

LEGISLATURE OF NEBRASKA  
ONE HUNDRED EIGHTH LEGISLATURE  
FIRST SESSION

**LEGISLATIVE BILL 723**

Introduced by Bostelman, 23; at the request of the Governor.

Read first time January 18, 2023

Committee: Natural Resources

1 A BILL FOR AN ACT relating to natural resources; to adopt the Public

2 Water and Natural Resources Project Contracting Act.

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

1           Section 1. Sections 1 to 20 of this act shall be known and may be  
2 cited as the Public Water and Natural Resources Project Contracting Act.

3           Sec. 2. For purposes of the Public Water and Natural Resources  
4 Project Contracting Act:

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

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

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

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

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

23           (6) Department means the Department of Natural Resources;

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

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

31           (9) Preconstruction services means all nonconstruction-related

1 services that a construction manager performs in relation to the design  
2 of the project before execution of a contract for construction services.  
3 Preconstruction services includes, but is not limited to, cost  
4 estimating, value engineering studies, constructability reviews, delivery  
5 schedule assessments, and life-cycle analysis;

6 (10) Private partner means any entity that is a partner in a public-  
7 private partnership other than the State of Nebraska, any agency of the  
8 State of Nebraska, the federal government, any agency of the federal  
9 government, any other state government, or any agency of any government  
10 at any level;

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

15 (12) Project performance criteria means the performance requirements  
16 of the project suitable to allow the design-builder to make a proposal.  
17 Performance requirements shall include, but are not limited to, the  
18 following, if required by the project: Capacity, durability, standards,  
19 ingress and egress requirements, description of the site, surveys, soil  
20 and environmental information concerning the site, material quality  
21 standards, design and milestone dates, site development requirements,  
22 compliance with applicable law, and other criteria for the intended use  
23 of the project;

24 (13) Proposal means an offer in response to a request for proposals  
25 (a) by a design-builder to enter into a design-build contract or (b) by a  
26 construction manager to enter into a construction manager-general  
27 contractor contract;

28 (14) Public-private partnership means a project delivery method for  
29 construction or financing of capital projects or procurement of services  
30 under a written public-private partnership agreement entered into  
31 pursuant to section 39-2825 between at least one private partner and the

1 State of Nebraska or any agency of the state;

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

5 (16) Request for proposals means the documentation by which the  
6 department solicits proposals; and

7 (17) Request for qualifications means the documentation or  
8 publication by which the department solicits qualifications.

9 Sec. 3. The purpose of the Public Water and Natural Resources  
10 Project Contracting Act is to provide the department alternative methods  
11 of contracting for public water and natural resources projects. The  
12 alternative methods of contracting shall be available to the department  
13 for use on any project regardless of the funding source. Notwithstanding  
14 any other provision of state law to the contrary, the Public Water and  
15 Natural Resources Project Contracting Act shall govern the design-build,  
16 progressive design-build, and construction manager-general contractor  
17 procurement processes.

18 Sec. 4. The department, in accordance with the Public Water and  
19 Natural Resources Project Contracting Act, may solicit and execute a  
20 design-build contract, a progressive design-build contract, or a  
21 construction manager-general contractor contract for a public surface  
22 water or groundwater-related infrastructure project.

23 Sec. 5. The department may hire an engineering or architectural  
24 consultant to assist the department with the development of project  
25 performance criteria and requests for proposals, with evaluation of  
26 proposals, with evaluation of the construction to determine adherence to  
27 the project performance criteria, and with any additional services  
28 requested by the department to represent its interests in relation to a  
29 project. The procedures used to hire such person or organization shall  
30 comply with the Nebraska Consultants' Competitive Negotiation Act. The  
31 person or organization hired shall be ineligible to be included as a

1 provider of other services in a proposal for the project for which the  
2 person or organization has been hired and shall not be employed by or  
3 have a financial or other interest in a design-builder or construction  
4 manager who will submit a proposal.

5       Sec. 6. The department shall adopt guidelines for entering into a  
6 design-build contract, a progressive design-build contract, or  
7 construction manager-general contractor contract. The department's  
8 guidelines shall include the following:

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

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

11          (3) Qualification and short-listing of design-builders, progressive  
12 design-builders, and construction managers. The guidelines shall provide  
13 that the department will evaluate prospective design-builders,  
14 progressive design-builders, and construction managers based on the  
15 information submitted to the department in response to a request for  
16 qualifications and will select a short list of design-builders,  
17 progressive design-builders, or construction managers who shall be  
18 considered qualified and eligible to respond to the request for  
19 proposals;

20          (4) Preparation and submittal of proposals;

21          (5) Procedures and standards for evaluating proposals;

22          (6) Procedures for negotiations between the department and the  
23 design-builders, progressive design-builders, or construction managers  
24 submitting proposals prior to the acceptance of a proposal if any such  
25 negotiations are contemplated; and

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

29       Sec. 7. (1) The process for selecting a design-builder and entering  
30 into a design-build contract shall be in accordance with sections 39-2813  
31 to 39-2816.

