

LEGISLATURE OF NEBRASKA  
ONE HUNDRED SEVENTH LEGISLATURE  
SECOND SESSION

**LEGISLATIVE BILL 1016**

FINAL READING

Introduced by Walz, 15.

Read first time January 13, 2022

Committee: Transportation and Telecommunications

1 A BILL FOR AN ACT relating to the Transportation Innovation Act; to amend  
2 sections 39-2801 and 39-2812, Reissue Revised Statutes of Nebraska,  
3 and sections 39-2802, 39-2808, 39-2809, 39-2811, 39-2813, 39-2814,  
4 39-2816, 39-2821, and 39-2822, Revised Statutes Cumulative  
5 Supplement, 2020; to define and redefine terms; to provide for  
6 public-private partnerships and progressive design-build; to  
7 harmonize provisions; and to repeal the original sections.  
8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 39-2801, Reissue Revised Statutes of Nebraska, is  
2 amended to read:

3 39-2801 Sections 39-2801 to 39-2824 and section 12 of this act shall  
4 be known and may be cited as the Transportation Innovation Act.

5 Sec. 2. Section 39-2802, Revised Statutes Cumulative Supplement,  
6 2020, is amended to read:

7 39-2802 For purposes of the Transportation Innovation Act:

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

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

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

18 (4) Construction manager-general contractor contract means a  
19 contract which is subject to a qualification-based selection process  
20 between a contracting agency and a construction manager to furnish  
21 preconstruction services during the design development phase of the  
22 project and, if an agreement can be reached which is satisfactory to the  
23 contracting agency, construction services for the construction phase of  
24 the project;

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

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

30 (7) Department means the Department of Transportation;

31 (8) Design-build contract means a contract between a contracting

1 agency and a design-builder which is subject to a best value-based  
2 selection process to furnish (a) architectural, engineering, and related  
3 design services and (b) labor, materials, supplies, equipment, and  
4 construction services;

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

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

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

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

20 (13) Private partner means any entity that is a partner in a public-  
21 private partnership other than the State of Nebraska, any agency of the  
22 State of Nebraska, the federal government, any agency of the federal  
23 government, any other state government, or any agency of any government  
24 at any level;

25 (14) Progressive design-build means a project-delivery process in  
26 which both the design and construction of a project are procured from a  
27 single entity that is selected through a qualification-based selection  
28 process at the earliest feasible stage of the project;

29 (15) ~~(13)~~ Project performance criteria means the performance  
30 requirements of the project suitable to allow the design-builder to make  
31 a proposal. Performance requirements shall include, but are not limited

1 to, the following, if required by the project: Capacity, durability,  
2 standards, ingress and egress requirements, description of the site,  
3 surveys, soil and environmental information concerning the site, material  
4 quality standards, design and milestone dates, site development  
5 requirements, compliance with applicable law, and other criteria for the  
6 intended use of the project;

7 (16) (14) Proposal means an offer in response to a request for  
8 proposals (a) by a design-builder to enter into a design-build contract  
9 or (b) by a construction manager to enter into a construction manager-  
10 general contractor contract;

11 (17) Public-private partnership means a project delivery method for  
12 construction or financing of capital projects or procurement of services  
13 under a written public-private partnership agreement entered into  
14 pursuant to section 12 of this act between at least one private partner  
15 and the State of Nebraska or any agency of the state;

16 (18) (15) Qualification-based selection process means a process of  
17 selecting a construction manager or progressive design-builder based on  
18 qualifications;

19 (19) (16) Request for proposals means the documentation by which a  
20 contracting agency solicits proposals; and

21 (20) (17) Request for qualifications means the documentation or  
22 publication by which a contracting agency solicits qualifications.

23 Sec. 3. Section 39-2808, Revised Statutes Cumulative Supplement,  
24 2020, is amended to read:

25 39-2808 The purpose of sections 39-2808 to 39-2824 is to provide a  
26 contracting agency alternative methods of contracting for public  
27 projects. The alternative methods of contracting shall be available to a  
28 contracting agency for use on any project regardless of the funding  
29 source. Notwithstanding any other provision of state law to the contrary,  
30 the Transportation Innovation Act shall govern the design-build,  
31 progressive design-build, and construction manager-general contractor

1 procurement ~~processes~~ process.

2 Sec. 4. Section 39-2809, Revised Statutes Cumulative Supplement,  
3 2020, is amended to read:

4 39-2809 A contracting agency, in accordance with sections 39-2808 to  
5 39-2824, may solicit and execute a design-build contract, a progressive  
6 design-build contract, or a construction manager-general contractor  
7 contract for a public project, other than a project that is primarily  
8 resurfacing, rehabilitation, or restoration.

