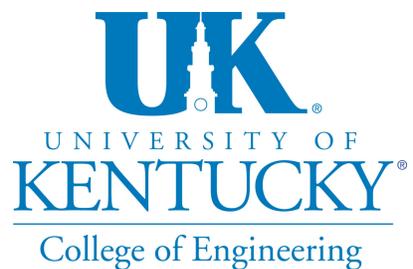




KENTUCKY TRANSPORTATION CENTER

**ANALYSIS OF PROCUREMENT PROCESSES AND
DEVELOPMENT OF RECOMMENDATIONS FOR
INTELLIGENT TRANSPORTATION SYSTEMS (ITS)
PROCUREMENTS**





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Research Report
KTC-07-28 / SPR242-02-1F

**ANALYSIS OF PROCUREMENT PROCESSES AND
DEVELOPMENT OF RECOMMENDATIONS FOR
INTELLIGENT TRANSPORTATION SYSTEMS (ITS)
PROCUREMENTS**

(Final Report)

by

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in cooperation with

The Kentucky Transportation Cabinet

and

The Federal Highway Administration,

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16. Abstract Traditional state procurement processes are not well-suited to the procurement of Intelligent Transportation Systems (ITS). The objective of this study was to analyze Kentucky's existing procurement processes, identify strengths and weaknesses of each, and develop recommendations for a revised process (or processes) that would meet the unique requirements of ITS procurements. Four existing processes were identified, studied, documented, and assessed. The study also looked at design-build processes, both in Kentucky and in other states. Recommendations were developed for statutory changes to improve Kentucky's ability to procure ITS technologies and systems.			
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EXECUTIVE SUMMARY

Intelligent Transportation Systems (ITS) deployments present many challenges, not least of which is the difficulty in procuring ITS equipment and services. Most state transportation agencies—including Kentucky’s—have procurement processes that were designed for traditional highway construction projects, and these processes often use “low bid” procurements. Unfortunately, low bid procurements are ill-suited to ITS projects, where the objective is to select the most qualified bidder. Poorly qualified, inexperienced bidders, if selected to provide ITS technologies and services, may cause delays, poor system performance, and much higher costs in the long run. ITS procurements often entail sophisticated collections of complex telecommunications, electronic, and computer equipment, as well as the software that drives them. These procurements are challenging because each procurement must be tailored to the unique requirements of the project.

Traditional procurement processes are often cumbersome and slow, requiring substantial lead times and providing little flexibility. This can be a major impediment to ITS procurements, where technologies are new and rapidly changing, and where specifications and standards may not exist. ITS procurements require speed and flexibility, and they often require unprecedented levels of cooperation between the public agency and the contractor. Many ITS procurements involve multiple agencies, and they often cross jurisdictional boundaries. Because of these complexities and uncertainties, standard procurement and contracting processes are not typically the best solutions for ITS procurements.

The objective of this study was to analyze Kentucky’s existing procurement processes, identify strengths and weaknesses of each, and develop recommendations for a revised process (or processes) that would incorporate the best features of each existing process and meet the unique requirements of ITS procurements.

This study identified four current processes in Kentucky with some applicability to ITS procurements. Each of these processes was studied, described, and assessed in terms of its advantages and disadvantages for ITS procurements. These processes are:

- Competitive Sealed Bid
- Highway Construction Projects—Prequalification and Selection
- Professional Services Contract and Project Management
- Strategic Alliance Services (SAS)

Transportation Cabinet representatives have identified a number of problems encountered when procuring ITS using existing processes. In general, these problems revolve around the lack of continuity between components of an integrated project, a lack of flexibility to address change during a project, and the cumbersome nature of the existing procurement processes.

Kentucky’s current processes provide a number of alternative methods of procuring ITS. When a project involves “highways, bridges, and bridge approaches,” the Transportation Cabinet may use the Professional Engineering Services process for design work and either the Highway

Construction process or the Finance and Administration Cabinet process for hardware, installation and related construction work.

