A bill for an act

relating to state government; abolishing the state designer selection board; amending Minnesota Statutes 2008, sections 16C.095, subdivision 1; 16C.32, subdivisions 1, 2; 16C.34, subdivision 2; repealing Minnesota Statutes 2008, section 16B.33.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2008, section 16C.095, subdivision 1, is amended to read:

Subdivision 1. **Professional services covered.** This section applies to an agency contract for professional services of persons regulated by the Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design for which the agency, with the approval of the commissioner, decides to use procedures under this section. If the agency, with the approval of the commissioner, decides to use procedures under this section, it must comply with subdivisions 2, 3, and 4. ~~This section does not apply to an agency contract that is subject to section 16B.33.~~

Sec. 2. Minnesota Statutes 2008, section 16C.32, subdivision 1, is amended to read:

Subdivision 1. **Definitions.** As used in sections 16C.32 to 16C.35, the following terms have the meanings given them, unless the context clearly indicates otherwise:

(1) "acceptance" means a formal resolution of the commissioner authorizing the execution of a design-build, construction manager at risk, or job order contracting contract;

(2) "agency" means any state officer, employee, board, commission, authority, department, or other agency of the executive branch of state government. Unless specifically indicated otherwise, as used in sections 16C.32 to 16C.35, agency also includes the Minnesota State Colleges and Universities;

(3) "architect" means an architect or landscape architect registered to practice under sections 326.02 to 326.15;

(4) "board" means the state Designer Selection Board, unless the estimated cost of the project is less than $2,000,000, in which case the commissioner may act as the board;

(5) "Capitol Area Architectural and Planning Board" means the board established to govern the Capitol area under chapter 15B;

(6) "commissioner" means the commissioner of administration or the Board of Trustees of the Minnesota State Colleges and Universities, whichever controls a project;

(7) "construction manager at risk" means a person who is selected by the commissioner to act as a construction manager to manage the construction process, which includes, but is not limited to, responsibility for the price, schedule, and workmanship of the construction performed in accordance with the procedures of section 16C.34;

(8) "construction manager at risk contract" means a contract for construction of a project between a construction manager at risk and the commissioner, which contract shall include a guaranteed maximum price, construction schedule, and workmanship of the construction performed;

(9) "design-build contract" means a contract between the commissioner and a design-builder to furnish the architectural, engineering, and related design services as well as the labor, materials, supplies, equipment, and construction services for a project;

(10) "design and price-based proposal" means the proposal to be submitted by a design-builder in the design and price-based selection process, as described in section 16C.33, which proposal meets the requirements of section 16C.33, subdivision 7, paragraph (c), in such detail as required in the request for proposals;

(11) "design and price-based selection" means the selection of a design-builder as described in section 16C.33, subdivision 8;

(12) "design criteria package" means performance criteria prepared by a design criteria professional who shall be either an employee of the commissioner or shall be selected in compliance with section ~~16B.33,~~ 16C.08~~,~~ or 16C.095;

(13) "design criteria professional" means a person licensed under chapter 326, or a person who employs an individual or individuals licensed under chapter 326, required to design a project, and who is employed by or under contract to the commissioner to provide professional, architectural, or engineering services in connection with the preparation of the design criteria package;

(14) "guaranteed maximum price" means the maximum amount that a design-builder, construction manager at risk, or subcontractor will be paid pursuant to a contract to perform a defined scope of work;

(15) "guaranteed maximum price contract" means a contract under which a design-builder, construction manager, or subcontractor is paid on the basis of their actual cost to perform the work specified in the contract plus an amount for overhead and profit, the sum of which must not exceed the guaranteed maximum price set forth in the contract;

(16) "job order contracting" means a project delivery method that requests a limited number of bids from a list of qualified contractors, selected from a registry of qualified contractors who have been prescreened and who have entered into master contracts with the commissioner, as provided in section 16C.35;

(17) "past performance" or "experience" does not include the exercise or assertion of a person's legal rights;

(18) "person" includes an individual, corporation, partnership, association, or any other legal entity;

(19) "project" means an undertaking to construct, alter, or enlarge a building, structure, or other improvements, except highways and bridges, by or for the state or an agency;

(20) "qualifications-based selection" means the selection of a design-builder as provided in section 16C.33;

(21) "request for qualifications" means the document or publication soliciting qualifications for a design-build, construction manager at risk, or job order contracting contract as provided in sections 16C.33 to 16C.35;

(22) "request for proposals" means the document or publication soliciting proposals for a design-build or construction manager at risk contract as provided in sections 16C.33 and 16C.34; and

(23) "trade contract work" means the furnishing of labor, materials, or equipment by contractors or vendors that are incorporated into the completed project or are major components of the means of construction. Work performed by trade contractors involves specific portions of the project, but not the entire project.

