

Featured Professionals

Jodie Clark McDougal

Related Services

Construction

Real Estate & Construction

Construction Manager at Risk Project Delivery Method Now Permitted for Iowa Public Projects

Legal Update

07.01.2022

Effective July 1, 2022, Iowa added an alternative project delivery method to the options available to Iowa public entities—construction manager at risk, also known as CM at risk and CMAR. On July 1, SF183, an Act relating to a construction manager-at-risk commercial constructions alternative delivery method and prohibiting certain other alternative delivery methods in the public sector, became effective. This is a significant change to Iowa law. Public owners, contractors, design professionals, and others in the industry must take notice of this new law.

Background

There are various approaches that can be utilized in the design and construction of a project, referred to as project delivery methods. Design-bid-build, often referred to as the traditional method, has been the most common for years. Other methods include design-build, construction manager at risk (“CMAR”), construction manager as advisor, and integrated project delivery. CMAR is still a traditional design-bid-build approach, but with the additional party of a construction manager retained by the owner (as further described below).

Iowa has long prohibited the use of the design-build method on Iowa public projects—that is, construction projects that involve the use of public funds. The only exception to that prohibition has been that the Iowa Board of Regents has recently utilized the design-build method on a limited number of projects (approximately 14). Notably, some argued the Board of Regents did not have the power to use the design-build method, while others disagreed.

In recent years, there have been legislative efforts to amend the law to allow the design-build method for all public projects. Those efforts were unsuccessful. Conversely, this year’s efforts to allow CMAR were successful with the passage of SF183.

Herein is an overview of the law, as well as a summary of the process and rules that must be followed by public entity-owners and construction managers who wish to utilize the CMAR project delivery method. All public owners and contractors who work on public projects should review the new law in detail and speak to their attorney for specific advice.

Construction Manager at Risk Project Delivery Method Now Permitted for Iowa Public Projects



Overview of the Law

The new law establishes a new Chapter 26A of the Iowa Code, which authorizes public projects to be constructed under the CMAR project delivery method. The one exclusion is for highway, bridge, and culvert work, for which the CMAR method is not lawful.

Generally speaking, a CMAR project delivery method involves the negotiation of a Guaranteed Maximum Price ("GMP") for the project with a construction manager who agrees to complete the project for the public entity-owner within the GMP. The GMP includes the cost of the construction work (including work performed by subcontractors and any self-performed work by the construction manager), plus the construction manager's negotiated fee.

In addition to allowing CMAR on public projects, SF183 has two other components.

First, the new law expressly prohibits the Iowa Board of Regents from using design-build contracts. This portion of the bill became effective June 14, 2022. Though, the Board of Regents may now utilize CMAR if it so chooses.

Second, the law expressly prohibits public entities from using fee-based selection of an architect, landscape architect, or engineer for a public project, confirming existing law.

Now, let us turn to the process and rules that must be followed by public entity-owners and construction managers who wish to utilize the CMAR project delivery method.

Public Entity's Intent to Use CMAR

As a starting point, under the law, if a public entity intends to utilize the CMAR method and enter into a GMP contract, such owner must publicly disclose its intent to do so at least 14 days prior to posting a Request for Statement of Qualifications seeking a contractor to serve as a CMAR. Thus, the public entity must first publicly disclose such intent.

Public Entity's Posting of its RFQ

After that 14-day period, the public entity must post its Request for Statement of Qualifications ("RFQ"). The selection criteria within the RFQ must comply with Iowa Code sec. 26A.3(3). During this part of the process, price proposals are *not* requested.

The RFQ must be posted at three specified locations: a contractor plan room service with statewide circulation; a construction lead generating service with statewide circulation; and an internet site sponsored by the governmental entity or statewide association that represents the governmental entity. The RFQ must be posted for not less than 13 days and not more than 45 days in relation to the response deadline.

Construction Manager at Risk Project Delivery Method Now Permitted for Iowa Public Projects



The Content of the RFQ

The RFQ must include general information on the project site, project scope, schedule, selection criteria, and the time and place for receipt of statements of qualifications.

