

LEGISLATURE OF NEBRASKA
ONE HUNDRED SIXTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 583

FINAL READING

Introduced by Hilgers, 21.

Read first time January 22, 2019

Committee: Government, Military and Veterans Affairs

1 A BILL FOR AN ACT relating to design-build contracts; to amend sections
2 13-2914, 39-2808, 39-2809, 39-2810, 39-2811, 39-2813, 39-2814,
3 39-2815, 39-2816, 39-2817, 39-2818, 39-2819, 39-2820, 39-2821,
4 39-2822, 39-2823, and 39-2824, Reissue Revised Statutes of Nebraska,
5 and section 39-2802, Revised Statutes Cumulative Supplement, 2018;
6 to change provisions relating to the Political Subdivisions
7 Construction Alternatives Act and the Transportation Innovation Act;
8 to define and redefine terms; to provide powers for certain cities,
9 counties, and joint entities as prescribed; to harmonize provisions;
10 and to repeal the original sections.
11 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 13-2914, Reissue Revised Statutes of Nebraska, is
2 amended to read:

3 13-2914 A political subdivision shall not use a design-build
4 contract or construction management at risk contract under the Political
5 Subdivisions Construction Alternatives Act for a project, in whole or in
6 part, for road, street, highway, water, wastewater, utility, or sewer
7 construction, except that a city of the metropolitan class may use a
8 design-build contract or construction management at risk contract for the
9 purpose of complying with state or federal requirements to control or
10 minimize overflows from combined sewers.

11 Sec. 2. Section 39-2802, Revised Statutes Cumulative Supplement,
12 2018, is amended to read:

13 39-2802 For purposes of the Transportation Innovation Act:

14 (1) Alternative technical concept means changes suggested by a
15 qualified, eligible, short-listed design-builder to a contracting
16 agency's ~~the department's~~ basic configurations, project scope, design, or
17 construction criteria;

18 (2) Best value-based selection process means a process of selecting
19 a design-builder using price, schedule, and qualifications for evaluation
20 factors;

21 (3) Construction manager means the legal entity which proposes to
22 enter into a construction manager-general contractor contract pursuant to
23 the act;

24 (4) Construction manager-general contractor contract means a
25 contract which is subject to a qualification-based selection process
26 between a contracting agency ~~the department~~ and a construction manager to
27 furnish preconstruction services during the design development phase of
28 the project and, if an agreement can be reached which is satisfactory to
29 the contracting agency ~~department~~, construction services for the
30 construction phase of the project;

31 (5) Construction services means activities associated with building

1 the project;

2 (6) Contracting agency means the department, an eligible county, a
3 city of the metropolitan class, or a city of the primary class using the
4 powers provided under the Transportation Innovation Act;

5 (7) (6) Department means the Department of Transportation;

6 (8) (7) Design-build contract means a contract between a contracting
7 agency the department and a design-builder which is subject to a best
8 value-based selection process to furnish (a) architectural, engineering,
9 and related design services and (b) labor, materials, supplies,
10 equipment, and construction services;

11 (9) (8) Design-builder means the legal entity which proposes to
12 enter into a design-build contract;

13 (10) Eligible county means (a) a county or (b) a joint entity
14 created by agreement under section 13-804 if a county is a party to the
15 agreement;

16 (11) (9) Multimodal transportation network means the interconnected
17 system of highways, roads, streets, rail lines, river ports, and transit
18 systems which facilitates the movement of people and freight to enhance
19 Nebraska's economy;

20 (12) (10) Preconstruction services means all nonconstruction-related
21 services that a construction manager performs in relation to the design
22 of the project before execution of a contract for construction services.
23 Preconstruction services includes, but is not limited to, cost
24 estimating, value engineering studies, constructability reviews, delivery
25 schedule assessments, and life-cycle analysis;

26 (13) (11) Project performance criteria means the performance
27 requirements of the project suitable to allow the design-builder to make
28 a proposal. Performance requirements shall include, but are not limited
29 to, the following, if required by the project: Capacity, durability,
30 standards, ingress and egress requirements, description of the site,
31 surveys, soil and environmental information concerning the site, material

1 quality standards, design and milestone dates, site development
2 requirements, compliance with applicable law, and other criteria for the
3 intended use of the project;

4 (14) ~~(12)~~ Proposal means an offer in response to a request for
5 proposals (a) by a design-builder to enter into a design-build contract
6 or (b) by a construction manager to enter into a construction manager-
7 general contractor contract;

8 (15) ~~(13)~~ Qualification-based selection process means a process of
9 selecting a construction manager based on qualifications;

10 (16) ~~(14)~~ Request for proposals means the documentation by which a
11 contracting agency ~~the department~~ solicits proposals; and

12 (17) ~~(15)~~ Request for qualifications means the documentation or
13 publication by which a contracting agency ~~the department~~ solicits
14 qualifications.

