

2 AAC 12 is amended by adding new sections to read:

Article 16. Design-Build Construction Contracts.

Section

931. Purpose

933. General design-build requirements

935. Design-builders

937. Development of performance criteria

939. Solicitation of proposals

941. Preparation and submission of proposals

943. Evaluation and award of design-build construction contracts

945. Protests

949. Definitions

2 AAC 12.931. Purpose. The provisions of 2 AAC 12.931 - 2 AAC 12.949 set out requirements for the procurement and administration under AS 36.30.200(c) of design-build construction contracts. (Eff. ___/___/___, Register ___)

Authority: AS 36.30.040 AS 36.30.200

2 AAC 12.933. General design-build requirements. (a) The procurement officer may conduct a design-build procurement process only if the commissioner of transportation and public facilities determines in writing that it is advantageous to the state.

(b) When a design-build procurement process is used, the request for proposals must solicit a single price for both design and construction services. Nothing in this subsection prohibits a multi-step award process.

(c) The provisions of 2 AAC 12.931 - 2 AAC 12.949 apply to, and are incorporated in, all design-build construction contracts entered by an agency.

(d) Design-build construction contracts must be procured

(1) in accordance with AS 36.30.200 - 36.30.265; and

(2) except as provided in 2 AAC 12.931 - 2 AAC 12.949, in accordance with 2 AAC 12.220 - 2 AAC 12.315 (Competitive Sealed Proposals); in the case of inconsistency with 2 AAC 12.220 - 2 AAC 12.315, the provisions of 2 AAC 12.931 - 2 AAC 12.949 control.

(Eff. ___/___/____, Register ____)

Authority: AS 36.30.040 AS 36.30.200

2 AAC 12.935. Design-builders. (a) A design-builder must have a valid business license issued under AS 43.70 and 12 AAC 12, and must be

(1) registered as a general contractor in accordance with AS 08.18 and 12 AAC 21; or

(2) licensed as an architect or engineer in accordance with AS 08.48 and 12 AAC 36.

(b) A design-builder may provide professional or construction services that the design-builder is not itself licensed or registered to provide, if those services are assigned or subcontracted to a person that

- (1) is a member of the design-build team;
- (2) has a valid business license issued under AS 43.70 and 12 AAC 12; and
- (3) is registered or licensed to provide the services in accordance with AS 08.18

and 12 AAC 21, or with AS 08.48 and 12 AAC 36, as applicable.

(c) The agency shall evaluate a design-builder for at least the following qualification factors:

- (1) bonding capacity;
- (2) financial strength and capabilities;
- (3) experience and technical expertise with projects of similar size and scope;
- (4) past performance;
- (5) qualifications and experience of key management and professional staff who will be assigned to the project;
- (6) the capacity to accomplish work in the required time; as part of the evaluation, the agency shall consider, and the design-builder must disclose, the design-builder's present workload;
- (7) quality control and quality assurance policies and programs;
- (8) the design-builder's safety record, to include safety and drug-testing policies and programs;
- (9) equipment, including technical resources and information technology;
- (10) a subcontracting plan, including the qualifications and capabilities of any subcontractor required to be identified by the request for proposals.

(d) When evaluating a design-builder, the agency shall act in accordance with AS 36.30.250(b).

(e) The agency shall preclude or disqualify a design-builder or member of the design-build team from participation in a design-build construction contract if the procurement officer determines that the design-builder or design-build team member has an unfair competitive advantage or a conflict of interest.

(f) A consultant or subconsultant to the agency may not be allowed to participate in a project in other than a consultant or subconsultant capacity unless the procurement officer determines that

(1) the role of the consultant or subconsultant

(A) was limited to provision of preliminary design, reports, or similar low-level documents that will be incorporated in to the request for proposals; and

(B) did not include assistance in the development of instructions to offerors, qualification factors, performance criteria, or other evaluation criteria; or

(2) each document or report that the consultant or subconsultant delivered to the agency is made available to all offerors.

(g) With or without a request from the agency, a design-builder, or a member of the design-build team, must promptly disclose to the agency, in writing, any factor that may provide an unfair competitive advantage or potential or actual conflict of interest for the design-builder or design-build team member.