Under current law, projects that do not involve “highways, bridges and bridge approaches” are subject to the provisions of the Model Procurement Code and, unless the Finance and Administration Cabinet has delegated authority to the Transportation Cabinet, are subject to the Finance and Administration Cabinet or, where appropriate the SAS processes.

The Finance and Administration Cabinet regulations offer a design-build process that may be well-suited to the procurement of complex integrated systems. In addition, KRS 45A.045(3) permits the Finance and Administration Cabinet to delegate its authority over specific projects to any other spending agencies. The Finance Cabinet used this delegated authority in procuring the design, equipment, installation, and integration for the Statewide Transportation Operations Center.

The SAS process may be useful for specific IT solutions which do not involve substantial hardware purchases or for systems integration in which specific recommended hardware may be purchased through the Finance and Administration Cabinet. Here again, the Statewide Transportation Operations Center can provide a model for use of the SAS process.

In general, the statutes and the regulations provide the Transportation Cabinet with considerable flexibility in procurement methods. Of course, while these processes may be sufficient for a particular project, the Transportation Cabinet lacks its own general design-build process that will permit an integrated procurement of an entire system. The design-build method is becoming increasingly popular across the country. This report includes an overview, analysis, and listing of design-build statutes that are currently in place in many states.

The Kentucky Transportation Cabinet has available several procurement processes that are suitable (to varying degrees) for ITS procurements. Several successful ITS projects have been carried out using existing processes. However, each of the existing processes has one or more weaknesses or drawbacks with regard to ITS procurements. These weaknesses make ITS procurements more difficult and cumbersome than they ideally should be, and, in some cases, the use of these processes may reduce the probability of a successful project. Several of the weaknesses identified could be addressed with revisions to the Kentucky Revised Statutes and the Kentucky Administrative Regulations. Specifically, the following actions were recommended:

- Modify portions of KRS 45A.800-838 to strength and clarify the use of “engineering-related services” and “design-build”.
- Modify portions of KRS 45A.045(3) to ensure the Kentucky Transportation Cabinet may routinely use these methods of procurement.
- Create a new subsection of KRS 175,176,177,180 that would remove any prohibition to “design-build” or construction under KRS 45A.
- Modify KRS 45A.800(7) to specifically include projects that require the application of advanced computing and communication technologies to the transportation field. The

statute should state that these projects may include activities related to “designing and/or building and/or maintaining” the systems and technologies. These design/build/maintain activities may be managed by a single firm.

- Any sections or subsection of the KRS relating to “Design-Build” should be modified to include “notwithstanding the definitions in KRS 45A.800(7).”

CHAPTER ONE

INTRODUCTION

Kentucky has established itself as one of the nation's leaders in deployment of Intelligent Transportation Systems (ITS). This accomplishment, however, has not been achieved without difficulty. ITS deployments present many challenges, not least of which is the difficulty in procuring ITS equipment and services.

1.1 Background

The primary role of public procurement is to obtain quality goods and services to support effective and efficient government, thus ensuring the prudent use of public funds. Public procurement attempts to add value to government programs by:

- Providing efficient delivery of quality products and services;
- Obtaining best value through competition;
- Offering fair and equitable competitive contracting opportunities for suppliers; and
- Maintaining public confidence through ethical and transparent procurement practices.

Most state transportation agencies—including Kentucky's—have procurement processes that were designed for traditional highway construction projects. These processes may be designed to purchase a specified, standard item at the lowest possible cost. Typically, this is accomplished through the use of "low bid" procurements. Unfortunately, low bid procurements are ill-suited to ITS projects, where the objective is to select the most qualified bidder. Poorly qualified, inexperienced bidders, if selected to provide ITS technologies and services, may cause delays, poor system performance, and much higher costs in the long run. ITS procurements often entail very sophisticated collections of complex telecommunications, electronic, and computer equipment, as well as the software that drives them. These procurements are challenging because each procurement must be tailored to the unique requirements of the deployment.