Per Section 26A.3(3) of the law, selection criteria

- May include: the contractor's experience undertaking projects of similar size and scope in either the public or private sector, past performance, safety record, proposed personnel, and proposed methodology. The law expressly states that the criteria shall include experience in both the public and the private sector.
- Shall *not* include: specific delivery methods, including guaranteed maximum price projects.
- Shall *not* include: training, testing, or other certifications that may only be obtained through organized labor affiliations or other limited-membership organizations.

In relation to the above bullet point, the law expressly states:

A governmental entity shall *not* by ordinance, rule, or any other action relating to the request for qualifications stipulate criteria that would directly or indirectly restrict the selection of a construction manager-at-risk to any predetermined class of providers based on labor organization affiliation or any other criteria other than that allowed pursuant to this paragraph. (Section 26A.3(3)(a) (3))

Next, the public entity shall publicly open and read aloud the names of contractors submitting responses to the RFQ. The public entity then evaluates the RFQ proposals within 45 days from the opening.

Public Entity's Posting of its RFP

After considering the statements of qualifications, the public entity shall issue a Request for Proposal ("RFP") to each contractor who meets the qualifications in the RFQ.

The RFP must include selection and evaluation criteria which also complies with the above noted Section 26A.3(3).

Public Entity's Selection of the CMAR

After the timely submission of proposals, the public entity shall publicly open and read aloud the names of contractors who submitted proposals. As with above, the public entity then has 45 days to evaluate and rank the proposals according to selection criteria, with the public entity then selecting the construction manager who submits the proposal that **offers the "best value" to the public entity based on**

Construction Manager at Risk Project Delivery Method Now Permitted for Iowa Public Projects



the published selection criteria and on its ranking evaluation.

“Best value” is *not* defined under the law, but that phrase is clearly different than the general standard under Iowa’s public bidding law of the “lowest responsive, responsible bidder.”

CMAR’s Selection of its Subcontractors and Suppliers

Under the law, the CMAR is required to bid out all work to be performed by subcontractors and suppliers, with one exception noted below for self-performed work. The CMAR must issue an RFQ, similar to the RFQ described above for public owners. The RFQ may only include objective prequalification criteria that meets the requirements of Iowa Code sec. 26A.3(5).

Notably, the law provides, “**the construction manager-at-risk shall *not* be obligated to adhere to any terms and conditions of any labor agreement with one or more labor organizations for those trade contracts that are not self-performed by the construction manager-at-risk for the public improvement, and such terms shall be deemed void and unenforceable.**” (Section 26A.3(5)(a)(4))

The RFQ must be posted at the above noted three specified locations and must be posted for not less than 13 days and not more than 45 days in relation to the response deadline.

After responses are received, the CMAR must notify the subcontractors and suppliers whether they met the prequalification criteria no less than 15 days prior to the bids being due.

All subcontractors and suppliers who meet the prequalification criteria may then submit a bid for the relevant trade packages.

The CMAR and public entity both open and evaluate the bids. The subcontractor and supplier contracts must be awarded to the “lowest responsive, responsible bidder,” which has been the long-standing standard under Iowa’s existing public bidding laws.

CMAR’s Self-Performance of Work

The law also addresses the situation of a CMAR wanting to self-perform work.

If the work that the CMAR wants to self-perform is less than the competitive bidding threshold under Section 314.1B, then the CMAR may choose to do so.

Conversely, if such work exceeds the competitive bidding threshold, the CMAR must submit a bid proposal, as do all other subcontractors.

Construction Manager at Risk Project Delivery Method Now Permitted for Iowa Public Projects



The public entity then evaluates the bids in which the CMAR is included as a bidder. Notably, the law states that “Where the construction manager-at-risk is not the apparent low bidder, the government shall be responsible for determining whether a recommendation of award to the construction manager-at-risk is in the best interests of the project.” Thus, even if the CMAR is not the low bidder, the law provides that the public entity may still recommend to award that work to the CMAR if it is “in the best interests of the project.” Such phrase is not defined under the law.

Importantly, the law clarifies that if the CMAR self-performs the construction work, it **shall** adhere to any agreement it may have with one or more labor organizations.

What’s Next

From here, public owners, construction managers, subcontractors, suppliers, and their respective attorneys will begin the tasks of educating themselves on the law, implementing the law to the extent they are involved in CMAR public projects, and answering the questions that will inevitably arise in implementing and abiding by the new law.

Please contact Jodie McDougal or your attorney with any questions.