Sec. 3. Minnesota Statutes 2008, section 16C.32, subdivision 2, is amended to read:

Subd. 2. **Authority; design-build contract; construction manager at risk.** (a) Subject to limitations in sections 16B.31, subdivision 1; ~~16B.33, subdivision 1;~~ 16C.16; and 16C.32 to 16C.34, and notwithstanding any other law to the contrary, the commissioner may:

(1) solicit and award a design-build contract on the basis of either a qualifications based or a design and price-based selection process provided in section 16C.33 if the conditions in paragraph (b) are met;

(2) select a construction manager at risk as provided in section 16C.34, and award a guaranteed maximum price contract for a construction manager at risk if the conditions of paragraph (c) are met; and

(3) select a contractor by a job order contracting delivery method as provided in section 16C.35.

(b) The commissioner may not utilize design-build contracts for more than five percent of its total projects let, by number, in each of the fiscal years 2006 and 2007, and ten percent of its total projects let, by number, in each fiscal year thereafter, that are funded in whole or in part with proceeds from the sale of state general obligation bonds; and

(c) The commissioner may not utilize construction manager at risk contracts for more than five percent of its total projects let, by number, in each of the fiscal years 2006 and 2007, and ten percent of its total projects let, by number, in each fiscal year thereafter, that are funded in whole or in part with proceeds from the sale of state general obligation bonds.

(d) Pursuant to section 16B.31, subdivision 4, if the project is within the Capitol area, the project shall comply with sections 15B.03, subdivision 3; 15B.08, subdivision 2; 15B.10; and 15B.15, subdivision 4.

(e) The commissioner shall, for each design-build or construction manager at risk contract, make a written determination, including specific findings, indicating whether use of the design-build or construction manager at risk procurement serves the public interest.

(f) The solicitation of requests for qualifications or proposals does not obligate the commissioner to enter into a design-build or construction manager at risk contract. In accordance with the stated criteria and subcriteria for evaluating qualifications or proposals, the commissioner may accept or reject any or all responses received as a result of the request. The solicitation for qualifications or proposals may be canceled at any time in the commissioner's sole discretion if it is considered to be in the public's best interest. If the commissioner rejects all responses or cancels the solicitation for proposals, the commissioner may resolicit a request for qualifications or proposals using the same or different requirements or request selection of a primary designer pursuant to section ~~16B.33,~~ 16C.08~~,~~ or 16C.095 and proceed with competitive bidding pursuant to sections 16C.25 to 16C.29.

Sec. 4. Minnesota Statutes 2008, section 16C.34, subdivision 2, is amended to read:

Subd. 2. **Construction manager at risk selection process.** In a construction manager at risk selection process, the following shall apply:

(a)(1) Upon receipt of a written request from a user agency for a construction manager at risk for its project, the commissioner shall create a selection committee

composed of a minimum of three persons, at least one of whom has construction industry expertise; (2) the selection committee shall establish procedures for determining the appropriate content of each request for qualifications, the weighted criteria and subcriteria to be used to score the proposals of the construction managers at risk, and shall establish procedures for evaluating qualifications in an open, competitive, and objective manner; and (3) the commissioner shall issue a request for qualifications that includes the information as described in subdivision 1.

(b) In accordance with the criteria and procedures set forth in the request for qualifications, the selection committee shall evaluate the construction manager at risk's experience as a constructor, including, but not limited to, capacity of key personnel, technical competence, capability to perform, the past performance of the construction manager at risk and its employees, its safety record and compliance with state and federal law, availability to and familiarity with the project locale, and other appropriate facts submitted by the construction manager at risk in response to the request for qualifications. The commissioner must receive at least three proposals from construction managers or the commissioner may either (1) solicit new proposals; (2) request the selection committee to revise the request for qualifications and thereafter solicit new proposals using the revised request for qualifications; (3) select another allowed procurement method; or (4) reject all proposals.

