Kirsten J. Gross *Legislative Service Commission*

H.B. 286

123rd General Assembly
(As Introduced)

Reps. Coughlin, Jolivette

BILL SUMMARY

- Allows public authorities to use design-build contractors in the construction of public improvements.
- Establishes a two-phase procedure for selecting design-build contractors.

CONTENT AND OPERATION

Overview

The bill creates a method by which a public authority may enter into a "design-build construction contract" with a "design-build contractor." A design-build contractor is defined by the bill as a person who is capable of providing both professional design services and construction services in the performance of a design-build construction contract. Under the bill, a design-build construction contract means any written agreement involving a project delivery system for the erection, alteration, repair, replacement, renovation, installation, or demolition of any public improvement by which a person is solely responsible contractually as a contractor to a public authority for both the design and construction of the public improvement, which may include a performance-based specification established by the public authority, rather than a specific design as a public improvement goal. (Sec. 153.65.)

Preliminary considerations

Notwithstanding the law requiring separate bids for public improvement projects, the bill permits a public authority to use a design-build construction contract if it satisfies the following two criteria:

(1) The public authority is not using separate professional design services and separate construction contracts to contract for the construction of the public improvement or is not required by law to utilize and implement a method of

contracting for the construction of a public improvement that conflicts with using a design-build construction contract;

(2) The public authority determines in the manner described below that the two-phase procedure (see "***Two-phase procedure***," below) for selecting a design-build contractor is appropriate for the construction of the particular public improvement. (Sec. 153.72(A).)

To determine whether the two-phase procedure for selecting a design-build contractor is appropriate, the public authority must consider all of the following:

(1) Whether the public improvement the public authority intends to construct is suited to the use of design-build services;

(2) Whether the public authority has the capability to manage the two-phase selection procedure;

(3) Whether at least three capable and experienced design-build contractors will seek the award of the design-build construction contract;

(4) How much time and money the public authority must expend for preliminary design work necessary to enable a design-build contractor to develop a price or cost proposal for the design-build construction contract;

(5) Whether entering into a design-build construction contract is suitable given the time constraints for the construction of the public improvement;

(6) Any other factors established by the public authority. (Sec. 153.72(B).)

Scope of work statement

The bill requires a public authority that intends to enter into a design-build construction contract for the construction of a public improvement to develop or contract for the development of a scope-of-work statement that defines the public improvement and provides interested persons with sufficient information regarding the public authority's requirements to enable those persons to submit proposals for consideration. The scope-of-work statement may include preliminary criteria, design criteria, budget parameters, and schedule and delivery requirements. The bill requires the public authority to follow the law governing public contracts for professional design services when contracting for the development of a scope-of-work statement. The bill specifies that any professional design firm that prepares a scope-of-work statement is ineligible to hold any interest in any design-build construction contract for which the scope-of-interest statement was prepared. (Sec. 153.73.)

Two-phase procedure

Step one of the two-phase procedure

In the first phase of the procedure to select a design-build contractor, the bill requires the public authority to advertise notice of its intent to use a design-build contractor for a public improvement. The notice must be advertised according to all of the following requirements:

(1) In a newspaper of general circulation in the county where the design-build construction contract will be performed;

(2) At least 30 days before the deadline for accepting proposals;

(3) It must invite interested persons to submit proposals for consideration;

(4) It must include a general description of the public improvement, a statement of the professional design and construction services required for the project, and the method by which a design-build contractor may submit a statement of qualifications to be considered by the public authority in awarding the contract;

(5) It must either include the scope-of-work statement or state that interested persons may obtain the statement from the public authority;

(6) It must request a response to the scope-of-work statement, but cannot request detailed design, cost, or price information.

The bill allows the public authority to advertise in other forms of media, including appropriate trade journals, and it may also notify design-build contractors believed to be interested in contracting for public improvements. (Sec. 153.74(A) and (B).)