9 Sec. 5. Section 39-2811, Revised Statutes Cumulative Supplement,  
10 2020, is amended to read:

11 39-2811 The department shall adopt guidelines for entering into a  
12 design-build contract, a progressive design-build contract, or  
13 construction manager-general contractor contract. If an eligible county,  
14 a city of the metropolitan class, or a city of the primary class intends  
15 to proceed with a design-build contract, a progressive design-build  
16 contract, or a construction manager-general contractor contract, the  
17 eligible county, city of the metropolitan class, or city of the primary  
18 class may adopt the guidelines published by the department. The  
19 department's guidelines shall include the following:

20 (1) Preparation and content of requests for qualifications;

21 (2) Preparation and content of requests for proposals;

22 (3) Qualification and short-listing of design-builders, progressive  
23 design-builders, and construction managers. The guidelines shall provide  
24 that the contracting agency will evaluate prospective design-builders,  
25 progressive design-builders, and construction managers based on the  
26 information submitted to the contracting agency in response to a request  
27 for qualifications and will select a short list of design-builders,  
28 progressive design-builders, or construction managers who shall be  
29 considered qualified and eligible to respond to the request for  
30 proposals;

31 (4) Preparation and submittal of proposals;

1 (5) Procedures and standards for evaluating proposals;

2 (6) Procedures for negotiations between the contracting agency and  
3 the design-builders, progressive design-builders, or construction  
4 managers submitting proposals prior to the acceptance of a proposal if  
5 any such negotiations are contemplated; and

6 (7) Procedures for the evaluation of construction under a design-  
7 build contract or a progressive design-build contract to determine  
8 adherence to the project performance criteria.

9 Sec. 6. Section 39-2812, Reissue Revised Statutes of Nebraska, is  
10 amended to read:

11 39-2812 (1) The process for selecting a design-builder and entering  
12 into a design-build contract shall be in accordance with sections 39-2813  
13 to 39-2816.

14 (2) Except as otherwise specifically provided in the Transportation  
15 Innovation Act, the process for selecting a progressive design-builder  
16 and entering into a progressive design-build contract shall be in  
17 accordance with sections 39-2813 to 39-2816.

18 Sec. 7. Section 39-2813, Revised Statutes Cumulative Supplement,  
19 2020, is amended to read:

20 39-2813 (1) A contracting agency shall prepare a request for  
21 qualifications for design-build and progressive design-build proposals  
22 and shall prequalify design-builders and progressive design-builders. The  
23 request for qualifications shall describe the project in sufficient  
24 detail to permit a design-builder or a progressive design-builder to  
25 respond. The request for qualifications shall identify the maximum number  
26 of design-builders or progressive design-builders the contracting agency  
27 will place on a short list as qualified and eligible to receive a request  
28 for proposals.

29 (2) A person or organization hired by the contracting agency under  
30 section 39-2810 shall be ineligible to compete for a design-build  
31 contract on the same project for which the person or organization was

1 hired.

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

7 (4) The contracting agency shall create a short list of qualified  
8 and eligible design-builders or progressive design-builders in accordance  
9 with the guidelines adopted pursuant to section 39-2811. The contracting  
10 agency shall select at least two prospective design-builders or  
11 progressive design-builders, except that if only one design-builder or  
12 progressive design-builder has responded to the request for  
13 qualifications, the contracting agency may, in its discretion, proceed or  
14 cancel the procurement. The request for proposals shall be sent only to  
15 the design-builders or progressive design-builders placed on the short  
16 list.

17 Sec. 8. Section 39-2814, Revised Statutes Cumulative Supplement,  
18 2020, is amended to read:

19 39-2814 A contracting agency shall prepare a request for proposals  
20 for each design-build or progressive design-build contract. The request  
21 for proposals shall contain, at a minimum, the following elements:

22 (1) The guidelines adopted in accordance with section 39-2811. The  
23 identification of a publicly accessible location of the guidelines,  
24 either physical or electronic, shall be considered compliance with this  
25 subdivision;

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

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

31 (4) If applicable, a A statement regarding alternative technical

1 concepts including the process and time period in which such concepts may  
2 be submitted, confidentiality of the concepts, and ownership of the  
3 rights to the intellectual property contained in such concepts;

4 (5) Project performance criteria;

5 (6) Budget parameters for the project;

