

## Notice of Rulemaking Hearing

### Tennessee Department of Transportation Construction Division

There will be a hearing before the Tennessee Department of Transportation to consider the promulgation of new rules governing the solicitation and award of Design-Build contracts by the Department of Transportation as authorized in Chapter 274 of the Public Acts of 2007, Tennessee Code Annotated § 54-1-119. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tennessee Code Annotated § 4-5-204, and will take place in the Auditorium of the Main Administrative Building (Building "A") at the Tennessee Department of Transportation, Region III Office Complex, located at 6601 Centennial Boulevard, Nashville, Tennessee 37243-0360 (take Briley Parkway to Exit 26B, Centennial Boulevard West) at 1:30 p.m. CST on Thursday, January 17, 2008.

Written comments will be considered if received by the close of business (4:30 p.m. CST) on January 17, 2008, in the Office of General Counsel, Tennessee Department of Transportation, Suite 300, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243, or if received at the public rulemaking hearing on January 17, 2008.

Individuals with disabilities wishing to participate in these proceedings (or to review these filings) should contact the Department of Transportation to discuss any auxiliary aids or services needed to facilitate such participation. Such contact may be in person, by writing, telephone or other appropriate means, and should be made no less than ten (10) days prior to the public hearing (January 17, 2008) or the date the party intends to review such filings to allow time to provide such aid or service. Such contact may be made with the Department of Transportation's ADA Coordinator at Suite 400, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0327, or by telephone at (615) 741-4984.

For a copy of this notice of rulemaking hearing, contact: John Reinbold, Tennessee Department of Transportation, Office of General Counsel, Suite 300, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243, telephone number (615) 741-2941.

## Substance of Proposed Rules

### New Rules

#### Chapter 1680-05-04

#### Procedures for the Solicitation and Award of Design-Build Contracts

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1680-05-04-.01 Purpose.

The purpose of these rules is to establish procedures and criteria for the solicitation and award of Design-Build contracts as authorized in Chapter 274 of the Public Acts of 2007, Tennessee Code Annotated § 54-1-119.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04-.02 Definitions.

The following terms, as used in this Chapter, shall have the following meanings unless the context thereof indicates to the contrary:

- (1) "Adjusted low bid" means a form of best value selection in which qualitative aspects are scored on a 0 to 100 scale expressed as a decimal; price is then divided by the qualitative score or calculated by a modified version of this formula as stated within the RFP to yield an "adjusted bid". Award is made to the Design-Builder with the lowest adjusted bid.
- (2) "Alternate Technical Concepts (ATC)" are alternative concepts to the Base Technical Concept which promote innovation and are equal or better in quality or effect as determined by the Department in its sole discretion and which have successfully been used elsewhere under comparable circumstances.
- (3) "Base Technical Concept (BTC)" is the project information provided in the RFP upon which Design-Builders will develop their Technical and Price Proposals, and such project information may include without limitation roadway alignment, preliminary designs, interchange configurations, etc.
- (4) "Best and Final Offer" is a change to a Design-Builder's Technical and/or Price Proposal made at the request of, or as allowed by, the Department within a Best and Final Offer RFP after the solicitation closing date when all Price Proposals exceed an acceptable range of the Department's estimate.
- (5) "Best and Final Offer RFP" is a revised RFP issued to all eligible Design-Builders that may make minor changes to the scope and/or contract requirements to allow Design-Builders to revise their Technical and/or Price Proposals.
- (6) "Best value selection" means any selection process in which proposals contain both price and qualitative components and award is based upon a combination of price and qualitative considerations.
- (7) "CFR" means the Code of Federal Regulations.
- (8) "Commissioner" means the Commissioner of the Tennessee Department of Transportation.
- (9) "Department" means the Tennessee Department of Transportation.
- (10) "Design-Build" means a project delivery method that combines all or some portions of the design and construction phases of a project – including without limitation design, right-of-way acquisition, regulatory permit approvals, utility relocation, and construction – into a single contract.
- (11) "Design-Build contract" means an agreement that provides for the design and construction of a project – which without limitation may include design, right-of-way acquisition, regulatory permit approvals, utility relocation, and construction – into a single contract.

