

161.3410

Design-build contracts; definitions.

- Subdivision 1. **Scope.** The terms used in sections 161.3410 to 161.3428 have the meanings given in this section.
- Subd. 2. **Commissioner.** "Commissioner" means the commissioner of transportation.
- Subd. 3. **Design-build contract.** "Design-build contract" means a single contract between the department of transportation and a design-build company or firm to furnish the architectural or engineering and related design services as well as the labor, material, supplies, equipment, and construction services for the transportation project.
- Subd. 4. **Design-build firm.** "Design-build firm" means a proprietorship, partnership, limited liability partnership, joint venture, corporation, any type of limited liability company, professional corporation, or any legal entity.
- Subd. 5. **Design professional.** "Design professional" means a person who holds a license under chapter 326 that is required to be registered under Minnesota law.
- Subd. 6. **Design-build transportation project.** "Design-build transportation project" means the procurement of both the design and construction of a transportation project in a single contract with a company or companies capable of providing the necessary engineering services and construction.
- Subd. 7. **Design-builder.** "Design-builder" means the design-build firm that proposes to design and build a transportation project governed by the procedures of this section.
- Subd. 8. **Request for proposals or RFP.** "Request for proposals" or "RFP" means the document by which the commissioner solicits proposals from prequalified design-build firms to design and construct the transportation project.
- Subd. 9. **Request for qualifications or RFQ.** "Request for qualifications" or "RFQ" means a document to prequalify and short-list potential design-build firms.

161.3412

Design-build authority.

- Subdivision 1. **Best value selection.** Notwithstanding sections 16C.25, 161.32, and 161.321, or any other law to the contrary, the commissioner may solicit and award a design-build contract for a project on the basis of a best value selection process. Section 16C.08 does not apply to design-build contracts to which the commissioner is a party.
- Subd. 2. **Competitive, open process.** Sections 161.3410 to 161.3428 apply only to transportation projects using the two-step competitive process utilizing public solicitation for design-build services.
- Subd. 3. **Restriction; reports.**
- (a) The number of design-build contracts awarded by the commissioner in any fiscal year may not exceed ten percent of the total number of transportation construction contracts awarded by the commissioner in the previous fiscal year.
 - (b) The commissioner shall notify the chairs of the senate and house of representatives committees with jurisdiction over transportation policy and transportation finance each time the commissioner decides to use the design-build method of procurement and explain why that method was chosen.
- Subd. 4. **Municipal consent.** Use of the design-build method of state transportation project delivery is subject to state law concerning municipal consent to highways in municipalities.

HIST: 1Sp2001 c 8 art 3 s 2

161.3414

Determination to use design-build selection method.

- Subdivision 1. **General criteria.** A design-build contracting procedure authorized under sections 161.3410 to 161.3428 may be used for a specific project only after the commissioner determines that awarding a design-build contract will serve the public interest.
- Subd. 2. **Specific criteria.** The commissioner shall use the following criteria as the minimum basis for determining when to use the design-build method of project delivery:

- (1) the extent to which it can adequately define the project requirements in a proposed scope of the design and construction desired;
- (2) the time constraints for delivery of the project;
- (3) the capability and experience of potential contractors with the design-build method of project delivery or similar experience;
- (4) the suitability of the project for use of the design-build method of project delivery with respect to time, schedule, costs, and quality factors;
- (5) the capability of the department of transportation to manage the project, including the employment of experienced personnel or outside consultants;
- (6) the capability of the department of transportation to oversee the project with individuals or design-build firms who are familiar and experienced with the design-build method of project delivery or similar experience;
- (7) the lack of ability and availability of any current state employee to perform the services called for by the contract;
- (8) the original character of the product or the services;
- (9) the work to be performed on the project is necessary to the agency's achievement of its statutory responsibilities and there is statutory authority to enter into the contract; and
- (10) other criteria the commissioner deems relevant and states in writing in its determination to utilize the design-build method of project delivery.

HIST: 1Sp2001 c 8 art 3 s 3

161.3416

Design-build notice; report.

Subdivision 1. **Summary report of reasons for determination.** The commissioner shall summarize in a written statement its reasons for using the design-build construction contracting procedure. This statement, along with other relevant information describing the project, must be made available upon request to interested parties.

Subd. 2. **Final determination authority.** Final determination to use a design-build construction contracting procedure may be made only by the commissioner.

HIST: 1Sp2001 c 8 art 3 s 4

161.3418
Licensing requirements.

Subdivision 1. **Licensed professional required.** Each design-builder shall employ, or have as a partner, member, officer, coventurer, or subcontractor, a person duly licensed and registered to provide the design services required to complete the project and do business in the state.

Subd. 2. **Contracting for licensed professional.** A design-builder may enter into a contract to provide professional or construction services for a project that the design-builder is not licensed, registered, or qualified to perform, so long as the design-builder provides those services through subcontractors with duly licensed, registered, or otherwise qualified individuals in accordance with sections 161.3410 to 161.3428.

