

LEGISLATIVE BILL 889

Approved by the Governor April 11, 2008

Introduced by Flood, 19.

FOR AN ACT relating to political subdivisions; to amend sections 79-2001, 79-2002, 79-2003, 79-2004, 79-2005, 79-2006, 79-2007, 79-2008, 79-2009, 79-2010, 79-2011, 79-2012, and 79-2013, Reissue Revised Statutes of Nebraska; to transfer and rename the Nebraska Schools Construction Alternatives Act; to provide construction alternatives for political subdivisions; to provide and eliminate limitations on contracts; to repeal the original sections; and to outright repeal sections 79-2014 and 79-2015, Reissue Revised Statutes of Nebraska.

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

Section 1. Section 79-2001, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2001~~ Sections ~~79-2001 to 79-2015~~ 1 to 14 of this act shall be known and may be cited as the Nebraska Schools Political Subdivisions Construction Alternatives Act.

Sec. 2. Section 79-2002, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2002~~ The purpose of the Nebraska Schools Political Subdivisions Construction Alternatives Act is to authorize a ~~school district~~ political subdivision to enter into a design-build contract which is subject to qualification-based selection or a construction management at risk contract for a public project if the ~~school district~~ political subdivision adheres to the procedures set forth in the act.

Sec. 3. Section 79-2003, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2003~~ For purposes of the Nebraska Schools Political Subdivisions Construction Alternatives Act:

(1) Construction management at risk contract means a contract by which a construction manager (a) assumes the legal responsibility to deliver a construction project within a contracted price to the ~~school district,~~ political subdivision, (b) acts as a construction consultant to the ~~school district~~ political subdivision during the design development phase of the project when the ~~school district's~~ political subdivision's architect or engineer designs the project, and (c) is the builder during the construction phase of the project;

(2) Construction manager means the legal entity which proposes to enter into a construction management at risk contract pursuant to the act;

(3) Design-build contract means a contract which is subject to qualification-based selection between a ~~school district~~ political subdivision and a design-builder to furnish (a) architectural, engineering, and related design services for a project pursuant to the act and (b) labor, materials, supplies, equipment, and construction services for a project pursuant to the act;

(4) Design-builder means the legal entity which proposes to enter into a design-build contract which is subject to qualification-based selection pursuant to the act;

(5) Letter of interest means a statement indicating interest to enter into a design-build contract or a construction management at risk contract for a project pursuant to the act;

(6) Performance-criteria developer means any person licensed or any organization issued a certificate of authorization to practice architecture or engineering pursuant to the Engineers and Architects Regulation Act who is selected by a ~~school district~~ political subdivision to assist the ~~school district~~ political subdivision in the development of project performance criteria, requests for proposals, evaluation of proposals, evaluation of the construction under a design-build contract to determine adherence to the performance criteria, and any additional services requested by the ~~school district~~ political subdivision to represent its interests in relation to a project;

(7) Political subdivision means a city, village, county, school district, community college, or state college;

~~(7)~~ (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 water retention and disposal, parking requirements, applicable governmental code requirements, and other criteria for the intended use of the project;

~~(8)~~ (9) Proposal means an offer in response to a request for proposals (a) by a design-builder to enter into a design-build contract for a project pursuant to the ~~act~~ Political Subdivisions Construction Alternatives Act or (b) by a construction manager to enter into a construction management at risk contract for a project pursuant to the act;

~~(9)~~ (10) Qualification-based selection process means a process of selecting a design-builder based first on the qualifications of the design-builder and then on the design-builder's proposed approach to the design and construction of the project;

~~(10)~~ (11) Request for letters of interest means the documentation or publication by which a ~~school district~~ political subdivision solicits letters of interest;

~~(11)~~ (12) Request for proposals means the documentation by which a ~~school district~~ political subdivision solicits proposals; and

~~(12)~~ (13) School district means any school district classified under section 79-102.

Sec. 4. Section 79-2004, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2004~~ (1) Notwithstanding the procedures for public lettings in sections 73-101 to 73-106 or any other statute relating to the letting of bids by a political subdivision, a ~~school district~~ political subdivision which follows the ~~Nebraska Schools~~ Political Subdivisions Construction Alternatives Act may solicit and execute a design-build contract or a construction management at risk contract.

(2) The ~~school board~~ governing body of the political subdivision shall adopt a resolution selecting the design-build contract or construction management at risk contract delivery system provided under the act prior to proceeding with the provisions of sections ~~79-2005 to 79-2015~~, 5 to 14 of this act. The resolution shall require the affirmative vote of at least ~~seventy-five percent~~ two-thirds of the ~~school board~~, governing body of the political subdivision.

