

Sixty-second
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2209

Introduced by

Senators Klein, Nodland, Warner

Representatives Delmore, Keiser, Owens

1 A BILL for an Act to create and enact two new sections to chapter 48-01.2 of the North Dakota
2 Century Code, relating to using the design-build procurement process for public improvement
3 projects; and to amend and reenact section 48-01.2-01 of the North Dakota Century Code,
4 relating to the definition of design-build.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION 1. AMENDMENT.** Section 48-01.2-01 of the North Dakota Century Code is
7 amended and reenacted as follows:

8 **48-01.2-01. Definitions.**

9 In this chapter, unless the context otherwise requires:

- 10 1. "Agency construction management" means a public improvement delivery method
11 through which a person provides to a governing body experienced construction
12 management services, including ideas on constructability, documentation of design
13 and construction, and coordination of project schedules.
- 14 2. "Architect" means an individual registered as an architect under chapter 43-03.
- 15 3. "Common ownership" means a shared management or ownership interest in two or
16 more entities.
- 17 4. "Construction" means the process of building, altering, repairing, improving, or
18 demolishing any public structure or building or other improvement to any public
19 property. The term does not include the routine operation or maintenance of existing
20 facilities, structures, buildings, or real property or demolition projects costing less than
21 one hundred thousand dollars.
- 22 5. "Construction administration" means administrative services provided by a governing
23 body or an architect, a landscape architect, or an engineer, and includes providing
24 clarifications, submittal review, recommendations for payment, preparation of change

orders, and other administrative services included in the agreement with the architect, landscape architect, or engineer. The term does not include supervision of the construction activities for the construction contracts.

6. "Construction management at-risk" means a public improvement delivery method through which a construction manager provides advice to the governing body during the planning and design phase of a public improvement, negotiates a contract with the governing body for the general construction bid package of the public improvement, and contracts with subcontractors and suppliers for the actual construction of the public improvement.

7. "Construction manager" means a contractor licensed under chapter 43-07 or an individual employed by a licensed contractor which has the expertise and resources to assist a governing body with the management of the design, contracting, and construction aspects of a public improvement.

8. "Construction observation" means observation of construction work and site visits by an architect, a landscape architect, or an engineer to assist the governing body in determining that the work conforms in general to the requirements of the construction contract and that the contractor has implemented and maintained the integrity of the design concept of a project as a functioning whole as indicated in the construction contract.

9. "Contract" means a type of agency agreement for the procurement of services under this chapter.

10. "Contractor" means any person, duly licensed, that undertakes or enters a contract with a governing body for the construction or construction management of any public improvement, including multiple prime contracts.

11. "Design services" means architect services, engineer services, landscape architect services, or surveyor services.

12. "Design-bid-build" means a project delivery method in which design and construction of the project are in sequential phases, and in which the first project phase involves design services, the second project phase involves securing a contractor through a bidding process, and the third project phase provides for construction of the project by a contractor awarded the project.

- 1 13. "Design-build" means a procurement process under which the design and construction
2 of a public improvement project are procured from one entity that is appropriately
3 licensed to provide design services and construction services, whether directly or
4 through a subcontractor.
- 5 14. "Design-builder" or "design-build entity" means the corporation, partnership, limited
6 partnership, sole proprietorship, joint venture, or other organization established by
7 written agreement that undertakes or enters a contract with a governing body for the
8 design and construction of a design-build project.
- 9 15. "Design-build team" means the design-build entity and major subcontractors, including
10 those entities that are responsible for completing at least the design, general
11 construction, mechanical construction, and electrical construction of a design-build
12 project.
- 13 16. "Emergency situation" means a sudden generally unexpected occurrence that requires
14 immediate action to protect public health, safety, or property and which ends when the
15 immediate threat to public health, safety, or property ceases and services are restored.
16 The term does not include a lack of planning on the part of the governing body,
17 architect, engineer, landscape architect, or contractor.
- 18 ~~14.17.~~ "Engineer" means an individual registered as an engineer under chapter 43-19.1.
- 19 ~~15.18.~~ "General conditions" means the written portion of a contract setting forth the governing
20 body's minimum acceptable performance requirements, including the rights,
21 responsibilities, and relationships of the parties involved in the performance of the
22 contract.
- 23 ~~16.19.~~ "Governing body" means the governing officer or board of a state entity or a political
24 subdivision.
- 25 ~~17.20.~~ "Guaranteed maximum price" means the maximum amount a construction manager
26 at-risk may be paid under a contract to construct a public improvement.
- 27 ~~18.21.~~ "Landscape architect services" means landscape architecture services governed
28 under chapter 43-03.
- 29 ~~19.22.~~ "Lowest responsible bidder" means the lowest best bidder for the project considering
30 past experience, financial condition, past work with the governing body, and other
31 pertinent attributes that may be identified in the advertisement for bids.

20-23. "Public improvement" means any improvement undertaken by a governing body for the good of the public and which is paid for with public funds and constructed on public land or within a public building and includes an improvement on public or nonpublic land if any portion of the construction phase of the project is paid for with public funds. The term does not include a county road construction and maintenance, state highway, or public service commission project governed by title 11, 24, or 38.

24-24. "Subcontractor" means a person that contracts to perform work or render a service to a contractor or to another subcontractor as part of a contract with a governing body.

