

CHAPTER 176—S.F.No. 2131

An act relating to transportation; contracts; authorizing completion of design-build projects approved by commissioner of transportation; amending Laws 2009, chapter 36, article 3, sections 28; 29.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Laws 2009, chapter 36, article 3, section 28, is amended to read:

Sec. 28. **DESIGN-BUILD ~~PROJECT SELECTION COUNCIL~~ LOCAL PROJECTS.**

~~Subdivision 1. **Establishment of council.** A Design-Build Project Selection Council is established to select, evaluate, and support county and municipal transportation projects on the state-aid system that are conducive to use of the design-build method of contracting and to report to the legislature.~~

Subd. 1a. **Selection authority.** The commissioner of transportation or the commissioner's designee from the Department of Transportation State Aid for Local Transportation Division shall select, evaluate, and support county and municipal transportation projects on the state-aid system that are conducive to use of the design-build method of contracting.

Subd. 2. **Duties of ~~council~~ commissioner.** In order to accomplish these purposes, the ~~council~~ commissioner shall:

(1) review applications for participation received by the commissioner from counties and cities;

~~(2) select projects for participation in the pilot program a maximum of 15 projects on the state-aid system, no more than ten of which may be on the county state-aid highway system, and no more than ten of which may be on the municipal state-aid street system each calendar year;~~

(3) determine that the use of design-build in the selected projects would serve the public interest, after considering, at a minimum:

(i) the extent to which the municipality can adequately define the project requirements in a proposed scope of the design and construction desired;

(ii) the time constraints for delivery of the project;

(iii) the capability of potential contractors with the design-build method of project delivery;

(iv) the suitability of the project for use of the design-build method of project delivery with respect to time, schedule, costs, and quality factors;

(v) the capability of the municipality to manage the project, including the employment of experienced personnel or outside consultants; and

(vi) the original character of the product or the services; and

(4) periodically review and evaluate the use of design-build in the selected projects;
and

~~(5) assist the commissioner in preparing a report to the legislature at the conclusion of the pilot program.~~

~~Subd. 3. **Membership.** (a) The council is composed of the following members:~~

~~(1) two contractors, at least one of whom represents a small contracting firm, selected by the Associated General Contractors, Minnesota chapter;~~

~~(2) two project designers selected by the American Council of Engineering Companies, Minnesota chapter;~~

~~(3) one representative of a metropolitan area county selected by the Association of Minnesota Counties;~~

~~(4) one representative of a greater Minnesota county selected by the Association of Minnesota Counties;~~

~~(5) one representative of a metropolitan area city selected by the League of Minnesota Cities;~~

~~(6) one representative of a greater Minnesota city selected by the League of Minnesota Cities; and~~

~~(7) the commissioner of transportation or a designee from the Minnesota Department of Transportation Division of State Aid for Local Transportation.~~

~~(b) All appointments required by paragraph (a) must be completed by August 1, 2009.~~

~~(c) The commissioner or the commissioner's designee shall convene the first meeting of the council within two weeks after the members have been appointed to the council and shall serve as chair of the council.~~

~~Subd. 4. **Report to legislature.** Annually, by January 15, the council shall submit a report to the chairs and ranking minority members of the legislative committees with jurisdiction over transportation budget and policy, and to the legislature as provided under Minnesota Statutes, section 15.059. The report must summarize the design-build pilot program selection process, including the number of applications considered, the proposal process for each project that was selected, the contracting process for each project that was completed, and project costs. The report must evaluate the process and results applying the performance-based measures with which the commissioner evaluates trunk highway design-build projects. The report must include any recommendations for future legislation.~~

EFFECTIVE DATE. This section is effective the day following final enactment and expires upon completion of nine design-build projects.

