

LEGISLATIVE BILL 583

Approved by the Governor May 30, 2019

Introduced by Hilgers, 21.

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

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

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

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

39-2802 For purposes of the Transportation Innovation Act:

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

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

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

(4) Construction manager-general contractor contract means a contract which is subject to a qualification-based selection process between a contracting agency ~~the department~~ 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 contracting agency ~~department~~, construction services for the construction phase of the project;

(5) Construction services means activities associated with building the project;

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

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

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

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

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

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

(12) ~~(10)~~ 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;

(13) ~~(11)~~ 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;

(14) ~~(12)~~ Proposal means an offer in response to a request for proposals

(a) by a design-builder to enter into a design-build contract or (b) by a construction manager to enter into a construction manager-general contractor contract;

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

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

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

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

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

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

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

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

39-2810 A contracting agency ~~The department~~ may hire an engineering or architectural consultant to assist the contracting agency ~~department~~ 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 contracting agency ~~department~~ 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. 6. Section 39-2811, Reissue Revised Statutes of Nebraska, is amended to read:

39-2811 The department shall adopt guidelines for entering into a design-build contract or construction manager-general contractor contract. If an eligible county, a city of the metropolitan class, or a city of the primary class intends to proceed with a design-build contract or a construction manager-general contractor contract, the eligible county, city of the metropolitan class, or city of the primary class may adopt the guidelines published by the department. The department's 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 contracting agency ~~department~~ will evaluate prospective design-builders and construction managers based on the information submitted to the contracting agency ~~department~~ 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 contracting agency ~~department~~ 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. 7. Section 39-2813, Reissue Revised Statutes of Nebraska, is amended to read:

39-2813 (1) A contracting agency ~~The department~~ 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 contracting agency ~~department~~ will place on a short list as qualified and eligible to receive a request for proposals.

(2) A person or organization hired by the contracting agency ~~department~~ under section 39-2810 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 contracting agency ~~department~~ shall create a short list of qualified and eligible design-builders in accordance with the guidelines

adopted pursuant to section 39-2811. The contracting agency department shall select at least two prospective design-builders, except that if only one design-builder has responded to the request for qualifications, the contracting agency department 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. 8. Section 39-2814, Reissue Revised Statutes of Nebraska, is amended to read:

39-2814 A contracting agency ~~The department~~ 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 department~~ in accordance with section 39-2811. 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 contracting agency department;

(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 contracting agency department 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 contracting agency department 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 contracting agency department;

(b) At the time of the design-build proposal, the design-builder must furnish to the contracting agency department 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 contracting agency department;

(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 contracting agency department; 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) The amount and terms of the stipend required pursuant to section 39-2815; and~~

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

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

39-2815 The contracting agency department shall pay a stipend to qualified design-builders that submit responsive proposals but are not selected. Payment of the stipend shall give the contracting agency department 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 contracting agency department as disclosed in the request for proposals department.

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

39-2816 (1) Design-builders shall submit proposals as required by the request for proposals. A contracting agency ~~The department~~ 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 contracting agency department, 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 contracting agency department.

(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 contracting agency department shall have the right to reject any and all proposals at no cost to the contracting agency department other than any stipend for design-builders who have submitted responsive proposals. The contracting agency department may thereafter solicit new proposals using the same or different project performance criteria or may cancel the design-build solicitation.

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

(5) The contracting agency department may attempt to negotiate a design-build contract with the highest ranked design-builder selected by the contracting agency department and may enter into a design-build contract after negotiations. If the contracting agency department is unable to negotiate a satisfactory design-build contract with the highest ranked design-builder, the contracting agency department may terminate negotiations with that design-builder. The contracting agency department may then undertake negotiations with the second highest ranked design-builder and may enter into a design-build contract after negotiations. If the contracting agency department is unable to negotiate a satisfactory contract with the second highest ranked design-builder, the contracting agency department 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 contracting agency department is unable to negotiate a satisfactory contract with any of the ranked design-builders, the contracting agency department may either revise the request for proposals and solicit new proposals or cancel the design-build process under sections 39-2808 to ~~39-2824~~ ~~39-2823~~.

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

39-2817 (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 39-2818 to 39-2820.

(2) A contracting agency ~~The department~~ 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 contracting agency department 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 contracting agency department shall create a short list of qualified and eligible construction managers in accordance with the guidelines adopted pursuant to section 39-2811. The contracting agency department shall select at least two construction managers, except that if only one construction manager has responded to the request for qualifications, the contracting agency department 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. 12. Section 39-2818, Reissue Revised Statutes of Nebraska, is amended to read:

39-2818 A contracting agency ~~The department~~ 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 department~~ in accordance with section 39-2811. 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 contracting agency department;

(4) General information about the project which will assist the contracting agency department 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 contracting agency department. In no case shall the contracting agency department allow the construction manager to sublet more than seventy percent of the work, excluding specialty items; and

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

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

39-2819 (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 contracting agency department shall have the right to reject any and all proposals at no cost to the contracting agency department. The contracting agency department may thereafter solicit new proposals or may cancel the construction manager-general contractor procurement process.

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

(5) The contracting agency department 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 contracting agency department is unable to negotiate a satisfactory contract for preconstruction services with the highest ranked construction manager, the contracting agency department may terminate negotiations with that construction manager. The contracting agency department may then undertake negotiations with the second highest ranked construction manager and may enter into a contract for preconstruction services after negotiations. If the contracting agency department is unable to negotiate a satisfactory contract with the second highest ranked construction manager, the contracting agency department 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 contracting agency department is unable to negotiate a satisfactory contract for preconstruction services with any of the ranked construction managers, the contracting agency department may either revise the request for proposals and solicit new proposals or cancel the construction manager-general contractor contract process under sections 39-2808 to 39-2824 ~~39-2823~~.

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

39-2820 (1) Before the construction manager begins any construction services, ~~a contracting agency the department~~ 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 contracting agency department are unable to negotiate a contract, the contracting agency department may use other contract procurement processes. Persons or organizations who submitted proposals but were unable to negotiate a contract with the contracting agency department shall be eligible to compete in the other contract procurement processes.

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

39-2821 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 contracting agency department in agreement with the design-builder or construction manager to make changes in the project without invalidating the contract.

Sec. 16. Section 39-2822, Reissue Revised Statutes of Nebraska, is amended to read:

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

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

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

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

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

ordinance establishing rules to carry out the act.

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