

HAWKINS ADVISORY

NEW JERSEY DESIGN-BUILD CONSTRUCTION SERVICES PROCUREMENT ACT

On April 30, 2021, the State of New Jersey enacted the "Design-Build Construction Services Procurement Act" (P.L.2021, c.71) ("the Act"). The Act establishes procedures for awarding Design-Build contracts and it applies to State and local governmental entities including entities that are subject to the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.), Public School Contracts Law (N.J.S.A. 18A:18A-1 et seq.), State College Contracts Law (N.J.S.A. 18A:64-52 et seq.), and County College Contracts Law (N.J.S.A. 18A:64A-25.1 et seq.) as well as the New Jersey Schools Development Authority. While the Act contains provisions specific to each type of governmental unit (i.e., the Schools Development Authority, State colleges, counties/municipalities/authorities, public schools and county colleges), this summary focuses on local governments which are subject to the provisions of the Local Public Contracts Law.

I. What is a Design-Build Contract and how is it different from a traditional Construction Contract?

The Act defines "design-bid-build" as the delivery method used in public projects in which a licensed and prequalified design professional develops the project design in its entirety; the contracting unit then solicits bids and awards the contract to the lowest responsible bidder that demonstrates the ability to complete the project specified in the design. Design-bid-build is the traditional public works delivery method. A "design-build" contract, on the other hand, is defined under the Act as a contract between a contracting unit and a design-builder to provide labor, materials, and other construction services for a public project. A "design-builder" is defined as an entity that proposes to design and construct public projects. Therefore, a design-build contract is a single contract for the design and construction of a public project. Under the Act, a design-build contract may be conditioned upon subsequent refinements in scope and price, and may permit the contracting unit to make changes in the scope of the project without invalidating the design-build contract.

II. Conditions to Entering into a Design-Build Contract

If a contracting unit determines in its discretion that the design-build delivery method meets its needs better than the traditional design-bid-build approach for the project under consideration, the contracting unit is permitted to enter into a design-build contract as long as it meets the conditions set forth below:

1. \$5,000,000 Minimum Project Cost

The project or projects under consideration must have a cost equal to or exceeding \$5,000,000.

2. Publish Procedures Consistent with DCA Regulations

The contracting unit shall, prior to issuing solicitations, publish procedures consistent with the Act and regulations promulgated by the Department of Community Affairs (DCA) for the solicitation and award of design-build contracts. As of the time of this writing, the DCA had not yet promulgated such regulations.

3. Make Determination that Design-Build is in the Public Interest

For each public project procured under the Act, the contracting unit shall make a determination based on the timeliness of the project or projects that it is in the best interest of the public to enter into a design-build contract to complete the public project or projects.

III. Requirements for Design-Build Contracts

1. Prevailing Wages

All workers employed in a design-build construction project must be paid the prevailing wage determined by the Commissioner of Labor pursuant to the provisions of the "New Jersey Prevailing Wage Act," (N.J.S.A. 34:11-56.25 et seq.).

2. Adherence to Sustainable Development System

All design-build construction projects must be encouraged to adhere to the Leadership in Energy and Environmental Design (LEED) Green Building Rating System as adopted by the United States Green Building Council, the Green Globes Program adopted by the Green Building Initiative, or a comparable nationally recognized, accepted, and appropriate sustainable development system.

3. State Comptroller Review

Any design-build contract entered into pursuant to the Act may be reviewed by the State Comptroller's Office. [Note: Pursuant to N.J.S.A. 52:15C-10, for such contracts valued over \$12.5M, the State Comptroller's Office must approve the solicitation documents prior to issuance.].

IV. Procedures for Awarding Design-Build Contracts

1. Appointment of Design Professional and Development of Scope of Work Statement

The contracting unit must appoint a licensed and prequalified design professional, or designate an employee of the contracting unit licensed to provide architectural, engineering, or surveying services, to provide technical advice, construction review services, and professional expertise on behalf of the contracting unit.

2. Project Definition

With the assistance of the design professional or designated employee, the contracting unit shall develop performance criteria and a scope of work statement that defines the project and provides prospective design-builders with sufficient information regarding the contracting unit's requirements. The scope of work statement is required to include: evaluation factor criteria and preliminary design documents, general budget parameters, and general schedule or delivery requirements to enable the design-builders to submit proposals which meet the contracting unit's needs. The Act provides that when the design-build selection procedure is used and the contracting unit contracts for development of the scope of work statement, the contracting unit [Note: The statute uses the term "design-builder" which appears to be a mistake] shall contract for architectural or engineering services in accordance with N.J.S.A. 45:8-27 et seq., and all other applicable licensing statutes.

3. Solicitation of Proposals for Qualifications ("RFQ")

Once the contracting unit has developed the scope of work statement which adequately defines the requirements for the project, it must prepare and issue a solicitation of proposals for qualifications from design-builders (RFQ) in accordance with the requirements of the applicable procurement laws.

