

Second Regular Session
Seventy-third General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 22-0294.01 Jason Gelender x4330

SENATE BILL 22-074

SENATE SPONSORSHIP

Scott, Hisey, Sonnenberg

HOUSE SPONSORSHIP

(None), Pico, VanWinkle

Senate Committees

Finance

House Committees

A BILL FOR AN ACT

101 CONCERNING MONITORING OF THE USE OF PROCUREMENT METHODS
102 OTHER THAN TRADITIONAL DESIGN BID BUILD PROCUREMENT
103 FOR TRANSPORTATION PROJECTS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

The bill requires the transportation commission (commission) to annually contract with a fairness monitor to review and monitor the procurement process for transportation projects that the department of transportation (department) or an agency or enterprise of the department intends to procure using an alternative form of contracting. An alternative

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

form of contracting is any method of procurement used by the department or an agency or enterprise of the department for a transportation project other than design bid build contracting.

Before the department or an agency or enterprise of the department uses an alternative form of contracting to procure a transportation project, the fairness monitor is required to:

- Review the project to determine whether use of the alternative form of contracting will result in successful completion of the project sooner or at a lower cost;
- Review the decision making process by all involved department, agency, or enterprise employees regarding the decision to use an alternative form of contracting for the project;
- Oversee the fairness of the project criteria development, project advertisement, and contractor selection processes for the project; and
- Report to the contracting fairness committee (committee) required to be created by the commission regarding these reviews and oversight and make a recommendation to the committee as to whether the alternative form of contracting proposed for the project should be used.

The committee is required to review the information and recommendations reported to it by the fairness monitor and report to the commission its assessment of any recommendation of the fairness monitor that an alternative form of contracting project should not be used for a project.

For any transportation project for which an alternative form of contracting is used, the fairness monitor is required to designate a third-party team of private persons with expertise in contracting for transportation projects for the purpose of monitoring the fairness of the procurement process for the project. The department or an agency or enterprise of the department is required to pay the costs of the third-party team and to impose an equal fee on all contractors seeking to be selected for the project in an amount calculated to generate 50% of the amount needed to pay those costs.

Upon the completion of construction for any transportation project for which an alternative form of contracting is used, the fairness monitor is required to conduct a review of the project that, at a minimum:

- Compares actual project completion costs and time to the original budget, contract amount, and schedule for the project; and
- Makes a record of any claims, disputes, or pending litigation arising out of the project.

The fairness monitor is required to report the results of the review to the committee.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, **add** 43-1-131 as
3 follows:

4 **43-1-131. Monitoring of alternative forms of contracting -**
5 **fairness monitor - contracting fairness committee - legislative**
6 **declaration - definitions.** (1) (a) THE GENERAL ASSEMBLY HEREBY FINDS

7 AND DECLARES THAT:

8 (I) DESIGN BID BUILD CONTRACTING, ALSO KNOWN AS LOW BID
9 CONTRACTING OR THE TRADITIONAL METHOD OF CONTRACTING, IS OFTEN
10 A MORE COST-EFFECTIVE AND FAIR METHOD OF PROCURING
11 TRANSPORTATION PROJECTS THAN ALTERNATIVE FORMS OF CONTRACTING
12 THAT THE DEPARTMENT USES BECAUSE DESIGN BID BUILD CONTRACTING:

13 (A) REQUIRES THE DEPARTMENT TO FIRST DESIGN OR CONTRACT
14 FOR THE DESIGN OF A PROJECT AND THEN SOLICIT COMPETITIVE BIDS FOR
15 THE CONSTRUCTION OF THE PROJECT;

16 (B) IS WELL UNDERSTOOD BY BOTH THE DEPARTMENT AND
17 CONTRACTORS; AND

18 (C) ENSURES THAT MULTIPLE QUALIFIED CONTRACTORS COMPETE
19 ON AN EQUAL BASIS FOR CONTRACTS ON THE BASIS OF PRICE, THAT THE
20 LOW RESPONSIBLE BIDDER FOR EACH PROJECT FOR WHICH THE
21 DEPARTMENT SOLICITS BIDS IS AWARDED THE CONTRACT FOR THE
22 PROJECT, AND THAT THE BASIS FOR EACH CONTRACT AWARD IS APPARENT
23 TO THE PUBLIC;