Sec. 5. Section 79-2005, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2005~~ The ~~school district~~ political subdivision shall adopt policies for entering into a design-build contract or construction management at risk contract. The policies shall require that such contracts include the following:

(1) Procedures for selecting and hiring on its behalf a performance-criteria developer when soliciting and executing a design-build contract. The procedures shall be consistent with the Nebraska Consultants' Competitive Negotiation Act and shall provide that the performance-criteria developer (a) is ineligible to be included as a provider of any services in a proposal for the project on which it has acted as performance-criteria developer and (b) is not employed by or does not have a financial or other interest in a design-builder or construction manager who will submit a proposal;

(2) Procedures for the preparation and content of requests for proposals;

(3) Procedures and standards to be used to prequalify design-builders and construction managers. The procedures and standards shall provide that the ~~school district~~ political subdivision will evaluate prospective design-builders and construction managers based on the information submitted to the ~~school district~~ political subdivision in response to a request for letters of interest and will select design-builders or construction managers who are prequalified and consequently eligible to respond to the request for proposals;

(4) Procedures for preparing and submitting proposals;

(5) Procedures for evaluating proposals in accordance with sections ~~79-2008, 79-2010, and 79-2011~~, 8, 10, and 11 of this act;

(6) Procedures for negotiations between the ~~school district~~ political subdivision and the design-builders or construction managers submitting proposals prior to the acceptance of a proposal if any such negotiations are contemplated;

(7) Procedures for filing and acting on formal protests relating to the solicitation or execution of design-build contracts or construction management at risk contracts; and

(8) Procedures for the evaluation of construction under a

design-build contract by the performance-criteria developer to determine adherence to the performance criteria.

Sec. 6. Section 79-2006, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2006~~ (1) A ~~school district~~ political subdivision shall prepare a request for letters of interest for design-build proposals and shall prequalify design-builders in accordance with this section. The request for letters of interest shall describe the project in sufficient detail to permit a design-builder to submit a letter of interest.

(2) The request for letters of interest shall be (a) published in a newspaper of general circulation within the ~~school district~~ political subdivision at least thirty days prior to the deadline for receiving letters of interest and (b) sent by first-class mail to any design-builder upon request.

(3) Letters of interest shall be reviewed by the ~~school district~~ political subdivision in consultation with the performance-criteria developer. The ~~school district~~ political subdivision shall select prospective design-builders in accordance with the procedures and standards adopted by the ~~school district~~ political subdivision pursuant to section ~~79-2005, 5 of this act.~~ The ~~school district~~ political subdivision shall select at least three prospective design-builders, except that if only two design-builders have submitted letters of interest, the ~~school district~~ political subdivision shall select at least two prospective design-builders. The selected design-builders shall then be considered prequalified and eligible to receive requests for proposals.

Sec. 7. Section 79-2007, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2007~~ A ~~school district~~ political subdivision shall prepare a request for proposals for each design-build contract in accordance with this section. Notice of the request for proposals shall be published in a newspaper of general circulation within the ~~school district~~ and filed with the State Department of Education political subdivision at least thirty days prior to the deadline for receiving and opening proposals. A notice of the request for proposals by a school district shall be filed with the State Department of Education at least thirty days prior to the deadline for receiving and opening proposals. The request for proposals shall contain, at a minimum, the following elements:

(1) The identity of the ~~school district~~ political subdivision for which the project will be built and the ~~school district~~ political subdivision that will execute the design-build contract;

(2) Policies adopted by the ~~school district~~ political subdivision in accordance with section ~~79-2005, 5 of this act;~~

(3) The proposed terms and conditions of the design-build 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 and insurance required by law or as may be additionally required by the ~~school district,~~ political subdivision;

(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 the design-builder's proposed approach to the design and construction of the project, which may include graphic materials illustrating the proposed approach to design and construction but shall not include price proposals;

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

(a) An architect or engineer licensed to practice in Nebraska will participate substantially in those aspects of the offering which involve architectural or engineering services;

(b) At the time of the design-build offering, the design-builder will furnish to the ~~school board~~ governing body of the political subdivision a written statement identifying the architect or engineer who will perform the architectural or engineering work for the design-build project;

(c) 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 ~~school board~~, governing body of the political subdivision;

(d) A design-builder offering design-build services with its own employees who are design professionals licensed to practice in Nebraska will (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; and

(e) The rendering of architectural or engineering services by a licensed architect or engineer employed by the design-builder will conform to the Engineers and Architects Regulation Act and rules and regulations adopted under the act; and

(11) Other information which the ~~school district~~ political subdivision chooses to require.