In addition to their focus on the lowest bid, traditional procurement processes are often cumbersome and slow, requiring substantial lead times and providing very little flexibility. This can be a major impediment to ITS procurements, where technologies are new and rapidly changing, and where specifications and standards may not exist. ITS procurements require speed and flexibility, and they often require unprecedented levels of cooperation between the public agency and the contractor. Many ITS procurements involve multiple agencies, and they often cross jurisdictional boundaries. As a result, traditional procurement processes can be a source of frustration and inefficiency when they are used for ITS procurements. Also, ITS projects often use components or technologies that mature and evolve quickly—a given technology can become obsolete in the time between a project's conception and realization. Because of these complexities and uncertainties, the standard contracting process that transportation agencies have traditionally used to purchase capital improvements is not typically the best approach for ITS procurements.

Experience has shown that the procurement method used for ITS technologies—its rules, regulations, interpretations, procedures, and controls—can have substantial influence on the ultimate success of the ITS project. In fact, the ultimate success or failure of the project may depend directly on the procurement process used. Specifically, the procurement method used by the agency determines:

- how the responsibilities are distributed to the vendors and how decisions are made,
- the degree to which the selected vendor is qualified to perform the job,
- how the project is managed, e.g., the degree to which the systems engineering process is used, and
- the type and usefulness of the controls available to the contracting agency.

The Federal Highway Administration has recognized the issues and problems surrounding the procurement of ITS goods and services. In response, they have developed two training courses. National Highway Institute Course 137020, entitled **Intelligent Transportation System (ITS) Procurement (A-1)**, is targeted to professionals involved in the entire procurement process. National Highway Institute Course 1370190, entitled **Intelligent Transportation System (ITS) Software Procurement (A-2)**, is targeted to professionals involved in the planning and development of projects having a significant software component.

1.2 Objectives and Scope

The objective of this study was to analyze Kentucky’s existing procurement processes, identify strengths and weaknesses of each, and develop recommendations for a revised process (or processes) that would incorporate the best features of each existing process and meet the unique requirements of ITS procurements. This process would ensure the best outcome for both vendor selection and vendor performance.

To accomplish the objectives of this study, the following tasks were carried out:

Task 1: Literature Review

This task involved reviewing the available literature for information on procurement processes and how those processes related to ITS procurements. As part of this task, members of the project team attended and reviewed materials from the ITS procurement courses developed by the Federal Highway Administration (FHWA) (See Appendix A). The primary focus of this task was to identify possible “best practices” for application to ITS procurements in Kentucky.

Task 2: Analysis of Existing Procurement Processes

This task focused on identifying and describing Kentucky’s existing procurement processes. For each existing process, project staff prepared a step-by-step description of how the process works, along with an assessment of strengths and weaknesses of the process (relative to ITS procurements).

Task 3: Analysis of Statutes and Regulations

The Kentucky Revised Statutes related to procurement of good and services were analyzed, along with comparable statutes from other states. A summary of key findings from this analysis was prepared.

Task 4: Developing Recommendations

Using the analysis conducted in Task 3, specific recommendations were developed for improving the Kentucky Transportation Cabinet's ability to procure ITS technologies and services. These recommendations are presented in this report.

CHAPTER TWO

FINDINGS

2.1 Existing Procurement Processes

Kentucky has several processes that may have varying levels of applicability to ITS procurements. Four of these are separate, complete procurement processes. The remaining eight are sub-processes (i.e., specific portions of a larger process) or are special cases of a more general process. These processes are listed here.

Major Processes

- Competitive Sealed Bid
- Highway Construction Projects—Prequalification and Selection
- Professional Services Contract and Project Management
- Strategic Alliance Services (SAS)

Other Miscellaneous Processes

- Small Purchases
- Competitive Negotiation (allowed, but not currently used)
- Non-Competitive Negotiation
- Pro-Card
- “Bodyshop” Process
- The “Land-Air-Space Agreement”
- Special Authority
- Use of an Existing GSA or DOD contract

Descriptions of Kentucky’s major processes can be found on the following pages.