1       (2) Except as otherwise specifically provided in the Public Water  
2 and Natural Resources Project Contracting Act, the process for selecting  
3 a progressive design-builder and entering into a progressive design-build  
4 contract shall be in accordance with sections 39-2813 to 39-2816.

5       Sec. 8.     (1) The department shall prepare a request for  
6 qualifications for design-build and progressive design-build proposals  
7 and shall prequalify design-builders and progressive design-builders. The  
8 request for qualifications shall describe the project in sufficient  
9 detail to permit a design-builder or a progressive design-builder to  
10 respond. The request for qualifications shall identify the maximum number  
11 of design-builders or progressive design-builders the department will  
12 place on a short list as qualified and eligible to receive a request for  
13 proposals.

14       (2) A person or organization hired by the department under section  
15 39-2810 shall be ineligible to compete for a design-build contract on the  
16 same project for which the person or organization was hired.

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

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

31       Sec. 9.     The department shall prepare a request for proposals for

1 each design-build or progressive design-build contract. The request for  
2 proposals shall contain, at a minimum, the following elements:

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

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

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

12 (4) If applicable, a statement regarding alternative technical  
13 concepts including the process and time period in which such concepts may  
14 be submitted, confidentiality of the concepts, and ownership of the  
15 rights to the intellectual property contained in such concepts;

16 (5) Project performance criteria;

17 (6) Budget parameters for the project;

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

20 (8) The criteria for evaluation of proposals and the relative weight  
21 of each criterion. For both design-build and progressive design-build  
22 contracts, the criteria shall include, but are not limited to,  
23 construction experience, design experience, and the financial, personnel,  
24 and equipment resources available for the project. For design-build  
25 contracts only, the criteria shall also include the cost of the work. For  
26 progressive design-build contracts only, the criteria shall also include  
27 consideration of the historic reasonableness of the progressive design-  
28 builder's costs and expenses when bidding and completing projects,  
29 whether such projects were completed using the progressive design-build  
30 process or another bidding and contracting process. The relative weight  
31 to apply to any criterion shall be at the discretion of the department

1 based on each project, except that for all design-build contracts, the  
2 cost of the work shall be given a relative weight of at least fifty  
3 percent;

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

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

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

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

30 (c) A design-builder or progressive design-builder offering design-  
31 build or progressive design-build services with its own employees who are

1 design professionals licensed to practice in Nebraska must (i) comply  
2 with the Engineers and Architects Regulation Act by procuring a  
3 certificate of authorization to practice architecture or engineering and  
4 (ii) submit proof of sufficient professional liability insurance in the  
5 amount required by the department; and

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

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

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

14 Sec. 10. The department shall pay a stipend to qualified design-  
15 builders that submit responsive proposals but are not selected. Payment  
16 of the stipend shall give the department ownership of the intellectual  
17 property contained in the proposals and alternative technical concepts.  
18 The amount of the stipend shall be at the discretion of the department as  
19 disclosed in the request for proposals.

20 Sec. 11. (1) Design-builders and progressive design-builders shall  
21 submit proposals as required by the request for proposals. The department  
22 may meet with individual design-builders and progressive design-builders  
23 prior to the time of submitting the proposal and may have discussions  
24 concerning alternative technical concepts. If an alternative technical  
25 concept provides a solution that is equal to or better than the  
26 requirements in the request for proposals and the alternative technical  
27 concept is acceptable to the department, it may be incorporated as part  
28 of the proposal by the design-builder or progressive design-builder.  
29 Notwithstanding any other provision of state law to the contrary,  
30 alternative technical concepts shall be confidential and not disclosed to  
31 other design-builders, progressive design-builders, or members of the

1 public from the time the proposals are submitted until such proposals are  
2 opened by the department.

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

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

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

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

1 may enter into a design-build or progressive design-build contract after  
2 negotiations.

3 (6) If the department is unable to negotiate a satisfactory contract  
4 with any of the ranked design-builders or progressive design-builders,  
5 the department may either revise the request for proposals and solicit  
6 new proposals or cancel the design-build or progressive design-build  
7 process under the Public Water and Natural Resources Project Contracting  
8 Act.

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

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

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

24 (4) The department shall create a short list of qualified and  
25 eligible construction managers in accordance with the guidelines adopted  
26 pursuant to section 39-2811. The department shall select at least two  
27 construction managers, except that if only one construction manager has  
28 responded to the request for qualifications, the department may, in its  
29 discretion, proceed or cancel the procurement. The request for proposals  
30 shall be sent only to the construction managers placed on the short list.