Subd. 3. **Liability.**

- (a) Nothing in this section authorizing design-build contracts is intended to limit or eliminate the responsibility or liability owed by a professional on a design-build project to the state, county, or city, or other third parties under existing law.
- (b) The design service portion of a design-build contract must be considered a service and not a product.

HIST: 1Sp2001 c 8 art 3 s 5

161.3420
Design-build RFQ; selection team; evaluation.

Subdivision 1. **Two-phase procedure.** If the commissioner determines that the design-build best value method of project delivery is appropriate for a project, the commissioner shall establish a two-phase procedure for awarding the design-build contract, as described in this subdivision and section 161.3422.

Subd. 2. **Technical review committee.** During the phase-one request for qualifications (RFQ) and before solicitation, the commissioner shall

appoint a technical review committee of at least five individuals. The technical review committee must include an individual whose name and qualifications are submitted to the commissioner by the Minnesota chapter of the Associated General Contractors, after consultation with other commercial contractor associations in the state. Members of the technical review committee who are not state employees are subject to the Minnesota Government Data Practices Act and section 16C.06 to the same extent that state agencies are subject to those provisions. A technical review committee member may not participate in the review or discussion of responses to an RFQ or request for proposals (RFP) when the member has a financial interest in any of the design-build firms that respond to that RFQ or RFP. "Financial interest" includes, but is not limited to, being or serving as an owner, employee, partner, limited liability partner, shareholder, joint venturer, family member, officer, or director of a design-build firm responding to an RFQ or RFP for a specific project, or having any other economic interest in that design-build firm. The members of the technical review committee must be treated as state employees in the event of litigation resulting from any action arising out of their service on the committee.

Subd. 3. **Contents.** The commissioner shall prepare or have prepared an RFQ. The RFQ must include the following:

- (1) the minimum qualifications of design-builders necessary to meet the requirements for acceptance;
- (2) a scope of work statement and schedule;
- (3) documents defining the project requirements;
- (4) the form of contract to be awarded;
- (5) the weighted selection criteria for compiling a short list and the number of firms to be included in the short list, which must be at least two but not more than five;
- (6) a description of the request for proposals (RF)P requirements;
- (7) the maximum time allowed for design and construction;
- (8) the commissioner's estimated cost of design and construction;
- (9) requirements for construction experience, design experience, financial, personnel, and equipment resources available from potential design-builders for the project and experience in other

design-build transportation projects or similar projects, provided that these requirements may not unduly restrict competition; and

- (10) a statement that "past performance" or "experience" does not include the exercise or assertion of a person's legal rights.

Subd. 4. **Evaluation.** The selection team shall evaluate the design-build qualifications of responding firms and shall compile a short list of no more than five most highly qualified firms in accordance with qualifications criteria described in the request for qualifications (RFQ). If only one design-build firm responds to the RFQ or remains on the short list, the commissioner may readvertise or cancel the project as the commissioner deems necessary.

HIST: 1Sp2001 c 8 art 3 s 6

161.3422
RFP for design-build.

During phase two, the commissioner shall issue a request for proposals (RFP) to the design-builders on the short list. The request must include:

- (1) the scope of work, including (i) performance and technical requirements, (ii) conceptual design, (iii) specifications, and (iv) functional and operational elements for the delivery of the completed project, which must be prepared by a registered or licensed professional engineer;
- (2) a description of the qualifications required of the design-builder and the selection criteria, including the weight or relative order, or both, of each criterion;
- (3) copies of the contract documents that the successful proposer will be expected to sign;
- (4) the maximum time allowable for design and construction;
- (5) the road authority's estimated cost of design and construction;
- (6) the requirement that a submitted proposal be segmented into two parts, a technical proposal and a price proposal;
- (7) the requirement that each proposal be in a separately sealed, clearly identified package and include the date and time of the submittal deadline;
- (8) the requirement that the technical proposal include a critical path method; bar schedule of the work to be performed, or similar schematic; design plans and

specifications; technical reports; calculations; permit requirements; applicable development fees; and other data requested in the RFP;

- (9) the requirement that the price proposal contain all design, construction, engineering, inspection, and construction costs of the proposed project;
- (10) the date, time, and location of the public opening of the sealed price proposals; and
- (11) other information relevant to the project.

HIST: 1Sp2001 c 8 art 3 s 7

161.3424 Replacing team members.

An individual or a design-build firm identified in a response to a request for qualifications (RFQ) or a request for proposals (RFP) may not be replaced without the written approval of the commissioner. The commissioner may revoke an awarded contract if an individual or a design-build firm identified in a response to an RFQ or RFP is replaced without the commissioner's written approval. To qualify for the commissioner's approval, the written request must document that the proposed replacement individual or design-build firm will be equal to or better than that described in the response to the RFQ or RFP. The commissioner shall use the criteria specified in the RFQ or RFP to evaluate the request.

