

## LEGISLATIVE BILL 775

Approved by the Governor March 21, 2018

Introduced by Stinner, 48.

A BILL FOR AN ACT relating to the Game and Parks Commission; to amend section 37-201, Reissue Revised Statutes of Nebraska, and sections 73-101, 73-307, and 81-1701, Revised Statutes Cumulative Supplement, 2016; to adopt the State Park System Construction Alternatives Act; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 37-201, Reissue Revised Statutes of Nebraska, is amended to read:

37-201 Sections 37-201 to 37-811 and 37-1501 to 37-1510 and the State Park System Construction Alternatives Act shall be known and may be cited as the Game Law.

Sec. 2. Sections 2 to 33 of this act shall be known and may be cited as the State Park System Construction Alternatives Act.

Sec. 3. For purposes of the State Park System Construction Alternatives Act, unless the context otherwise requires, the definitions found in sections 4 to 17 of this act are used.

Sec. 4. Alternative technical concept means changes suggested by a qualified, eligible, short-listed design-builder to the commission's basic configurations, project scope, design, or construction criteria.

Sec. 5. Best value-based selection process means a process of selecting a design-builder using price, schedule, and qualifications for evaluation factors.

Sec. 6. Commission means the Game and Parks Commission.

Sec. 7. Construction manager means the legal entity which proposes to enter into a construction manager-general contractor contract pursuant to the State Park System Construction Alternatives Act.

Sec. 8. Construction manager-general contractor contract means a contract which is subject to a qualification-based selection process between the commission and a construction manager to furnish preconstruction services during the design development phase of the project and, if an agreement can be reached which is satisfactory to the commission, construction services for the construction phase of the project.

Sec. 9. Construction services means activities associated with building the project.

Sec. 10. Design-build contract means a contract between the commission and a design-builder which is subject to a best value-based selection process to furnish (1) architectural, engineering, and related design services and (2) labor, materials, supplies, equipment, and construction services.

Sec. 11. Design-builder means the legal entity which proposes to enter into a design-build contract.

Sec. 12. Preconstruction services means all nonconstruction-related services that a construction manager performs in relation to the design of the project before execution of a contract for construction services. Preconstruction services includes, but is not limited to, cost estimating, value engineering studies, constructability reviews, delivery schedule assessments, and life-cycle analysis.

Sec. 13. Project performance criteria means the performance requirements of the project suitable to allow the design-builder to make a proposal. Performance requirements shall include, but are not limited to, the following, if required by the project: Capacity, durability, standards, ingress and egress requirements, description of the site, surveys, soil and environmental information concerning the site, material quality standards, design and milestone dates, site development requirements, compliance with applicable law, and other criteria for the intended use of the project.

Sec. 14. Proposal means an offer in response to a request for proposals (1) by a design-builder to enter into a design-build contract or (2) by a construction manager to enter into a construction manager-general contractor contract.

Sec. 15. Qualification-based selection process means a process of selecting a construction manager based on qualifications.

Sec. 16. Request for proposals means the documentation by which the commission solicits proposals.

Sec. 17. Request for qualifications means the documentation or publication by which the commission solicits qualifications.

Sec. 18. The purpose of the State Park System Construction Alternatives Act is to provide the commission alternative methods of contracting for public projects for buildings in the state park system. The alternative methods of contracting shall be available to the commission for use on any project regardless of the funding source. Notwithstanding any other provision of state law to the contrary, the State Park System Construction Alternatives Act shall govern the design-build and construction manager-general contractor procurement process for the commission.

Sec. 19. The commission, in accordance with the State Park System Construction Alternatives Act, may solicit and execute a design-build contract or a construction manager-general contractor contract for a public project in the state park system.

Sec. 20. The commission may hire an architect licensed pursuant to the Engineers and Architects Regulation Act or an engineer licensed pursuant to the act to assist the commission with the development of project performance criteria and requests for proposals, with evaluation of proposals, with evaluation of the construction to determine adherence to the project performance criteria, and with any additional services requested by the commission to represent its interests in relation to a project. The procedures used to hire such person or organization shall comply with the Nebraska Consultants' Competitive Negotiation Act. The person or organization hired shall be ineligible to be included as a provider of other services in a proposal for the project for which he or she has been hired and shall not be employed by or have a financial or other interest in a design-builder or construction manager who will submit a proposal.

