

3043 Design-Build Contracts

This policy is adopted pursuant to the Political Subdivisions Construction Alternatives Act (NEB. REV. STAT. § 13-2901 through § 13-2914).

The board shall adopt a resolution by a two-thirds affirmative vote selecting the design-build contract delivery system prior to proceeding with any of the steps involved with solicitation or execution of any construction contract. For a project authorized under subsection (3) of section 13-2914, the resolution shall include a statement that the political subdivision has made a determination that the design-build contract delivery system is in the public interest based, at a minimum, on one of the following criteria: (a) Savings in cost or time or (b) requirement of specialized or complex construction methods suitable for the design-build contract delivery system.

Definitions. For purposes of this policy:

1. Board means the District's Board of Education.
2. Department means the Nebraska Department of Education.
3. Design-Build Contract (DB Contract) means a contract which is subject to qualification-based selection between the District and a Design-Builder to furnish (a) architectural, engineering, and related design services for a project pursuant to the Nebraska Political Subdivisions Construction Alternatives Act (Act) and (b) labor, materials, supplies, equipment, and construction services for a project pursuant to the Act.
4. Design-Builder means a legal entity which proposes to enter into a DB Contract which is subject to qualification-based selection pursuant to the Act.
5. District means _____ Public Schools.
6. NEARA means the Nebraska Engineers and Architects Regulation Act.
7. Performance-Criteria Developer (PCD) means any person licensed or any organization issued a certificate of authorization to practice architecture or engineering pursuant to the NEARA who is selected by the District pursuant to this policy to assist the District in the development of Project Performance Criteria, Requests For Proposals, evaluation of Proposals, evaluation of construction under

a DB Contract to determine adherence to the Project Performance Criteria, and any additional services requested by the District to represent its interests in relation to a project.

8. Project Performance Criteria means the performance requirements of the project suitable to allow the Design-Builder to make a Proposal. Performance requirements include 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, interior space requirements, material quality standards, design and construction schedules, site development requirements, provisions for utilities, storm weather retention and disposal, parking requirements, applicable governmental code requirements, and other criteria for the intended use of the project.
9. Proposal means an offer in response to a Request For Proposals ("RFP") by a Design-Builder to enter into a DB Contract for a project pursuant to the Act.
10. Act means the Nebraska Political Subdivisions Construction Alternatives Act.
11. Request for Proposals (RFP) means the documentation by which the District solicits Proposals.
12. Superintendent means the District's Superintendent of Schools.

Procedures. The District shall follow the procedures below in connection with any DB Contract.

- 1. Rules and Procedures for Selecting and Hiring a PCD for a Specific Project.**
 - A. The District shall encourage eligible persons or organizations who desire to provide services to the District as a PCD to submit a statement of qualifications and performance data to the District. At least thirty days prior to selecting and hiring a PCD, the District shall publish notice in a newspaper of general circulation in the District that it is seeking a PCD for a design-build project. The notice shall include the following:

- (1) A general description of the Design-Build project;

- (2) Directions regarding how interested persons or organizations can apply for consideration by the District;
 - (3) The date by which persons or organizations must submit their applications; and
 - (4) A statement that any person or organization applying for consideration by the District must obtain a copy of the District's Design-Build Contract Policy from the Superintendent.
- B. To apply to be the District's PCD, applicants must submit a current statement of qualifications and performance data to the District. The statement of qualifications must include evidence that the applicant is licensed or certified to practice architecture or engineering pursuant to the NEARA. Applicants must update any information provided to the District to reflect any changed conditions of the applicant.
- C. Applicants shall first be certified by the Superintendent as qualified to act as a PCD for the District. In order to certify an applicant, the Superintendent shall make a finding that a PCD is fully qualified to render the required service. Factors to be considered in making this finding shall include capabilities to perform, adequacy of personnel, past record and performance, and experience; and may also include consideration of recent, current, and projected workloads; experience; equipment and facilities; promptness, and the quality of work previously done by applicant; suitability to the particular task; willingness to meet time and budget requirements; and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, the applicant could perform it strictly in accordance with its terms capabilities to perform.
- D. The Board shall evaluate each qualified applicant's current statement of qualifications and performance data. The Board shall conduct discussions with, and may require public presentations by no less than three applicants regarding their qualifications, approach to the project, ability to furnish the required service, and other factors identified above.
- E. The Board shall select, in order of preference, at least three applicants deemed to be most highly qualified to perform the required services after considering the factors outlined above.