(c)(1) The selection committee shall review the proposers' qualifications and create a short list of three to five proposals of construction managers at risk; (2) the commissioner shall issue a request for proposal requiring fee and expense proposals and other information as desired from the short-listed construction managers at risk; (3) the selection committee shall conduct formal interviews with the short-listed construction managers at risk but shall not disclose any proprietary or confidential information contained in one proposal to another proposer; and (4) the selection committee shall recommend the construction manager at risk achieving the highest score on the evaluation criteria as described in subdivision 1, paragraph (b).

(d) The ~~board~~ commissioner shall select the primary designer as described in ~~section 16B.33 or in the case of the commissioner,~~ section 16C.08 or 16C.095.

Sec. 5. **REPEALER.**

Minnesota Statutes 2008, section 16B.33, is repealed.

Sec. 6. **EFFECTIVE DATE.**

Sections 1 to 5 are effective July 1, 2009.

16B.33 DESIGNER SELECTION BOARD.

Subdivision 1. **Definitions.** As used in this section, the following terms have the meanings given them:

(a) "Agency" has the meaning given in section 16B.01.

(b) "Architect" means an architect or landscape architect registered to practice under sections 326.02 to 326.15.

(c) "Board" means the state Designer Selection Board.

(d) "Design-build" means the process of entering into and managing a single contract between the commissioner and the design-builder in which the design-builder agrees to both design and construct a project as specified in the contract at a guaranteed maximum or a fixed price.

(e) "Design-builder" means a person who proposes to design and construct a project in accordance with the requirements of section 16C.33.

(f) "Designer" means an architect or engineer, or a partnership, association, or corporation comprised primarily of architects or engineers or of both architects and engineers.

(g) "Engineer" means an engineer registered to practice under sections 326.02 to 326.15.

(h) "Person" includes an individual, corporation, partnership, association, or any other legal entity.

(i) "Primary designer" means the designer who is to have primary design responsibility for a project, and does not include designers who are merely consulted by the user agency and do not have substantial design responsibility, or designers who will or may be employed or consulted by the primary designer.

(j) "Project" means an undertaking to construct, erect, or remodel a building by or for the state or an agency.

(k) "User agency" means the agency undertaking a specific project. For projects undertaken by the state of Minnesota, "user agency" means the Department of Administration or a state agency with an appropriate delegation to act on behalf of the Department of Administration.

Subd. 2. **Organization of board.** (a) Membership. The state Designer Selection Board consists of seven individuals, the majority of whom must be Minnesota residents. Each of the following four organizations shall nominate one individual whose name and qualifications shall be submitted to the commissioner of administration for consideration: the Consulting Engineers Council of Minnesota after consultation with other professional engineering societies in the state; the AIA Minnesota; the Minnesota chapter of the Associated General Contractors after consultation with other commercial contractor associations in the state; and the Minnesota Board of the Arts. The commissioner may appoint the four named individuals to the board but may reject a nominated individual and request another nomination. The fifth member shall be a representative of the user agency, the University of Minnesota, or the Minnesota State Colleges and Universities, designated by the user agency. The remaining two citizen members shall also be appointed by the commissioner.

(b) Nonvoting member. In addition to the seven members of the board, one nonvoting member representing the commissioner shall participate in the interviewing and selection of designers pursuant to this section.

(c) Terms; compensation; removal; vacancies. The membership terms, compensation, removal of members, and filling of vacancies on the board are as provided in section 15.0575. No individual may serve for more than two consecutive terms.

(d) Officers, rules. At its first meeting, the board shall elect a voting member of the board as chair. The board shall also elect other officers necessary for the conduct of its affairs. The board shall adopt rules governing its operations and the conduct of its meetings. The rules shall provide for the terms of the chair and other officers.

(e) Meetings. The board shall meet as often as is necessary, not less than twice annually, in order to act expeditiously on requests submitted to it for selection of primary designers.

(f) Office, staff, records. The Department of Administration shall provide the board with suitable quarters to maintain an office, hold meetings, and keep records. The commissioner shall designate an employee of the Department of Administration to serve as executive secretary to the board and shall furnish a secretarial staff to the board as necessary for the expeditious conduct of the board's duties and responsibilities.

