

CHAPTER 80
HOUSE BILL No. 2394*

AN ACT concerning the procurement of design and construction services for state public improvements contracts; enacting the Kansas alternative project delivery building construction procurement act.

Be it enacted by the Legislature of the State of Kansas:

Section 1. Sections 1 through 7, and amendments thereto, shall be known and may be cited as the Kansas alternative project delivery building construction procurement act.

Sec. 2. As used in the Kansas alternative project delivery construction procurement act, unless the context expressly provides otherwise:

(a) "Act" means the Kansas alternative project delivery building construction procurement act.

(b) "Agency" means the agency or state educational institution, as defined in K.S.A. 76-756, and amendments thereto, with the authority to award public contracts for building design and construction.

(c) "Alternative project delivery" means an integrated comprehensive building design and construction process, including all procedures, actions, sequences of events, contractual relations, obligations, interrelations and various forms of agreement all aimed at the successful completion of the design and construction of buildings and other structures whereby a construction manager or general contractor or building design-build team is selected based on a qualifications and best value approach.

(d) "Ancillary technical services" include, but shall not be limited to, geology services and other soil or subsurface investigation and testing services, surveying, adjusting and balancing air conditioning, ventilating, heating and other mechanical building systems and testing and consultant services that are determined by the agency to be required for the project.

(e) "Architectural services" means those services described by subsection (e) of K.S.A. 74-7003, and amendments thereto.

(f) "Best value selection" means a selection based upon project cost, qualifications and other factors.

(g) "Building construction" means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building or structure. Building construction does not include highways, roads, bridges, dams, turnpikes or related structures, or stand-alone parking lots.

(h) "Building design-build" means a project for which the design and construction services are furnished under one contract.

(i) "Building design-build contract" means a contract between the agency and a design-builder to furnish the architecture or engineering and related design services required for a given public facilities construction project and to furnish the labor, materials and other construction services for such public project.

(j) "Construction services" means the process of planning, acquiring, building, equipping, altering, repairing, improving, or demolishing any structure or appurtenance thereto, including facilities, utilities or other improvements to any real property, excluding highways, roads, bridges, dams, turnpikes or related structures, or stand-alone parking lots.

(k) "Construction management at-risk services" means the services provided by a firm which has entered into a contract with the agency to be the construction manager or general contractor for the value and schedule of the contract for a project, which is to hold the trade contracts and execute the work for a project in a manner similar to a general contractor, and which is required to solicit competitive bids for the trade packages developed for the project and to enter into the trade contracts for a project with the lowest responsible bidder therefor. Construction management at-risk services may include, but are not limited to scheduling, value analysis, system analysis, constructability reviews, progress document reviews, subcontractor involvement and prequalification, subcontractor bonding policy, budgeting and price guarantees, and construction coordination.

(l) "Construction management at-risk contract" means the contract whereby the state agency acquires from a construction manager or general contractor a series of preconstruction services and an at-risk financial obligation to carry out construction under a specified cost agreement.

(m) “Construction manager or general contractor” means any individual, partnership, joint venture, corporation, or other legal entity who is a member of the integrated project team with the state agency, design professional and other consultants that may be required for the project, who utilizes skill and knowledge of general contracting to perform pre-construction services and competitively procures and contracts with specialty contractors assuming the responsibility and the risk for construction delivery within a specified cost and schedule terms including a guaranteed maximum price.

(n) “Design-builder” means any individual, partnership, joint venture, corporation or other legal entity that furnishes the architectural or engineering services and construction services, whether by itself or through subcontracts.

(o) “Design criteria consultant” means a person, corporation, partnership, or other legal entity duly registered and authorized to practice architecture or professional engineering in this state pursuant to K.S.A. 74-7003, and amendments thereto, and who is employed by contract to the agency to provide professional design and administrative services in connection with the preparation of the design criteria package.

(p) “Design criteria package” means performance-oriented specifications for the public construction project sufficient to permit a design-builder to prepare a response to the division’s request for proposals for a building design-build project.

(q) “Director” means the director of the division of facilities management.

(r) “Division of facilities management” means the division of facilities management of the department of administration.

(s) “Engineering services” means those services described by subsection (i) of K.S.A. 74-7003, and amendments thereto.

