

## 23 §753-A. DESIGN-BUILD CONTRACTS

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**1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Best value" means the highest overall value to the State, considering quality and cost. [2001, c. 140, §1 (NEW).]

B. "Department" means the Department of Transportation. [2001, c. 140, §1 (NEW).]

C. "Design-build contracting" means a method of project delivery whereby a single firm is contractually responsible to perform design, construction and related services. [2001, c. 140, §1 (NEW).]

D. "Major participant" means any firm that would have a major role in the design or construction of the project as specified by the department in the request for proposals. [2001, c. 140, §1 (NEW).]

E. "Project" means the highway, bridge, railroad, pier, airport, trail, ferry vessel, building or other improvement being constructed or rehabilitated, including all professional services, labor, equipment, materials, tools, supplies, warranties and incidentals needed for a complete and functioning product. [2001, c. 140, §1 (NEW).]

F. "Proposal" means an offer by the proposer to design and construct the project in accordance with all request-for-proposals provisions for the price contained in the proposal. [2001, c. 140, §1 (NEW).]

G. "Proposer" means an individual, firm, corporation, limited liability company, partnership, joint venture, sole proprietorship or other entity that submits a proposal. After contract execution, the successful proposer is the design-builder. [2001, c. 140, §1 (NEW).]

H. "Quality" means those features that the department determines are most important to the project. Quality criteria may include quality of design, constructability, long-term maintenance costs, aesthetics, local impacts, traveler and other user costs, service life, time to construct and other factors that the department considers to be in the best interest of the State. [2001, c. 140, §1 (NEW).]

[2001, c. 140, §1 (NEW).]

**2. Authorization.** Notwithstanding chapter 410, subchapter 4 or any other provision of law, the department may use design-build contracting to deliver projects. The department may evaluate and select proposals on either a best-value or low-bid basis. If the scope of work requires substantial engineering judgment, the quality of which may vary significantly as determined by the department, then the basis of award must be best value.

The department shall identify in its planning process those projects it believes are candidates for design-build contracting. The failure of the department to identify such projects does not prevent the department from using design-build contracting in extraordinary circumstances including emergency work, unscheduled projects or loss of funding.

The department retains the authority to terminate the contracting process at any time, to reject any proposal, to waive technicalities or to advertise for new proposals if the department determines that it is in the best interest of the State.

[2005, c. 313, §4 (AMD).]

**3. Prequalification.** The department may require that firms be prequalified to submit proposals. If the department requires prequalification, it shall give public notice requesting qualifications from interested firms electronically through the department's publicly accessible website or through advertisements in newspapers. If such a request is published exclusively in newspapers, the notice must appear in 2 or more public newspapers circulated wholly or in part in the State and in one public newspaper circulated wholly or

in part in the county where the proposed work is to be done if any such newspaper is circulated in that county. The department shall issue a request-for-qualifications package to all firms requesting one in accordance with the notice.

Interested firms shall supply, for themselves and all major participants, all information required by the department. The department may investigate and verify all information received. All financial information, trade secrets or other information customarily regarded as confidential business information submitted to the department is confidential.

The department shall evaluate and rate all firms submitting a conforming statement of qualifications and select the most qualified firms to each receive a request for proposals. The department may select any number of firms, except that, if the department fails to prequalify at least 2 firms, the department shall readvertise the project.

[ 2007, c. 306, §3 (AMD) .]

**4. Request for proposals.** If the department requires prequalification, it shall issue a draft request for proposals to those firms prequalified. The department shall give prequalified firms adequate time to review and comment on a draft request for proposals. The department shall consider those comments in the best interest of the State before issuing the request for proposals. If the department does not require prequalification, it shall give public notice of the request for proposals in at least 2 newspapers distributed in the State.

The request for proposals must set forth the scope of work, design parameters, construction requirements, time constraints and all other requirements that have a substantial impact on the cost or quality of the project and the project development process, as determined by the department. The request for proposals must include the criteria for acceptable proposals. For projects to be awarded on a best-value basis, the scoring process and quality criteria must also be contained in the request for proposals. In the department's discretion, the request for proposals may provide for a process, including the establishment of a team to review proposals, for the department to review conceptual technical elements of each proposal before full proposal submittal for the purposes of identifying defects that would cause rejection of the proposal as nonresponsive. The majority of the members of the team reviewing proposals for responsiveness must be persons not employed by the department. Rejection of any proposal as nonresponsive requires a unanimous vote of the review team. All such conceptual submittals and responses are confidential until award of the contract. Upon award of the contract and after resolution of any procurement disputes, the department shall return documents submitted by unsuccessful proposers upon request. The request for proposals may also provide for a stipend upon specified terms to unsuccessful proposers that submit proposals conforming to all request-for-proposals requirements.

[ 2001, c. 140, §1 (NEW) .]

**5. Low-bid award.** If the basis of the award of responsive proposals is lowest cost, then each proposal, including the price or prices, must be sealed by the proposer and submitted to the department as one complete package. The department shall award the design-build contract to the proposer that submits a responsive proposal with the lowest price, if the proposal meets all request-for-proposals requirements.

[ 2001, c. 140, §1 (NEW) .]

**6. Best-value award.** If the basis of the award of responsive proposals is best value, then each proposal must be submitted by the proposer to the department in 2 separate components, which are a sealed technical proposal and a sealed price proposal. These 2 components must be submitted simultaneously.

The department shall first open, evaluate and score each responsive technical proposal, based on the quality criteria contained in the request for proposals. The request for proposals may provide that the range between the highest and lowest quality score of responsive technical proposals must be limited to an amount certain. During this evaluation process, the price proposals will remain sealed and all technical proposals are confidential.

After completion of the evaluation of the technical proposals, the department shall publicly open and read each price proposal. The department shall calculate the overall value rating for each proposal, which is the total price divided by the quality score. The department shall award the contract to the proposer with the lowest price per quality score point, provided that the proposal meets all request-for-proposals requirements.

[ 2001, c. 140, §1 (NEW) . ]

**7. Procurement disputes.** The request for proposals must provide for resolution of disputes that may arise before award of the contract by including a dispute review board procedure in accordance with the department's standard specifications and a provision that provides that the procurement process must be suspended pending final resolution of such disputes. This subsection does not prevent an aggrieved party from seeking judicial review.

[ 2001, c. 140, §1 (NEW) . ]

SECTION HISTORY

2001, c. 140, §1 (NEW). 2005, c. 313, §4 (AMD). 2007, c. 306, §3 (AMD).

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