2.1.1 Procurement Process Description

Process Name: Competitive Sealed Bid.

Managed by:

Kentucky Transportation Cabinet, Division of Purchases.
Kentucky Finance Cabinet, Division of Purchases

Sources of Information:

Sondra Perry, Acting Director, Division of Purchases
John Crossfield, ITS Branch, Division of Operations, KY Transportation Cabinet
Leon Walden, ITS Branch, Division of Operations, KY Transportation Cabinet

Statutory or Regulatory Basis:

KRS 45A.050(1), 080-095
200 KAR 5: 015-340

Used for:

Nearly all commodities and services are procured using this process.

Typically used for goods, but can also be used for services. Not used for professional services, but technical services, janitorial services, etc., can be procured.

The Transportation Cabinet's technology hardware is procured using this process.

Cannot be Used for:

Construction, building, or assembling

Process Description (see Figure 1):

- 1) The buying agency recognizes a need.
- 2) The agency must first determine if the needed commodity or service is available internally (to KYTC) or in surplus.
- 3) If the item must be purchased, the agency sends a purchase request to the Division of Purchases. The purchase request includes the item needed, specifications, quantity, potential funding sources, and any suggested suppliers. The purchase request is created and sent using the enhanced Management and Administrative Reporting System (eMARS). If appropriate, the buying agency may request an umbrella agreement or master agreement.
- 4) The purchase request is reviewed for completeness by the Director of Purchases. If complete, it goes to a Buyer.
- 5) The Buyer reviews the purchase request, checks the sources, and attempts to identify other potential suppliers. The Buyer also determines if the purchase is delegated or non-delegated. If delegated, the Director of Purchases can approve. If non-delegated, it must go to the Finance and Administration Cabinet.