15 Sec. 3. Section 39-2808, Reissue Revised Statutes of Nebraska, is
16 amended to read:

17 39-2808 The purpose of sections 39-2808 to 39-2824 ~~39-2823~~ is to
18 provide a contracting agency ~~the department~~ alternative methods of
19 contracting for public projects. The alternative methods of contracting
20 shall be available to a contracting agency ~~the department~~ for use on any
21 project regardless of the funding source. Notwithstanding any other
22 provision of state law to the contrary, the Transportation Innovation Act
23 shall govern the design-build and construction manager-general contractor
24 procurement process.

25 Sec. 4. Section 39-2809, Reissue Revised Statutes of Nebraska, is
26 amended to read:

27 39-2809 A contracting agency ~~The department~~, in accordance with
28 sections 39-2808 to 39-2824 ~~39-2823~~, may solicit and execute a design-
29 build contract or a construction manager-general contractor contract for
30 a public project, other than a project that is primarily resurfacing,
31 rehabilitation, or restoration.

1 Sec. 5. Section 39-2810, Reissue Revised Statutes of Nebraska, is
2 amended to read:

3 39-2810 A contracting agency ~~The department~~ may hire an engineering
4 or architectural consultant to assist the contracting agency ~~department~~
5 with the development of project performance criteria and requests for
6 proposals, with evaluation of proposals, with evaluation of the
7 construction to determine adherence to the project performance criteria,
8 and with any additional services requested by the contracting agency
9 ~~department~~ to represent its interests in relation to a project. The
10 procedures used to hire such person or organization shall comply with the
11 Nebraska Consultants' Competitive Negotiation Act. The person or
12 organization hired shall be ineligible to be included as a provider of
13 other services in a proposal for the project for which he or she has been
14 hired and shall not be employed by or have a financial or other interest
15 in a design-builder or construction manager who will submit a proposal.

16 Sec. 6. Section 39-2811, Reissue Revised Statutes of Nebraska, is
17 amended to read:

18 39-2811 The department shall adopt guidelines for entering into a
19 design-build contract or construction manager-general contractor
20 contract. If an eligible county, a city of the metropolitan class, or a
21 city of the primary class intends to proceed with a design-build contract
22 or a construction manager-general contractor contract, the eligible
23 county, city of the metropolitan class, or city of the primary class may
24 adopt the guidelines published by the department. The department's
25 guidelines shall include the following:

- 26 (1) Preparation and content of requests for qualifications;
27 (2) Preparation and content of requests for proposals;
28 (3) Qualification and short-listing of design-builders and
29 construction managers. The guidelines shall provide that the contracting
30 agency ~~department~~ will evaluate prospective design-builders and
31 construction managers based on the information submitted to the

1 ~~contracting agency department~~ in response to a request for qualifications
2 and will select a short list of design-builders or construction managers
3 who shall be considered qualified and eligible to respond to the request
4 for proposals;

5 (4) Preparation and submittal of proposals;

6 (5) Procedures and standards for evaluating proposals;

7 (6) Procedures for negotiations between the contracting agency
8 ~~department~~ and the design-builders or construction managers submitting
9 proposals prior to the acceptance of a proposal if any such negotiations
10 are contemplated; and

11 (7) Procedures for the evaluation of construction under a design-
12 build contract to determine adherence to the project performance
13 criteria.

14 Sec. 7. Section 39-2813, Reissue Revised Statutes of Nebraska, is
15 amended to read:

16 39-2813 (1) A contracting agency ~~The department~~ shall prepare a
17 request for qualifications for design-build proposals and shall
18 prequalify design-builders. The request for qualifications shall describe
19 the project in sufficient detail to permit a design-builder to respond.
20 The request for qualifications shall identify the maximum number of
21 design-builders the contracting agency department will place on a short
22 list as qualified and eligible to receive a request for proposals.