(h) Nothing in 2 AAC 12.931 - 2 AAC 12.949 limits or eliminates any responsibility or liability that a professional on a design-build construction contract owes to the agency or to a

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third party. (Eff. ___/___/____, Register ____)

Authority: AS 36.30.040 AS 36.30.200

2 AAC 12.937. Development of performance criteria. The agency shall establish the scope and level of detail required for performance criteria contained in a request for proposals.

The performance criteria must be detailed enough to permit offerors to submit proposals in accordance with the request for proposals. (Eff. ___/___/____, Register ____)

Authority: AS 36.30.040 AS 36.30.200

2 AAC 12.939. Solicitation of proposals. (a) The agency shall prepare a request for proposals for each design-build construction contract. The request for proposals must contain, at a minimum, the following elements:

- (1) the name and purpose of the project;
- (2) the identity of the agency that will award the design-build construction contract;
- (3) a description of the method selected under 2 AAC 12.943(a) as the basis for awarding the design-build construction contract;
- (4) the procedures to be followed for submitting proposals, the criteria for evaluation of proposals and their relative weight, the procedures for making awards, and a statement that the requirements of 2 AAC 12.931 - 2 AAC 12.949 are incorporated;
- (5) the date on or before which the agency must receive proposals; that date may not be less than 21 days after issuance of the request for proposals;

- (6) provisions for the payment of a stipend, if any;
- (7) provisions specifying ownership of design plans or concepts or of technical plans or concepts;
- (8) the proposed contract form, terms, and conditions;
- (9) performance criteria developed under 2 AAC 12.937, including, as appropriate, capacity, durability, and production standards, ingress and egress requirements, and other criteria for the intended use of the project, expressed in performance-oriented drawings and specifications suitable to allow the design-builder to make a proposal;
- (10) a description of the drawings, specifications, or other required submittals, with guidance as to the form and level of completeness that will be acceptable; that description must include a description of the submittal review process;
- (11) a schedule for planned commencement and completion of the design-build construction contract, unless contract time is to be proposed by the design-builder and is one of the weighted proposal evaluation criteria;
- (12) budget limits, if any, for the design-build construction contract;
- (13) affirmative action, disadvantaged business, or set-aside goals, if any, for the design-build construction contract;
- (14) the qualifications the design-builder will be required to have;
- (15) detailed material quality standards;
- (16) the method for handling pre-proposal inquiries;
- (17) long-term maintenance provisions, if any;
- (18) a reference to the provisions of 2 AAC 12.235(e) and (f);

(19) a requirement that an offeror provide, in the offeror's proposal, information regarding actual or potential conflicts of interest;

(20) requirements related to changes in design-build team members or changes in personnel within design-build teams;

(21) each evaluation factor, including cost or price, and including each significant subfactor, if any, that will affect the award of the design-build construction contract;

(22) the relative importance of each evaluation factor and each subfactor, if any, in determining the award of the design-build construction contract;

(23) a requirement that the design-builder review the request for proposals to ascertain the project requirements, and a requirement that the design-builder notify the agency in the event of any ambiguity or uncertainty;

(24) terms or conditions detailing incentives, disincentives, or liquidated damages, if any;

(25) warranty provisions; the request for proposals must include notice that in addition to warranting materials, workmanship, and construction, and providing any additional warranties that the agency requires, a design-builder must warrant the design of the project;

(26) notice that the design-builder must provide, in a form and amount acceptable to the agency, insurance coverage for a defined period after final payment for the cost of

(A) correcting defects or deficiencies arising from or associated with design or construction negligence;

(B) errors or omissions; and

(C) legal defense and payment of indemnity;

(27) identification of the disciplines to be evaluated.

(b) In a request for proposals, an agency may require a cash deposit, letter of credit, or bond not to exceed five percent of the maximum cost of the design-build construction contract, as established by the proposal. (Eff. ___/___/____, Register ____)

Authority: AS 36.30.040 AS 36.30.200

2 AAC 12.941. Preparation and submission of proposals. (a) An offeror must submit its proposal to the agency at the specific place and at or before the specific time identified in the request for proposals.

(b) An offeror must complete any form required in the request for proposals and provided by the agency. The offeror must include with its proposal each completed form and any necessary attachment or additional information.

(c) Proposals shall be sealed and may not be opened until expiration of the time set in the request for proposals for submitting proposals.

(d) If the request for proposals requires a cash deposit or bond as described in 2 AAC 12.939(b), the deposit or bond is subject to forfeiture if the proposal is accepted but the offeror fails to execute the design-build construction contract.