Sec. 8. Section 79-2008, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2008~~ (1) A ~~school district~~ political subdivision shall evaluate proposals for a design-build contract in accordance with this section.

(2) The request for proposals shall be sent only to the prequalified design-builders selected pursuant to section ~~79-2006~~, 6 of this act.

(3) Design-builders shall submit proposals as required by the request for proposals. The ~~school district~~ political subdivision may only proceed to negotiate and enter into a design-build contract if there are at least two proposals from prequalified design-builders.

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

(5) Proposals may be withdrawn at any time prior to acceptance. The ~~school district~~ political subdivision shall have the right to reject any and all proposals except for the purpose of evading the provisions and policies of the Nebraska Schools Political Subdivisions Construction Alternatives Act. The ~~school district~~ political subdivision may thereafter solicit new proposals using the same or a different project performance criteria.

(6) The ~~school district~~ political subdivision shall rank in order of preference the design-builders pursuant to the criteria in the request for proposals and taking into consideration the recommendation of the selection committee pursuant to section ~~79-2011~~, 11 of this act.

(7) The ~~school district~~ political subdivision may attempt to negotiate a design-build contract with the highest ranked design-builder selected by the ~~school district~~ political subdivision and may enter into a design-build contract after negotiations. The negotiations shall include a final determination of the manner by which the design-builder selects a subcontractor. If the ~~school district~~ political subdivision is unable to negotiate a satisfactory design-build contract with the highest ranked design-builder, the ~~school district~~ political subdivision may terminate negotiations with that design-builder. The ~~school district~~ political subdivision may then undertake negotiations with the second highest ranked design-builder and may enter into a design-build contract after negotiations. If the ~~school district~~ political subdivision is unable to negotiate a satisfactory contract with the second highest ranked design-builder, the ~~school district~~ political subdivision may undertake negotiations with the third highest ranked design-builder, if any, and may enter into a design-build contract after negotiations.

(8) The A school 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 department.

(9) If the ~~school district~~ political subdivision is unable to negotiate a satisfactory contract with any of the ranked design-builders, the ~~school district~~ political subdivision may either revise the request for proposals and solicit new proposals or cancel the design-build process under the act.

Sec. 9. Section 79-2009, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2009~~ A ~~school district~~ political subdivision shall prepare a request for proposals for each construction management at risk contract in accordance with this section. At least thirty days prior to the deadline for receiving and opening proposals, notice of the request for proposals shall be published in a newspaper of general circulation within the ~~school district~~ and

~~filed with the State Department of Education.~~ political subdivision. A notice of the request for proposals by a school district shall be filed with the State Department of Education at least thirty days prior to the deadline for receiving and opening proposals. The request for proposals shall contain, at a minimum, the following elements:

(1) The identity of the ~~school district~~ political subdivision for which the project will be built and the ~~school district~~ political subdivision that will execute the contract;

(2) Policies adopted by the ~~school district~~ political subdivision in accordance with section ~~79-2005,~~ 5 of this act;

(3) The proposed terms and conditions of the 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 construction manager selects any subcontractor and may require that any work subcontracted be awarded by competitive bidding;

(4) Any bonds and insurance required by law or as may be additionally required by the ~~school district,~~ political subdivision;

(5) General information about the project which will assist the ~~school district~~ political subdivision in its selection of the construction manager, including a project statement which contains information about the scope and nature of the project, the project site, the schedule, and the estimated budget;

(6) The criteria for evaluation of proposals and the relative weight of each criterion; and

(7) A description of any other information which the ~~school district~~ political subdivision chooses to require.

Sec. 10. Section 79-2010, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2010~~ (1) A ~~school district~~ political subdivision shall evaluate proposals for a construction management at risk contract in accordance with this section.

(2) The ~~school district~~ political subdivision shall 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 pursuant to section ~~79-2011,~~ 11 of this act.

