the

1 usual course of their jobs.

2 (5) "Contract" means all types of agreements, including grants and orders, for the
3 purchase or disposal of supplies, services, construction, or any other item. It includes awards;
4 contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for
5 the issuance of job or task orders; leases; letter contracts; purchase orders; and construction
6 management contracts. It also includes supplemental agreements with respect to any of the
7 foregoing. "Contract" does not include labor contracts with employees of state agencies.

8 (6) "Contract amendment" means any written alteration in the specifications, delivery
9 point, rate of delivery, contract period, price, quantity, or other contract provisions of any existing
10 contract, whether accomplished by unilateral action in accordance with a contract provision, or by
11 mutual action of the parties to the contract. It includes bilateral actions, such as supplemental
12 agreements, and unilateral actions, such as change orders, administrative changes, notices of
13 termination, and notices of the exercise of a contract option.

14 (7) "Contractor" means any person having a contract with a governmental body.

15 (8) "Data" means recorded information, regardless of form or characteristic.

16 (9) "Designee" means a duly authorized representative of a person holding a superior
17 position.

18 (10) "Employee" means an individual drawing a salary from a state governmental entity.

19 (11) "State governmental entity" means any entity created as a legislative body or a
20 public or state agency by the general assembly or constitution of this state, except for municipal,
21 regional, or county governmental entities.

22 (12) "May" means permissive.

23 (13) "Negotiation" means contracting by either the method set forth in section 37-2-19,
24 37-2-20, or 37-2-21.

25 (14) "Person" means any business, individual, organization, or group of individuals.

26 (15) "Procurement" means the purchasing, buying, renting, leasing, or otherwise
27 obtaining of any supplies, services, or construction. It also includes all functions that pertain to
28 the obtaining of any supply, service, or construction item, including a description of
29 requirements, selection and solicitation of sources, preparation, and award of contract, and all
30 phases of contract administration.

31 (16) "Public agency" shall mean the Rhode Island industrial recreational building
32 authority, the Rhode Island economic development corporation, the Rhode Island industrial
33 facilities corporation, the Rhode Island refunding bond authority, the Rhode Island housing and
34 mortgage finance corporation, the Rhode Island resource recovery corporation, the Rhode Island

1 public transit authority, the Rhode Island student loan authority, the Howard development
2 corporation, the water resources board corporate, the Rhode Island health and education building
3 corporation, the Rhode Island higher education assistance authority, the Rhode Island turnpike
4 and bridge authority, the Blackstone Valley district commission, the Narragansett Bay water
5 quality management district commission, the Rhode Island telecommunications authority, the
6 convention center authority, the Channel 36 foundation, the Rhode Island lottery commission
7 their successors and assigns, any other body corporate and politic which has been or will be
8 created or established within this state excepting cities and towns, and the board of governors for
9 higher education for all purchases which are funded by restricted, sponsored, or auxiliary monies.

10 (17) "Purchase request" or "purchase requisition" means that document whereby a using
11 agency requests that a contract be entered into to obtain goods and/or services for a specified
12 need, and may include, but is not limited to, the technical description of the requested item,
13 delivery requirements, transportation mode request, criteria for evaluation of proposals, and/or
14 preparation of suggested sources of supply, and information supplied for the making of any
15 written determination and finding required by section 37-2-6.

16 (18) "Purchasing agency" means any state governmental entity which is authorized by
17 this chapter, its implementing regulations, or by way of delegation from the chief purchasing
18 officer to contract on its own behalf rather than through the central contracting authority of the
19 chief purchasing officer.

20 (19) "Purchasing agent" means any person authorized by a governmental entity in
21 accordance with procedures prescribed by regulations, to enter into and administer contracts and
22 make written determinations and findings with respect to contracts. The term also includes an
23 authorized representative acting within the limits of authority. "Purchasing agent" also means the
24 person appointed in accordance with section 37-2-1.

25 (20) "Services" means the rendering, by a contractor, of its time and effort rather than the
26 furnishing of a specific end product, other than reports which are merely incidental to the required
27 performance of services. "Services" does not include labor contracts with employees of state
28 agencies.

