

# State of South Dakota

SEVENTY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 1998

400B0256

## SENATE BILL NO. 39

Introduced by: The Committee on State Affairs at the request of the Bureau of Administration

1 FOR AN ACT ENTITLED, An Act to provide for the public procurement of construction  
2 services utilizing the design-build procurement process.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 5-18-1 be amended to read as follows:

5 5-18-1. ~~For the purposes of~~ Terms used in this chapter and in this Act mean:

6 (1) "Construction<sub>2</sub>" and "constructed<sub>2</sub>" ~~shall~~, in addition to their ordinary meaning  
7 ~~embrace<sub>2</sub>~~ repair and alteration;

8 (2) "Public corporation<sub>2</sub>" ~~shall embrace~~ the state and all counties, municipalities, public  
9 school corporations and all officers, boards or commissions empowered by law to  
10 enter into contracts for the construction of public improvements;

11 (3) "Public improvement<sub>2</sub>" is one the cost of which is payable from taxes or other funds  
12 under the control of the public corporation and also local improvements for which  
13 special assessments are to be levied;

14 (4) "Surety<sub>2</sub>" ~~shall mean~~ a bond or undertaking executed by a surety company authorized  
15 to do business in the State of South Dakota and countersigned by an agent of ~~said~~ the  
16 company resident in the State of South Dakota, but nothing ~~herein shall require~~ in this

- 1            subdivision requires countersignature of a bid bond;
- 2        (5)    "Acceptance," the formal resolution of a public corporation authorizing the execution  
3            of a design-build contract;
- 4        (6)    "Design-build contract," a contract between a public corporation and a design-builder  
5            to furnish the architecture, engineering, and related services as required, and the labor,  
6            materials, and other construction services for a public improvement. A design-build  
7            contract may be conditioned upon future refinements in scope and price, and may  
8            permit the public corporation to make changes in the scope of the project without  
9            invalidating the design-build contract;
- 10       (7)    "Design-builder," the person that proposes to design and construct a public  
11           improvement covered by the procedures of this Act;
- 12       (8)    "Performance criteria," the requirements for the public improvement, including as  
13           appropriate, capacity, durability, production standards, ingress and egress  
14           requirements, building code requirements, or other criteria for the intended use of the  
15           public improvement, expressed in performance-oriented specifications or drawings  
16           suitable to allow the design-builder to make a proposal;
- 17       (9)    "Performance criteria developer," the person and the person's subcontractors retained  
18           by the public corporation to develop performance criteria;
- 19       (10)   "Proposal, an offer to enter into a design-build contract;
- 20       (11)   "Request for proposals," the document or publication whereby a public corporation  
21           solicits proposals for a design-build contract.

22       Section 2. Notwithstanding any other provisions of law, a public corporation may enter into  
23       design-build contracts for public improvements, if the following conditions are met:

- 24       (1)    The public corporation shall, prior to issuing any request for proposals, establish and  
25           publish procedures for the solicitation and award of design-build contracts. The

1 Bureau of Administration shall establish such procedures for the state. Such  
2 procedures shall include, at a minimum, the following:

- 3 (a) The procedure to select or designate a performance criteria developer utilizing  
4 a qualification based process and the procedure to prepare performance  
5 criteria;
- 6 (b) The procedures for the preparation and contents of a request for proposals;
- 7 (c) The procedure and standards to be used to qualify or prequalify design-  
8 builders;
- 9 (d) The procedures for preparing and submitting proposals;
- 10 (e) The procedures for evaluating proposals;
- 11 (f) The procedures for negotiations between the public corporation and those  
12 submitting proposals prior to the acceptance of a proposal. Such procedure  
13 shall contain safeguards to preserve confidential information and proprietary  
14 information supplied by those submitting proposals, consistent with section 14  
15 of this Act;
- 16 (g) The procedures for awarding and executing design-build contracts;
- 17 (h) The procedures for awarding design-build contracts in the event of public  
18 emergencies as defined in § 5-18-3.1; and
- 19 (i) The procedures for acting on formal protests relating to the solicitation or  
20 award of design-build contracts;