Sec. 21. The commission shall adopt guidelines for entering into a design-build contract or construction manager-general contractor contract. The guidelines shall include the following:

- (1) Preparation and content of requests for qualifications;
- (2) Preparation and content of requests for proposals;
- (3) Qualification and short-listing of design-builders and construction managers. The guidelines shall provide that the commission will evaluate prospective design-builders and construction managers based on the information submitted to the commission in response to a request for qualifications and will select a short list of design-builders or construction managers who shall be considered qualified and eligible to respond to the request for proposals;
- (4) Preparation and submittal of proposals;
- (5) Procedures and standards for evaluating proposals;
- (6) Procedures for negotiations between the commission and the design-builders or construction managers submitting proposals prior to the acceptance of a proposal if any such negotiations are contemplated; and
- (7) Procedures for the evaluation of construction under a design-build contract to determine adherence to the project performance criteria.

Sec. 22. The process for selecting a design-builder and entering into a design-build contract shall be in accordance with sections 23 to 26 of this act.

Sec. 23. (1) The commission shall prepare a request for qualifications for design-build proposals and shall prequalify design-builders. The request for qualifications shall describe the project in sufficient detail to permit a design-builder to respond. The request for qualifications shall identify the maximum number of design-builders the commission will place on a short list as qualified and eligible to receive a request for proposals.

(2) A person or organization hired by the commission under section 20 of this act shall be ineligible to compete for a design-build contract on the same project for which the person or organization was hired.

(3) The request for qualifications shall be (a) published in a newspaper of statewide circulation at least thirty days prior to the deadline for receiving the request for qualifications and (b) sent by first-class mail to any design-builder upon request.

(4) The commission shall create a short list of qualified and eligible design-builders in accordance with the guidelines adopted pursuant to section 21 of this act. The commission shall select at least two prospective design-builders, except that if only one design-builder has responded to the request for qualifications, the commission may, in its discretion, proceed or cancel the procurement. The request for proposals shall be sent only to the design-builders placed on the short list.

Sec. 24. The commission shall prepare a request for proposals for each design-build contract. The request for proposals shall contain, at a minimum, the following elements:

(1) The guidelines adopted by the commission in accordance with section 21 of this act. The identification of a publicly accessible location of the guidelines, either physical or electronic, shall be considered compliance with this subdivision;

(2) The proposed terms and conditions of the design-build contract, including any terms and conditions which are subject to further negotiation;

(3) A project statement which contains information about the scope and nature of the project;

(4) A statement regarding alternative technical concepts including the process and time period in which such concepts may be submitted, confidentiality of the concepts, and ownership of the rights to the intellectual property contained in such concepts;

(5) Project performance criteria;

(6) Budget parameters for the project;

(7) Any bonding and insurance required by law or as may be additionally required by the commission;

(8) The criteria for evaluation of proposals and the relative weight of each criterion. The criteria shall include, but are not limited to, the cost of the work, construction experience, design experience, and the financial, personnel, and equipment resources available for the project. The relative weight to apply to any criterion shall be at the discretion of the commission based on each project, except that in all cases, the cost of the work shall be

given a relative weight of at least fifty percent;

(9) A requirement that the design-builder provide a written statement of the design-builder's proposed approach to the design and construction of the project, which may include graphic materials illustrating the proposed approach to design and construction and shall include price proposals;

(10) A requirement that the design-builder agree to the following conditions:

(a) At the time of the design-build proposal, the design-builder must furnish to the commission a written statement identifying the architect or engineer who will perform the architectural or engineering work for the project. The architect or engineer engaged by the design-builder to perform the architectural or engineering work with respect to the project must have direct supervision of such work and may not be removed by the design-builder prior to the completion of the project without the written consent of the commission;

(b) At the time of the design-build proposal, the design-builder must furnish to the commission a written statement identifying the general contractor who will provide the labor, material, supplies, equipment, and construction services. The general contractor identified by the design-builder may not be removed by the design-builder prior to completion of the project without the written consent of the commission;

(c) A design-builder offering design-build services with its own employees who are design professionals licensed to practice in Nebraska must (i) comply with the Engineers and Architects Regulation Act by procuring a certificate of authorization to practice architecture or engineering and (ii) submit proof of sufficient professional liability insurance in the amount required by the commission; and

(d) The rendering of architectural or engineering services by a licensed architect or engineer employed by the design-builder must conform to the Engineers and Architects Regulation Act; and

(11) Other information or requirements which the commission, in its discretion, chooses to include in the request for proposals.

Sec. 25. The commission shall pay a stipend to qualified design-builders that submit responsive proposals but are not selected. Payment of the stipend shall give the commission ownership of the intellectual property contained in the proposals and alternative technical concepts. The amount of the stipend shall be at the discretion of the commission. The refusal to pay or accept the stipend shall leave the intellectual property contained in the proposals and alternative technical concepts in the possession of the creator of the proposals and alternative technical concepts.