24 (II) FOR MANY YEARS, THE DEPARTMENT PROCURED
25 TRANSPORTATION PROJECTS SUCH AS ROADS, HIGHWAYS, AND BRIDGES
26 EXCLUSIVELY BY USING DESIGN BID BUILD CONTRACTING, BUT OVER THE

1 LAST THREE DECADES THE GENERAL ASSEMBLY HAS AUTHORIZED THE
2 DEPARTMENT TO USE, AND THE DEPARTMENT HAS INCREASINGLY USED,
3 SEVERAL ALTERNATIVE FORMS OF CONTRACTING SUCH AS COMPETITIVE
4 SEALED BEST VALUE BIDDING, INTEGRATED PRODUCT DELIVERY
5 CONTRACTS, PUBLIC-PRIVATE INITIATIVES, PUBLIC-PRIVATE
6 PARTNERSHIPS, AND DESIGN-BUILD CONTRACTS; AND

7 (III) WHILE THE USE OF ALTERNATIVE FORMS OF CONTRACTING BY
8 THE DEPARTMENT IS SOMETIMES APPROPRIATE, ESPECIALLY FOR LARGE
9 AND COMPLEX PROJECTS THAT FEW CONTRACTORS ARE CAPABLE OF
10 EFFECTIVELY AND EFFICIENTLY COMPLETING, OVERUSE OF ALTERNATIVE
11 FORMS OF CONTRACTING IN LIEU OF DESIGN BID BUILD CONTRACTING FOR
12 TRANSPORTATION PROJECTS FOR WHICH DESIGN BID BUILD CONTRACTING
13 IS FEASIBLE IS UNFAIR BECAUSE IT LIMITS THE ABILITY OF CONTRACTORS
14 THAT ARE SMALL OR MEDIUM-SIZED, RECENTLY ESTABLISHED, OR FOCUSED
15 ON A NARROW RANGE OF TECHNICAL CONTRACTING CAPABILITIES FROM
16 COMPETING FOR THOSE CONTRACTS AGAINST LARGER OR MORE
17 EXPERIENCED CONTRACTORS ON A TRANSPARENT AND OBJECTIVELY
18 EVALUATED LOW-COST BASIS.

19 (b) THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT
20 TO INCREASE FAIRNESS IN DEPARTMENT CONTRACTING, INCLUDING
21 CONTRACTING BY AGENCIES AND ENTERPRISES OF THE DEPARTMENT, BY
22 LIMITING OVERUSE OF ALTERNATIVE FORMS OF CONTRACTING, IT IS
23 NECESSARY AND APPROPRIATE TO REQUIRE ADDITIONAL MONITORING OF
24 THE PROCUREMENT PROCESS FOR TRANSPORTATION PROJECTS FOR WHICH
25 ALTERNATIVE FORMS OF CONTRACTING ARE BEING CONSIDERED IN THE
26 MANNER SET FORTH IN THIS SECTION.

27 (2) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE

1 REQUIRES:

2 (a) "ALTERNATIVE FORM OF CONTRACTING" MEANS ANY METHOD
3 OF PROCUREMENT USED BY THE DEPARTMENT OR AN AGENCY OR
4 ENTERPRISE OF THE DEPARTMENT FOR A TRANSPORTATION PROJECT OTHER
5 THAN DESIGN BID BUILD CONTRACTING SUCH AS COMPETITIVE SEALED
6 BEST VALUE BIDDING AUTHORIZED BY SECTION 24-92-103.5, AN
7 INTEGRATED PRODUCT DELIVERY CONTRACT AUTHORIZED BY ARTICLE 93
8 OF TITLE 24, A PUBLIC-PRIVATE INITIATIVE AUTHORIZED BY PART 12 OF
9 THIS ARTICLE 1, A DESIGN-BUILD CONTRACT AUTHORIZED BY PART 14 OF
10 THIS ARTICLE 1, OR A PUBLIC-PRIVATE PARTNERSHIP.

11 (b) "DESIGN BID BUILD CONTRACTING" MEANS THE METHOD OF
12 PROCUREMENT THAT CONSISTS OF THE DEPARTMENT OR AN AGENCY OR
13 ENTERPRISE OF THE DEPARTMENT FIRST DESIGNING OR CONTRACTING FOR
14 THE DESIGN OF A TRANSPORTATION PROJECT AND THEN SOLICITING
15 COMPETITIVE BIDS FOR THE CONSTRUCTION OF THE TRANSPORTATION
16 PROJECT USING THE INVITATION FOR BIDS PROCESS SET FORTH IN SECTION
17 24-92-103.