23 (2) A person or organization hired by the contracting agency
24 ~~department~~ under section 39-2810 shall be ineligible to compete for a
25 design-build contract on the same project for which the person or
26 organization was hired.

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

31 (4) The contracting agency department shall create a short list of

1 qualified and eligible design-builders in accordance with the guidelines
2 adopted pursuant to section 39-2811. The contracting agency department
3 shall select at least two prospective design-builders, except that if
4 only one design-builder has responded to the request for qualifications,
5 the contracting agency department may, in its discretion, proceed or
6 cancel the procurement. The request for proposals shall be sent only to
7 the design-builders placed on the short list.

8 Sec. 8. Section 39-2814, Reissue Revised Statutes of Nebraska, is
9 amended to read:

10 39-2814 A contracting agency ~~The department~~ shall prepare a request
11 for proposals for each design-build contract. The request for proposals
12 shall contain, at a minimum, the following elements:

13 (1) The guidelines adopted ~~by the department~~ in accordance with
14 section 39-2811. The identification of a publicly accessible location of
15 the guidelines, either physical or electronic, shall be considered
16 compliance with this subdivision;

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

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

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

26 (5) Project performance criteria;

27 (6) Budget parameters for the project;

28 (7) Any bonding and insurance required by law or as may be
29 additionally required by the contracting agency department;

30 (8) The criteria for evaluation of proposals and the relative weight
31 of each criterion. The criteria shall include, but are not limited to,

1 the cost of the work, construction experience, design experience, and the
2 financial, personnel, and equipment resources available for the project.
3 The relative weight to apply to any criterion shall be at the discretion
4 of the contracting agency ~~department~~ based on each project, except that
5 in all cases, the cost of the work shall be given a relative weight of at
6 least fifty percent;

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

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

14 (a) At the time of the design-build proposal, the design-builder
15 must furnish to the contracting agency ~~department~~ a written statement
16 identifying the architect or engineer who will perform the architectural
17 or engineering work for the project. The architect or engineer engaged by
18 the design-builder to perform the architectural or engineering work with
19 respect to the project must have direct supervision of such work and may
20 not be removed by the design-builder prior to the completion of the
21 project without the written consent of the contracting agency ~~department~~;

22 (b) At the time of the design-build proposal, the design-builder
23 must furnish to the contracting agency ~~department~~ a written statement
24 identifying the general contractor who will provide the labor, material,
25 supplies, equipment, and construction services. The general contractor
26 identified by the design-builder may not be removed by the design-builder
27 prior to completion of the project without the written consent of the
28 contracting agency ~~department~~;

29 (c) A design-builder offering design-build services with its own
30 employees who are design professionals licensed to practice in Nebraska
31 must (i) comply with the Engineers and Architects Regulation Act by

1 procuring a certificate of authorization to practice architecture or
2 engineering and (ii) submit proof of sufficient professional liability
3 insurance in the amount required by the contracting agency ~~department~~;
4 and

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

8 (11) The amount and terms of the stipend required pursuant to
9 section 39-2815; and

10 (12) ~~(11)~~ Other information or requirements which the contracting
11 agency ~~department~~, in its discretion, chooses to include in the request
12 for proposals.

13 Sec. 9. Section 39-2815, Reissue Revised Statutes of Nebraska, is
14 amended to read:

15 39-2815 The contracting agency ~~department~~ shall pay a stipend to
16 qualified design-builders that submit responsive proposals but are not
17 selected. Payment of the stipend shall give the contracting agency
18 ~~department~~ ownership of the intellectual property contained in the
19 proposals and alternative technical concepts. The amount of the stipend
20 shall be at the discretion of the contracting agency as disclosed in the
21 request for proposals ~~department~~.

22 Sec. 10. Section 39-2816, Reissue Revised Statutes of Nebraska, is
23 amended to read:

24 39-2816 (1) Design-builders shall submit proposals as required by
25 the request for proposals. A contracting agency ~~The department~~ may meet
26 with individual design-builders prior to the time of submitting the
27 proposal and may have discussions concerning alternative technical
28 concepts. If an alternative technical concept provides a solution that is
29 equal to or better than the requirements in the request for proposals and
30 the alternative technical concept is acceptable to the contracting agency
31 ~~department~~, it may be incorporated as part of the proposal by the design-

1 builder. Notwithstanding any other provision of state law to the
2 contrary, alternative technical concepts shall be confidential and not
3 disclosed to other design-builders or members of the public from the time
4 the proposals are submitted until such proposals are opened by the
5 contracting agency department.