Sec. 26. (1) Design-builders shall submit proposals as required by the request for proposals. The commission may meet with individual design-builders prior to the time of submitting the proposal and may have discussions concerning alternative technical concepts. If an alternative technical concept provides a solution that is equal to or better than the requirements in the request for proposals and the alternative technical concept is acceptable to the commission, it may be incorporated as part of the proposal by the design-builder. Notwithstanding any other provision of state law to the contrary, alternative technical concepts shall be confidential and not disclosed to other design-builders or members of the public from the time the proposals are submitted until such proposals are opened by the commission.

(2) Proposals shall be sealed and shall not be opened until expiration of the time established for making the proposals as set forth in the request for proposals.

(3) Proposals may be withdrawn at any time prior to the opening of such proposals in which case no stipend shall be paid. The commission shall have the right to reject any and all proposals at no cost to the commission other than any stipend for design-builders who have submitted responsive proposals. The commission may thereafter solicit new proposals using the same or different project performance criteria or may cancel the design-build solicitation.

(4) The commission shall rank the design-builders in order of best value pursuant to the criteria in the request for proposals. The commission may meet with design-builders prior to ranking.

(5) The commission may attempt to negotiate a design-build contract with the highest ranked design-builder selected by the commission and may enter into a design-build contract after negotiations. If the commission is unable to negotiate a satisfactory design-build contract with the highest ranked design-builder, the commission may terminate negotiations with that design-builder. The commission may then undertake negotiations with the second highest ranked design-builder and may enter into a design-build contract after negotiations. If the commission is unable to negotiate a satisfactory contract with the second highest ranked design-builder, the commission may undertake negotiations with the third highest ranked design-builder, if any, and may enter into a design-build contract after negotiations.

(6) If the commission is unable to negotiate a satisfactory contract with any of the ranked design-builders, the commission may either revise the request for proposals and solicit new proposals or cancel the design-build process under the State Park System Construction Alternatives Act.

Sec. 27. (1) The process for selecting a construction manager and entering into a construction manager-general contractor contract shall be in accordance with this section and sections 28 to 30 of this act.

(2) The commission shall prepare a request for qualifications for construction manager-general contractor contract proposals and shall prequalify construction managers. The request for qualifications shall describe the

project in sufficient detail to permit a construction manager to respond. The request for qualifications shall identify the maximum number of eligible construction managers the commission will place on a short list as qualified and eligible to receive a request for proposals.

(3) The request for qualifications shall be (a) published in a newspaper of statewide circulation at least thirty days prior to the deadline for receiving the request for qualifications and (b) sent by first-class mail to any construction manager upon request.

(4) The commission shall create a short list of qualified and eligible construction managers in accordance with the guidelines adopted pursuant to section 21 of this act. The commission shall select at least two construction managers, except that if only one construction manager has responded to the request for qualifications, the commission may, in its discretion, proceed or cancel the procurement. The request for proposals shall be sent only to the construction managers placed on the short list.

Sec. 28. The commission shall prepare a request for proposals for each construction manager-general contractor contract. The request for proposals shall contain, at a minimum, the following elements:

(1) The guidelines adopted by the commission in accordance with section 21 of this act. The identification of a publicly accessible location of the guidelines, either physical or electronic, shall be considered compliance with this subdivision;

(2) The proposed terms and conditions of the contract, including any terms and conditions which are subject to further negotiation;

(3) Any bonding and insurance required by law or as may be additionally required by the commission;

(4) General information about the project which will assist the commission in its selection of the construction manager, including a project statement which contains information about the scope and nature of the project, the project site, the schedule, and the estimated budget;

(5) The criteria for evaluation of proposals and the relative weight of each criterion;

(6) A statement that the construction manager shall not be allowed to sublet, assign, or otherwise dispose of any portion of the contract without consent of the commission. In no case shall the commission allow the construction manager to sublet more than seventy percent of the work, excluding specialty items; and

(7) Other information or requirements which the commission, in its discretion, chooses to include in the request for proposals.

Sec. 29. (1) Construction managers shall submit proposals as required by the request for proposals.

(2) Proposals shall be sealed and shall not be opened until expiration of the time established for making the proposals as set forth in the request for proposals.

(3) Proposals may be withdrawn at any time prior to signing a contract for preconstruction services. The commission shall have the right to reject any and all proposals at no cost to the commission. The commission may thereafter solicit new proposals or may cancel the construction manager-general contractor procurement process.