- F. The Board shall negotiate a contract with the most qualified applicant for compensation which the Board determines is fair and reasonable. In making this determination, the Board shall conduct a detailed analysis of the cost of the professional services required in addition to considering their scope and complexity. For all lump-sum or cost-plus-a-fixed-fee professional service contracts, the Board shall require the applicant receiving the award to execute a certificate stating that wage rates and other factual unit costs supporting the compensation are accurate, complete, and current at the time of contracting. Any contract under which such a certificate is required shall contain a provision that the original contract price and any additions thereto shall be adjusted to exclude any significant sums by which the Board determines the contract price had been increased due to inaccurate, incomplete, or noncurrent wage rates and other factual unit costs. All such contract adjustments shall be made within one year following the end of the contract.
- G. If the Board is unable to negotiate a satisfactory contract with the applicant considered to be the most qualified at a price the Board determines to be fair and reasonable, it shall terminate negotiations with that applicant. The Board may then undertake negotiations with the second most qualified applicant. If the Board fails to reach an agreement with the second most qualified applicant, it shall terminate negotiations with that applicant. The Board shall then undertake negotiations with the third most qualified applicant.
- H. If the Board is unable to negotiate a satisfactory contract with any of the selected applicants, it shall either select additional applicants in order of their competence and qualification and continue negotiations in accordance with this policy until an agreement is reached or review the agreement under negotiation to determine the possible cause for failure to achieve a negotiated agreement.
- I. The Board may designate a committee to carry out any or all of the Board's duties under the PCD selection section of this policy, provided that the Board must approve any agreement with an applicant prior to its execution. Any such committee must have among its membership at least one person who is licensed to practice architecture or engineering pursuant to the NEARA.

- J. The public shall not be excluded from the meetings or proceedings under this section of this policy in accordance with the Open Meetings Act.
- K. The contract between the District and the PCD shall contain a prohibition against contingent fees as follows: "The PCD warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the PCD, to solicit or secure this agreement and that the PCD has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for the PCD, any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award or the making of this agreement." Upon violation of such provision, the District shall have the right to terminate the agreement without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, or consideration.
- L. The PCD is ineligible to be included as a provider of any services in a Proposal for the project on which it has acted as a PCD.
- M. A PCD may not be employed by or may not have a financial or other interest in a Design-Builder that will submit a Proposal.

2. Procedures and standards to be used to prequalify Design-Builders.

- A. The District, with the help of the PCD, shall prepare a request for letters of interest. The request for letters of interest shall:
 - (1) Describe the project in sufficient detail to permit a Design-Builder to submit a letter of interest;
 - (2) Be published in a newspaper of general circulation within the District at least 30 days prior to the deadline for receiving letters of interest; and
 - (3) Be sent by first-class mail to any Design-Builder upon request.
- B. Letters of interest shall be reviewed by the District in consultation with the PCD. The District and the PCD will evaluate prospective Design-Builders based on the information submitted to the District in response to the request for letters of interest.

- C. The District shall select at least three prospective Design-Builders, except that if only two Design-Builders have submitted letters of interest, the District shall select at least two prospective Design-Builders. Such selected Design-Builders shall be considered prequalified and eligible to receive and respond to the RFP.
- D. The District and PCD shall use the following standards when selecting which prospective Design-Builders to prequalify: capabilities to perform, adequacy of personnel, past record and performance, and experience; and may also include consideration of recent, current, and projected workloads; experience; equipment and facilities; promptness, and the quality of work previously done by applicant; suitability to the particular task; willingness to meet time and budget requirements; and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, the applicant could perform it strictly in accordance with its terms capabilities to perform.

3. Procedures for the preparation and content of RFPs.

- A. The District, with the help of the PCD, shall prepare the RFP, which shall contain:
 - (1) The identity of the school district for which the project will be built and will execute the Design-Build Contract;
 - (2) A copy of this Design-Build Contract Policy and all other policies adopted by the District relating to the DB Contract;
 - (3) The proposed terms and conditions of the DB Contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions shall be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in Nebraska. The proposed terms and conditions may set forth an initial determination of the manner by which the Design-Builder selects any subcontractor and may require that any work subcontracted be awarded by competitive bidding;
 - (4) A project statement which contains information about the scope and nature of the project;
 - (5) Project Performance Criteria;
 - (6) Budget parameters for the project;