29 (21) "Shall" means imperative.

30 (22) "State" means the state of Rhode Island and any of its departments or agencies and
31 public agencies.

32 (23) "Supplemental agreement" means any contract modification which is accomplished
33 by the mutual action of the parties.

34 (24) "Supplies" means all property, including, but not limited to, leases of real property,

1 printing, and insurance, except land or permanent interest in land.

2 (25) "Using agency" means any state governmental entity which utilizes any supplies,
3 services, or construction purchased under this chapter.

4 (26) As used in section 37-2-59, "architect" or "engineer" services means those
5 professional services within the scope of practice of architecture, professional engineering, or
6 registered land surveying pertaining to construction, as defined by the laws of this state.
7 "Consultant" means any person with whom the state and/or a public agency has a contract which
8 contract provides for the person to give direction or information as regards a particular area of
9 knowledge in which the person is a specialist and/or has expertise.

10 (27) For purposes of sections 37-2-62 -- 37-2-70, "directors" means those members of a
11 public agency appointed pursuant to a statute who comprise the governing authority of the board,
12 commission, authority, and/or corporation.

13 (28) "State agency" means any department, commission, council, board, bureau,
14 committee, institution, or other governmental entity of the executive or judicial branch of this
15 state not otherwise established as a body corporate and politic, and includes, without limitation,
16 the board of governors for higher education except for purchases which are funded by restricted,
17 sponsored, or auxiliary moneys and the board of regents for elementary and secondary education.

18 (29) "Governmental entity" means any department, commission, council, board, bureau,
19 committee, institution, legislative body, agency, or government corporation of the executive,
20 legislative, or judicial branches of state, federal, and/or local governments.

21 (30) "Construction management at-risk" or "construction management at-risk services" or
22 "construction management at-risk delivery method" is a construction method wherein a
23 construction manager at-risk provides a range of preconstruction services and construction
24 management services which may include cost estimation and consultation regarding the design of
25 the building project, the preparation and coordination of bid packages, scheduling, cost control,
26 and value engineering, acting as the general contractor during the construction, detailing the trade
27 contractor scope of work, holding the trade contracts and other contracts, evaluating trade
28 contractors and subcontractors, and providing management and construction services, all at a
29 guaranteed maximum price, which shall represent the maximum amount to be paid by the using
30 agency for the building project, including the cost of work, the general conditions and the fee
31 payable to the construction management at-risk firm.

32 (31) "Construction manager at-risk" or "construction management at-risk firm" is a
33 person or business experienced in construction that has the ability to evaluate and to implement
34 drawings and specifications as they affect time, cost and quality of construction and the ability to

1 coordinate and deliver the construction of the project within a guaranteed maximum price, which
2 shall represent the maximum amount to be paid by the using agency for the building project,
3 including the cost of the work, the general conditions and the fee payable to the construction
4 management at-risk firm. The construction manager at-risk provides consultation services during
5 the preconstruction and construction phases of the project. The project engineer, architect or
6 owner's program manager may not serve as the construction manager at-risk.

7 (32) "Owner's program manager" shall be an entity engaged to provide project
8 management services on behalf of a state agency for the construction and supervision of the
9 construction of a building project. The owner's program manager acts as the owner's agent in all
10 aspects of the construction project, including, but not limited to, architectural programming,
11 planning, design, construction, and the selection and procurement of an appropriate construction
12 delivery method. The owner's program manager shall have at least seven (7) years experience in
13 the construction and supervision of construction of buildings of similar size and complexity. The
14 owner's program manager shall be and have been for at least one year independent of the design
15 firm, the construction firm and the subcontractors.