(4) The commission shall rank the construction managers in accordance with the qualification-based selection process and pursuant to the criteria in the request for proposals. The commission may meet with construction managers prior to the ranking.

(5) The commission may attempt to negotiate a contract for preconstruction services with the highest ranked construction manager and may enter into a contract for preconstruction services after negotiations. If the commission is unable to negotiate a satisfactory contract for preconstruction services with the highest ranked construction manager, the commission may terminate negotiations with that construction manager. The commission may then undertake negotiations with the second highest ranked construction manager and may enter into a contract for preconstruction services after negotiations. If the commission is unable to negotiate a satisfactory contract with the second highest ranked construction manager, the commission may undertake negotiations with the third highest ranked construction manager, if any, and may enter into a contract for preconstruction services after negotiations.

(6) If the commission is unable to negotiate a satisfactory contract for preconstruction services with any of the ranked construction managers, the commission may either revise the request for proposals and solicit new proposals or cancel the construction manager-general contractor contract process under the State Park System Construction Alternatives Act.

Sec. 30. (1) Before the construction manager begins any construction services, the commission shall:

(a) Conduct an independent cost estimate for the project; and

(b) Conduct contract negotiations with the construction manager to develop a construction manager-general contractor contract for construction services.

(2) If the construction manager and the commission are unable to negotiate a contract, the commission may use other contract procurement processes as provided by law. Persons or organizations who submitted proposals but were unable to negotiate a contract with the commission shall be eligible to compete in the other contract procurement processes.

Sec. 31. A design-build contract and a construction manager-general contractor contract may be conditioned upon later refinements in scope and price and may permit the commission in agreement with the design-builder or

construction manager to make changes in the project without invalidating the contract.

Sec. 32. Nothing in the State Park System Construction Alternatives Act shall limit or reduce statutory or regulatory requirements regarding insurance.

Sec. 33. The commission may adopt and promulgate rules and regulations to carry out the State Park System Construction Alternatives Act.

Sec. 34. Section 73-101, Revised Statutes Cumulative Supplement, 2016, is amended to read:

73-101 Whenever the State of Nebraska, or any department or any agency thereof, any county board, county clerk, county highway superintendent, the mayor and city council or commissioner of any municipality, any entity created pursuant to the Interlocal Cooperation Act or the Joint Public Agency Act, or the officers of any school district, township, or other governmental subdivision, shall advertise for bids in pursuance of any statutes of the State of Nebraska, on any road contract work or any public improvements work, or for supplies, construction, repairs, and improvements, and in all other cases where bids for supplies or work, of any character whatsoever, are received for the various departments and agencies of the state, and other subdivisions and agencies enumerated in this section, they shall fix not only the day upon which such bids shall be returned, received, or opened, as provided by other statutes, but shall also fix the hour at which such bids shall close, or be received or opened, and they shall also provide that such bids shall be immediately and simultaneously opened in the presence of the bidders, or representatives of the bidders, when the hour is reached for the bids to close. If bids are being opened on more than one contract, the officials having in charge the opening of such bids may, if they deem it advisable, award each contract as the bids are opened. Sections 73-101 to 73-106 shall not apply to the State Park System Construction Alternatives Act or sections 39-2808 to 39-2823.

Sec. 35. Section 73-307, Revised Statutes Cumulative Supplement, 2016, is amended to read:

73-307 Sections 73-301 to 73-306 shall not apply to the Nebraska Consultants' Competitive Negotiation Act, the State Park System Construction Alternatives Act, sections 39-2808 to 39-2823, or section 57-1503.

Sections 73-301 to 73-306 shall not be construed to apply to renewals of contracts already approved pursuant to or not subject to such sections, to amendments to such contracts, or to renewals of such amendments unless the amendments would directly cause or result in the replacement by the private entity of additional permanent state employees or positions greater than the replacement caused by the original contract.

Sec. 36. Section 81-1701, Revised Statutes Cumulative Supplement, 2016, is amended to read:

81-1701 The purpose of the Nebraska Consultants' Competitive Negotiation Act is to provide managerial control over competitive negotiations by the state for acquisition of professional architectural, engineering, landscape architecture, or land surveying services. The act does not apply to (1) contracts under section 57-1503, (2) contracts under subsection (4) of section 39-1349, ~~or~~ (3) contracts under sections 39-2808 to 39-2823 except as provided in section 39-2810, or (4) contracts under the State Park System Construction Alternatives Act except as provided in section 20 of this act.

Sec. 37. Original section 37-201, Reissue Revised Statutes of Nebraska, and sections 73-101, 73-307, and 81-1701, Revised Statutes Cumulative Supplement, 2016, are repealed.