

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.