16 SECTION 2. Chapter 37-2 of the General Laws entitled "State Purchases" is hereby
17 amended by adding thereto the following sections:

18 **37-2-27.1. Procurement of construction manager at-risk services - Written**
19 **determination.** -- (a) Prior to procuring construction manager at-risk services the chief
20 purchasing officer must sign a written determination documenting the following:

21 (1) That in accordance with section 37-2-18, a general contractor selected as the lowest
22 responsive bidder based on a lump-sum, fixed fee contract is not practicable for the construction
23 of the project and will not result in the best value for the state;

24 (2) That the using agency has clearly identified in writing why the use of construction
25 management at-risk services is appropriate for the building project;

26 (3) That the building project has an estimated construction value of twenty-five million
27 dollars (\$25,000,000) or more;

28 (4) That the using agency has in place written procedures to ensure fairness in
29 competition, evaluation and reporting of results at every stage in the procurement process;

30 (5) That the using agency has the capacity, a detailed plan and procedures in place to
31 effectively procure and manage construction management at-risk services for the specific project
32 and has procured the services of a qualified owner's program manager pursuant to chapter 37-2;
33 and

34 (6) That the using agency has a detailed, written plan with clearly identified procedures to

1 monitor and approve all reimbursable costs.

2 The chief purchasing officer shall file copies of the written determination with the
3 president of the senate, the speaker of the house, the senate fiscal advisor and the house fiscal
4 advisor no later than three (3) business days after executing the written determination.

5 (b) Notwithstanding any other provision to the contrary, including any provision
6 exempting any entity from the requirements of this chapter, the chief executive officer of a public
7 corporation as defined in subdivision 35-20-5(4) or the chief executive officer of a quasi-public
8 agency, prior to procuring construction manager at-risk services shall sign a written determination
9 documenting the following:

10 (1) That in accordance with section 37-2-18, a general contractor selected as the lowest
11 responsive bidder based on a lump-sum, fixed fee contract is not practicable for the construction
12 of the project and will not result in the best value for the state;

13 (2) Why the use of construction management at-risk services is appropriate for the
14 building project;

15 (3) That the building project has an estimated construction value of twenty-five million
16 dollars (\$25,000,000) or more;

17 (4) That there is in place written procedures to ensure fairness in competition, evaluation
18 and reporting of results at every stage in the procurement process;

19 (5) That the corporation or quasi-public agency has the capacity, a detailed plan, and
20 procedures in place to effectively procure and manage construction management at-risk services
21 for the specific project and has procured the services of a qualified owner's program manager, as
22 set forth in subdivision 37-2-7(32); and

23 (6) That there is a detailed, written plan with clearly identified procedures to monitor and
24 approve all reimbursable costs.

25 The chief executive officer shall file copies of the written determination with the
26 president of the senate, the speaker of the house, the senate fiscal advisor, and the house fiscal
27 advisor no later than three (3) business days after executing the written determination.

28 **37-2-27.2. Procurement of construction manager at-risk services - Owner's**
29 **program manager.** – (a) In order to bring the experience and knowledge necessary to maximize
30 the benefits of the construction manager at-risk services, a using agency shall procure an owner's
31 program manager as set forth in subdivision 37-2-7(32) prior to procuring a construction manager
32 at-risk. The owner's program manager shall have at least seven (7) years experience in the
33 construction and supervision of the construction of buildings of similar size and complexity. The
34 owner's program manager shall be, and have been for at least one year, independent of the design

1 firm, the construction management at-risk firm, and the subcontractors associated with the
2 project.

3 (b) Notwithstanding any other provision of this section or of the general or public laws to
4 the contrary, including any provision exempting any entity from the requirements of this chapter,
5 all public corporations as defined in subdivision 35-20-5(4) and quasi-public agencies, shall be
6 subject to and shall comply with the terms of this section.

7 **37-2-27.3. Procurement of construction manager at-risk services – Technical review**
8 **subcommittee.** – (a) When procuring a construction manager at-risk, a technical review
9 subcommittee of the architectural, engineering and consulting selection committee, as set forth in
10 sections 37-2-59 through 37-2-63, shall be created to evaluate the statements of qualifications,
11 performance data and cost proposals submitted and any other relevant information. The technical
12 review subcommittee shall be comprised of five (5) members with one member from the division
13 of legal services at the department of administration, one member from the department of
14 administration with experience in the procurement of construction manager at- risk services, the
15 owner's program manager, and no more than two (2) members from the using agency.