Sec. 2. Laws 2009, chapter 36, article 3, section 28, the effective date, is amended to read:

~~**EFFECTIVE DATE.** This section is effective the day following final enactment and expires on October 1, 2012, or upon completion of nine design-build projects under this pilot program, whichever occurs first.~~

Sec. 3. Laws 2009, chapter 36, article 3, section 29, is amended to read:

Sec. 29. **DESIGN-BUILD CONTRACTING ~~PILOT~~ PROGRAM.**

Subdivision 1. **Definitions.** The following terms have the meanings given:

- (1) "commissioner" means the commissioner of transportation;
- (2) "municipality" means a county or statutory or home rule charter city;
- (3) "design-build contract" means a single contract between a municipality 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;
- (4) "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;
- (5) "design professional" means a person who holds a license under Minnesota Statutes, chapter 326B, that is required to be registered under Minnesota law;
- (6) "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;
- (7) "design-builder" means the design-build firm that proposes to design and build a transportation project governed by the procedures of this section;
- (8) "request for proposals" or "RFP" means the document by which the municipality solicits proposals from qualified design-build firms to design and construct the transportation project;
- (9) "request for qualifications" or "RFQ" means a document to qualify potential design-build firms; and
- (10) "responsive proposal" means a technical proposal of which no major component (i) contradicts the goals of the project, (ii) materially violates an RFP requirement so as to give the proposer a competitive advantage, or (iii) places conditions on a proposal inconsistent with the requirements of the RFP.

Subd. 2. **Establishment of ~~pilot~~ the program.** (a) The commissioner of transportation shall conduct a design-build contracting ~~pilot~~ program to select local transportation projects for participation in the program, to conduct information sessions for engineers and contractors, to support and evaluate the use of the design-build method of contracting by counties and statutory and home rule charter cities in constructing, improving, and maintaining streets and highways on the state-aid system, ~~and to report to the legislature.~~

(b) The commissioner must concur in the RFQ and RFP prior to solicitation.

(c) The selection of design-build projects under the ~~pilot~~ program must be as made by the ~~Design-Build Project Selection Council~~ established commissioner as provided in section 28.

Subd. 3. **Licensing requirements.** (a) 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, including the provision of sureties of sufficient amount to protect the interests of the awarding municipality.

(b) 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 Minnesota Statutes, sections 161.3410 to 161.3428.

(c) 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, municipality, or other third party under existing law.

(d) The design service portion of a design-build contract must be considered a service and not a product.

Subd. 4. Information session for municipal engineer. After a project is selected for participation in the design-build contracting ~~pilot~~ program, the commissioner or the commissioner's designee with design-build experience shall conduct an information session for the municipality's engineer for each selected project, in which issues unique to design-build must be discussed, including, but not limited to, writing an RFP, project oversight requirements, assessing risk, and communication with the design-build firm. After participation in the information session, the municipality's engineer is qualified to post the selected project, along with any future design-build project RFP in the ~~pilot~~ program.

Subd. 5. Technical Review Committee. During the phase one RFQ and before solicitation, the municipality 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 municipality 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 Minnesota Statutes, 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 the RFQ or RFP when a design-build firm in which the member has a financial interest has responded to the 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 municipal employees in the event of litigation resulting from any action arising out of their service on the committee.

Subd. 6. Phase one; design-build RFQ. The municipality shall prepare an RFQ, which 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 (RFP) requirements;

(7) the maximum time allowed for design and construction;

(8) the municipality'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" or other criteria used in the RFQ evaluation process does not include the exercise or assertion of a person's legal rights.

Subd. 7. **Information session for prospective design-build firms.** After a design-build project is advertised, any prospective design-build firm shall attend a design-build information session conducted by the commissioner or the commissioner's designee with design-build experience. The information must include information about design-build contracts, including, but not limited to, communication with partner firms, project oversight requirements, assessing risk, and communication with the municipality's engineer. After participation in the information session, the design-build firm is eligible to bid on the design-build project and any future design-build ~~pitot~~ program projects.

Subd. 8. **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 RFQ. If only one design-build firm responds to the RFQ or remains on the short list, the municipality may readvertise or cancel the project as the municipality deems necessary.