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

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

17 (4) The contracting agency department shall rank the design-builders
18 in order of best value pursuant to the criteria in the request for
19 proposals. The contracting agency department may meet with design-
20 builders prior to ranking.

21 (5) The contracting agency department may attempt to negotiate a
22 design-build contract with the highest ranked design-builder selected by
23 the contracting agency department and may enter into a design-build
24 contract after negotiations. If the contracting agency department is
25 unable to negotiate a satisfactory design-build contract with the highest
26 ranked design-builder, the contracting agency department may terminate
27 negotiations with that design-builder. The contracting agency department
28 may then undertake negotiations with the second highest ranked design-
29 builder and may enter into a design-build contract after negotiations. If
30 the contracting agency department is unable to negotiate a satisfactory
31 contract with the second highest ranked design-builder, the contracting

1 ~~agency department~~ may undertake negotiations with the third highest
2 ranked design-builder, if any, and may enter into a design-build contract
3 after negotiations.

4 (6) If the ~~contracting agency department~~ is unable to negotiate a
5 satisfactory contract with any of the ranked design-builders, the
6 ~~contracting agency department~~ may either revise the request for proposals
7 and solicit new proposals or cancel the design-build process under
8 sections 39-2808 to ~~39-2824~~ ~~39-2823~~.

9 Sec. 11. Section 39-2817, Reissue Revised Statutes of Nebraska, is
10 amended to read:

11 39-2817 (1) The process for selecting a construction manager and
12 entering into a construction manager-general contractor contract shall be
13 in accordance with this section and sections 39-2818 to 39-2820.

14 (2) ~~A contracting agency~~ ~~The department~~ shall prepare a request for
15 qualifications for construction manager-general contractor contract
16 proposals and shall prequalify construction managers. The request for
17 qualifications shall describe the project in sufficient detail to permit
18 a construction manager to respond. The request for qualifications shall
19 identify the maximum number of eligible construction managers the
20 ~~contracting agency department~~ will place on a short list as qualified and
21 eligible to receive a request for proposals.

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

26 (4) The ~~contracting agency department~~ shall create a short list of
27 qualified and eligible construction managers in accordance with the
28 guidelines adopted pursuant to section 39-2811. The ~~contracting agency~~
29 ~~department~~ shall select at least two construction managers, except that
30 if only one construction manager has responded to the request for
31 qualifications, the ~~contracting agency department~~ may, in its discretion,

1 proceed or cancel the procurement. The request for proposals shall be
2 sent only to the construction managers placed on the short list.

3 Sec. 12. Section 39-2818, Reissue Revised Statutes of Nebraska, is
4 amended to read:

5 39-2818 A contracting agency ~~The department~~ shall prepare a request
6 for proposals for each construction manager-general contractor contract.
7 The request for proposals shall contain, at a minimum, the following
8 elements:

9 (1) The guidelines adopted by ~~the department~~ in accordance with
10 section 39-2811. The identification of a publicly accessible location of
11 the guidelines, either physical or electronic, shall be considered
12 compliance with this subdivision;

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

15 (3) Any bonding and insurance required by law or as may be
16 additionally required by the contracting agency ~~department~~;

17 (4) General information about the project which will assist the
18 contracting agency ~~department~~ in its selection of the construction
19 manager, including a project statement which contains information about
20 the scope and nature of the project, the project site, the schedule, and
21 the estimated budget;

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

24 (6) A statement that the construction manager shall not be allowed
25 to sublet, assign, or otherwise dispose of any portion of the contract
26 without consent of the contracting agency ~~department~~. In no case shall
27 the contracting agency ~~department~~ allow the construction manager to
28 sublet more than seventy percent of the work, excluding specialty items;
29 and

30 (7) Other information or requirements which the contracting agency
31 ~~department~~, in its discretion, chooses to include in the request for

1 proposals.

2 Sec. 13. Section 39-2819, Reissue Revised Statutes of Nebraska, is
3 amended to read:

4 39-2819 (1) Construction managers shall submit proposals as required
5 by the request for proposals.

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

9 (3) Proposals may be withdrawn at any time prior to signing a
10 contract for preconstruction services. The contracting agency ~~department~~
11 shall have the right to reject any and all proposals at no cost to the
12 contracting agency ~~department~~. The contracting agency ~~department~~ may
13 thereafter solicit new proposals or may cancel the construction manager-
14 general contractor procurement process.