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

8 (8) The criteria for evaluation of proposals and the relative weight  
9 of each criterion. For both design-build and progressive design-build  
10 contracts, the ~~The~~ criteria shall include, but are not limited to, ~~the~~  
11 ~~cost of the work,~~ construction experience, design experience, and the  
12 financial, personnel, and equipment resources available for the project.  
13 For design-build contracts only, the criteria shall also include the cost  
14 of the work. For progressive design-build contracts only, the criteria  
15 shall also include consideration of the historic reasonableness of the  
16 progressive design-builder's costs and expenses when bidding and  
17 completing projects, whether such projects were completed using the  
18 progressive design-build process or another bidding and contracting  
19 process. The relative weight to apply to any criterion shall be at the  
20 discretion of the contracting agency based on each project, except that  
21 for in all design-build contracts cases, the cost of the work shall be  
22 given a relative weight of at least fifty percent;

23 (9) A requirement that the design-builder or progressive design-  
24 builder provide a written statement of the design-builder's or  
25 progressive design-builder's proposed approach to the design and  
26 construction of the project, which may include graphic materials  
27 illustrating the proposed approach to design and construction ~~and shall~~  
28 ~~include price proposals;~~

29 (10) A requirement that the design-builder or progressive design-  
30 builder agree to the following conditions:

31 (a) At the time of the design-build or progressive design-build

1 proposal, the design-builder or progressive design-builder must furnish  
2 to the contracting agency a written statement identifying the architect  
3 or engineer who will perform the architectural or engineering work for  
4 the project. The architect or engineer engaged by the design-builder or  
5 progressive design-builder to perform the architectural or engineering  
6 work with respect to the project must have direct supervision of such  
7 work and may not be removed by the design-builder or progressive design-  
8 builder prior to the completion of the project without the written  
9 consent of the contracting agency;

10 (b) At the time of the design-build or progressive design-build  
11 proposal, the design-builder or progressive design-builder must furnish  
12 to the contracting agency a written statement identifying the general  
13 contractor who will provide the labor, material, supplies, equipment, and  
14 construction services. The general contractor identified by the design-  
15 builder or progressive design-builder may not be removed by the design-  
16 builder or progressive design-builder prior to completion of the project  
17 without the written consent of the contracting agency;

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

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

29 (11) The amount and terms of the stipend required pursuant to  
30 section 39-2815, if any; and

31 (12) Other information or requirements which the contracting agency,

1 in its discretion, chooses to include in the request for proposals.

2 Sec. 9. Section 39-2816, Revised Statutes Cumulative Supplement,  
3 2020, is amended to read:

4 39-2816 (1) Design-builders and progressive design-builders shall  
5 submit proposals as required by the request for proposals. A contracting  
6 agency may meet with individual design-builders and progressive design-  
7 builders prior to the time of submitting the proposal and may have  
8 discussions concerning alternative technical concepts. If an alternative  
9 technical concept provides a solution that is equal to or better than the  
10 requirements in the request for proposals and the alternative technical  
11 concept is acceptable to the contracting agency, it may be incorporated  
12 as part of the proposal by the design-builder or progressive design-  
13 builder. Notwithstanding any other provision of state law to the  
14 contrary, alternative technical concepts shall be confidential and not  
15 disclosed to other design-builders, progressive design-builders, or  
16 members of the public from the time the proposals are submitted until  
17 such proposals are opened by the contracting agency.

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

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

29 (4) The contracting agency shall rank the design-builders or  
30 progressive design-builders in order of best value pursuant to the  
31 criteria in the request for proposals. The contracting agency may meet

1 with design-builders or progressive design-builders prior to ranking.

2 (5) The contracting agency may attempt to negotiate a design-build  
3 or progressive design-build contract with the highest ranked design-  
4 builder or progressive design-builder selected by the contracting agency  
5 and may enter into a design-build or progressive design-build contract  
6 after negotiations. If the contracting agency is unable to negotiate a  
7 satisfactory design-build or progressive design-build contract with the  
8 highest ranked design-builder or progressive design-builder, the  
9 contracting agency may terminate negotiations with that design-builder or  
10 progressive design-builder. The contracting agency may then undertake  
11 negotiations with the second highest ranked design-builder or progressive  
12 design-builder and may enter into a design-build or progressive design-  
13 build contract after negotiations. If the contracting agency is unable to  
14 negotiate a satisfactory contract with the second highest ranked design-  
15 builder or progressive design-builder, the contracting agency may  
16 undertake negotiations with the third highest ranked design-builder or  
17 progressive design-builder, if any, and may enter into a design-build or  
18 progressive design-build contract after negotiations.