18 (3) (a) FOR THE 2022-23 STATE FISCAL YEAR AND FOR EACH STATE
19 FISCAL YEAR THEREAFTER, THE COMMISSION SHALL CONTRACT ON AN
20 ANNUAL BASIS FOR THE SERVICES OF A FAIRNESS MONITOR TO REVIEW AND
21 MONITOR THE PROCUREMENT PROCESS FOR TRANSPORTATION PROJECTS
22 FOR WHICH THE DEPARTMENT OR AN AGENCY OR ENTERPRISE OF THE
23 DEPARTMENT INTENDS TO USE OR IS USING AN ALTERNATIVE FORM OF
24 CONTRACTING.

25 (b) BEFORE THE DEPARTMENT OR AN AGENCY OR ENTERPRISE OF
26 THE DEPARTMENT USES AN ALTERNATIVE FORM OF CONTRACTING TO
27 PROCURE A TRANSPORTATION PROJECT, THE FAIRNESS MONITOR SHALL:

1 (I) REVIEW THE PROJECT TO DETERMINE WHETHER, COMPARED TO
2 USING DESIGN BID BUILD CONTRACTING, USE OF THE ALTERNATIVE FORM
3 OF CONTRACTING WILL RESULT IN SUCCESSFUL COMPLETION OF THE
4 PROJECT SOONER OR AT A LOWER COST;

5 (II) REVIEW THE DECISION MAKING PROCESS BY ALL INVOLVED
6 DEPARTMENT, AGENCY, OR ENTERPRISE EMPLOYEES REGARDING THE
7 DECISION TO USE AN ALTERNATIVE FORM OF CONTRACTING FOR THE
8 PROJECT;

9 (III) OVERSEE THE PROJECT CRITERIA DEVELOPMENT, PROJECT
10 ADVERTISEMENT, AND CONTRACTOR SELECTION PROCESSES FOR THE
11 PROJECT TO ENSURE THAT ANY USE OF AN ALTERNATIVE FORM OF
12 CONTRACTING IS AT EACH STEP CONDUCTED WITHOUT CREATING ANY
13 ACTUAL OR PERCEIVED UNFAIR ADVANTAGE TO ANY PROSPECTIVE
14 CONTRACTOR; AND

15 (IV) REPORT TO THE CONTRACTING FAIRNESS COMMITTEE
16 CREATED IN SUBSECTION (4) OF THIS SECTION REGARDING THE REVIEWS
17 AND OVERSIGHT REQUIRED FOR THE PROJECT BY SUBSECTIONS (3)(b)(I)
18 THROUGH (3)(b)(III) OF THIS SECTION AND MAKE A RECOMMENDATION TO
19 THE COMMITTEE AS TO WHETHER THE ALTERNATIVE FORM OF
20 CONTRACTING PROPOSED FOR THE PROJECT SHOULD BE USED.

21 (4) THE COMMISSION SHALL CREATE A CONTRACTING FAIRNESS
22 COMMITTEE. THE COMMITTEE SHALL REVIEW THE INFORMATION AND
23 RECOMMENDATIONS REPORTED TO IT BY THE FAIRNESS MONITOR
24 PURSUANT TO SUBSECTION (3)(b)(IV) OF THIS SECTION AND SHALL REPORT
25 TO THE COMMISSION ITS ASSESSMENT OF ANY RECOMMENDATION OF THE
26 FAIRNESS MONITOR THAT AN ALTERNATIVE FORM OF CONTRACTING
27 PROJECT PROPOSED BY THE DEPARTMENT OR AN AGENCY OR ENTERPRISE

1 OF THE DEPARTMENT SHOULD NOT BE USED FOR A PROJECT. THE
2 COMMITTEE MUST INCLUDE:

3 (a) FROM THE EXECUTIVE BRANCH OF STATE GOVERNMENT:

4 (I) TWO MEMBERS OF THE COMMISSION DESIGNATED BY THE
5 COMMISSION, ONE OF WHOM MUST ALSO BE A MEMBER OF THE BOARD OF
6 DIRECTORS OF THE HIGH-PERFORMANCE TRANSPORTATION ENTERPRISE
7 CREATED IN SECTION 43-4-806 (2)(a)(I);