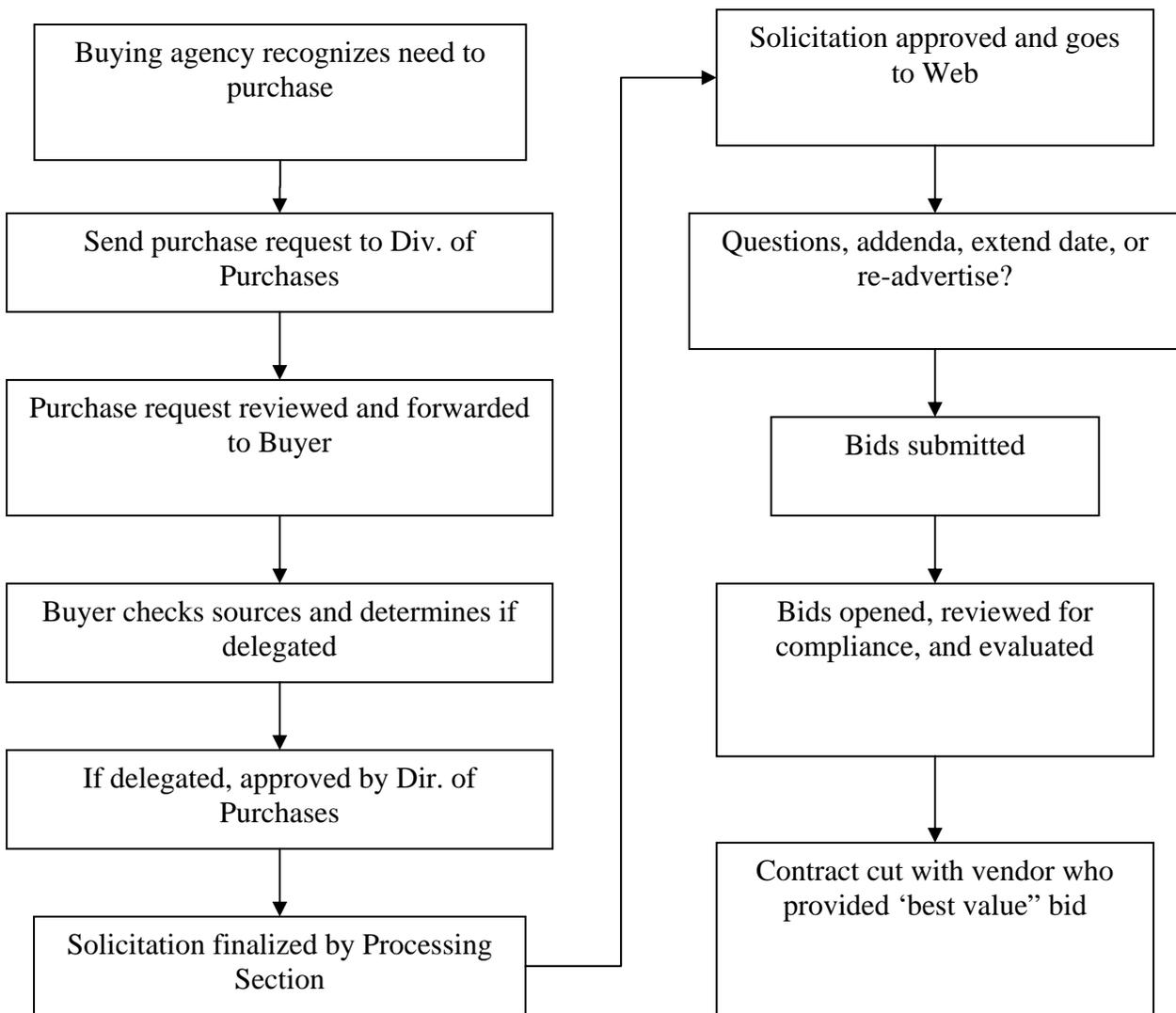


Figure 1. Flowchart for Competitive Sealed Bid Procurement Process

- 6) For a delegated purchase, once approved, it goes to the Processing Section. They add the terms, conditions, disclosures, etc., to the solicitation. They also set a bid opening date. Then, the Buyer and the Director of Purchases approve the solicitation.
- 7) Once approved, the solicitation goes to the web automatically. Hardcopies are also mailed to potential suppliers that have been identified.
- 8) Most solicitations are on the street for 14-28 days. Potential suppliers may call in with questions or requests. If necessary, the Division of Purchases can issue addenda, extend the date, or even cancel and re-advertise.

- 9) Bids are submitted as hardcopies. The Division of Purchases must have original signatures. Bids are opened and read publicly at 10 AM on the bid opening date. A bid tabulation sheet is prepared, and a bid evaluation is performed in the system.
- 10) The Buyer reviews each bid for compliance with requirements, then runs the best value calculations. The results are noted on the bid tabulation sheet and entered into the bid evaluation in the system.
- 11) When the Buyer approves the bid evaluation, the resulting contract is cut by the Processing Section. The contract goes back to the Buyer for approval. When the Buyer approves the contract, it is sent to the vendor.

Advantages:

Process is open, competitive, and keeps prices in line. There is integrity of the process.

Can use formulas to get a best-value procurement. As long as you publish your criteria up front, you can pretty much do whatever you want. You may have to justify unusual criteria or weighting.

The Division of Purchases has a lot of leeway in doing things. They can move quickly on some things, up to certain dollar limits.

KYTC is delegated some authority, while other agencies are not. Some purchasing approval has been delegated to KYTC's Office of Technology.

Process has been around for a while. Well established. The process is efficient, if it can be done within KYTC.

Disadvantages:

Over those dollar limits, the purchase must go through the Finance and Administration Cabinet. Then, you are at the mercy of their priorities.

The Finance Cabinet is not anxious to deal with unusual procurements.

No construction, building, or assembling can be procured.