31 Sec. 13. The department shall prepare a request for proposals for

1 each construction manager-general contractor contract. The request for  
2 proposals shall contain, at a minimum, the following elements:

3 (1) The guidelines adopted by the department in accordance with  
4 section 39-2811. The identification of a publicly accessible location of  
5 the guidelines, either physical or electronic, shall be considered  
6 compliance with this subdivision;

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

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

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

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

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

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

24 Sec. 14. (1) Construction managers shall submit proposals as  
25 required by the request for proposals.

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

29 (3) Proposals may be withdrawn at any time prior to signing a  
30 contract for preconstruction services. The department shall have the  
31 right to reject any and all proposals at no cost to the department. The

1 department may thereafter solicit new proposals or may cancel the  
2 construction manager-general contractor procurement process.

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

7 (5) The department may attempt to negotiate a contract for  
8 preconstruction services with the highest ranked construction manager and  
9 may enter into a contract for preconstruction services after  
10 negotiations. If the department is unable to negotiate a satisfactory  
11 contract for preconstruction services with the highest ranked  
12 construction manager, the department may terminate negotiations with that  
13 construction manager. The department may then undertake negotiations with  
14 the second highest ranked construction manager and may enter into a  
15 contract for preconstruction services after negotiations. If the  
16 department is unable to negotiate a satisfactory contract with the second  
17 highest ranked construction manager, the department may undertake  
18 negotiations with the third highest ranked construction manager, if any,  
19 and may enter into a contract for preconstruction services after  
20 negotiations.

21 (6) If the department is unable to negotiate a satisfactory contract  
22 for preconstruction services with any of the ranked construction  
23 managers, the department may either revise the request for proposals and  
24 solicit new proposals or cancel the construction manager-general  
25 contractor contract process under the Public Water and Natural Resources  
26 Project Contracting Act.

27 Sec. 15. (1) Before the construction manager begins any  
28 construction services, the department shall:

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

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

1 construction services.

2 (2) If the construction manager and the department are unable to  
3 negotiate a contract, the department may use other contract procurement  
4 processes. Persons or organizations who submitted proposals but were  
5 unable to negotiate a contract with the department shall be eligible to  
6 compete in the other contract procurement processes.

7 Sec. 16. A design-build contract, a progressive design-build  
8 contract, and a construction manager-general contractor contract may be  
9 conditioned upon later refinements in scope and price and may permit the  
10 department in agreement with the design-builder, progressive design-  
11 builder, or construction manager to make changes in the project without  
12 invalidating the contract.

13 Sec. 17. The department may enter into agreements under the Public  
14 Water and Natural Resources Project Contracting Act to let, design, and  
15 construct projects for political subdivisions when any of the funding for  
16 such projects is provided by or through the department. In such  
17 instances, the department may enter into contracts with the design-  
18 builder, progressive design-builder, or construction manager. The  
19 provisions of the Political Subdivisions Construction Alternatives Act  
20 shall not apply to projects let, designed, and constructed under the  
21 supervision of the department pursuant to agreements with political  
22 subdivisions under the Public Water and Natural Resources Project  
23 Contracting Act.

24 Sec. 18. Nothing in the Public Water and Natural Resources Project  
25 Contracting Act shall limit or reduce statutory or regulatory  
26 requirements regarding insurance.

27 Sec. 19. The department may adopt and promulgate rules and  
28 regulations to carry out the Public Water and Natural Resources Project  
29 Contracting Act.

30 Sec. 20. (1) A public-private partnership delivery method may be  
31 used for projects under the Public Water and Natural Resources Project

1 Contracting Act as provided in this section and rules and regulations  
2 adopted and promulgated pursuant to this section only to the extent  
3 allowed under the Constitution of Nebraska. State contracts using this  
4 method shall be awarded by competitive negotiation.

5 (2) The department utilizing a public-private partnership shall  
6 continue to be responsible for oversight of any function that is  
7 delegated to or otherwise performed by a private partner.

8 (3) On or before July 1, 2024, the Director-State Engineer shall  
9 adopt and promulgate rules and regulations setting forth criteria to be  
10 used in determining when a public-private partnership is to be used for a  
11 particular project. The rules and regulations shall reflect the intent of  
12 the Legislature to promote and encourage the use of public-private  
13 partnerships in the State of Nebraska. The Director-State Engineer shall  
14 consult with design-builders, progressive design-builders, construction  
15 managers, other contractors and design professionals, including engineers  
16 and architects, and other appropriate professionals during the  
17 development of the rules and regulations.

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

20 (a) The parameters of the proposed public-private partnership  
21 agreement;

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

24 (c) The methods of oversight to be employed by the department;

25 (d) The duties and responsibilities that are to be performed by the  
26 department and any other parties to the contract;

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

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

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

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

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

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

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

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

26       (8) The department shall:

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

30       (b) Electronically report annually to the Appropriations Committee  
31 of the Legislature and the Natural Resources Committee of the Legislature

- 1 regarding private-public partnerships which have been considered or are
- 2 approved pursuant to this section.