(t) “Guaranteed maximum price” means the cost of the work as defined in the contract.

(u) “Negotiating committee” means a group of individuals as defined by K.S.A. 75-1251 and 75-5802, and amendments thereto.

(v) “Parking lot” means a designated area constructed on the ground surface for parking motor vehicles. A parking lot included as part of a building construction project shall be subject to the provisions of this act. A parking lot designed and constructed as a stand-alone project shall not be subject to the provisions of this act.

(w) “Preconstruction services” means a series of services that can include, but are not necessarily limited to: design review, scheduling, cost control, value engineering, constructability evaluation, and preparation and coordination of bid packages.

(x) “Project services” means architectural, engineering services, land surveying, construction management at-risk services, ancillary technical services or other construction-related services determined by the agency to be required by the project.

(y) “Public construction project” means the process of designing, constructing, reconstructing, altering or renovating a public building or other structure. Public construction project does not include the process of designing, constructing, altering or repairing a public highway, road, bridge, dam, turnpike or related structure.

(z) “State building advisory commission” means the state building advisory commission created by K.S.A. 75-3780, and amendments thereto.

(aa) “Stipend” means an amount paid to the unsuccessful proposers to defray the cost of submission of phase II of the building design-build proposal.

Sec 3. (a) Notwithstanding any other provision of the law to the contrary, the state building advisory commission is hereby authorized to institute an alternative project delivery program whereby construction management at-risk or building design-build procurement processes may be utilized on state agency public projects pursuant to this act. This authorization for construction public projects at-risk and building design-build procurement shall be for the sole and exclusive use of planning, acquiring, designing, building, equipping, altering, repairing, improving, or demolishing any structure or appurtenance thereto, including facilities, utilities, or other improvements to any real property, but shall not include highways, roads, bridges, dams, turnpikes or related structures, or stand-alone parking lots.

(b) To assist in the procurement of alternative project delivery construction services as defined under this act, the secretary of administration shall encourage firms engaged in the performance of construction services to submit annually to the secretary of administration and to the state building advisory commission a statement of qualifications and performance data. Each statement shall include data relating to the following:

- (1) The firm's capacity and experience, including experience on similar or related projects;
- (2) the capabilities and other qualifications of the firm's personnel; and
- (3) such other information related to qualifications and capability of the firm to perform construction services for projects as may be described by the secretary of administration.

(c) The state building advisory commission shall approve those projects for which the use of alternative project delivery procurement process is appropriate. In making such determination, the commission shall consider the following factors:

- (1) The likelihood that the alternative project delivery method of procurement selected will serve the public interest by providing substantial savings of time or money over the traditional design-bid-build delivery process.
- (2) The ability to overlap design and construction phases is required to meet the needs of the end user.
- (3) The use of an accelerated schedule is required to make repairs resulting from an emergency situation.
- (4) The project presents significant phasing or technical complexities, or both, requiring the use of an integrated team of designers and constructors to solve project challenges during the design or preconstruction phase.
- (5) The use of an alternative project delivery method will not encourage favoritism in awarding the public contract or substantially diminish competition for the public contract.

(d) When a request is made for alternative delivery procurement by an agency, the director shall publish a notice in the Kansas register that the state building advisory commission will be holding a public hearing with the opportunity for comment on such request. Notice shall be published at least 15 days prior to the hearing.

(e) Notwithstanding the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto, if the state building advisory commission finds that the project does not qualify for the alternative project delivery methods included under this act, then the construction services for such project shall be obtained pursuant to competitive bids and all contracts for construction services shall be awarded to the lowest responsible bidder in accordance with procurement procedures determined and administered by the division of facilities management which shall be consistent with the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto.

(f) The secretary of administration may adopt regulations pursuant to K.S.A. 75-3783, and amendments thereto, for the conduct of the alternative project delivery process.

(g) When it is necessary in the judgment of the agency to obtain project services for a particular project as described under this act, the director shall publish a notice of the request for qualifications and proposals for the required project services at least 15 days prior to the commencement of such request in the Kansas register in accordance with K.S.A. 75-430a, and amendments thereto, and in such other appropriate manner as may be determined by the agency.