- (7) Any bonds or insurance required by law or as may be additionally required by the District;
- (8) The criteria for evaluation of Proposals and the relative weight of each criterion;
- (9) A requirement that the Design-Builder provide a written statement of its proposed approach to the design and construction of the project, which may include graphic materials illustrating the proposed approach to design and construction but shall not include price proposals;
- (10) A requirement that the Design-Builder agree to the following conditions:
 - (i) An architect or engineer licensed to practice in Nebraska will participate substantially in those aspects of the offering which involve architectural or engineering services;
 - (ii) At the time of the design-build offering, the Design-Builder will furnish to the Board a written statement identifying the architect or engineer who will perform the architectural or engineering work for the design-build project;
 - (iii) The architect or engineer engaged by the Design-Builder to perform the architectural or engineering work with respect to the design-build project will 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 Board;
 - (iv) A Design-Builder offering design-build services with its own employees who are design professionals licensed to practice in Nebraska will: (a) comply with the NEARA by procuring a certificate of authorization to practice architecture or engineering and (b) submit proof of sufficient professional liability insurance; and
 - (v) The rendering of architectural or engineering services by a licensed architect or engineer employed by the Design-Builder will conform to the NEARA and rules and regulations adopted under the Act; and
- (11) Other information the District chooses to require.

- B. At least 30 days prior to the deadline for receiving and opening Proposals, the notice of the RFP shall be:
 - (1) Published in a newspaper of general circulation within the District;
 - (2) Filed with the Department; and
 - (3) Sent by first-class mail to the prequalified Design-Builders only.

4. Procedures for preparing and submitting Proposals.

- A. Prequalified Design-Builders shall prepare and submit Proposals as required by the RFP.
- B. All Proposals shall be sealed. Proposals shall not be opened until expiration of the time established for making Proposals as set forth in the RFP.
- C. Proposals may be withdrawn at any time prior to acceptance.
- D. The District has the right to reject any and all Proposals except for the purpose of evading the law. The District may thereafter solicit new Proposals using the same or a different Project Performance Criteria.

5. Procedures for evaluating Proposals.

- A. The District may only proceed to negotiate and enter into a DB Contract if there are at least two proposals from prequalified Design-Builders.
- B. The District shall refer the proposals for recommendation to a selection committee. The selection committee shall be a group of at least five persons designated by the District. Members of the selection committee shall include (1) members of the school board, (2) members of the school administration or staff, (3) the school's architect or engineer (4) any person having special expertise relevant to selection of a design-builder under the Act, and (5) a resident of the District other than an individual included in subdivisions (1) through (4) of this subsection. A member of the selection committee designated under subdivision (4) or (5) of this subsection shall not be employed by or have a financial or other interest in a design-builder who has a proposal being evaluated and shall not be employed by the District or the school's architect or engineer.

C. The selection committee and the District shall evaluate proposals taking into consideration the criteria enumerated in subdivisions (1) through (7) of this subsection with the maximum percentage of total points for evaluation which may be assigned to each criterion set forth following the criterion. The following criteria shall be evaluated, when applicable:

- (1) The financial resources of the design-builder to complete the project **(up to ten percent)**;
- (2) The ability of the proposed personnel of the design-builder to perform **(up to thirty percent)**;
- (3) The character, integrity, reputation, judgment, experience, and efficiency of the design-builder **(up to thirty percent)**;
- (4) The quality of performance on previous projects **(up to thirty percent)**;
- (5) The ability of the design-builder to perform within the time specified **(up to thirty percent)**;
- (6) The previous and existing compliance of the design-builder with laws relating to the contract **(up to ten percent)**; and
- (7) Such other information as may be secured having a bearing on the selection **(up to twenty percent)**.

~~NOTE TO BE DELETED: The percentages listed above must be modified so that they add up to 100%. This can be done directly in the policy, at the time the school board designates the Design-Build method for a specific project, or at a later time but before the RFP is published and sent out.~~

The records of the selection committee in evaluating proposals and making recommendations shall be considered public records for purposes of NEB. REV. STAT. § 84-712.01.

D. The District shall then evaluate and rank each proposal on the basis of best meeting the criteria in the request for

proposals and taking into consideration the recommendation of the selection committee.

6. Procedures for Negotiations between the District and Design-Builders Submitting Proposals Prior to the District's Acceptance of a Proposal.