19 (6) If the contracting agency is unable to negotiate a satisfactory  
20 contract with any of the ranked design-builders or progressive design-  
21 builders, the contracting agency may either revise the request for  
22 proposals and solicit new proposals or cancel the design-build or  
23 progressive design-build process under sections 39-2808 to 39-2824.

24 Sec. 10. Section 39-2821, Revised Statutes Cumulative Supplement,  
25 2020, is amended to read:

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

1           Sec. 11. Section 39-2822, Revised Statutes Cumulative Supplement,  
2 2020, is amended to read:

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

12           Sec. 12. (1) A public-private partnership delivery method may be  
13 used for projects under the Transportation Innovation Act as provided in  
14 this section and rules and regulations adopted and promulgated pursuant  
15 to this section only to the extent allowed under the Constitution of  
16 Nebraska. State contracts using this method shall be awarded by  
17 competitive negotiation.

18           (2) A contracting agency utilizing a public-private partnership  
19 shall continue to be responsible for oversight of any function that is  
20 delegated to or otherwise performed by a private partner.

21           (3) On or before July 1, 2023, the Director-State Engineer shall  
22 adopt and promulgate rules and regulations setting forth criteria to be  
23 used in determining when a public-private partnership is to be used for a  
24 particular project. The rules and regulations shall reflect the intent of  
25 the Legislature to promote and encourage the use of public-private  
26 partnerships in the State of Nebraska. The Director-State Engineer shall  
27 consult with design-builders, progressive design-builders, construction  
28 managers, other contractors and design professionals, including engineers  
29 and architects, and other appropriate professionals during the  
30 development of the rules and regulations.

31           (4) A request for proposals for a project utilizing a public-private

1 partnership shall include at a minimum:

2 (a) The parameters of the proposed public-private partnership  
3 agreement;

4 (b) The duties and responsibilities to be performed by the private  
5 partner or private partners;

6 (c) The methods of oversight to be employed by the contracting  
7 agency;

8 (d) The duties and responsibilities that are to be performed by the  
9 contracting agency and any other parties to the contract;

10 (e) The evaluation factors and the relative weight of each factor to  
11 be used in the scoring of awards;

12 (f) Plans for financing and operating the project and the revenues,  
13 service payments, bond financings, and appropriations of public funds  
14 needed for the qualifying project;

15 (g) Comprehensive documentation of the experience, capabilities,  
16 capitalization and financial condition, and other relevant qualifications  
17 of the private entity submitting the proposal;

18 (h) The ability of a private partner or private partners to quickly  
19 respond to the needs presented in the request for proposals and the  
20 importance of economic development opportunities represented by the  
21 project. In evaluating proposals, preference shall be given to a plan  
22 that includes the involvement of small businesses as subcontractors, to  
23 the extent that small businesses can provide services in a competitive  
24 manner, unless any preference interferes with the qualification for  
25 federal or other funds; and

26 (i) Other information required by the contracting agency to evaluate  
27 the proposals submitted and the overall proposed public-private  
28 partnership.

29 (5) A private entity desiring to be a private partner shall  
30 demonstrate to the satisfaction of the contracting agency that it is  
31 capable of performing any duty, responsibility, or function it may be

1 authorized or directed to perform as a term or condition of the public-  
2 private partnership agreement.

3 (6) A request for proposals may be canceled, or all proposals may be  
4 rejected, if it is determined in writing that such action is taken in the  
5 best interest of the State of Nebraska and approved by the purchasing  
6 officer.

7 (7) Upon execution of a public-private partnership agreement, the  
8 contracting agency shall ensure that the contract clearly identifies that  
9 a public-private partnership is being utilized.

10 (8) The department shall:

11 (a) Adhere to the rules and regulations adopted and promulgated  
12 under this section when utilizing a public-private partnership for  
13 financing capital projects; and

14 (b) Electronically report annually to the Appropriations Committee  
15 of the Legislature and the Transportation and Telecommunications  
16 Committee of the Legislature regarding private-public partnerships which  
17 have been considered or are approved pursuant to this section.

18 Sec. 13. Original sections 39-2801 and 39-2812, Reissue Revised  
19 Statutes of Nebraska, and sections 39-2802, 39-2808, 39-2809, 39-2811,  
20 39-2813, 39-2814, 39-2816, 39-2821, and 39-2822, Revised Statutes  
21 Cumulative Supplement, 2020, are repealed.