(e) For each discipline that an agency identifies in the request for proposals, proposals must identify each person within that discipline to whom the offeror proposes to subcontract obligations under the design-build construction contract. A person that the offeror identifies may not be replaced without the approval of the agency. (Eff. ___/___/____, Register ____)

Authority: AS 36.30.040 AS 36.30.200

2 AAC 12.943. Evaluation and award of design-build contracts. (a) The agency shall use one or a combination of the following methods as a basis for award unless the commissioner of transportation and public facilities approves another method:

(1) the best value method, in which the agency gives numerical scores to technical proposals, and then uses those numerical scores and the bid price to establish a best value in accordance with a formula published in the request for proposals;

(2) the two-step method, in which the agency

(A) first, uses a request for qualifications and the qualification factors under 2 AAC 12.935 to short-list offerors; the request for qualifications must contain, at a minimum, the following elements:

(i) the date on or before which the agency must receive qualifications submissions; that date may not be less than 21 days after issuance of the request for qualifications;

(ii) the qualifications the offerors will be required to have;

(iii) a description of the project in enough detail to let offerors determine if they wish to compete and to form the basis for their qualification submissions;

(iv) qualification factors and their relative weights;

(v) identification of the maximum number of offerors that will be permitted, at the second step described in (B) of this paragraph, to submit price and technical proposals; the maximum number may not exceed five offerors,

unless the procurement officer determines that a maximum number greater than five is in the best interest of the state; and

(B) second, uses a request for proposals to evaluate price and technical proposals from the offerors that are short-listed;

(3) the low-bid method, in which

(A) an offeror must submit a technically qualified proposal in order for the agency to consider the bid; and

(B) the agency awards the design-build construction contract to the offeror that submits a proposal that is technically qualified and lowest price.

(b) If an agency uses a request for qualifications to short-list offerors, the agency shall issue notice of the request for qualifications in accordance with 2 AAC 12.130.

(c) To evaluate either submissions made in response to a request for qualifications or submissions made in response to a request for proposals, the agency may form evaluation committees. To assist in the evaluation process, an evaluation committee may retain the services of non-voting members, including consultants or subconsultants.

(d) An agency is not required to award a design-build construction contract as a result of a request for proposals. In accordance with 2 AAC 12.270, 2 AAC 12.860, and 2 AAC 12.870, the agency may reject a proposal.

(e) Notice of intent to award a design-build construction contract shall be issued in accordance with 2 AAC 12.210.

(f) The award of a design-build construction contract, if any, shall be made in accordance with AS 36.30.250.

(g) If the agency awards a design-build construction contract, the agency shall execute the contract and issue the successful offeror a written notice to proceed.

(h) At the time of award of a design-build construction contract, the agency may negotiate minor changes with the selected offeror for the purpose of clarifying the design criteria and work to be done, if the negotiated changes do not affect the ranking of the proposals based on their adjusted scores.

(i) In this section,

(1) "short-list" means to narrow the field of offerors through the selection of the most qualified offerors who have responded to a request for qualifications;

(2) "technical proposal" means the portion of a proposal that contains design solutions and other qualitative factors that are provided in response to the request for proposals.

(Eff. ___/___/___, Register ____)

Authority: AS 36.30.040 AS 36.30.350 AS 36.30.365
AS 36.30.200

2 AAC 12.945. Protests and claims. Protests and claims arising from the procurement process under 2 AAC 12.931 - 2 AAC 12.949 shall be reviewed in accordance with AS 36.30.550 - 36.30.699, as applicable. (Eff. ___/___/___, Register ____)

Authority: AS 36.30.040 AS 36.30.200

2 AAC 12.949. Definitions. In 2 AAC 12.931 - 2 AAC 12.949, unless the context requires otherwise,

(1) "agency" means

(A) the Department of Transportation and Public Facilities; or

(B) an agency within the meaning of AS 36.30.990 to which the commissioner of transportation and public facilities has delegated, under AS 36.30.015, authority to contract for construction;

(2) "design-build construction contract," within the meaning given in AS 36.30.990, means a construction contract between an agency and a design-builder to furnish architecture, engineering, and related design services, and to furnish construction services, including labor and materials. (Eff. ___/___/___, Register ____)

Authority: AS 36.30.040 AS 36.30.200