16 (b) Prior to opening the cost or pricing data the technical review subcommittee shall
17 prequalify at least three (3) firms as professionally and technically qualified. If unable to
18 prequalify three (3) firms, the technical review subcommittee may re-advertise the request for
19 proposals or may complete the project through the procurement of a general contractor. If unable
20 to prequalify at least three (3) firms after the second advertising of the request for proposals for
21 construction manager at-risk services, the using agency shall complete the project through the
22 procurement of a general contractor.

23 (c) The technical review subcommittee shall draft and evaluate the request for proposals
24 used to procure the construction manger at-risk.

25 (1) If federal restrictions do not prohibit the consideration of cost in the selection process,
26 the request for proposals shall require that the proposals submitted itemize the following:

27 (i) The fee for pre-construction services;

28 (ii) The fee for construction services with the profit and overhead separately itemized;

29 and

30 (iii) The estimated cost of the general conditions.

31 (2) The request for proposals shall include a standardized contract for construction
32 manager at-risk services. Firms responding to the request for proposals shall submit proposed
33 changes to the contract language in writing as part of their proposal. The technical review
34 subcommittee shall consider the favorability to the state of any proposed changes to the

1 standardized contract as a criteria for evaluating and ranking the firms.

2 (3) The technical review subcommittee may conduct written or oral discussions
3 concerning proposed changes to the standardized contract with all offerors determined in writing
4 to be reasonably susceptible to being selected for award. Any discussions conducted must be
5 clearly memorialized through the detailed documentation of the decisions made and the reasons
6 for those decisions.

7 (4) The technical review subcommittee shall submit its final recommendation for
8 selection to the architectural, engineering and consultant services selection committee, as set forth
9 in sections 37-2-59 through 37-2-63.

10 (5) The chief purchasing officer must determine through signature that all the terms of the
11 contract are fair and reasonable to the state.

12 (6) The firm selected may not be reimbursed or paid for any services provided prior to the
13 execution of the contract through signature by the chief purchasing officer, a representative of the
14 using agency and a representative of the construction manager at-risk firm.

15 (d) The technical review subcommittee shall negotiate the guaranteed maximum price as
16 an amendment to the contract executed pursuant to subsection (c) of this section when the design
17 documents are no less than sixty percent (60%) complete. The guaranteed maximum price shall
18 represent the maximum amount to be paid by the using agency for the building project, including
19 the cost of the work, the general conditions and the fee payable to the construction management
20 at-risk firm.

21 (1) The guaranteed maximum price shall itemize:

22 (i) The amount of any construction manger at-risk contingency;

23 (ii) The amount of the general conditions;

24 (iii) Any fees, including fees incurred prior to the guaranteed maximum price;

25 (iv) Each allowance with a statement of its basis;

26 (v) A breakdown of costs by trade;

27 (vi) The dates for substantial and final completion upon which the guaranteed maximum
28 price is based;

29 (vii) A schedule of applicable alternates and the unit prices; and

30 (viii) The drawings, specifications and other information on which the price is based.

31 (2) The chief purchasing officer must determine through signature that all the terms of the
32 guaranteed maximum price amendment are fair and reasonable to the state.

33 (3) The project may not proceed to the construction phase without the execution of the
34 guaranteed maximum price amendment to the contract through signature by the chief purchasing

1 officer, a representative of the using agency and a representative of the construction management
2 at-risk firm.

3 (4) If the technical review subcommittee is unable to obtain a guaranteed maximum price
4 amendment that is fair and reasonable to the state or if the construction management at-risk firm
5 is unable to provide all necessary bonds within five (5) days of the execution of the amendment,
6 the contract shall be terminated in writing and the project shall be completed through the
7 procurement of a general contractor.