4. Technical Review Committee

The Act requires that the contracting unit establish a technical review committee, which must consist of a representative of the contracting unit, the contracting unit's project manager, and the contracting unit's authorized design professional. In addition, the contracting unit's attorney may advise the technical review committee. The technical review committee is responsible for evaluating "bids based on rating and scoring proposals, and must evaluate design-builders based on their qualifications". Members of the technical review committee may not have a personal or financial interest in any of the design-builders submitting proposals.

5. RFQ Evaluation Factors

The factors used to evaluate qualification statements must be stated in the RFQ and shall include, but not be limited to: (i) specialized experience and technical competence, (ii) training certification of professional and field workforce, (iii) principal location of the company, (iv) capability to perform, (v) safety modification rating, (vi) past performance of the individual members of the design-builder's team in their respective capacities, including the architect-engineer and construction members of the team, and (vii) other appropriate technical and qualification factors as determined by the Department of Community Affairs, where applicable. The RFQ must establish the relative importance assigned to the evaluation factors and sub-factors to be considered. The RFQ must also state the maximum number of design-builders that are to be selected to submit second proposals (at least two and no more than six). Price can only be considered in the second phase (the "RFP" phase) of the selection process.

6. Shortlist

On the basis of the proposal of qualification, the technical review committee must select the most highly qualified number of design-builders specified in the RFQ and request the selected design-builders to submit a second proposal and sealed bid. Each solicitation for second proposals ("request for proposals" or "RFP") must establish the relative importance assigned to the evaluation factors to be considered.

7. Avoidance of Conflicts

Each RFP must contain evaluation factors prepared by a design professional or designated employee. The design professional or designated employee that develops the evaluation factors must be either an employee of the contracting unit or must be engaged in compliance with applicable New Jersey public procurement laws, and to the extent allowed by law may delegate the development of specific aspects of the design criteria to other consultants. Pursuant to the Act, the design professional or designated employee that develops the evaluation factors shall be disqualified from submitting a proposal to enter into the design-build contract, and the design-builder shall not be permitted to delegate services under the design-build contract to the design professional or designated employee that developed the evaluation factors.

8. Stipend

The contracting unit may offer a stipend, based upon the project size and type, which must not exceed three percent of the project's estimated cost, to any design-builder providing design, construction information, or materials presented in response to a request for proposals. This stipend is intended to encourage the submission of proposals and to increase competition.

9. RFP Evaluation Factors

The evaluation factors should be detailed enough to permit qualified design-build firms to submit proposals in accordance with the RFP, given the nature of the public project and the level of design to be provided in the proposal. Cost must have a minimum weight of 50% in the evaluation.

10. Mandatory RFP Inclusions

Pursuant to the Act, the following are required to be included in the RFP:

- i. The identity of the contracting unit which shall award the design-build contract;
- ii. The procedures to be followed for submitting proposals, the criteria for evaluation of proposals and their relative weight, and the procedures for making awards, including a reference to the requirements of the Act and the regulations of the contracting unit;
- iii. The proposed terms and conditions for the design-build contract;
- iv. A description of the drawings, specifications, or other submittals to be submitted with the proposal, with guidance as to the form and level of completeness of the

drawings, specifications, or submittals that shall be acceptable;

v. A schedule for planned commencement and completion of the design-build contract;

vi. Budget limits, if any;

vii. Affirmative action, disadvantaged business or set-aside goals or requirements for the design-build contract, in accordance with the requirements of all rules, regulations, standards, or policies adopted by the contracting unit;

viii. The required qualifications of the design-builder;

ix. Requirements for performance bond, payment bond, insurance requirements and to meet requirements of the Division of Property Management and Construction in the Department of Treasury;

x. A statement that the prospective design-builder must be in compliance with all applicable laws, including the "New Jersey Prevailing Wage Act," "The Public Works Contractor Registration Act," and the "Construction Industry Independent Contractor Act".

11. Notice of RFP

Notice of the RFP must be advertised in the same manner in which proposals generally are solicited for public projects.

12. Proposal Requirements

Proposals in response to the RFP must adhere with the following:

i. Each design-build team shall include a licensed or prequalified design professional independent from the contracting unit's licensed architect or engineer.

ii. The licensed or prequalified design professional shall be named in any proposal submitted to the contracting unit.

iii. Proposals shall be sealed and shall not be opened until expiration of the time established for making proposals as set forth in the solicitation.

iv. Proposals shall identify each person to whom the design-builder proposes to delegate obligations under the design-build contract. Persons so identified shall not be replaced without the approval of the contracting unit.

v. Proposals shall establish the cost of the design-build contract which shall not be exceeded if the proposal is accepted without change. Afterward, the maximum cost in the proposal may be converted to fixed prices by negotiated agreement between the contracting unit and the design-builder.

