

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1833 Session of 2023

INTRODUCED BY NEILSON, STRUZZI, GIRAL, MADDEN, HILL-EVANS, McNEILL, SANCHEZ, SMITH AND PARKER, NOVEMBER 8, 2023

AS REPORTED FROM COMMITTEE ON TRANSPORTATION, HOUSE OF REPRESENTATIVES, AS AMENDED, NOVEMBER 14, 2023

AN ACT

1 Amending Title 74 (Transportation) of the Pennsylvania
2 Consolidated Statutes, in transportation infrastructure,
3 providing for design build best value.

4 The General Assembly of the Commonwealth of Pennsylvania
5 hereby enacts as follows:

6 Section 1. Title 74 of the Pennsylvania Consolidated
7 Statutes is amended by adding a chapter to read:

8 CHAPTER 98

9 DESIGN BUILD BEST VALUE

10 Sec.

11 9801. Scope of chapter.

12 9802. Definitions.

13 9803. Design build best value process.

14 9804. Applicability of other laws.

15 9805. Limitation on powers and duties and existing contracts.

16 § 9801. Scope of chapter.

17 This chapter relates to design build best value as an
18 alternative procurement process for highway and bridge design

1 and construction.

2 § 9802. Definitions.

3 The following words and phrases when used in this chapter
4 shall have the meanings given to them in this section unless the
5 context clearly indicates otherwise:

6 "Agency." The Department of Transportation of the
7 Commonwealth or the Pennsylvania Turnpike Commission.

8 "Alternative technical concept" or "ATC." A proposed
9 variance from the contractual requirements or request for
10 proposal that is equal to or better than the requirements in the
11 request for proposal document.

12 "Design build best value." The source selection method other
13 than competitive sealed proposals in 62 Pa.C.S. § 513 (relating
14 to competitive sealed proposals), as described in section 9803
15 (relating to design build best value process), which may be used
16 by the agency acting as the purchasing agency, as an alternative
17 to competitive sealed bidding.

18 "Offeror." A person or entity that submits a proposal in
19 response to a request for proposals or request for
20 qualifications.

21 "Request for proposals." All documents, including those
22 either attached or incorporated by reference, used for
23 soliciting proposals.

24 "Request for qualifications." All documents, including those
25 either attached or incorporated by reference, used for
26 soliciting statements of qualifications.

27 "Responsible offeror." An entity that has submitted a
28 responsive statement of qualifications to a request for
29 qualifications or responsive proposal to a request for proposals
30 and that possesses the capability to fully perform the contract

1 requirements in all respects and the integrity and reliability
2 to assure good faith performance.

3 "Responsive proposal." A proposal which conforms in all
4 material respects to the requirements and criteria in the
5 request for proposals.

6 "Statement of qualifications." An offeror's response to an
7 agency, after the agency issues a request for qualifications.
8 § 9803. Design build best value process.

9 (a) General rule.--Notwithstanding any other provision of
10 law, an agency may use the design build best value source
11 selection method for construction projects in accordance with
12 this section.

13 (b) Conditions for use.--Design build best value may be used
14 when a deputy secretary for the Department of Transportation or
15 a contracting officer for the Pennsylvania Turnpike Commission
16 determines in writing a construction project would benefit from
17 the design build best value method of procurement due to the
18 following factors:

- 19 (1) project complexity;
- 20 (2) potential for innovation;
- 21 (3) unique equipment or specialized systems;
- 22 (4) project risks;
- 23 (5) project schedule;
- 24 (6) other project considerations; and
- 25 (7) estimated project value.

26 (c) Projects procured per calendar year.--

27 (1) An agency shall advertise no more than five one-step
28 design build best value procurements per calendar year.

29 (2) An agency shall advertise no more than 20 two-step
30 design build best value procurements per calendar year.

1 (d) Public notice of determination for use of design build
2 best value.--The notice of determination under subsection (b)
3 shall be posted by the agency for a reasonable time prior to the
4 date the procurement documents are posted on a website regularly
5 accessed by industry partners in consulting and construction.

6 (e) Request for proposals.--

7 (1) After the determination under subsection (b) has
8 been issued, the agency shall solicit proposals through a
9 request for proposals.

10 (2) The agency may conduct a one-step or two-step
11 request for proposals, subject to the following:

12 (i) If the agency conducts a one-step request for
13 proposals, the agency shall seek a technical and price
14 proposal in accordance with subsection (i).

15 (ii) If the agency conducts a two-step request for
16 proposals, the agency shall seek a statement of
17 qualifications as step one in accordance with subsection
18 (j) and a technical and price proposal as step two in
19 accordance with subsection (k).

