

OFFICIAL OPINION NO. 11-01, Construction Manager-at-Risk Services Available to be Provided

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

February 23, 2011

Randolph F. Stiles  
Mitchell City Attorney  
612 N. Main St.  
Mitchell, SD 57301

OFFICIAL OPINION NO. 11-01

**Construction Manager-at-Risk Services Available to be Provided**

Dear Mr. Stiles:

You have requested an official opinion from this Office regarding the following question:

QUESTION 1:

Whether the construction management provisions in SDCL 5-18B-40 through 44 allow the City to hire a construction manager-at-risk where the construction manager does not perform any of the actual construction work on the project other than warranty work or completion/correction of incomplete or unacceptable work done by a third party contractor, subcontractor or supplier and receives no additional compensation for such work?

QUESTION 2:

Whether a construction manager-at-risk providing architect/engineer services violates SDCL 5-18B-15 where the construction manager's performance of work on the project is limited to warranty work or completion/correction of incomplete or unacceptable work done by third parties?

OPINION SUMMARY:

The City may negotiate a contract with a firm to act as a construction manager-at-risk; however, that firm may not perform any construction work, including warranty work or completion/correction of incomplete or unacceptable work done by a third party. SDCL

5-18B-15 prohibits a construction manager-at-risk from performing architect or engineer services and performing any construction work when the public improvement exceeds \$100,000.

FACTS:

The City of Mitchell is in the development stages of construction of a community wellness center. The City desires to hire, through negotiation, a firm who will provide services as an architect/engineer and act as a construction manager-at-risk for the project. It is anticipated that the firm acting as a construction manager-at-risk will enter into contracts with third party contractors, subcontractors and suppliers utilizing a bidding process with public notice. It is further anticipated that the firm will not perform construction work, except which is necessary for the completion or correction of work performed by third party contractors, subcontractors and suppliers, or warranty work following final acceptance and occupancy by the City. It is anticipated that the firm will receive no additional compensation for such work.

IN RE QUESTION 1:

In 2003, the South Dakota Legislature authorized construction management as an alternative procurement system for construction of a public improvement. SDCL 5-18-45 through 54. These construction management provisions were substantially recodified as part of the 2010 revision of the government procurement laws. See SDCL 5-18A-1(5), (6), (7), (8), SDCL 5-18B-39 through 45. The decision to contract for construction management services is discretionary. SDCL 5-18B-39.

Under state law, there are two types of construction managers; construction manager-agents and construction managers-at-risk. Your question pertains solely to a construction manager-at-risk. SDCL 5-18A-1(8) defines "construction manager-at-risk" as "any construction manager that assumes the risk for construction, rehabilitation, alteration, or repair of a public improvement and that provides construction management services to the purchasing agency." One of the distinctive characteristics of using a construction manager-at-risk is that the construction manager-at-risk, and not the governing body, is the entity that contracts directly with the contractor, subcontractor and suppliers of a project. SDCL 5-18B-42. This provision facilitates the construction manager-at-risk's assumption of the monetary risks of construction.

The Legislature varied the procedure required of a governing body in contracting with a construction manager-at-risk, depending on whether the construction manager-at-risk is to "perform actual construction on the project." Where actual construction is to be performed, unless the exceptions in SDCL 5-18B-43(2)(c) or (d) apply, the governing body must satisfy the request for proposal method of procurement under SDCL 5-18B-44. SDCL 5-18B-43(2)(b). There is no comparable provision when the construction manager-at-risk does not perform construction services. Thus, if construction services are not part of the contract, local governmental bodies may negotiate a construction manager-at-risk contract.

Assuming that the City negotiates a contract for construction manager-at-risk services, the question is whether the construction manager-at-risk may perform warranty work or completion/correction of incomplete or unacceptable work performed by a third party with whom the construction manager-at-risk has contracted. The answer to this question is no. SDCL 5-18A-1(4) defines "construction" and "constructed," "in addition to their ordinary meaning, repair, demolition, and alteration." Based upon this broad definition, "construction" encompasses warranty work and the completion/correction of incomplete or unacceptable work done by a third party. Thus, under the current statutory scenario, a construction manager-at-risk hired under a negotiated contract may not perform any construction activities. SDCL 5-18B-43(2) and 5-18B-44.

IN RE QUESTION 2:

SDCL 5-18B-15 provides:

No person, firm, or corporation may act as architect or engineer and also contractor on any public improvement project if the amount to be expended exceeds one hundred thousand dollars. Any public improvement of an emergency nature which affects the public health and safety of the state and are funded through the use of an emergency appropriation or special appropriation, and any full-service firm which specialize in the design, fabrication, and installation of cultural and educational exhibits are exempt from this section.

Assuming that the public improvement exceeds \$100,000, it is my opinion that SDCL 5-18B-15 prohibits a construction manager-at-risk from performing architectural/engineering services, and also acting as a contractor. As set forth above, "construction" includes warranty work and work necessary for completion/correction of incomplete or unacceptable work.

Respectfully Submitted,

Marty J. Jackley  
Attorney General

MJJ/JPH/rar

<sup>11</sup> In contrast, given the description of the services performed by a construction manager in SDCL 5-18B-40, state agencies may be required to go through a request for proposal process under SDCL

5-18D-17 to 20. The description of services for a construction manager satisfies the definition of “professional services” in SDCL 5-18A-1(19).