- (12) "Design-Build Review Committee (DBRC)" means the committee designated by the Department to review and evaluate Statements of Qualifications and/or Technical and Price Proposals, as provided elsewhere in these rules, for the purpose of selecting a Design-Builder for a Design-Build contract.
- (13) "Design-Builder" means any entity or joint venture contractually responsible for delivering the project design and construction, or, as the context may require, any entity or joint venture that responds to a Department solicitation for a Design-Build contract.
- (14) "Final design" means any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work.
- (15) "Fixed Price/Best Design" means a variation of Design-Build utilizing a best value selection process in which contract price is established by the Department and stated in the Request for Proposals document. Design solutions and other qualitative factors are evaluated and rated. Award is made to the Design-Builders offering the best qualitative proposal for the established price.
- (16) "FHWA" means the Federal Highway Administration.
- (17) "FTA" means the Federal Transit Administration.
- (18) "Lowest Price-Technically Acceptable" means a type of modified Design-Build selection process in which the Department identifies evaluation factors that establish the minimum requirements of acceptability. Proposals are evaluated for acceptability but not ranked using non-cost/price factors. The award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost/price factors. Evaluated prices may include provisions such as cost-plus-time bidding, lane rental or other cost-based provisions.
- (19) "Modified Design-Build" means a variation of Design-Build in which the Department furnishes Design-Builders with partially complete plans. The Design-Builder's role is generally limited to the completion of the design and construction of the project.
- (20) "NEPA" means the National Environmental Policy Act.
- (21) "Organizational conflict of interest" means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the owner or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.
- (22) "Price Proposal" means the price submitted by a Design-Build to provide the required design and construction services.
- (23) "Preliminary design" defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design.
- (24) "Prequalification" means the Department's process for determining whether a Design-Builder, or any member thereof, is fundamentally qualified to compete for a particular project or class of projects. The prequalification process is separate from short listing as elsewhere provided for in these rules.

- (25) "Price reasonableness" means the determination that the price of the work for any project or series of projects is not excessive and is a fair and reasonable price for the services to be performed.
- (26) "Request for Proposals (RFP)" means the document issued by the Department in a single-phase process or the second phase of a two-phase selection process that describes the procurement process, forms the basis for the final proposals, and may potentially become an element of the Design-Build contract.
- (27) "Request for Qualifications (RFQ)" means the document issued by the Department in the first phase of a two-phase selection process that describes the project in enough detail to let potential Design-Builders determine if they wish to compete and forms the basis for identifying (i.e., short listing) the most qualified Design-Builders.
- (28) "Short listing" or "short listed" means the narrowing of the field of potential Design-Builders through the selection of the most qualified Design-Builders who have responded to an RFQ.
- (29) "Single-phase selection process" means a procurement process where price and/or technical proposals are submitted in response to an RFP without an RFQ or short listing.
- (30) "Standard Specifications" means the Department's Standard Specifications for Road and Bridge Construction.
- (31) "Statement of Qualifications (SOQ)" means the document(s) submitted by a Design-Builder in response to an RFQ that describes the qualifications and capability of the Design-Builder to perform the scope of services to be included in the Design-Build contract. For each Design-Builder, the SOQ must include, at a minimum, documentation that the Design-Builder is capable of performing the scope of services of the project.
- (32) "Stipend" means a monetary amount paid to unsuccessful Design-Builders who have submitted responsive proposals in response to an RFP.
- (33) "Technical Proposal" means that portion of a Design-Build proposal which contains design solutions and other qualitative factors that are provided in response to an RFP.
- (34) "Two-phase selection process" means a procurement process in which the first phase consists of short listing based on statements of qualifications submitted in response to an RFQ and the second phase consists of the submission of price and technical proposals in response to an RFP.
- (35) "Weighted criteria process" means a form of best value selection in which maximum point values are pre-established for qualitative and price components. Award is made to the Design-Builder with the highest total points earned.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04-.03 Overview of Design-Build Selection Process.

The following steps outline the typical sequence of actions in a two-phase selection process for the award of a Design-Build contract (provided, however, that some steps may be omitted or condensed in a single-phase selection process or in a modified design-build process):

- (1) Selection of Design-Build Review Committee;

- (2) Advertisement of proposed Design-Build project (Request for Qualifications);
- (3) Submission of Statements of Qualifications;
- (4) Determination of most qualified Design-Builders (short listing);
- (5) Issuance of the Request for Proposals;
- (6) Submission of Technical Proposals and Price Proposals;
- (7) Evaluation of Technical Proposals;
- (8) Opening of Price Proposals;
- (9) Issuance of a Best and Final RFP (if any);
- (10) Submission of Best and Final Offers (if any);
- (11) Determination of the best evaluated Design-Build Team in accordance with the identified selection method;
- (12) Recommendation for action by the Design-Build Review Committee; and
- (13) Award of Design-Build contract.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04-.04 Design-Build Review Committee.

