



S.B. 236

124th General Assembly
(As Introduced)

Sen. Coughlin

BILL SUMMARY

- Allows public authorities to use design-build firms in the construction of public improvements.
- Establishes a two-phase and one-phase procedure for selecting design-build firms, and permits public authorities to award public improvement contracts by utilizing one of these procedures, notwithstanding any existing competitive bidding requirements.
- Establishes criteria for evaluating the qualifications of design-build firms and requires public authorities, when using the two-phase procedure, to evaluate and rank the firms using that criteria.
- Requires public authorities utilizing the one-phase procedure to evaluate the qualifications of design-build firms using the criteria established under the bill and then to award a public improvement contract to the lowest responsive and responsible bidder.

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 firm." A design-build firm 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 responsible contractually 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 laws that require that a contract for a public improvement be awarded to the lowest and best bidder, lowest responsible bidder, lowest responsive and responsible bidder, or other competitive bidding requirement, 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;

(2) The public authority determines, by considering specified criteria described below (see "**Determination criteria**"), that the two-phase procedure (see explanations concerning "two-phase" and "one-phase" procedures, below) or the one-phase procedure for selecting a design-build firm is appropriate for the construction of the particular public improvement. (Sec. 153.72(A).)

Determination criteria

To determine whether the two-phase procedure for selecting a design-build firm 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 firms 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 firm 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) Whether the use of a design-build construction contract will provide the opportunity for public comment, if needed, as determined by the public authority;

(7) Any other factors established by the public authority.

A public authority must have a population of 250,000 or more to use the two-phase procedure. If the public authority determines that the two-phase procedure is appropriate, it must issue the determination in writing. (Sec. 153.72(B).)

To determine whether the one-phase procedure for selecting a design-build firm is appropriate, the public authority must consider (1), (6), and (7) above, and all of the following:

(1) Whether the public authority has the capability to manage the one-step selection procedure;

(2) Whether enough capable and experienced design-build firms will participate in the bidding process to make it competitive;

(3) How much time and money the use of a design-build construction contract can save in constructing the public improvement.

If the public authority determines that the one-phase procedure is appropriate, it must issue the determination in writing. (Sec. 153.72(C).)

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 professional design services contracts 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.)

Identical requirements of the two-phase and one-phase procedures

In both the two-phase and one-phase procedures to select a design-build firm, the bill requires the public authority to advertise notice of its intent to use a design-build firm 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 firm 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) For both procedures, it must request a response to the scope-of-work statement. But for the two-phase procedure, it cannot request detailed design, cost, or price information. For the one-phase procedure, it must request cost information and request that the bidder submit the bid in a separately sealed envelope.

The bill allows the public authority to advertise in other forms of media, including appropriate trade journals, and any other publications considered appropriate, and it also may notify design-build firms 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 firms who submit a response. (Sec. 153.74(C).)

Specific requirements for the two-phase procedure

The bill requires the public authority, for the two-phase procedure, to select no less than three and no more than five respondents that it considers to be the most qualified to provide the required professional 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. After the public authority determines which respondents it considers to be the most qualified, the public authority shall request a technical submission from those respondents that includes design concepts and addresses the requirements set forth in the scope-of-work statement for the public improvement. (Sec. 153.74(D) and (E).)

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

- (1) The estimated 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. (Sec. 153.74(F).)

The bill specifies that the technical submission of the firm with whom the public authority does not enter into a design-build construction contract remains the property of the firm. (Sec. 153.74(G).)

Specific requirements for the one-phase procedure

In the one-phase procedure, following the evaluation to determine a design-build firm's qualifications (see **Determining qualifications of design-build firms** below), the public authority must open the bids of those it determines to be responsive and responsible and award the contract to the lowest responsive and responsible bidder.¹ (Sec. 153.74(H).)

Determining qualifications of design-build firms

Under the bill, the public authority must consider all of the following when evaluating the qualifications of a design-build firms for both the two-phase and one-phase procedures:

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

¹ R.C. 9.312 specifies that a bidder on a contract is considered responsive if the bidder's proposal responds to bid specifications in all material respects and contains no irregularities or deviations from the specifications that would affect the amount of the bid or otherwise give the bidder a competitive advantage. The factors that a state agency or political subdivision must consider in determining whether a bidder on the contract is responsible include the bidder's experience, financial condition, conduct and performance on previous contracts, facilities, management skills, and ability to execute the contract properly.

(2) The ability of the firm 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 firm as reflected by the evaluations of previous clients with respect to factors such as 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(I).)

Ranking the design-build firms and negotiations

Following that evaluation, for the two-phase procedure, the bill requires a public authority to rank the design-build firms who submitted technical submissions in order from most to least qualified. After ranking the qualified firms, the public authority must enter into negotiations for a design-build construction contract with the firm it ranks most qualified to perform the required professional design and construction services at a compensation the public authority and design-build firm 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. (Sec. 153.75(A).)

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

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

Under the bill, a design-build firm 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 public improvement contracts, for not less than an amount equal to the amount of the contract minus the amount of the contract related to providing design services;

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

The bond and liability insurance policy must be provided by a company authorized to do business in Ohio. (Sec. 153.76.)

HISTORY

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