Sec. 4. Construction management at-risk project delivery procedures shall be conducted as follows:

(a) The director shall determine the scope and level of detail required to permit qualified construction manager or general contractors to submit construction management at-risk proposals in accordance with the request for proposals given the nature of the project.

(b) Prior to completion of the construction documents, but as early as during the schematic design phase, the construction manager or general contractor shall be selected. The project design professional may be employed or retained by the agency to assist in the selection process. The design professional shall be selected and its contract negotiated in compliance with K.S.A. 75-1257 and 75-5804, and amendments thereto.

(c) The agency shall publish a notice of the request for qualifications and proposals for the required project services at least 15 days prior to the commencement of such requests in the Kansas register in accordance with K.S.A. 75-430a, and amendments thereto, and in such other appropriate manner as may be determined by the agency.

(d) The director shall solicit proposals in a three stage qualifications based selection process. Phase I shall be the solicitation of qualifications and prequalifying a minimum of three but no more than five construction manager or general contractors to advance to phase II. Phase II shall be the solicitation of a request for proposal for the project, and phase III shall include an interview with each proposer to present their qualifications and answer questions.

(1) Phase I shall require all proposers to submit a statement of qualifications which shall include, but not be limited to:

- (A) Similar project experience;
- (B) experience in this type of project delivery system;
- (C) references from design professionals and owners from previous projects;

(D) description of the construction manager or general contractor's project management approach;

(E) financial statements; and

(F) bonding capacity. Firms submitting a statement of qualifications shall be capable of providing a public works bond in accordance with K.S.A. 60-1111, and amendments thereto, and shall present evidence of such bonding capacity to the state building advisory commission with their statement of qualifications. If a firm fails to present such evidence, such firm shall be deemed unqualified for selection under this subsection.

(2) The state building advisory commission shall evaluate the qualifications of all proposers in accordance with the instructions of the request for qualifications. The state building advisory commission shall prepare a short list containing a minimum of three and maximum of five qualified firms, which have the best and most relevant qualifications to perform the services required of the project, to participate in phase II of the selection process. If three qualified proposers cannot be identified, the selection process shall cease. The state building advisory commission shall have discretion to disqualify any proposer that, in the state building advisory commission's opinion, lacks the minimal qualifications required to perform the work.

(3) Phase II of the process shall be conducted as follows:

(A) Prequalified firms selected in phase I shall be given a request for proposal. The request for proposal shall require all proposers to submit a more in depth response including, but not be limited to:

- (i) Company overview;
- (ii) experience or references, or both, relative to the project under question;
- (iii) resumes of proposed project personnel;
- (iv) overview of preconstruction services;
- (v) overview of construction planning;
- (vi) proposed safety plan;
- (vii) fees, including fees for preconstruction services, fees for general conditions, fees for overhead and profit and fees for self-performed work, if any.

(4) Phase III shall be conducted as follows:

(A) Once all proposals have been submitted, the negotiating committee shall interview all of the proposers, allowing the competing firms to present their proposed team members, qualifications, project plan and to answer questions. Interview scores shall not account for more than 50% of the total possible score.

(B) The negotiating committee shall select the firm providing the best value based on the proposal criteria and weighting factors utilized to emphasize important elements of each project. All scoring criteria and weighting factors shall be identified by the agency in the request for proposal instructions to proposers. The negotiating committee shall proceed to negotiate with and attempt to enter into contract with the firm receiving the best total score to serve as the construction manager or general contractor for the project. The negotiations shall proceed in accordance with the same process with which negotiations are undertaken to contract with design professionals under K.S.A. 75-1250 and 75-5804, and amendments thereto, to the extent that such provisions are consistent

with this act. Should the negotiating committee be unable to negotiate a satisfactory contract with the firm scoring the best total score, negotiations with that firm shall be terminated, and the committee shall undertake negotiations with the firm with the next best total score, in accordance with this act.

(C) If the negotiating committee determines, that it is not in the best interest of the agency to proceed with the project pursuant to the proposals offered, the negotiating committee shall reject all proposals. If all proposals are rejected, the director may solicit new proposals using different design criteria, budget constraints or qualifications.

(D) The contract to perform construction management at-risk services for a project shall be prepared by the secretary of administration and entered into between the agency and the firm performing such construction management at-risk services. A construction management at-risk contract utilizing a cost plus guaranteed maximum price contract value shall return all savings under the guaranteed maximum price to the agency.