- (1) For each proposed Design-Build project, the Department will designate a Design-Build Review Committee (DBRC).
- (2) The members of the DBRC shall include at least three (3) Department employees from various Departmental divisions who are qualified by education and experience and at least two of whom shall be licensed Professional Engineers. Additional engineering and technical experts may be selected by the Department to serve as DBRC committee members on a project-by-project basis.
- (3) It shall be the responsibility of the DBRC to implement the Design-Build selection process, including the following:
  - (a) Write or oversee the writing of the RFQ and/or RFP for the proposed Design-Build project, including the selection process to be used and a description of the scope of services to be obtained;
  - (b) Determine the criteria for the award of a stipend, if any, to responsive but unsuccessful Design-Builders.
  - (c) Advertise the proposed Design-Build project or cause it to be advertised;
  - (d) Review and evaluate the Statements of Qualifications submitted in response to an RFQ;
  - (e) Determine which Design-Builders shall be deemed qualified or short listed for further consideration in accordance with the selection method identified in the RFQ or RFP;
  - (f) Review and evaluate Technical Proposals submitted by qualified or short listed Design-Builders in accordance with the identified selection method;
  - (g) Open and read Price Proposals from eligible and responsive Design-Builders, or cause such to be opened and read.
  - (h) Determine whether the Price Proposals are within an acceptable range of the Department's cost estimate and, if not, determine whether to proceed with a Best and Final RFP and, if so, to review and evaluate Best and Final Offers from eligible and responsive Design-Builders;

- (i) Determine the apparent best evaluated Design-Builder in accordance with the identified selection method; and
- (j) Recommend to the Commissioner either:
  - 1. The rejection of all proposals;
  - 2. The award of a Design-Build contract to the best evaluated Design-Builder; or
  - 3. If the DBRC determines after opening the Price Proposals that the apparent best evaluated Design-Builder should be considered non-responsive, or if, after award, the best evaluated Design-Builder forfeits the proposal guaranty, the DBRC may recommend award of the contract to the next best evaluated Design-Builder.
- (4) The DBRC shall have the authority to discontinue the Design-Build selection process at any time prior to the opening of Price Proposals, subject to any applicable obligation to pay a stipend to eligible and responsive Design-Builders.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-5-3-.05 Advertisement of Design-Build Projects.

- (1) Advertisement of the RFQ and/or RFP for Design-Build projects will be published, at a minimum, through the Internet by posting on the Department's website. The announcement for a Design-Build project or projects will be made by the Department in sufficient time for Design-Builders to submit Statements of Qualifications or other responses solicited in the RFQ or RFP.
- (2) The Department's RFQ shall outline the tentative general scope, description, location, and anticipated procurement schedule for each proposed Design-Build project.
- (3) The Department will establish and determine the appropriate selection method on a project-by-project basis (e.g., adjusted low bid, fixed price/best design, weighted criteria process, lowest price-technically acceptable, etc.). This selection method will be stated in the RFP, and in the RFQ in a two-phase selection process.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04 -.06 Description of the Scope of Service.

- (1) A Design-Build project will be designed and constructed as described in the RFP. Through the RFP, the Design-Builder's specific scope of work will be defined in detail on a project by project basis.
- (2) A tentative general scope of work will be described as part of the RFQ in a two-phase selection process.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04-.07 Request for Qualifications (RFQ).

- (1) The RFQ (or the RFP in a single-phase selection process) will contain all prequalification requirements for the proposed Design-Build project. The Department will evaluate the scope of the Design-Build project and will list the required prequalification categories for the Design-Build contract.