21 (2) The public corporation shall, for each public improvement or improvements under this  
22 Act, make a determination that it is in the best interest of the public to enter into a  
23 design-build contract to complete the public improvement. The determination to  
24 utilize design-build and the basis for the determination shall be recorded in the minutes

1 of the meeting of the governing board of the public corporation. In making this  
2 determination, design-build projects should meet one or more of the following  
3 criteria:

4 (a) The public corporation requires a project design and construction time line that  
5 is faster than the traditional design/bid/build process would allow;

6 (b) The complexity of the project requires close coordination of design and  
7 construction expertise or an extreme amount of coordination;

8 (c) The public corporation requires early cost commitments;

9 (d) The project can be defined at an early stage and the public corporation is able  
10 to specify all requirements;

11 (3) The public corporation shall follow the procedures of other laws governing public  
12 improvement construction contracts to the extent such laws are compatible with the  
13 use of design build contracts.

14 Section 3. Each design-builder shall be licensed and registered to do business in this state.

15 Section 4. A design-builder may sublet responsibility for professional design services to any  
16 person licensed and registered to provide professional design services in this state. Nothing in  
17 this Act limits or eliminates the responsibility or liability of any person registered pursuant to  
18 chapter 36-18, on a design-build project to the public corporation or other third parties under  
19 existing law.

20 Section 5. A design-builder may sublet responsibility for construction or other services to  
21 persons registered, licensed, or otherwise qualified to provide those services in this state.

22 Section 6. A design-builder may contract with the public corporation to provide professional  
23 services or construction services for which the design-builder is not licensed, registered, or  
24 qualified to perform, as long as the design-builder sublets all such services required under the  
25 design-build contract to a licensed, registered, or otherwise qualified person.

1 Section 7. Any request for proposals shall contain performance criteria developed by a  
2 performance criteria developer and approved by the public corporation. For projects not  
3 exempted under chapter 36-18 from using a registered design professional, the performance  
4 criteria developer shall be a design professional registered under chapter 36-18.

5 Section 8. The performance criteria developer may not submit a proposal to enter into the  
6 design-build contract and the design-builder may not delegate or contract services under the  
7 design-build contract to the performance criteria developer.

8 Section 9. The performance criteria developer shall be either an employee of the public  
9 corporation or shall be engaged in accordance with normal procedures for contracting with  
10 architects or engineers. With the approval of the public corporation, the developer may delegate  
11 or contract for the development of specific aspects of the design criteria to other consultants.  
12 The performance criteria developer may be retained at the public corporation's option through  
13 to the completion of the design-build contract.

14 Section 10. The public corporation, in consultation with the performance criteria developer,  
15 shall determine the scope and level of detail required for the performance criteria. The  
16 performance criteria shall be detailed enough to permit a person to submit a proposal in  
17 accordance with the request for proposals, given the nature of the public project and the level  
18 of design to be provided in the proposal.

19 Section 11. A request for proposals shall be prepared for each design-build contract  
20 containing, at a minimum, the following elements:

- 21 (1) The identity of the public corporation which will award the design-build contract and  
22 the identity of the performance criteria developer;
- 23 (2) The procedures to be followed for submitting proposals, the criteria for evaluation of  
24 a proposal and its relative weight, and the procedures for making awards;

- 1 (3) The proposed terms and conditions for the design-build contract;
- 2 (4) The performance criteria;
- 3 (5) A description of the drawings, specifications, or other submittals to be submitted with  
4 the proposal, with guidance as to the form and level of completeness of the drawings,  
5 specifications, or submittals that is acceptable;
- 6 (6) A schedule for planned commencement and completion of the design-build contract;
- 7 (7) Budget limits for the design-build contract, if any;
- 8 (8) Affirmative action, disadvantaged business, or set-aside goals or requirements for the  
9 design-build contract, if any;
- 10 (9) The qualifications the design-builder is required to have;
- 11 (10) Requirements for performance and payment bonds, and insurance. At a minimum,  
12 these requirements shall meet the requirements of § 5-21-1; and
- 13 (11) The compensation, if any, to be given to design-builders submitting proposals who are  
14 not awarded the project.