Other Comments:

Supposed to be "a best value" procurement, but the majority are still driven by price.

2.1.2 Procurement Process Description

Process Name: Highway Construction Projects—Prequalification and Selection.

Managed by:

Kentucky Transportation Cabinet, Division of Contracts Procurement. The Division of Construction actually controls the subcontracts.

Sources of Information:

Rick Stansel, Director, Division of Contracts Procurement, KY Transportation Cabinet
John Crossfield, ITS Branch, Division of Operations, KY Transportation Cabinet
Leon Walden, ITS Branch, Division of Operations, KY Transportation Cabinet

Statutory or Regulatory Basis:

KRS 175, KRS 176, KRS 177, KRS 180

Federal: For highway projects funded in part by federal-aid funds, the Transportation Cabinet is regulated by Title 23 of the United States Code and by the Code of Federal Regulations 23 CFR and 49 CFR 18 0 (The Common Rule).

Used for:

All highway construction projects. Jobs generally include Grade and Drain, Bridge, and Asphalt.

Usually used for highway construction projects. However, all construction projects are really RFP's. So, any RFP can legally be done under this process. Theoretically, we could buy pencils and pens through this process. You need plans, specifications, and estimates.

Note: This process was used for the Management and Operations of the Cumberland Gap Tunnel.

Cannot be Used for:

(This was not specified)

Process Description (see Figure 2):

- 1) After PS&E (Plans, Specifications, and Estimate), all highway construction jobs are routed through the Division of Design to the State Highway Engineer's Office and then to the Secretary of Transportation. If approved, the Secretary's Office issues an official order to advertise.
- 2) The Division of Contracts Procurement prepares a Notice to Contractors and assigns a project code number. The notice is sent out to all prequalified contractors, put on the web page, and put in newspapers. The job is advertised a minimum of 21 days prior to letting.