(E) The director shall publish a construction services bid notice in the Kansas register and in such other appropriate manner for the construction manager or general contractor as may be determined by the state agency. Each construction services bid notice shall include the request for bids and other bidding information prepared by the construction manager or general contractor and the state agency with the assistance of the division of facilities management. The current statements of qualifications of and performance data on the firms submitting bid proposals shall be made available to the construction manager or general contractor and the state agency by the state building advisory commission along with all information and evaluations developed regarding such firms by the secretary of administration under K.S.A. 75-3783, and amendments thereto. The agency may allow the construction manager or general contractor to self-perform construction services provided the construction manager or general contractor submits a bid proposal under the same conditions as all other competing firms. If a firm submitting a bid proposal fails to present such evidence, such firm shall be deemed unqualified for selection under this subsection. At the time for opening the bids, the construction manager or general contractor shall evaluate the bids and shall determine the lowest responsible bidder except in the case of self-performed work for which the agency and the department of administration shall determine the lowest responsible bidder. The construction manager or general contractor shall enter into a contract with each firm performing the construction services for the project and make a public announcement of each firm selected in accordance with this subsection.

Sec. 5. Building design-build project delivery procedures shall be conducted as follows:

(a) The director shall determine the scope and level of detail required to permit qualified persons to submit building design-build proposals in accordance with the request for proposals given the nature of the project.

(b) Notice of requests for proposals shall be advertised in accordance with K.S.A. 75-430a, and amendments thereto. The director shall publish a notice of a request for proposal with a description of the project, the procedures for submittal and the selection criteria to be used.

(c) The director shall establish in the request for proposal a time, place and other specific instructions for the receipt of proposals. Proposals not submitted in strict accordance with such instructions shall be subject to rejection.

(d) A request for proposals shall be prepared for each building design-build contract containing at minimum the following elements:

(1) The procedures to be followed for submitting proposals, the criteria for evaluation of proposals and their relative weight, and the procedures for making awards.

(2) The proposed terms and conditions for the building design-build contract.

(3) The design criteria package.

(4) A description of the drawings, specifications or other information to be submitted with the proposal, with guidance as to the form and level of completeness of the drawings, specifications or other information that will be acceptable.

(5) A schedule for planned commencement and completion of the building design-build contract.

(6) Budget limits for the building design-build contract, if any.
(7) Requirements, including any available ratings for performance bonds, payment bonds and insurance.

(8) Any other information that the agency at its discretion chooses to supply, including without limitation, surveys, soil reports, drawings of existing structures, environmental studies, photographs or references to public records.

(e) The director shall solicit proposals in a three-stage process. Phase I shall be the solicitation of qualifications of the building design-build team. Phase II shall be the solicitation of a technical proposal including conceptual design for the project and phase III shall be the proposal of the construction cost.

(1) The state building advisory commission shall review the submittals of the proposers and assign points to each proposal as prescribed in the instructions of the request for proposal.

(2) Phase I shall require all proposers to submit a statement of qualifications which shall include, but not be limited to, the following:

(A) Demonstrated ability to perform projects comparable in design, scope and complexity.

(B) References of owners for whom building design-build projects have been performed.

(C) Qualifications of personnel who will manage the design and construction aspects of the project.

(D) The names and qualifications of the primary design consultants and contractors with whom the building design-builder proposes to subcontract. The building design-builder may not replace an identified subcontractor or subconsultant without the written approval of the agency.

(E) Firms submitting a statement of qualifications shall be capable of providing a public works bond in accordance with K.S.A. 60-1111, and amendments thereto, and shall present evidence of such bonding capability to the state building advisory commission with their statement of qualifications. If a firm fails to present such evidence, such firm shall be deemed unqualified for selection under this subsection.

(3) The state building advisory commission shall evaluate the qualifications of all proposers in accordance with the instructions prescribed in the request for proposal. Designers on the project shall be evaluated in accordance with the requirements of K.S.A. 74-7003, and amendments thereto. Qualified proposers selected by the evaluation team may proceed to phase II of the selection process. Proposers lacking the necessary qualifications to perform the work shall be disqualified and shall not proceed to phase II of the process. Under no circumstances shall price or fees be considered as a part of the prequalification criteria. Points assigned in the phase I evaluation process shall not carry forward to phase II of the process. All qualified proposers shall be ranked on points given in phases II and III only. The two phase evaluation and scoring process shall be combined to determine the greatest value to the state agency.