8 (II) THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OR THE
9 EXECUTIVE DIRECTOR'S DESIGNEE; AND

10 (III) THE CHIEF ENGINEER OF THE DEPARTMENT OR THE CHIEF
11 ENGINEER'S DESIGNEE;

12 (b) FROM THE LEGISLATIVE BRANCH OF STATE GOVERNMENT:

13 (I) ONE MEMBER OF THE HOUSE OF REPRESENTATIVES DESIGNATED
14 BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES IN CONSULTATION
15 WITH THE MINORITY LEADER OF THE HOUSE OF REPRESENTATIVES; AND

16 (II) ONE MEMBER OF THE SENATE DESIGNATED BY THE PRESIDENT
17 OF THE SENATE IN CONSULTATION WITH THE MINORITY LEADER OF THE
18 SENATE; AND

19 (c) FROM OUTSIDE OF STATE GOVERNMENT, ONE REPRESENTATIVE
20 OF CONTRACTORS DESIGNATED BY THE COLORADO CONTRACTORS
21 ASSOCIATION.

22 (5) FOR ANY TRANSPORTATION PROJECT FOR WHICH AN
23 ALTERNATIVE FORM OF CONTRACTING IS USED, THE FAIRNESS MONITOR
24 SHALL DESIGNATE A THIRD-PARTY TEAM OF PRIVATE PERSONS WITH
25 EXPERTISE IN CONTRACTING FOR TRANSPORTATION PROJECTS FOR THE
26 PURPOSE OF MONITORING THE FAIRNESS OF THE PROCUREMENT PROCESS
27 FOR THE PROJECT. THE THIRD-PARTY TEAM MUST BE PAID ON A PER

1 PROJECT BASIS. THE DEPARTMENT OR AN AGENCY OR ENTERPRISE OF THE
2 DEPARTMENT SHALL PAY THE COSTS OF THE THIRD-PARTY TEAM AND
3 SHALL IMPOSE AN EQUAL FEE ON ALL CONTRACTORS SEEKING TO BE
4 SELECTED FOR THE PROJECT IN AN AMOUNT CALCULATED TO GENERATE
5 FIFTY PERCENT OF THE AMOUNT NEEDED TO PAY THOSE COSTS.

6 (6) (a) UPON THE COMPLETION OF CONSTRUCTION FOR ANY
7 TRANSPORTATION PROJECT FOR WHICH AN ALTERNATIVE FORM OF
8 CONTRACTING IS USED, THE FAIRNESS MONITOR SHALL CONDUCT A REVIEW
9 OF THE PROJECT THAT, AT A MINIMUM:

10 (I) COMPARES THE ACTUAL COST OF COMPLETING THE PROJECT TO
11 THE ORIGINAL BUDGET AND CONTRACT AMOUNT FOR THE PROJECT;

12 (II) COMPARES THE ACTUAL AMOUNT OF TIME THAT IT TOOK TO
13 COMPLETE THE PROJECT TO THE ORIGINAL PROJECT SCHEDULE AS
14 SPECIFIED IN THE PROJECT CONTRACT; AND

15 (III) MAKES A RECORD OF ANY CLAIMS, DISPUTES, OR PENDING
16 LITIGATION ARISING OUT OF THE PROJECT.

17 (b) THE FAIRNESS MONITOR SHALL REPORT THE RESULTS OF THE
18 REVIEW REQUIRED BY SUBSECTION (6)(a) OF THIS SECTION TO THE
19 CONTRACTING FAIRNESS COMMITTEE CREATED IN SUBSECTION (4) OF THIS
20 SECTION.

21 **SECTION 2. Act subject to petition - effective date -**
22 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
23 the expiration of the ninety-day period after final adjournment of the
24 general assembly; except that, if a referendum petition is filed pursuant
25 to section 1 (3) of article V of the state constitution against this act or an
26 item, section, or part of this act within such period, then the act, item,
27 section, or part will not take effect unless approved by the people at the

1 general election to be held in November 2022 and, in such case, will take
2 effect on the date of the official declaration of the vote thereon by the
3 governor.

4 (2) This act applies to transportation projects for which the
5 procurement process is initiated on or after the applicable effective date
6 of this act.