Subd. 3. **Agencies must request designer.** (a) Application. Upon undertaking a project with an estimated cost greater than $2,000,000 or a planning project with estimated fees greater than $200,000, every user agency, except the Capitol Area Architectural and Planning Board, shall submit a written request for a primary designer for its project to the commissioner, who shall

forward the request to the board. The University of Minnesota and the Minnesota State Colleges and Universities shall follow the process in subdivision 3a to select designers for their projects. The written request must include a description of the project, the estimated cost of completing the project, a description of any special requirements or unique features of the proposed project, and other information which will assist the board in carrying out its duties and responsibilities set forth in this section.

(b) Reactivated project. If a project for which a designer has been selected by the board becomes inactive, lapses, or changes as a result of project phasing, insufficient appropriations, or other reasons, the commissioner, the Minnesota State Colleges and Universities, or the University of Minnesota may, if the project is reactivated, retain the same designer to complete the project.

(c) Fee limit reached after designer selected. If a project initially estimated to be below the cost and planning fee limits of this subdivision has its cost or planning fees revised so that the limits are exceeded, the project must be referred to the board for designer selection even if a primary designer has already been selected. In this event, the board may, without conducting interviews, elect to retain the previously selected designer if it determines that the interests of the state are best served by that decision and shall notify the commissioner of its determination.

Subd. 3a. **Higher education projects.** (a) When the University of Minnesota or the Minnesota State Colleges and Universities undertakes a project involving construction or major remodeling, as defined in section 16B.335, subdivision 1, with an estimated cost greater than $2,000,000 or a planning project with estimated fees greater than $200,000, the system shall submit a written request for a primary designer to the commissioner, as provided in subdivision 3.

(b) When the University of Minnesota or the Minnesota State Colleges and Universities undertakes a project involving renovation, repair, replacement, or rehabilitation, the system office may submit a written request for a primary designer to the commissioner as provided in subdivision 3.

(c) For projects at the University of Minnesota or the State Colleges and Universities, the board shall select at least two primary designers under subdivision 4 for recommendation to the Board of Regents or the Board of Trustees. Meeting records or written evaluations that document the final selection are public records. The Board of Regents or the Board of Trustees shall notify the commissioner of the designer selected from the recommendations.

Subd. 4. **Designer selection process.** (a) Publicity. Upon receipt of a request from a user agency for a primary designer, the board shall publicize the proposed project in order to determine the identity of designers interested in the design work on the project. The board shall establish criteria for the selection process and make this information public, and shall compile data on and conduct interviews of designers. The board's selection criteria must include consideration of each interested designer's performance on previous projects for the state or any other person. Upon completing the process, the board shall select the primary designer and shall state its reasons in writing. If the board's vote for the selection of a primary designer results in a tie vote, the nonvoting member appointed under subdivision 2, paragraph (b), must vote for the selection of the primary designer. Notification to the commissioner of the selection shall be made not more than 60 days after receipt from a user agency of a request for a primary designer. The commissioner shall promptly notify the designer and the user agency. The commissioner shall negotiate the designer's fee and prepare the contract to be entered into between the designer and the user agency.

(b) Conflict of interest. A board member may not participate in the review, discussion, or selection of a designer or firm in which the member has a financial interest.

(c) Selection by commissioner. In the event the board receives a request for a primary designer on a project, the estimated cost of which is less than the limit established by subdivision 3, or a planning project with estimated fees of less than the limit established by subdivision 3, the board may submit the request to the commissioner of administration, with or without recommendations, and the commissioner shall thereupon select the primary designer for the project.

(d) Second selection. If the designer selected for a project declines the appointment or is unable to reach agreement with the commissioner on the fee or the terms of the contract, the commissioner shall, within 60 days after the first appointment, request the board to make another selection.

(e) Sixty days to select. If the board fails to make a selection and forward its recommendation to the commissioner within 60 days of the user agency's request for a designer, the commissioner may appoint a designer to the project without the recommendation of the board.

(f) Less than satisfactory performance. The commissioner, or the University of Minnesota and the Minnesota State Colleges and Universities for projects under their supervision, shall forward to the board a written report describing each instance in which the performance of a designer selected by the board or the commissioner has been less than satisfactory. Criteria for

determining satisfaction include the ability of the designer to complete design work on time, to provide a design responsive to program needs within the constraints of the budget, to solve design problems and achieve a design consistent with the proposed function of the building, to avoid costly design errors or omissions, and to observe the construction work. These reports are public data and are available for inspection under section 13.03.