Under the bill, a public authority must evaluate any responses to the scope-of-work statement submitted to it on the basis of the professional design and construction qualifications and the technical approach to the scope-of-work statement of the design-build contractors who submit a response (sec. 153.74(C)). The bill then requires the public authority to select no less than three and no more than five respondents that it considers to be the most qualified to provide the required design and construction services, except that, it may select less than three when it determines that less than three respondents are qualified. In this case, it must issue a statement that includes the rationale for its determination. (Sec. 153.74(D).)

Step two of the two-phase procedure

In the second phase of the procedure to select a design-build contractor, the bill requires the public authority to request from each of the respondents considered to be most qualified under step one, a technical submission that includes design concepts and addresses the requirements set forth in the scope-of-work statement for the public improvement. (Sec. 153.74(E).)

The public authority's request for a technical submission must provide all of the following information:

(1) The fixed price (total amount of money available for the project) or lump sum cost (lowest possible price for the project) of the public improvement;

(2) The criteria that the public authority will use in evaluating a technical submission;

(3) The deadline for submitting a technical submission;

(4) A statement that the public authority will pay a design-build contractor an equitable amount agreed to by the public authority and contractor for keeping the contractor's technical submission if the public authority does not enter into a design-build construction contract with that contractor. (Sec. 153.74(F).)

The bill specifies that the technical submission of the contractor with whom the public authority does not enter into a design-build construction contract remains the property of the contractor unless the public authority pays the contractor an equitable amount agreed to by the public authority and the contractor. (Sec. 153.74(G).)

Determining the qualifications of the design-build contractors

Under the bill, the public authority must consider all of the following when evaluating the qualifications of a design-build contractor:

(1) The competence of the design-build contractor to perform the required professional design and construction services as indicated by the technical training, education, and experience of the contractor's personnel, especially the technical training, education, and experience of the employees who would be assigned to perform the services;

(2) The ability of the contractor in terms of its workload and the availability of qualified personnel, equipment, and facilities to perform the

required professional design and construction services competently and expeditiously;

(3) Past performance of the contractor as reflected by the evaluations of previous clients with respect to control of costs, quality of work, and meeting deadlines;

(4) Financial responsibility as evidenced by the capability to provide a letter of credit, a surety bond, certified check, or cashier's check in an amount equal to the value of the design-build construction contract, or by other means acceptable to the public authority;

(5) Other similar factors. (Sec. 153.74(H).)

Ranking the design-build contractors and negotiations

Following that evaluation, the bill requires a public authority to rank the design-build contractors who submitted technical submissions in order of most to least qualified. After ranking the qualified contractors, the public authority must enter into negotiations for a design-build construction contract with the contractor it ranks most qualified to perform the required professional design and construction services at a compensation the public authority and design-build contractor determine to be fair and reasonable. Under the bill, the public authority must issue a written statement that includes the rationale for the price determination.

The negotiations between the design-build contractor and the public authority are required so that both parties understand the essential requirements involved in providing the professional design and construction services and to ensure that the design-build contractor will make available the necessary personnel, equipment, and facilities to perform the design and construction services within the time specified in the design-build construction contract. (Sec. 153.75(A) and (B).)

If the public authority fails to negotiate a construction contract with the design-build contractor it ranks most qualified, then the bill requires the public authority to inform the contractor in writing of the termination of negotiations. The public authority then must enter negotiations with the next most qualified contractor. The negotiations continue until the public authority negotiates a successful contract or until it runs out of qualified candidates. If the public authority fails to negotiate a contract with any of the contractors selected and ranked based on the above factors, then, under the bill, the public authority may either select additional contractors and repeat the ranking and negotiation process,

or use any other procedure permitted by law to contract for the construction of the public improvement. (Sec. 153.75(C) and (D).)

Bonding and insurance requirements

Under the bill, a design-build contractor that is awarded a design-build construction contract for the construction of a public improvement must do both of the following:

(1) Provide a bond in accordance with the law on bonding requirements for construction contracts entered into with the state;

(2) Have and maintain, or be covered by, a professional liability insurance policy during the period in which professional design services are rendered.

The liability insurance policy must be provided by a company authorized to do business in Ohio and that offers professional liability insurance for the professional design services rendered by the design-build contractor. (Sec. 153.76.)

HISTORY

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