

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 1016

FINAL READING

Introduced by Walz, 15.

Read first time January 13, 2022

Committee: Transportation and Telecommunications

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

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

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

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

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

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

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

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

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

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

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

30 (7) Department means the Department of Transportation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 procurement ~~processes~~ process.

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

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

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

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

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

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

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

31 (4) Preparation and submittal of proposals;

1 (5) Procedures and standards for evaluating proposals;

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

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

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

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

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

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

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

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

1 hired.

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

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

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

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

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

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

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

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

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

4 (5) Project performance criteria;

5 (6) Budget parameters for the project;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 partnership shall include at a minimum:

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

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

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

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

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

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

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

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

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

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

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

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

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

10 (8) The department shall:

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

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

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