13. Opening of Proposals

All proposals must be received and opened at a previously announced time, where a synopsis of each must be publicly read and recorded consistent with the following:

i. Unless and until a proposal is "accepted", the drawings, specifications and other information in the proposal shall remain the property of the person making the proposal. The contracting unit shall make reasonable

efforts to maintain the secrecy and confidentiality of all proposals, and all information contained in the proposals, and shall not disclose the proposals or the information contained therein to the design-builders' competitors or the public.

ii. Once a proposal is accepted, the disclosure of the proposal and the information in the proposal, and the ownership of the drawings, specifications, and information therein, shall be determined in accordance with existing law and the terms of the design-build contract. The Act defines "acceptance" as adoption of a law, ordinance, or resolution by the contracting unit authorizing the execution of a design-build contract.

14. Certification

Once received, proposals must be submitted to the design professional or designated employee retained by the contracting unit. No proposal can be considered until certification is issued by the design professional or designated employee that the proposal is consistent with the evaluation factors.

15. Competition

No proposal for a design-build contract may be accepted unless the contracting unit determines that there was adequate competition for such contract. [Note: Authorizing resolution or ordinance should make an express "determination".]

16. Evaluation by Technical Review Committee

The technical review committee must evaluate each technical proposal based on the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work, using the criteria and methodology set forth in the RFP. The Act provides that the technical review committee must make an award recommendation to the governing body and that the governing body shall make the award decision, consistent with the award recommendation.

17. Evaluation by Contracting Unit

The Act provides that "the contracting unit shall evaluate the received technical proposals and price bid against the published factors and weighting to arrive at a composite score".

18. Award of Contract

The governing body of the contracting unit shall make the design-build contract award decision, consistent with the award recommendation. Acceptance of a proposal must be made by written notice to the design-builder which submitted the accepted proposal. Such acceptance must be made public. At the same time notice of acceptance is delivered, the contracting unit shall also inform, in writing, the other design-builders that their proposals were not accepted. After the award is made, the contracting unit shall make public the sealed price bid for each proposal submitted to the contracting unit by a design-builder.

19. Rights of the Parties

a. The contracting unit shall have the right to reject any and all proposals, except for the purpose of evading the provisions and policies of the Act.

b. Proposals may be withdrawn for any reason at any time prior to acceptance.

c. When a design-builder receives notification from a public body that the proposal, which it has submitted, has not been accepted, the design-builder may, within 30 days, request (in writing) to review the design-build proposals submitted, the technical review committee evaluation scores from the selection process, and the final recommendation of award document.

20. DCA Regulations

The Act requires that the Department of Community Affairs adopt, immediately upon filing with the Office of Administrative Law, regulations that the Department of Community Affairs deems necessary to implement the provisions of the Act, which regulations shall be effective for a period not to exceed 180 days from the date of the filing. The Department of Community Affairs shall thereafter amend, adopt, or readopt the regulations pursuant to the Administrative Procedures Act.

21. Public Records

All proceedings, records, contracts and other public records relating to procurement transactions authorized under the Act shall be accessible to the public pursuant to the Open Public Records Act (N.J.S.A. 47:1A-1 et seq.), except as otherwise may be provided under the Act.

V. Why Design-Build is a Useful Tool

There can be several advantages to developing a project pursuant to the design-build delivery method including the following:

- Single Point of Responsibility
- Accelerated Schedule
- Advantageous Pricing
- Early Price Certainty
- Competition on Design Ideas
- Increased Risk Insulation
- Increased Risk Transfer
- Less Change Orders

VI. Hawkins Experience with Design-Build Procurements

Hawkins Delafield & Wood LLP lawyers are leading national experts in the representation of public entities in the design-build contracting field. We specialize in providing public entities with the legal services necessary for any design-build contracting program: planning and structuring design-build project transactions; preparing solicitation documents; assisting in the proposal evaluation process; drafting and negotiating final design-build contracts; achieving commercial close; and providing strategic assessments and legal advice relating to the procurement and negotiations. Further information about our firm may be found on our website: www.hawkins.com.

Hawkins has represented New Jersey governmental clients as lead counsel in the procurement of over a dozen major design-build based infrastructure projects pursuant to existing State laws including the New Jersey Wastewater Treatment Public-Private Contracting Act, New Jersey Water Treatment Public-Private Contracting Act, McEnroe Act, statutory exceptions to bidding under the Local Public Contracts Law, regulations applicable to the New Jersey Schools Development Authority and New Jersey Economic Stimulus Law of 2009.

Hawkins serves as public finance counsel to many of the State’s public authorities, and numerous cities and towns. As a result, we are thoroughly familiar with the broad range of legal issues in New Jersey that pertain to public infrastructure transactions.

Our experience implementing design-build and design-build-based projects in New Jersey and nationally would provide value to any local government considering implementing design-build contracting for its critical public infrastructure projects.

For further information on the new Design-Build Construction Services Procurement Act or to discuss the development of projects on an alternative project delivery basis, please contact:

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About Hawkins Advisory

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