(3) The ~~school district~~ political subdivision shall attempt to negotiate a construction management at risk contract with the highest ranked construction manager and may enter into a construction management at risk contract after negotiations. The negotiations shall include a final determination of the manner by which the construction manager selects a subcontractor. If the ~~school district~~ political subdivision is unable to negotiate a satisfactory contract with the highest ranked construction manager, the ~~school district~~ political subdivision may terminate negotiations with that construction manager. The ~~school district~~ political subdivision may then undertake negotiations with the second highest ranked construction manager and may enter into a construction management at risk contract after negotiations. If the ~~school district~~ political subdivision is unable to negotiate a satisfactory contract with the second highest ranked construction manager, the ~~school district~~ political subdivision may undertake negotiations with the third highest ranked construction manager, if any, and may enter into a construction management at risk contract after negotiations.

(4) The A school district shall file a copy of all construction management at risk contract documents with the State Department of Education within thirty days after their full execution. Within thirty days after completion of the project, the construction manager shall file a copy of all contract modifications and change orders with the department.

(5) If the ~~school district~~ political subdivision is unable to negotiate a satisfactory contract with any of the ranked construction managers, the ~~school district~~ political subdivision may either revise the request for proposals and solicit new proposals or cancel the construction management at risk process under the ~~act.~~ Political Subdivisions Construction Alternatives Act.

Sec. 11. Section 79-2011, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2011~~ (1) In evaluating proposals in accordance with sections ~~79-2008 and 79-2010,~~ 8 and 10 of this act, the ~~school district~~ political subdivision 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 ~~school district.~~ political subdivision. Members of the

selection committee shall include (a) members of the ~~school board~~, governing body of the political subdivision, (b) members of the ~~school~~ administration or staff of the political subdivision, (c) the performance-criteria developer when evaluating proposals from design-builders under section ~~79-2008~~ 8 of this act or the ~~school's~~ political subdivision's architect or engineer when evaluating proposals from construction managers under section ~~79-2010~~, 10 of this act, (d) any person having special expertise relevant to selection of a design-builder or construction manager under the Nebraska Schools Political Subdivisions Construction Alternatives Act, and (e) a resident of the ~~school district~~ political subdivision other than an individual included in subdivisions (a) through (d) of this subsection. A member of the selection committee designated under subdivision (d) or (e) of this subsection shall not be employed by or have a financial or other interest in a design-builder or construction manager who has a proposal being evaluated and shall not be employed by the ~~school district~~ political subdivision or the performance-criteria developer.

(2) The selection committee and the ~~school district~~ political subdivision shall evaluate proposals taking into consideration the criteria enumerated in subdivisions (a) through (g) 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:

(a) The financial resources of the design-builder or construction manager to complete the project, ten percent;

(b) The ability of the proposed personnel of the design-builder or construction manager to perform, thirty percent;

(c) The character, integrity, reputation, judgment, experience, and efficiency of the design-builder or construction manager, thirty percent;

(d) The quality of performance on previous projects, thirty percent;

(e) The ability of the design-builder or construction manager to perform within the time specified, thirty percent;

(f) The previous and existing compliance of the design-builder or construction manager with laws relating to the contract, ten percent; and

(g) Such other information as may be secured having a bearing on the selection, twenty percent.

(3) The records of the selection committee in evaluating proposals and making recommendations shall be considered public records for purposes of section 84-712.01.

Sec. 12. Section 79-2012, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2012~~ A design-build contract and a construction management at risk contract may be conditioned upon later refinements in scope and price and may permit the ~~school district~~ political subdivision in agreement with the design-builder or construction manager to make changes in the project without invalidating the contract. Later refinements under this section shall not exceed the scope of the project statement contained in the request for proposals pursuant to section ~~79-2007~~ ~~or 79-2009~~, 7 or 9 of this act.

Sec. 13. Section 79-2013, Reissue Revised Statutes of Nebraska, is amended to read:

~~79-2013~~ Nothing in the Nebraska Schools Political Subdivisions Construction Alternatives Act shall limit or reduce statutory or regulatory requirements regarding bonding or insurance.

Sec. 14. A political subdivision shall not use a design-build contract or construction management at risk contract for a project, in whole or in part, for road, street, highway, water, wastewater, utility, or sewer construction, except that a city of the metropolitan class may use a design-build contract or construction management at risk contract for the purpose of complying with state or federal requirements to control or minimize overflows from combined sewers.

Sec. 15. Original sections 79-2001, 79-2002, 79-2003, 79-2004, 79-2005, 79-2006, 79-2007, 79-2008, 79-2009, 79-2010, 79-2011, 79-2012, and 79-2013, Reissue Revised Statutes of Nebraska, are repealed.

Sec. 16. The following sections are outright repealed: Sections 79-2014 and 79-2015, Reissue Revised Statutes of Nebraska.