15 (4) The contracting agency ~~department~~ shall rank the construction
16 managers in accordance with the qualification-based selection process and
17 pursuant to the criteria in the request for proposals. The contracting
18 agency ~~department~~ may meet with construction managers prior to the
19 ranking.

20 (5) The contracting agency ~~department~~ may attempt to negotiate a
21 contract for preconstruction services with the highest ranked
22 construction manager and may enter into a contract for preconstruction
23 services after negotiations. If the contracting agency ~~department~~ is
24 unable to negotiate a satisfactory contract for preconstruction services
25 with the highest ranked construction manager, the contracting agency
26 ~~department~~ may terminate negotiations with that construction manager. The
27 contracting agency ~~department~~ may then undertake negotiations with the
28 second highest ranked construction manager and may enter into a contract
29 for preconstruction services after negotiations. If the contracting
30 agency ~~department~~ is unable to negotiate a satisfactory contract with the
31 second highest ranked construction manager, the contracting agency

1 ~~department~~ may undertake negotiations with the third highest ranked
2 construction manager, if any, and may enter into a contract for
3 preconstruction services after negotiations.

4 (6) If the contracting agency ~~department~~ is unable to negotiate a
5 satisfactory contract for preconstruction services with any of the ranked
6 construction managers, the contracting agency ~~department~~ may either
7 revise the request for proposals and solicit new proposals or cancel the
8 construction manager-general contractor contract process under sections
9 39-2808 to 39-2824 ~~39-2823~~.

10 Sec. 14. Section 39-2820, Reissue Revised Statutes of Nebraska, is
11 amended to read:

12 39-2820 (1) Before the construction manager begins any construction
13 services, a contracting agency ~~the department~~ shall:

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

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

18 (2) If the construction manager and the contracting agency
19 ~~department~~ are unable to negotiate a contract, the contracting agency
20 ~~department~~ may use other contract procurement processes. Persons or
21 organizations who submitted proposals but were unable to negotiate a
22 contract with the contracting agency ~~department~~ shall be eligible to
23 compete in the other contract procurement processes.

24 Sec. 15. Section 39-2821, Reissue Revised Statutes of Nebraska, is
25 amended to read:

26 39-2821 A design-build contract and a construction manager-general
27 contractor contract may be conditioned upon later refinements in scope
28 and price and may permit the contracting agency ~~department~~ in agreement
29 with the design-builder or construction manager to make changes in the
30 project without invalidating the contract.

31 Sec. 16. Section 39-2822, Reissue Revised Statutes of Nebraska, is

1 amended to read:

2 39-2822 The department may enter into agreements under sections
3 39-2808 to 39-2824 ~~39-2823~~ to let, design, and construct projects for
4 political subdivisions when any of the funding for such projects is
5 provided by or through the department. In such instances, the department
6 may enter into contracts with the design-builder or construction manager.
7 The provisions of the Political Subdivisions Construction Alternatives
8 Act shall not apply to projects let, designed, and constructed under the
9 supervision of the department pursuant to agreements with political
10 subdivisions under sections 39-2808 to 39-2824 ~~39-2823~~.

11 Sec. 17. Section 39-2823, Reissue Revised Statutes of Nebraska, is
12 amended to read:

13 39-2823 Nothing in sections 39-2808 to 39-2824 ~~39-2823~~ shall limit
14 or reduce statutory or regulatory requirements regarding insurance.

15 Sec. 18. Section 39-2824, Reissue Revised Statutes of Nebraska, is
16 amended to read:

17 39-2824 The department may adopt and promulgate rules and
18 regulations to carry out the Transportation Innovation Act. An eligible
19 county, a city of the metropolitan class, or a city of the primary class
20 may adopt a resolution or an ordinance establishing rules to carry out
21 the act.

22 Sec. 19. Original sections 13-2914, 39-2808, 39-2809, 39-2810,
23 39-2811, 39-2813, 39-2814, 39-2815, 39-2816, 39-2817, 39-2818, 39-2819,
24 39-2820, 39-2821, 39-2822, 39-2823, and 39-2824, Reissue Revised Statutes
25 of Nebraska, and section 39-2802, Revised Statutes Cumulative Supplement,
26 2018, are repealed.