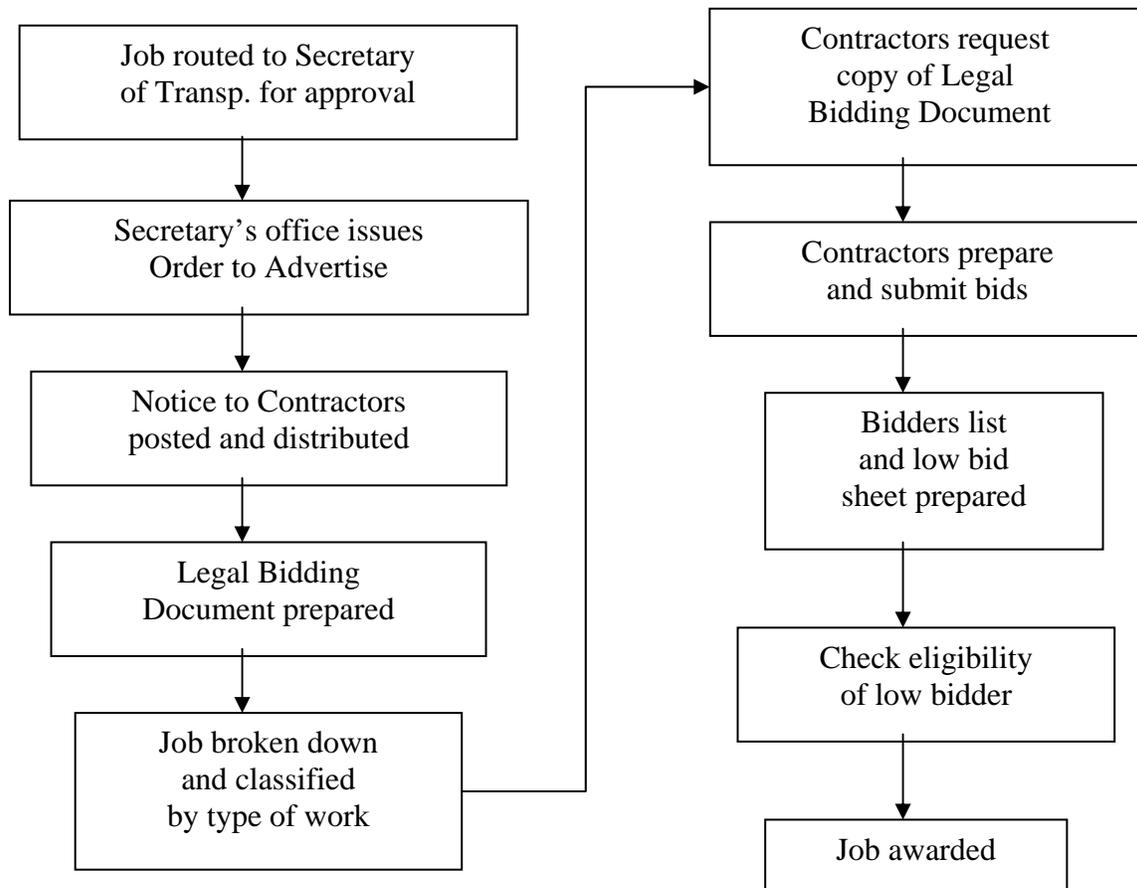


Figure 2. Flowchart for Highway Construction Projects—Prequalification and Selection. Procurement Process

- 3) The Division of Contracts Procurement adds the DBE (Disadvantaged Business Enterprise) notes, wage rates, and other necessary pages. They check quantities, put it in the right form, and prepare the legal bidding document. This is sent to Service and Supply to be printed.
- 4) Contractors can submit questions or request a copy of the official bidding document (i.e., the proposal). Non-bidding quantity sheets are available on the web.
- 5) The Division of Contracts Procurement breaks the job down into categories of work: grade and drain, bridges, and asphalt. They determine the percentage of the total work in each area and then classify the job according to the controlling factor. They then control who can bid based on the type of job and who is prequalified in that area. Contractors submit prequalification information along with other administrative information periodically.
- 6) Contractors prepare bids and submit them by the letting date. Bids are submitted on disk and on paper. (Software for disk submittal is on the web.)

- 7) The Division of Contracts Procurement prepares a bidders list and then a low bid sheet. This is sent out on Friday afternoon (unofficial).
- 8) For the low bidder, the Division of Contracts Procurement must check eligibility. Each contractor has a maximum amount of work that they are allowed to take on, to prevent them from overextending themselves. The Contractor's bid will contain information about their other jobs. Eligibility is based on resources available to the contractor and the contractor's prior performance.
 - a) Note: The contractor decides how to get subcontract work done. The bid does not need to specify who the subcontractors will be. The full job goes against the prime contractor's eligibility. Subcontract work does not go against the eligibility of the subcontractor.
- 9) Assuming eligibility requirements are met, the low bidder gets the job. However, the Cabinet may elect to reject all bids if they are significantly above the Engineer's estimate.
- 10) If the contractor makes an error in their bid, they can get out by paying 5% of the total bid.

Advantages:

The prequalification requirement gives some assurance of ability to complete the work and the administrative wherewithal to sustain the firm.

We can rely on ITS experts, or even a consultant, to make recommendations on prequalifying contractors.

It's an established method.

Change orders take days, not months. This can be very nimble.

Payment mechanism is tried and true. Vendors get paid much quicker than with eMARS.

Legal and contracts people are now recognizing that some of the services we procure are activities, not projects. They have a level of permanence. Therefore, we can provide options for annual renewal. This has become an accepted practice. (Note: This comment could apply to all processes; not just construction.)

Disadvantages:

Current Prequalification Committee doesn't know a lot about ITS. We don't have a lot of knowledge and experience in procuring ITS technologies, so we may need outside help in pre-qualifying contractors.

The work breakdown is tricky for ITS projects, which may involve software development, hardware, integration, etc. Who controls the job?