(4) The state building advisory commission shall have discretion to disqualify any proposer, which in the state building advisory commission's opinion, lacks the minimal qualifications required to perform the work.

(5) The state building advisory commission shall prepare a short list containing a minimum of three, but no more than the top five qualified proposers to participate in phase II of the process. If three qualified proposers cannot be identified, the contracting process shall cease.

(6) Phase II of the process shall be conducted as follows:

(A) Proposers shall submit their design for the project to the level of detail required in the request for proposal. The design proposal should demonstrate compliance with the requirements set out in the request for proposal.

(B) Up to 20% of the points awarded to each proposer in phase II may be based on each proposer's qualifications and ability to design, construct and deliver the project on time and within budget.

(C) The design proposal shall not contain any reference to the cost of the proposal.

(D) The design submittals shall be evaluated and assigned points in accordance with the requirements of the request for proposal.

(7) Phase III shall be conducted as follows:

(A) The phase III proposal shall provide a firm fixed cost of construction. The proposal shall be accompanied by bid security and any other submittals as required by the request for proposal.

(B) The proposed contract time, in calendar days, for completing a project as designed by a proposer shall be considered as an element of evaluation in phase III. The request for proposal shall establish a user delay value for each proposed calendar day identified in the proposal.

(C) Cost and schedule proposals shall be submitted in accordance with the instructions of the request for proposal. Failure to submit a cost proposal on time shall be cause to reject the proposal.

(8) Proposals for phase II and III shall be submitted concurrently at the time and place specified in the request for proposal. The phase III cost proposals shall be opened only after the phase II design proposals have been evaluated and assigned points.

(9) Phase III cost and schedule, which shall prescribe containing the number of calendar days, proposals shall be opened and read aloud at the time and place specified in the request for proposal. At the same time and place, the evaluation team shall make public its scoring of phase II. Cost proposals shall be evaluated in accordance with the requirements of the request for proposal. In evaluating the proposals, each proposer's adjusted score shall be determined by adding the phase III cost proposal to the product of the proposed contract time and the user delay cost, and dividing that sum by the phase II score.

(10) The responsive proposer with the lowest total number of points shall be awarded the contract. If the director determines, that it is not in the best interest of the state to proceed with the project pursuant to the proposal offered by the proposer with the lowest total number of points, the director shall reject all proposals. In such event, all qualified proposers with higher point totals shall receive a stipend pursuant to subsection (e)(12) of section 5, and amendments thereto, of this act, and the proposer with the lowest total number of points shall receive an amount equal to two times such stipend.

(11) If all proposals are rejected, the negotiating committee may solicit new proposals using different design criteria, budget constraints or qualifications.

(12) As an inducement to qualified proposers, the agency shall pay a stipend, the amount of which shall be established in the request for proposal, to each prequalified building design-builder whose proposal is responsive but not accepted. Upon payment of the stipend to any unsuccessful building design-build proposer, the state shall acquire a nonexclusive right to use the design submitted by the proposer, and the proposer shall have no further liability for its use by the state in any manner. If the building design-build proposer desires to retain all rights and interest in the design proposed, the proposer shall forfeit the stipend.

Sec. 6. Every bid conforming to the terms of the advertisement, together with the name of the bidder, shall be recorded, and all such records with name of the successful bidder indicated thereon shall, after award or letting of the contract, be subject to public inspection upon request. The secretary of administration shall, within five days after award or letting of the contract, publish the name of the successful bidder. The public notice on public display shall show the phase II and III scores and the adjusted final score. The secretary of administration shall, within five days after award or letting of the contract, have the names of all proposers whose bids were not selected, together with phase II and III scores and the final adjusted score for each, available for public review.

Sec. 7. The provisions of the Kansas alternative project delivery building construction procurement act shall not apply to the process of designing, constructing, altering or repairing a public highway, road, bridge, dam, turnpike or related structures, or stand-alone parking lots.

Sec. 8. This act shall take effect and be in force from and after its publication in the statute book.