- (2) Through the RFQ (or the RFP in a single-phase selection process), the Department shall establish criteria for the evaluation of Statements of Qualifications on a project-by-project basis. The RFQ shall include information on the procedures that apply for consideration of a proposal.
- (3) The criteria for evaluation of qualifications may include, without limitation:
  - (a) Technical qualifications, such as specialized experience and technical competence;
  - (b) Capability to perform, including key personnel;
  - (c) Past performance by members of the Design-Builder's team, including design and construction members;
  - (d) Technical approach, including innovative techniques; and/or
  - (e) Other appropriate qualifications-based selection factors.
- (4) A letter of interest shall be submitted as a cover letter to the Design-Builder's SOQ submittal package. The SOQ shall address all stated criteria in the RFQ in order to be considered complete.
- (5) The RFQ (or the RFP in a single-phase selection process) will require the Design-Builders to provide information concerning potential organizational conflicts of interest. The Design-Builders must disclose all relevant facts concerning any past, present, or currently planned interests which may present an organizational conflict of interest. The Design-Builder must state how their interests may result, or could be viewed as, an organizational conflict of interest. If at any time during the selection process or during the contract period a previously undetermined organizational conflict of interest arises, the Design-Builder must disclose that information as soon as discovered.
- (6) The Department will review all SOQs in accordance with the advertised criteria in the solicitation. The advertised criteria shall include, at a minimum:
  - (a) Any prequalification requirements; and
  - (b) All project-specific qualifications necessary to satisfy both the construction and design portions of the scope of services.
- (7) Based on the responses provided in the SOQs, the Design-Build Review Committee shall evaluate the qualified Design-Builders. Based on these evaluations, the Department may either accept all qualified Design-Builders or short list as appropriate in accordance with the identified selection method.
- (8) The RFQ may be released prior to the conclusion of the NEPA review process as long as the RFQ informs Design-Builders of the general status of the NEPA process. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04-.08 Request for Proposals.

- (1) The Department will issue a Request for Proposals (RFP) for the Design-Build project to the Design-Builders that are deemed qualified or that are short listed based on their response to the RFQ.

- (2) The RFP will outline the Department's time allowance for review of all submittals.
- (3) The RFP shall reference any applicable Department construction specifications including Standard Specifications, supplemental specifications or special provisions. The RFP will define the mandatory project scope elements, deliverables and the project schedule.
- (4) The RFP may address any particular processes, traffic control requirements, construction phasing, techniques that need to be specified in order to construct the project satisfactorily, or responsibilities of the Design-Builder.
- (5) As part of the RFP, and when available, the Department will provide any project-specific documentation, drawings, files, reports, and other pertinent materials which would be of use to the eligible Design-Builders.
- (6) The RFP will address the Base Technical Concept for the Design-Build contract and may allow Design-Builders to submit Alternate Technical Concepts (ATC) in their proposals as long as these alternate concepts do not conflict with criteria agreed upon in the environmental decision making process. A concept is not an ATC if it merely seeks to reduce quantities, performance, or reliability, or seeks a relaxation of the contract requirements. ATCs shall be submitted by the Design-Builder and pre-approved in writing by the Department. All Technical Proposals must include the Department's pre-approval letters for consideration of the ATC Technical Proposals. Each Design-Builder may submit only one pre-approved ATC proposal.
- (7) The RFP will address any other project specific information including, but not limited to:
  - (a) Selection and award criteria;
  - (b) Conflict of interest resolution; and
  - (c) Proposal Guaranty requirements.
- (8) The RFP may address and identify contract provisions regarding, including but not limited to:
  - (a) Risk allocation according to the type and location of the project, and the following risk factors may be considered:
    1. Governmental risks;
    2. Regulatory compliance risks;
    3. Construction phase risks;
    4. Post-construction risks; and
    5. Right-of-way risks.
  - (b) Payment and Performance Bonds;
  - (c) Post-construction warranties;
  - (d) General and professional liability insurance;
  - (e) Meetings regarding the preconstruction services;
  - (f) The Department's standards, rules, guidelines, and special provisions requirements;

- (g) Environmental regulatory requirements, including whether the Department or the Design-Builder will acquire any or all of the permits required for construction, or inclusion of the required permits in the RFP if the Department has already acquired them for the project prior to the award of the contract; and
  - (h) Design and construction requirements, including specifications for the final documents and their format required by the Department from the Design-Builder upon completion of the project, which may include as-built plans, engineering reports, shop drawings, test results, documentation, daily reports, and item quantities.
- (9) The RFP will outline the terms and conditions of a project stipend (if applicable).

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04-.09 Review of Technical and Price Proposals.