15 Section 12. Notice of any request for proposals shall be advertised in accordance with the  
16 provisions of § 5-18-3 unless design-builders have been prequalified in accordance with the  
17 provisions of section 13 of this Act.

18 Section 13. A public corporation may prequalify design-builders for design-build contracts  
19 by advertising requests for letters of interest in accordance with § 5-18-3. Requests for letters  
20 of interest shall contain, at a minimum, the following elements:

- 21 (1) The identity of the public corporation;
- 22 (2) A description of the proposed public improvement;
- 23 (3) Budget limits for the proposed public improvement;
- 24 (4) The requirements the design-builder will be required to have; and
- 25 (5) The criteria and their relative weight for prequalification.

1 Section 14. Any proposal, submitted pursuant to this Act, shall be accompanied by a deposit  
2 or bond meeting the requirements of § 5-18-6. The deposit or security may be forfeited if the  
3 proposal is accepted but the design-builder fails to execute the design-build contract.

4 Section 15. Any proposal shall be sealed and may not be opened until expiration of the time  
5 established for making proposals as set forth in the request for proposals. To the extent required  
6 by the request for proposals, any proposal shall identify each person to whom the design builder  
7 proposes to sublet obligations under the design build contract. At a minimum, any proposal shall  
8 identify each person to whom the design-builder proposes to sublet any design obligations or  
9 general construction obligations. Any person so identified may not be replaced without the  
10 approval of the public corporation. Any proposal shall establish a cost of the design-build  
11 contract that may not be exceeded if the proposal is accepted without change. The maximum  
12 cost in the proposal may be converted to fixed prices by negotiated agreement between the  
13 public corporation and the selected design-builder.

14 Section 16. Until a proposal is accepted, the drawings, specifications, and other information  
15 in the proposal remain the property of the person making the proposal. The public corporation  
16 shall make reasonable efforts to maintain the secrecy and confidentiality of any proposal and all  
17 information contained in any proposal and may not disclose any proposal or the information  
18 contained in a proposal to the design-builder's competitors. To the extent permitted by the  
19 provisions of chapter 1-25, the public corporation may not disclose confidential and proprietary  
20 information contained in any proposal to the public until such time as the public corporation  
21 takes final action to accept a proposal.

22 Section 17. Once received, any proposal shall be submitted to the performance criteria  
23 developer for review. Clarifications may be required to ensure conformance of any proposal with  
24 the performance criteria. In seeking clarifications, the performance criteria developer may not

1 reveal any aspect of any design-builder's proposal to any other design-builder. No proposal may  
2 be considered until the performance criteria developer issues a written opinion that the proposal  
3 is consistent with the performance criteria. Once the performance criteria developer has issued  
4 such an opinion, the proposal shall be submitted to the governing body of the public corporation  
5 for review and evaluation. No proposal or design-build contract may be accepted unless the  
6 public corporation determines there was adequate competition for such contract.

7 Section 18. After obtaining and evaluating proposals according to the criteria and procedures  
8 set forth in the request for proposals, a public corporation may accept the proposal it considers  
9 most advantageous to the public corporation. Acceptance of a proposal shall be by written notice  
10 to the design-builder which submitted the accepted proposal. At the same time notice of  
11 acceptance is delivered, the public corporation shall also inform, in writing, the other design-  
12 builders that their proposals were not accepted.

13 Section 19. The public corporation may reject any and all proposals, except for the purpose  
14 of evading the provisions of this Act. The public corporation may solicit new proposals using the  
15 same or different performance criteria, budget constraints, or qualifications.

16 Section 20. Any proposal may be withdrawn by the proposer for any reason at any time prior  
17 to acceptance.