SECTION 2. A new section to chapter 48-01.2 of the North Dakota Century Code is created and enacted as follows:

Design-build procurement.

1. A governing body may utilize the design-build procurement method for a public improvement for a project that has an estimated cost of twenty million dollars or more if the governing body determines the use of the design-build method will:
 - a. Reduce the cost of the project;
 - b. Expedite the completion of the project; or
 - c. Provide design features not achievable through the design-bid-build method.
2. A governing body electing to utilize the design-build method for a public improvement shall appoint a selection committee of at least three individuals to review the proposals submitted and select the best proposal. At least fifty percent of the members of the selection committee must be registered architects or registered engineers and at least one member must be a licensed contractor. The selection committee may include employees of the state entity or political subdivision proposing the public improvement. No member of the selection committee may be associated with a design-build entity submitting a proposal.
3. A governing body electing to utilize the design-build method for a public improvement shall establish the content of a request for qualifications, which must include the following:
 - a. The minimum qualifications of the design-builder.
 - b. A scope of work statement and schedule.
 - c. A definition of the project requirements.

- d. The form of the contract to be awarded.
- e. The selection criteria for completing a final list of proposals and the number of entities to be included on the final list, which may not exceed five.
- f. A description of the project requirements and the management necessary to complete the project.
- g. The maximum time allowed for design and completion of the project.
- h. The estimated cost of the project.
- i. A description of any stipend that may be offered under section 3 of this Act.

SECTION 3. A new section to chapter 48-01.2 of the North Dakota Century Code is created and enacted as follows:

Design-build procurement selection process.

1. A governing body electing to utilize the design-build method shall establish a procedure using a standard questionnaire to qualify design-build entities. In developing the questionnaire, the governing body shall consult with representatives of the construction, building trades, and surety industries. A questionnaire used by a governing body must include the following required information:
 - a. A list of each member of the design-build entity.
 - b. Evidence that the design-build team for the proposed project has completed or demonstrated the experience, competency, capability, and capacity to complete a project of the size, scope, and complexity of the proposed project and that key personnel expected to be involved on the project have sufficient experience and training to competently manage and complete the design and construction of the proposed project.
 - c. Evidence of the licenses, registrations, and credentials required to design and construct the proposed project and information detailing any revocation or suspension of a license, registration, or credential.
 - d. Evidence that the design-build entity has the capability to obtain all required payment and performance bonds, liability insurance, and errors and omissions insurance to provide the capacity to complete the proposed project.
 - e. A description of any instance in which the design-build entity or its principals submitted a bid for a public improvement project which was found to be

1 nonresponsive or any instance in which the entity or principals were found to not
2 be a responsible bidder.

3 f. A description of any instance in which the design-build entity or its principals
4 defaulted on a construction contract.

5 g. A description of any declaration of bankruptcy or any case of receivership of any
6 member of the design-build entity and a disclosure of any instance in which a
7 surety was required to finish a project.

8 h. A list detailing each settled adverse claim, dispute, or lawsuit in excess of fifty
9 thousand dollars involving a public improvement project in which any member of
10 the design-build entity has been a party within the last five years.

11 i. Detailed data regarding the safety record of all members of the design-build
12 entity.

13 2. A member of a design-build entity submitting a response may not be replaced at any
14 time during the submission process or at any point of the project without the written
15 consent of the governing body. A governing body may revoke a contract if a
16 design-build entity replaces a member without receiving written approval. A request to
17 replace a member must document the reason for the replacement of the member. A
18 governing body may not approve a request to replace a member solely due to financial
19 considerations. A request to replace a member must provide assurance the proposed
20 replacement is equal to or better than the member being replaced.

21 3. Unless otherwise provided by law, a governing body shall advertise for proposals for a
22 design-build contract by publishing for three consecutive weeks. The first publication
23 of the advertisement must be at least twenty-one days before the date of the opening
24 of bids. The advertisement must be published in the official newspaper of the political
25 subdivision in which the public improvement is or will be located, and in a trade
26 publication of general circulation among the contractors, building manufacturers, and
27 dealers in this state, except the advertisement for a public improvement financed by
28 special assessments need be published only once each week for two weeks in the
29 official newspaper with the first publication being at least fourteen days before the
30 proposal opening.

- 1 4. a. The selection committee shall review each submission and each bid submitted
2 based upon the selection criteria established by the governing body. In evaluating
3 proposals, the selection committee shall include the numeric scoring of each
4 criteria item on a weighted basis, with at least ten percent of the total weight
5 being given to each of the following:
6 (1) Price.
7 (2) Technical design of the project.
8 (3) Construction expertise.
9 (4) Lifecycle costs over fifteen years or more.
10 b. The selection committee shall rank the top submissions sequentially based upon
11 the directives established by the governing body as provided under section 2 of
12 this Act and recommend to the governing body the design-builder receiving the
13 highest score on the evaluation criteria.
14 5. The governing body shall announce the issuance of the contract award by identifying
15 the selected design-builder and providing a written explanation of the factors
16 supporting its decision. The announcement of the award must also identify the
17 submissions that were ranked second and third.
18 6. The governing body may offer a stipend to any design-build entity determined to be a
19 finalist to obtain any intellectual property included in the submission. If a design-build
20 entity declines the stipend, the intellectual property remains the property of the
21 design-builder and the governing body and successful bidder are prohibited from
22 utilizing the intellectual property.