- A. The District may attempt to negotiate a DB Contract with the highest ranked Design-Builder selected by the Board and may enter into a DB Contract after negotiations.
- B. The negotiations shall include a final determination of the manner by which the design-builder selects a subcontractor.
- C. If the District is unable to negotiate a satisfactory DB Contract with the highest ranked Design-Builder, it may terminate negotiations with that Design-Builder. The District may then undertake negotiations with the second highest ranked Design-Builder and may enter into a DB Contract with that Design-Builder after negotiations.
- D. If the District is unable to negotiate a satisfactory DB Contract with the second highest ranked Design-Builder, it may terminate negotiations with that Design-Builder. The District may then undertake negotiations with the third highest ranked Design-Builder, if any, and may enter into a DB Contract with that Design-Builder after negotiations.
- E. If the District is unable to negotiate a satisfactory DB Contract with any of the ranked Design-Builders, it may either revise the RFP and solicit new Proposals or cancel the design-build process.
- F. If the District is able to negotiate a satisfactory contract with a design-builder, the District shall file a copy of all design-build contract documents with the State Department of Education within thirty days after their full execution. Within thirty days after completion of the project, the design-builder shall file a copy of all contract modifications and change orders with the State Department of Education.

7. Procedures for Filing and Acting on Formal Protests Relating to the Solicitation or Execution of DB Contracts.

- A. Definitions.
 - (1) Interested party shall mean an actual or prospective bidder whose direct economic interest would be affected by the award of a contract by the District to another party

or by the failure of the District to award a contract to such actual or prospective bidder.

- (2) Protest shall mean a written objection by an interested party on any phase of the bidding process, including specification, preparation, bid solicitation, and intent to award.

B. Right to Protest. An interested party may protest to the Superintendent. The protest shall be submitted in writing on company letterhead within five working days after public notice of the bid. Protests based on alleged apparent improprieties in a solicitation or other request for proposals must be filed before bid opening or the closing date for receipt of proposals. In all other cases, the protest must be filed within five working days following the selection of the design-builder. To expedite handling of protests, the envelope containing the protest should be clearly labeled "Protest". The written protest shall include as a minimum the following:

- (1) The name and address of the interested party;
- (2) Appropriate identification of the relevant solicitation, and if a bid has been opened, its number, and date of opening;
- (3) A detailed statement of reasons for the protest;
- (4) Supporting, exhibits, evidence, or documents to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated; and a list of all persons who have knowledge of facts relevant to the protest; and
- (5) The action(s) the protestor desires the school district to take to resolve the protest.

The Superintendent will immediately decide upon receipt of the protest whether or not the award of a contract shall be delayed, or if the protest is timely received after the award, whether the performance of the contract should be suspended. The school district shall not proceed further with the solicitation or with the award of the contract and shall suspend performance under the contract, if awarded, unless the Superintendent makes a written determination that the protest is clearly without merit or that award of the contract without delay is necessary to protect the substantial interests of the District.

- C. Authority to Resolve Protests. Prior to the commencement of an administrative review by the Board concerning any protest, the Superintendent shall attempt to resolve any protest filed by an interested party concerning any solicitation. If the protest is not resolved by mutual agreement, the Superintendent shall create and deliver a Decision to the protestor within a reasonable time after the written protest was received. The Decision shall include a written summary of the Superintendent's investigation and a recommendation regarding the outcome of the protest. The Decision shall (1) state the reasons for the action taken, and (2) inform the interested party of their right to the administrative review by the Board. A copy of the Decision shall be mailed or otherwise furnished immediately to the interested party and any other party intervening protester and all other bidders. If not satisfied with the decision of the Superintendent, any interested party protester may appeal to the Board, but the decision shall be final unless the interested party protester files a timely appeal with the Board.
- D. Board Appeal Procedures. Any interested party protester, within five working days of receipt of a decision of the Superintendent, may file with the Superintendent a written notice of appeal for an administrative review before the Board. The Notice of Appeal must clearly state the action protested and the basis of appeal. The Board will conduct an administrative review at its next regularly scheduled meeting or at a special meeting. The school district board of education shall consider the Decision of the Superintendent and shall make the final decision on the protest. The school district board of education's decision shall be final.

8. Refinements and Changes. A DB Contract may be conditioned upon later refinements in scope and price and may permit the District, in agreement with the Design-Builder, to make changes in the project without invalidating the DB Contract. Later refinements shall not, however, exceed the scope of the project statement contained in the RFP.

9. Projects Excluded. The District shall not use a design-build contract for any construction project excluded by NEB. REV. STAT. § 13-2914 or any other applicable law.

Adopted on: July 9, 2018

Revised on: _____

Reviewed on: _____