20 (3) The agency shall include a schedule in a request for
21 proposal under this chapter that identifies the anticipated
22 dates for the procurement, including an anticipated final
23 selection of a best value offeror.

24 (f) Public notice.--Public notice of the one-step or two-
25 step request for proposals shall be given in the same manner as
26 provided in 62 Pa.C.S. § 512(c) (relating to competitive sealed
27 bidding).

28 (g) Submission and receipt of proposals and statements of
29 qualifications.--Offerors shall submit their statements of
30 qualifications and proposals to ensure that their statements of

1 qualifications and proposals are received prior to the times and
2 dates established for the submission of statements for
3 qualifications and proposals. Statements of qualifications and
4 proposals shall be submitted in the format required by the
5 request for qualifications and the request for proposals.
6 Statements of qualifications and proposals shall be opened so as
7 to avoid disclosure of their contents to competing offerors.

8 (h) Preproposal conference.--The agency shall schedule a
9 preproposal conference after issuing the request for
10 qualifications in a two-step procurement or the request for
11 proposals in a one-step procurement, which conference may be
12 held virtually. The agency shall indicate the date, time and
13 location for a preproposal conference within the request for
14 qualifications in a two-step procurement or the request for
15 proposals in a one-step procurement.

16 (i) Request for technical and price proposals in a one-step
17 procurement.--

18 (1) If the Department of Transportation seeks to use the
19 one-step procurement, the deputy secretary must first approve
20 use of the one-step procurement in writing prior to issuance
21 of the request for proposals. If the Pennsylvania Turnpike
22 Commission seeks to use the one-step procurement, the
23 contracting officer must first approve use of the one-step
24 procurement in writing prior to issuance of the request for
25 proposals.

26 (2) The agency shall issue a formal request for
27 proposals publicly, which shall include separate proposals
28 for a technical solution, to be known as the technical
29 proposal, and the proposed price, to be known as the price
30 proposal.

1 (3) After receipt of all technical proposals, the
2 evaluation committee shall evaluate each responsive proposal
3 based on the criteria stated in the request for proposals.
4 The technical and price proposals shall be evaluated and
5 scored or rated separately. Except for a responsiveness
6 determination made by a nonvoting member of the evaluation
7 committee, a price proposal may not be opened until all
8 technical proposals are scored or rated.

9 (4) In scoring or rating a technical proposal and price
10 proposal, the evaluation committee shall consider the
11 relative importance of the evaluation factors fixed prior to
12 the opening of the technical and price proposals, which shall
13 be stated in the request for proposals. The Department of
14 Transportation shall invite its comptroller to participate in
15 the evaluation as a nonvoting member of any evaluation
16 committee.

17 (5) Failure of an offeror to meet the requirements of a
18 request for proposal shall result in the proposal being
19 deemed nonresponsive.

20 (j) Statement of qualifications and short-list process in a
21 two-step procurement.--

22 (1) A statement of qualifications received by an agency
23 from a responsible offeror shall be scored or rated by an
24 evaluation committee based on the criteria stated in the
25 request for qualifications.

26 (2) After the statements of qualifications are scored or
27 rated under paragraph (1), the evaluation committee shall
28 develop a short list of the number of offerors established in
29 the request for qualifications, which shall identify the
30 responsible offerors eligible to receive a stipend under

1 subsection (n) (2).

2 (3) The agency shall publicly post a list and rank of
3 all responsible offerors.

4 (4) A responsible offeror that submitted a statement of
5 qualifications under the request for qualifications process,
6 but was not shortlisted by the agency, is ineligible to
7 receive a stipend after the request for proposals process but
8 may still submit proposals in response to the request for
9 proposals step two of the procurement under subsection (k).

10 (k) Request for technical and price proposals in a two-step
11 procurement.--

12 (1) Following the creation of a short list and to the
13 extent that an agency is satisfied with the number of
14 responsible offerors, the agency shall issue a formal request
15 for proposals to all responsible offerors who submitted a
16 responsive statement of qualifications, which shall include
17 separate proposals for a technical solution, to be known as
18 the technical proposal, and the proposed price, to be known
19 as the price proposal.

20 (2) After receipt of all technical proposals, the
21 evaluation committee shall evaluate each submission based on
22 the criteria stated in the request for proposals. The
23 technical and price proposals shall be evaluated and scored
24 or rated separately. Except for a responsiveness
25 determination made by a nonvoting member of the evaluation
26 committee, a price proposal may not be opened until all
27 technical proposals are scored or rated.