HIST: 1Sp2001 c 8 art 3 s 8

161.3426 Design-build award.

- Subdivision 1. **Award; computation; announcement.** Except as provided in subdivision 2, a design-build contract shall be awarded as follows:
- (a) The technical review committee shall score the technical proposals using the selection criteria in the request for proposals (RFP). The technical review committee shall then submit a technical proposal score for each design-builder to the commissioner. The technical review committee shall reject any proposal it deems nonresponsive.
 - (b) The commissioner shall announce the technical proposal score for each design-builder and shall publicly open the sealed price proposals and shall divide each design-builder's price by the

technical score that the technical review committee has given to it to obtain an adjusted score. The design-builder selected must be that responsive and responsible design-builder whose adjusted score is the lowest.

- (c) If a time factor is included with the selection criteria in the RFP package, the commissioner may also adjust the bids using a value of the time factor established by the commissioner. The value of the time factor must be expressed as a value per day. The adjustment must be based on the total time value. The total time value is the design-builder's total number of days to complete the project multiplied by the factor. The time-adjusted price is the total time value plus the bid amount. This adjustment must be used for selection purposes only, and must not affect the department of transportation's liquidated damages schedule or incentive or disincentive program. An adjusted score must then be obtained by dividing each design-builder's time-adjusted price by the score given by the technical review team. The commissioner shall select the responsive and responsible design-builder whose adjusted score is the lowest.
- (d) Unless all proposals are rejected, the commissioner shall award the contract to the responsive and responsible design-builder with the lowest adjusted score. The commissioner shall reserve the right to reject all proposals.

Subd. 2.

Alternative process for certain contracts.

- (a) The commissioner may elect to use the process in paragraph for a design-build contract for a project with an estimated project cost of less than \$5,000,000.
- (b) The commissioner shall give the lowest cost proposal the full number of price points defined in the request for proposals (RFP). The commissioner shall award each of the other proposals a percentage of the price points based on a ratio of the lowest price divided by the responder's price. The commissioner shall add the technical score and price score and award the contract to the responder with the highest total score.

Subd. 3.

Stipulated fee. The commissioner shall award a stipulated fee not less than two-tenths of one percent of the department's estimated cost of design and construction to each short-listed, responsible proposer who provides a responsive but unsuccessful proposal. If the commissioner does not award a contract, all short-listed proposers must receive the stipulated fee. If the commissioner cancels the contract before reviewing the technical proposals, the commissioner

shall award each design-builder on the short list a stipulated fee of not less than two-tenths of one percent of the commissioner's estimated cost of design and construction. The commissioner shall pay the stipulated fee to each proposer within 90 days after the award of the contract or the decision not to award a contract. In consideration for paying the stipulated fee, the commissioner may use any ideas or information contained in the proposals in connection with any contract awarded for the project or in connection with a subsequent procurement, without any obligation to pay any additional compensation to the unsuccessful proposers. Notwithstanding the other provisions of this subdivision, an unsuccessful short-list proposer may elect to waive the stipulated fee. If an unsuccessful short-list proposer elects to waive the stipulated fee, the commissioner may not use ideas and information contained in that proposer's proposal. Upon the request of the commissioner, a proposer who waived a stipulated fee may withdraw the waiver, in which case the commissioner shall pay the stipulated fee to the proposer and thereafter may use ideas and information in the proposer's proposal.

Subd. 4.

Low-bid design-build process.

- (a) The commissioner may also use low-bid, design-build procedures to award a design-build contract where the scope of the work can be clearly defined.
- (b) Low-bid design-build projects may require a request for qualifications (RFQ) and short-listing, and must require a request for proposals (RFP).
- (c) Submitted proposals under this subdivision must include separately a technical proposal and a price proposal. The low-bid, design-build procedures must follow a two-step process for review of the responses to the RFP as follows:
 - (1) The first step is the review of the technical proposal by the technical review committee as provided in section 161.3420, subdivision 2. The technical review committee must open the technical proposal first and must determine if it complies with the requirements of the RFP and is responsive. The technical review committee may not perform any ranking or scoring of the technical proposals.
 - (2) The second step is the determination of the low bidder based on the price proposal. The commissioner may not open the price proposal until the review of the technical proposal is complete.

- (d) The contract award under low-bid, design-build procedures must be made to the proposer whose sealed bid is responsive to the technical requirements as determined by the technical review committee and that is also the lowest bid.
- (e) A stipulated fee may be paid for unsuccessful bids on low-bid, design-build projects only when the commissioner has required an RFQ and short-listed the most highly qualified responsive bidders.

Subd. 5. **Rejection of bids.** The commissioner may reject all bids under this section.

HIST: 1Sp2001 c 8 art 3 s 9

161.3428

List of design-build contracts.

Beginning September 1, 2002, and every subsequent year on September 1, the commissioner shall submit to the governor, the chairs of the house of representatives ways and means and senate finance committees, the chairs of the house of representatives and senate committees having jurisdiction over transportation policy and finance, and the legislative reference library, a yearly listing of all executed design-build contracts. The report must identify the contractor, contract amount, duration, and services to be provided. The list and summary must:

- (1) be sorted by contractor;
- (2) show the aggregate value of contracts issued by the commissioner of transportation and issued to each contractor; and
- (3) state the termination date of each contract.

HIST: 1Sp2001 c 8 art 3 s 10