Subd. 9. **Phase two; design-build RFP.** The municipality shall prepare an RFP, which must include:

(1) the scope of work, including (i) performance and technical requirements, (ii) conceptual design, (iii) specifications consistent with state standards and specifications, and (iv) functional and operational elements for the delivery of the completed project, all of which must be prepared by a registered or licensed professional engineer;

(2) copies of the contract documents that the successful proposer will be expected to sign;

(3) the maximum time allowable for design and construction;

(4) the road authority's estimated cost of design and construction;

(5) the requirement that a submitted proposal be segmented into two parts, a technical proposal and a price proposal;

(6) the requirement that each proposal be in a separately sealed, clearly identified package and include the date and time of the submittal deadline;

(7) the requirement that the technical proposal include a critical path method, bar schedule of the work to be performed, or similar schematic; preliminary design plans and specifications; technical reports; calculations; permit requirements; applicable development fees; and other data requested in the RFP;

(8) the requirement that the price proposal contain all design, construction, engineering, inspection, and construction costs of the proposed project;

(9) the requirement that surety be submitted equal to the total amount of the proposal;

(10) a description of the qualifications required of the design-builder and the selection criteria, including the weight of each criterion and subcriterion;

- (11) the date, time, and location of the public opening of the sealed price proposals;
- (12) the amount of, and eligibility for, a stipulated fee;
- (13) other information relevant to the project; and

(14) a statement that "past performance," "experience," or other criteria used in the RFP evaluation process does not include the exercise or assertion of a person's legal rights.

Subd. 10. **Design-build award; computation; announcement.** A design-build contract shall be awarded as follows:

(a) The Technical Review Committee shall score the technical proposals of the proposers selected under subdivision 8 using the selection criteria in the RFP. The Technical Review Committee shall then submit a technical proposal score for each design-builder to the municipality. The Technical Review Committee shall reject any nonresponsive proposal, including those unable to provide sufficient surety to guarantee project completion. The municipality shall review the technical proposal scores.

(b) The commissioner or the commissioner's designee shall review the technical proposal scores. The commissioner shall submit the final technical proposal scores to the municipality.

(c) The municipality 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 commissioner 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.

(d) If a time factor is included with the selection criteria in the RFP package, the municipality may use a value of the time factor established by the municipality as a criterion in the RFP.

(e) Unless all proposals are rejected, the municipality shall award the contract to the responsive and responsible design-builder with the lowest adjusted score. The municipality shall reserve the right to reject all proposals.

(f) The municipality shall award a stipulated fee not less than two-tenths of one percent of the municipality's estimated cost of design and construction to each short-listed, responsible proposer who provides a responsive but unsuccessful proposal. If the municipality does not award a contract, all short-listed proposers must receive the stipulated fee. If the municipality cancels the contract before reviewing the technical proposals, the municipality shall award each design-builder on the short list a stipulated fee of not less than two-tenths of one percent of the municipality's estimated cost of design and construction. The municipality 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 municipality 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 municipality may not use ideas and information contained in that proposer's proposal. Upon the request of the municipality, a proposer who waived a stipulated fee

may withdraw the waiver, in which case the municipality shall pay the stipulated fee to the proposer and thereafter may use ideas and information in the proposer's proposal.

(g) The municipality shall not limit the ability of design-builders that have submitted proposals to protest a contemplated or actual award by the commissioner by, among other things, unreasonably restricting the time to protest; restricting the right to seek judicial review of the commissioner's actions; attempting to change the judicial standard of review; or requiring the protestor to pay attorney fees for an unsuccessful, nonfrivolous protest. Unless all design-builders that have submitted proposals agree to execution of a contract for the project without a waiting period beforehand, the municipality shall wait at least seven days after both the award of the project and public disclosure of the Technical Review Committee's scoring data and the successful proposal before executing a contract for the project.

Subd. 11. **Low-bid design-build process.** (a) The municipality 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 an RFQ and short-listing, and must require an 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 subdivision 5. 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; and

(2) the second step is the determination of the low bidder based on the price proposal. The municipality 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 municipality has required an RFQ and short-listed the most highly qualified responsive bidders.

EFFECTIVE DATE. This section is effective the day following final enactment and expires upon completion of nine design-build projects.

Sec. 4. Laws 2009, chapter 36, article 3, section 29, the effective date, is amended to read:

~~**EFFECTIVE DATE.** This section is effective the day following final enactment and expires on October 1, 2012, or upon completion of nine design-build projects under this pilot program, whichever occurs first.~~

Presented to the governor April 16, 2012

Signed by the governor April 18, 2012, 01:42 p.m.