28 (3) In scoring or rating a technical proposal and price
29 proposal, the evaluation committee shall consider the
30 relative importance of the evaluation factors fixed prior to

1 the opening of the technical and price proposals, which shall
2 be stated in the request for proposals. The Department of
3 Transportation shall invite its comptroller to participate in
4 the evaluation as a nonvoting member of any evaluation
5 committee.

6 (4) If the statement of qualifications rating or score
7 will be included in the final rating or score for the design
8 build best value two-step procurement, the request for
9 proposal shall indicate that fact.

10 (l) Alternative technical concepts.--

11 (1) An alternative technical concept, proposed by an
12 offeror, if any, shall be submitted by the offeror to the
13 agency on or before the due date for ATC submission
14 established by the request for proposal.

15 (2) The agency shall determine at its sole discretion
16 whether an ATC is acceptable or approved.

17 (3) The agency may communicate individually with an
18 offeror regarding its proposed or submitted ATC.

19 (4) Approval of an ATC will constitute a change in the
20 specific requirements of the contractual requirements or
21 request for proposal associated with the approved ATC for
22 that specific offeror. An offeror shall ensure that its
23 proposal complies with the request for proposal requirements
24 for the specific offeror, as modified by approval of the ATC.

25 (5) Approval of an ATC in no way implies that the ATC or
26 the proposal will receive a favorable review from the
27 ~~procurement review~~ EVALUATION committee. <--

28 (m) Records of requests for alternative technical concepts
29 and use of intellectual property.--

30 (1) An ATC shall be confidential unless or until:

1 (i) the submittal does not qualify as an ATC;
2 (ii) the ATC is deemed to take advantage of an error
3 or omission in the request for proposal or contract
4 documents, which may be subsequently amended by the
5 purchasing agency in its sole discretion;

6 (iii) cancellation of the procurement without
7 selection of an offeror;

8 (iv) the effective date of the contract as a result
9 of the procurement; or

10 (v) such other date as may be prescribed under
11 applicable law, at which time all confidentiality rights,
12 if any, shall be of no further force and effect except as
13 otherwise allowed under the applicable law.

14 (2) An unsuccessful offeror's ATC is not a public record
15 subject to inspection and duplication under the act of
16 February 14, 2008 (P.L.6, No.3), known as the Right-to-Know
17 Law, unless the agency enters into an agreement with an
18 unsuccessful offeror for payment of the ATC.

19 (3) Except to the extent not transferable by law, the
20 agency may use all or a portion of a submitted proposal and
21 ATC, including the technologies, techniques, methods,
22 processes and information contained in the proposal or ATC,
23 with an agreement for payment of the ATC. Notice of
24 nontransferability by law shall be given to the agency in
25 response to the request for proposals or submittal of the
26 ATC.

27 (4) Under no circumstances may the agency be responsible
28 for or liable to an offeror or other party as a result of
29 disclosing an offeror's ATC materials.

30 (n) Stipends.--

1 (1) The determination to offer a stipend and its amount
2 shall be determined by the agency on a project-by-project
3 basis. The determination to offer a stipend and its terms
4 shall be stated in the request for qualifications or request
5 for proposals.

6 (2) In a one-step procurement, as stated by the agency
7 in a request for proposal, the agency may compensate
8 unsuccessful responsible offerors for a portion of the costs
9 associated with preparation of a responsive proposal in
10 response to a request for proposals and for payment of an
11 ATC.

12 (3) In a two-step procurement, the agency may compensate
13 unsuccessful shortlisted responsible offerors for a portion
14 of the costs associated with the preparation of a responsive
15 proposal in response to a request for proposals and for
16 payment of an ATC. If a stipend is provided to unsuccessful
17 shortlisted offerors, the agency may only provide payment if
18 the unsuccessful shortlisted offeror's technical and price
19 proposals are responsive and the offeror is a responsible
20 offeror.

21 (o) Due dates for technical proposal and price proposal.--

22 (1) An agency may determine that a technical proposal is
23 due on a date prior to the due date for a price proposal. All
24 due dates shall be clearly stated by the agency in the
25 request for proposals.

26 (2) If an agency seeks submission of a technical
27 proposal prior to submission of the price proposal, the
28 agency and offeror may not communicate with each other
29 between the technical proposal due date and price proposal
30 due date, which includes the prohibition to ask questions or

1 seek clarifications regarding a technical proposal.

2 (3) After the technical proposal and price proposal due
3 dates, an agency may have discussions with responsible
4 offerors for the purpose of clarification. Responsible
5 offerors shall be accorded fair and equal treatment with
6 respect to any opportunity for discussion. In conducting
7 discussions, the Department of Transportation AGENCY may not <--
8 disclose information derived from proposals submitted by
9 competing offerors.