8 **37-2-27.4. Procurement of construction manager at-risk services - Bidding of**
9 **subcontracts.** – (a) In order to promote transparency and the fair and equitable treatment of all
10 persons who deal with the procurement system, when using the construction manager at-risk
11 (CMAR) delivery method all subcontract work and equipment and material purchases shall be
12 procured pursuant to the following:

13 (1) All vendors shall be prequalified as a responsible bidder or offeror as defined in
14 subdivision 37-2-15(6);

15 (2) All subcontract work and equipment and material purchases shall be procured through
16 the Rhode Island vendor information program (RIVIP);

17 (3) All bids shall be opened in public at the time and place designated in the invitation for
18 bids and each bid, together with the name of the bidder, shall be recorded and an abstract made
19 available for public inspection;

20 (4) The three (3) lowest responsive bids, as defined in subdivision 37-2-15(7), shall be
21 forwarded to the CMAR who shall evaluate the bids and conduct further negotiations where
22 appropriate;

23 (5) Prior to the awarding of a bid, the using agency shall provide written approval of the
24 final award;

25 (6) The final award shall be awarded with reasonable promptness.

26 (b) When using the construction manager at-risk (CMAR) delivery method, all
27 subcontract work and equipment and material purchases shall be memorialized through the
28 detailed documentation of the decisions made and the reasons for those decisions.

29 (c) All bid documents, bid abstracts and documents referring to the bid process shall be
30 public in accordance with the provisions of chapter 38-2, the Access to Public Records Act. The
31 burden to identify trade secrets, commercial or financial information, or other records not subject
32 to public disclosure pursuant to chapter 38-2 shall rest with the bidder or offeror.

33 Any person or entity denied the right to inspect records may appeal the denial in
34 accordance with the provisions of chapter 38-2, the Access to Public Records Act.

1 **37-2-27.5. Procurement of construction manager at-risk services -- Audit of**
2 **completed project.** – (a) Within ninety (90) days of completing a construction project utilizing
3 the construction manager at-risk delivery method, the using agency shall cause a financial and
4 performance audit of the project in compliance with the generally acceptable governmental
5 auditing standards and conducted by the auditor general, the bureau of audits, or a certified public
6 accounting firm qualified in performance audits.

7 (b) If the audit is not directly performed by his or her office, the selection of the auditor
8 and the scope of the audit shall be subject to the approval of the auditor general.

9 (c) The cost of the audit shall be paid by the using agency out of project funds.

10 (d) The results of the audit shall be made public upon completion and made available for
11 public inspection.

12 (e) Notwithstanding any other provision to the contrary, including any provision
13 exempting any entity from the requirements of this chapter, all public corporations as defined in
14 subdivision 35-20-5(4) and quasi-public agencies, shall be subject to and shall comply with the
15 terms of this section.

16 **37-2-27.6. Procurement of construction manager at-risk services - Public records. --**

17 (a) All documents related to a construction project delivered through a construction manager at-
18 risk, including, but not limited to, design documents, construction documents, bid documents,
19 financial documents and contract documents, shall be considered public records and be made
20 available for public inspection in accordance with chapter 38-2, entitled the Access to Public
21 Records Act. Information may only be withheld from public inspection if the construction
22 manager at-risk firm or the relevant subcontractor specifically states in writing a description of
23 the data or materials to be protected and the reasons why protection is necessary, and if the chief
24 purchasing officer determines through a written determination that the records are not public
25 pursuant to chapter 38-2 access to public records law. The burden to identify trade secrets,
26 commercial or financial information, or other information not subject to public disclosure
27 pursuant to chapter 38-2 shall rest with the construction manager at-risk or the relevant
28 subcontractor. Any person or entity denied the right to inspect records may appeal the denial in
29 accordance with chapter 38-2, the access to public records law.

30 (b) Notwithstanding any other provision to the contrary, including any provision
31 exempting any entity from the requirements of this chapter, all public corporations as defined in
32 subdivision 35-20-5(4) and quasi-public agencies, shall be subject to and shall comply with the
33 terms of this section.

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1 SECTION 3. This act shall take effect upon passage.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO PUBLIC PROPERTY AND WORKS -- STATE PURCHASES

1 This act would add certain definitions regarding "construction management at-risk"
2 services to the state purchases chapter; would create requirements for all persons dealing with the
3 procurement system relative to construction manage at-risk delivery method; would establish
4 criteria with respect to the procurement of construction manager at-risk services; and would
5 require state agencies, public corporations and quasi-public agencies to conduct a financial and
6 performance audit of any construction project which utilizes the construction manager at-risk
7 delivery method.

8 This act would take effect upon passage.

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