- (1) Short listed or otherwise eligible Design-Builders will each submit a Technical Proposal and a Price Proposal, concurrently, for the project. The Technical Proposal and Price Proposal shall be submitted to the Department in separate sealed envelopes marked in strict accordance with the requirements and timeline contained in the RFP or as it may be amended. Price Proposals will be kept in a secure location until read publicly.
- (2) On the date provided in the RFP, the DBRC will open, review, and score or otherwise evaluate the Technical Proposals and any other required technical information in accordance with the evaluation criteria established in the RFP. As part of the evaluation of Technical Proposals, the DBRC may require each Design-Builder to make an oral presentation and submit to an interview.
- (3) After evaluating the Technical Proposals, and on the date and at the time specified in the RFP, or as it may be amended, the Department will publicly open and read the total proposed contract amount in the Price Proposals submitted by each eligible and responsive Design-Builder.
- (4) The DBRC may request that an eligible Design-Builder provide the support information used to develop its Price Proposal. This information may include, but is not limited to, design assumptions, summary of quantities, mobilization assumptions, and construction staging assumptions.
- (5) In the event all Price Proposals submitted exceed an acceptable range of the Department's cost estimate for the project, the Department, at its discretion, may determine whether to proceed to request a Best and Final Offer.
- (6) If a Best and Final Offer is requested, the Department will issue a Best and Final Offer RFP to the eligible Design-Builders. The Best and Final Offer RFP may or may not include minor changes in the scope or contract requirements of the original RFP.
- (7) Based upon the proposal from each Design-Builder and the appropriate selection method as specified in the RFP, or the Best and Final Offer RFP, if applicable, the DBRC will determine the best evaluated Design-Builder.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

1680-05-04-.10 Award Process.

- (1) The DBRC will forward the apparent best evaluated Design-Builder to the Commissioner with a recommendation either to:

- (a) Reject all proposals,
  - (b) Award a Design-Build contract to the best evaluated Design-Builder; or
  - (c) If the DBRC determines after opening the Price Proposals that the apparent best evaluated Design-Builder should be considered non-responsive, or if, after award, the best evaluated Design-Builder forfeits the proposal guaranty, the DBRC may recommend award of the contract to the next best evaluated Design-Builder.
- (2) The Department shall have the authority to discontinue the Design-Build selection process at any time prior to the opening of Price Proposals, subject to any applicable obligation to pay a stipend to eligible and responsive Design-Builders.
  - (3) After the Design-Build contract has been awarded, the Department will publish the technical scores and adjusted prices on the Department's website.
  - (4) All short listed Design-Builders will be afforded the opportunity for a debriefing with the Department regarding the relative merits of their Technical Proposals and Price Proposals.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

#### 1680-05-04-.11 Criteria for Providing a Stipend.

- (1) At the discretion of the Department, a stipend may be paid to the eligible Design-Builders who submit responsive but unsuccessful proposals in response to the RFP. The decision to do so shall be based on the Department's analysis of the estimated proposal development costs, the complexity of the project and the anticipated degree of competition during the procurement process. The purpose of a stipend is to encourage competition by offering to compensate responsive but unsuccessful Design-Builders for a portion of the estimated proposal development costs.
- (2) The terms and conditions for stipends shall be included in the RFP.
- (3) If a stipend is provided to an unsuccessful eligible Design-Builder, the work produced within the proposal for the project shall be provided to the Department for its use in connection with the contract awarded for the project, or in connection with a subsequent procurement, without obligation to pay any additional compensation to the unsuccessful Design-Builder.
- (4) Design-Builders submitting a response to the RFQ who are considered non-responsive or unqualified, or who are not short listed by the Design-Build Review Committee, will not be eligible for a stipend.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

#### 1680-05-04-.12 Resolution of Contract Issues.

- (1) It is the goal of the Department to resolve disputes that may arise under the contract in a timely, just and fair manner consistent with the terms of the contract. The dispute resolution process may be undertaken at any time from the contract award to the issuance of the final payment.
- (2) The dispute resolution process recognizes and will take into consideration the risks and controls inherent in construction which the Design-Builder or the Department have agreed to assume pursuant to the terms of the contract.

- (3) The procedure for resolution of contract issues for Design-Build contracts will be stated within the RFP and contract.

Authority: T.C.A. §§ 54-1-119 and 4-3-2303.

The notice of rulemaking set out herein was properly filed in the Department of State on the 29th day of November, 2007. (FS 11-19-07; DBID 784)