10 (p) Selection for negotiation.--The responsible offeror
11 whose proposal is determined in writing to be the most
12 advantageous to the agency shall be selected for contract
13 negotiations necessary to finalize a contract or to clarify any
14 remaining issue regarding scope, schedule or any other
15 information provided by the selected best value offeror without
16 impacting material price and evaluation factors.

17 (g) Incorporation of an unsuccessful offeror's ATC.--The
18 agency may incorporate an unsuccessful offeror's ATC into the
19 agreement as a result of the procurement and, if the agency
20 chooses to do so, a change order must be executed.

21 (r) Proposal validity period.--The request for proposal
22 shall state the validity period for the proposal, unless
23 extended by the parties' mutual consent.

24 (S) EVALUATION COMMITTEE.--NOTWITHSTANDING ANY OTHER <--
25 PROVISIONS OF THIS CHAPTER, AN EVALUATION COMMITTEE UNDER THIS
26 CHAPTER SHALL CONSIST OF AT LEAST FIVE INDIVIDUALS AS DETERMINED
27 BY THE AGENCY. AN INDIVIDUAL WHO HAS BEEN EMPLOYED BY AN OFFEROR
28 WITHIN THE PRECEDING TWO YEARS MAY NOT PARTICIPATE IN THE
29 EVALUATION OF ANY PROPOSALS SUBMITTED BY THAT OFFEROR.

30 § 9804. Applicability of other laws.

1 (a) General rule.--Except as provided under subsection (b),
2 laws related to the development, construction, operation or
3 financing of a project in effect on the date the agreement is
4 fully executed shall apply to the agreement between the agency
5 and contractor. The provisions shall include:

6 (1) The act of May 1, 1913 (P.L.155, No.104), referred
7 to as the Separations Act.

8 (2) The act of August 15, 1961 (P.L.987, No.442), known
9 as the Pennsylvania Prevailing Wage Act.

10 (b) Procurement Code.--~~The~~ ONLY THE following provisions of <--
11 62 Pa.C.S. (relating to procurement) shall apply to this
12 chapter:

13 (1) Section 107 (relating to reciprocal
14 limitations).

15 (2) Section 521 (relating to cancellation of
16 invitations for bids or requests for proposals).

17 (3) Section 531 (relating to debarment or
18 suspension).

19 (4) Section 541 (relating to approval of accounting
20 system).

21 (5) Section 551 (relating to right to inspect
22 plant).

23 (6) Section 552 (relating to right to audit
24 records).

25 (7) Section 562 (relating to anticompetitive
26 practices).

27 (8) Section 563 (relating to retention of
28 procurement records).

29 (9) Section 902 (relating to bid or proposal
30 security).

- 1 (10) Section 903 (relating to contract performance
2 security and payment bonds).
- 3 (11) Chapter 17 (relating to legal and contractual
4 remedies).
- 5 (12) Chapter 23 (relating to ethics in public
6 contracting).
- 7 (13) Section 3921 (relating to retainage).
- 8 (14) Section 3922 (relating to payment of retainage
9 to subcontractors).
- 10 (15) Section 3931 (relating to performance by
11 contractor or subcontractor).
- 12 (16) Section 3932 (relating to government agency's
13 progress payment obligations).
- 14 (17) Section 3933 (relating to contractors' and
15 subcontractors' payment obligations).
- 16 (18) Section 3934 (relating to withholding of
17 payment for good faith claims).
- 18 (19) Section 3935 (relating to penalty and attorney
19 fees).
- 20 (20) Section 3936 (relating to contracts involving
21 Federal aid).
- 22 (21) Section 3937 (relating to certain provisions
23 unenforceable).
- 24 (22) Section 3938 (relating to applicability).
- 25 (23) Section 3939 (relating to claims by innocent
26 parties).
- 27 (24) Section 3941 (relating to substantial/final
28 payment under contract).
- 29 (25) Section 3942 (relating to arbitration).
- 30 § 9805. Limitation on powers and duties and existing contracts.

1 (a) General rule.--The powers and duties of an agency under
2 this chapter may not be exercised beginning eight years after
3 the effective date of this section.

4 (b) Exception.--Notwithstanding subsection (a), all
5 contracts procured by use of this chapter, which are fully
6 executed prior to eight years after the effective date of this
7 section, shall remain in full force and effect, unless
8 terminated in accordance with the terms of the contract.

9 Section 2. This act shall take effect immediately.