



DESIGN BUILD IN NEW HAMPSHIRE

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Despite widespread use of the Design Build method of project delivery across the country, the State of New Hampshire has been slow to implement Design Build. Until 2005, New Hampshire law did not authorize the use of Design Build on public projects. Additional legislation in 2009 paved the way for Design Build on substantial capital projects (up to \$25 million); however, only one project has been completed, one is in the procurement stage, and one is proposed. As the number of Design Build projects appears poised to increase in the coming years, contractors interested in these potential projects should be aware of the laws and procedures governing Design Build procurement and the methodology used by the State in evaluating proposals and in awarding contracts. This article summarizes the New Hampshire laws authorizing Design Build and the procedures used by the State in evaluating proposals and awarding contracts.

The Law

In 2005, New Hampshire enacted legislation authorizing the use of Design Build on State projects estimated not to exceed \$5 million. RSA 228:4(l)(c) (2005). The law defined Design Build as a “method of contracting where the state engages the professional services of a single entity designer/builder who is responsible for the provision of the design and construction of a project.” RSA 21-I:78 and RSA 228:1(IV-a).

The law allows the Designer/Builder to be a single firm or a team of architect, engineer, and contractor, but requires the Designer/Builder to contract directly with all subcontractors and to be responsible for the delivery of the completed project. Prior to construction, the capital budget overview committee is required to approve preliminary plans if: 1) the project is part of a capital project; 2) Design Build delivery is intended; and, 3) the project is estimated to cost over \$500,000. RSA 21-I:80.

The law requires that the state issue a request for proposals (“RFP”) and that the selection of the Designer/Builder must be “based on an objective standard and measurable criteria for evaluation of the proposals.” RSA 228:4(l)(c). As discussed below, New Hampshire has developed a scoring system for evaluating proposals.

In 2009, the legislature revised the law to allow Design Build on projects estimated not to exceed \$25 million and enacted the following additional requirements (See RSA 228:4(l)(c-d)):

The New Hampshire Department of Transportation (“NHDOT”) must demonstrate that the use of Design Build benefits the state more than conventional contracting methods. NHDOT is required to hold a publicly noticed hearing to solicit comments and a 30-day public comment period shall follow the publicly-noticed hearing. NHDOT must then request formal

approval from the governor and executive council to utilize Design Build.

If the governor and council approve the use of the Design Build, NHDOT may solicit proposals. Any contract with the selected bidder shall be submitted to the governor and council for final approval.

The commissioner is required to report the results of any statewide transportation improvement program project using Design Build to the capital budget overview committee within 90 days after project completion.

Evaluation Procedures and Contract Award

Following the completion of a “test project,” NHDOT decided to implement Design Build on a major bridge replacement project in 2010: the Route 3 Bridge Replacement in Bedford, New Hampshire (“Route 3 Project”). The Route 3 Project represents the first major Design Build project in New Hampshire. (Another major Design Build project, the Memorial Bridge replacement in Portsmouth, is currently in the planning stage and pending confirmation of funding).

For the Route 3 Project, NHDOT used a “two-step design build procurement process based on an objective standard and measurable criteria for evaluation in the selection of the Design-Build Team for this project.” The evaluation process used by the State in reviewing the RFQ and the RFP are discussed below.

Evaluating Responses to the RFQ

In the fall of 2010, NHDOT issued a Request for Qualifications (“RFQ”). The RFQ identified a list of specific criteria to be submitted by all potential Designer/Builders including, but not limited to: (1) a cover letter describing the proposed legal teaming arrangement, the names of all major participants on the team, and

statements and certifications regarding licensing, (2) a statement of project approach, (3) a statement of the organization and key personnel, (4) a statement of relevant past performance and experience, (5) a safety plan, experience modification rate, and insurance and bonding requirements, (6) the legal structure of designer/builder entity.

The RFQ also contains a detailed description of the evaluation process. First, the submissions are evaluated for responsiveness. The following parts of the submission are graded pass/fail: (1) cover letter, (2) insurance and bonding requirements, and (3) legal structure of designer/builder entity. Second, each member of the evaluation committee grades the following parts of the submission on a numerical scale (0-5) (5 being the best and representing significant strengths or advantages to NHDOT): (1) project approach, (2) organization and key personnel, (3) relevant past performance and experience. The scores from each committee member are combined for each section, with each section receiving equal weight. The highest scoring Designer/Builders are selected and invited to submit proposals. Of the six Designer/Builders making a submission, the NHDOT selected three (3) for the short list.

Evaluating Responses to the RFP

On February 17, 2011, NHDOT issued the final Request for Proposals (“RFP”). Proposals from the short-listed Designer/Builders were submitted this spring and final selection will occur in the summer of 2011. Although the evaluation and selection process has not yet occurred, the criteria for evaluating and scoring the proposals is addressed in the RFP and is discussed below.

Short-listed Designer/Builders must submit separate technical and price proposal packages.

The NHDOT will evaluate the proposals in four stages: (1) review of technical proposals for compliance, (2) scoring of technical proposals, (3) opening of price proposals and determination of best value, (4) award.

The RFP lists specific technical proposal requirements that must be met in order to be considered a responsive submission. These elements concern technical aspects of the project including project dimensions, design criteria, and specified or restricted materials. After determining responsiveness, the NHDOT will score the proposals based on the following elements: (1) bridge design and construction concept [25 pts], (2) highway/traffic design and construction concept [25 pts], (3) project management [25 pts], (4) project quality control and assurance [20 pts], and (5) innovation/added value [5 pts]. The RFP contains a detailed description of the factors the NHDOT will consider in evaluating each of these elements. There is also a limited time period for the consideration of alternative technical proposals.

Once the technical proposals are opened and evaluated, the NHDOT will open the price proposals and determine the “best value proposal.” The price component of the proposal is given a weight of 75% and the technical component of the proposal is given a weight of 25%. The contract will be awarded to the best value proposal. Despite the numerous technical requirements for proposals, it is clear that the price component of the proposal still carries significant weight and will largely determine which entity is ultimately selected.

Conclusions

It is clear that NHDOT is not done revising their Design/Build program, but Contractors interested in bidding on upcoming Design Build projects in New Hampshire should carefully tailor their submissions to address the criteria being

evaluated and scored. Contractors should also be cognizant of the additional risks shifted to the Designer/Builder in Design Build delivery and should carefully consider these risks in developing teaming agreements and during contract negotiations.

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