

LEGISLATIVE BILL 1016

Approved by the Governor April 18, 2022

Introduced by Walz, 15.

A BILL FOR AN ACT relating to the Transportation Innovation Act; to amend sections 39-2801 and 39-2812, Reissue Revised Statutes of Nebraska, and sections 39-2802, 39-2808, 39-2809, 39-2811, 39-2813, 39-2814, 39-2816, 39-2821, and 39-2822, Revised Statutes Cumulative Supplement, 2020; to define and redefine terms; to provide for public-private partnerships and progressive design-build; to harmonize provisions; and to repeal the original sections.

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

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

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

Sec. 2. Section 39-2802, Revised Statutes Cumulative Supplement, 2020, 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 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 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, 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) Department means the Department of Transportation;

(8) Design-build contract means a contract between a contracting agency 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) 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) 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) 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) Private partner means any entity that is a partner in a public-private partnership other than the State of Nebraska, any agency of the State of Nebraska, the federal government, any agency of the federal government, any other state government, or any agency of any government at any level;

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

(15) ~~(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;

(16) ~~(14)~~ 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;

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

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

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

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

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

39-2808 The purpose of sections 39-2808 to 39-2824 is to provide a contracting agency alternative methods of contracting for public projects. The alternative methods of contracting shall be available to a contracting agency 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, progressive design-build, and construction manager-general contractor procurement ~~processes~~ process.

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

39-2809 A contracting agency, in accordance with sections 39-2808 to 39-2824, may solicit and execute a design-build contract, a progressive 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 39-2811, Revised Statutes Cumulative Supplement, 2020, is amended to read:

39-2811 The department shall adopt guidelines for entering into a design-build contract, a progressive 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, a progressive 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, progressive design-builders, and construction managers. The guidelines shall provide that the contracting agency will evaluate prospective design-builders, progressive design-builders, and construction managers based on the information submitted to the contracting agency in response to a request for qualifications and will select a short list of design-builders, progressive 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 and the design-builders, progressive 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 or a progressive design-build contract to determine adherence to the project performance criteria.

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

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

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

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

39-2813 (1) A contracting agency shall prepare a request for qualifications for design-build and progressive design-build proposals and shall prequalify design-builders and progressive design-builders. The request for qualifications shall describe the project in sufficient detail to permit a design-builder or a progressive design-builder to respond. The request for qualifications shall identify the maximum number of design-builders or progressive design-builders the contracting agency 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 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 or progressive design-builder upon request.

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

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

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

(1) The guidelines adopted 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 or progressive 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) ~~If applicable, a~~ 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;

(8) The criteria for evaluation of proposals and the relative weight of each criterion. ~~For both design-build and progressive design-build contracts, the 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. ~~For design-build contracts only, the criteria shall also include the cost of the work. For progressive design-build contracts only, the criteria shall also include consideration of the historic reasonableness of the progressive design-builder's costs and expenses when bidding and completing projects, whether such projects were completed using the progressive design-build process or another bidding and contracting process.~~ The relative weight to apply to any criterion shall be at the discretion of the contracting agency based on each project, except that ~~for in~~ all design-build contracts cases, the cost of the work shall be given a relative weight of at least fifty percent;

(9) A requirement that the design-builder or progressive design-builder provide a written statement of the design-builder's or progressive 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 or progressive design-builder agree to the following conditions:

(a) At the time of the design-build or progressive design-build proposal, the design-builder or progressive design-builder must furnish to the contracting agency 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 or progressive 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 or progressive design-builder prior to the completion of the project without the written consent of the contracting agency;

(b) At the time of the design-build or progressive design-build proposal, the design-builder or progressive design-builder must furnish to the contracting agency 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 or progressive design-builder may not be removed by the design-builder or progressive design-builder prior to completion of the project without the written consent of the contracting agency;

(c) A design-builder or progressive design-builder offering design-build or progressive 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; and

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

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

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

Sec. 9. Section 39-2816, Revised Statutes Cumulative Supplement, 2020, is

amended to read:

39-2816 (1) Design-builders and progressive design-builders shall submit proposals as required by the request for proposals. A contracting agency may meet with individual design-builders and progressive 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, it may be incorporated as part of the proposal by the design-builder or progressive 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, progressive design-builders, or members of the public from the time the proposals are submitted until such proposals are opened by the contracting agency.

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

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

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

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

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

39-2821 A design-build contract, a progressive 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 in agreement with the design-builder, progressive design-builder, or construction manager to make changes in the project without invalidating the contract.

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

39-2822 The department may enter into agreements under sections 39-2808 to 39-2824 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, progressive 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.

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

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

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

professionals during the development of the rules and regulations.

(4) A request for proposals for a project utilizing a public-private partnership shall include at a minimum:

(a) The parameters of the proposed public-private partnership agreement;
(b) The duties and responsibilities to be performed by the private partner or private partners;

(c) The methods of oversight to be employed by the contracting agency;
(d) The duties and responsibilities that are to be performed by the contracting agency and any other parties to the contract;

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

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

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

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

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

(5) A private entity desiring to be a private partner shall demonstrate to the satisfaction of the contracting agency that it is capable of performing any duty, responsibility, or function it may be authorized or directed to perform as a term or condition of the public-private partnership agreement.

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

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

(8) The department shall:

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

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

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