This is a low bid process. However, you can make it a "best-value" procurement. You need to be very detailed in spelling out your criteria.

Requires some forms (plans, specifications, and estimates) that we (i.e., the ITS folks) don't usually do. The people in the Division of Contracts Procurement expect a set of construction plans.

With change orders, you can get taken to the cleaners by the vendor.

Very location-oriented. Need to define location limits in your plans and specifications. (But, there have been some statewide projects, so you can get around that.)

Must conform to the letting schedule. (There can be a special letting for unusual situations.)

Does not lend itself well to task orders.

Other Comments:

(None)

2.1.3 Procurement Process Description

Process Name: Professional Services Contract and Project Management.

Managed by:

Kentucky Transportation Cabinet, Division of Professional Services

Sources of Information:

Jim Grider, Director, Division of Professional Services, KY Transportation Cabinet
John Crossfield, ITS Branch, Division of Operations, KY Transportation Cabinet
Leon Walden, ITS Branch, Division of Operations, KY Transportation Cabinet .

Statutory or Regulatory Basis:

KRS 45A, the Model Procurement Code, is the enabling legislation. (See 45A.095 and 45A.800)

KAR 600.010 – 600.080

KRS Chapter 11A (The Executive Branch Code of Ethics)

Federal: For highway projects funded in part by federal-aid funds, the Transportation Cabinet is regulated by the Title 23 of the United States Code and from the Code of Federal Regulations 23 CFR and 49 CFR 18 0 (The Common Rule).

Used for:

Anything attendant to a highway design project. If it involves changing the profile of a piece of ground (with or without existing roadway), then it is a highway design project.

Professional Services procurements use federal money and are based on prequalification and selection.

The Division of Professional Services could use this process for ITS procurements if they had a prequalified list.

“Wide Open.” The process itself is fairly rigid, but you can procure almost any type of services with this process. Reading the definition from KRS 45A.800, it implies that it can be used for almost anything.

Cannot be Used for:

Personal service contracts using state money.

Purchase of commodities.

Process Description:

Prequalification process:

- 1) The Division of Professional Services maintains a list on their web site of all categories for which firms may be pre-qualified. Written criteria for prequalification are maintained and are listed on the application form.
- 2) A firm desiring consideration for prequalification shall complete the applicable questionnaire pertaining to the services for which qualification is desired.
- 3) Applications received by the Division of Professional Services are forwarded to the appropriate user divisions or offices for review.
- 4) Based on the review by the user division or office, the firm is either added to the prequalified list or is denied prequalification. If denied prequalification, the firm may appeal (within 30 days) to the Consultant Pre-qualification Committee.
- 5) If an appeal is made, the Consultant Prequalification Committee shall review the appeal and make a decision within 60 days (can be extended an additional 60 days for discussions with the firm). If the appeal is denied, the firm can appeal (within 30 days) to the State Highway Engineer. The State Highway Engineer shall review the appeal and make a decision, which shall be final.
- 6) All pre-qualified firms are required to notify the Division of Professional Services of any major changes either increasing or decreasing the firm's professional or financial qualifications or capabilities.
- 7) Prequalification is granted for one year and must be renewed annually prior to the anniversary date of prequalification.
- 8) A firm may be removed from the list of pre-qualified firms by the Prequalification Committee for failing to comply with the prequalification requirements. This removal may be appealed to the Consultant Prequalification Committee, and, if necessary, to the State Highway Engineer.

Selection Process (see Figure 3):

- 1) An agency within the Transportation Cabinet identifies a need for professional services. The user agency describes the work required and develops the recommended evaluation factors and relative weights. The Secretary of Transportation must approve the procurement and the evaluation factors.
- 2) A Procurement Bulletin is prepared by the Division of Professional Services, for announcement of projects to the general public. The Procurement Bulletin is placed on the web site and is also mailed to all pre-qualified consultants (and those having pending prequalification applications). An announcement of the availability of the Procurement Bulletin is placed in at least two newspapers.

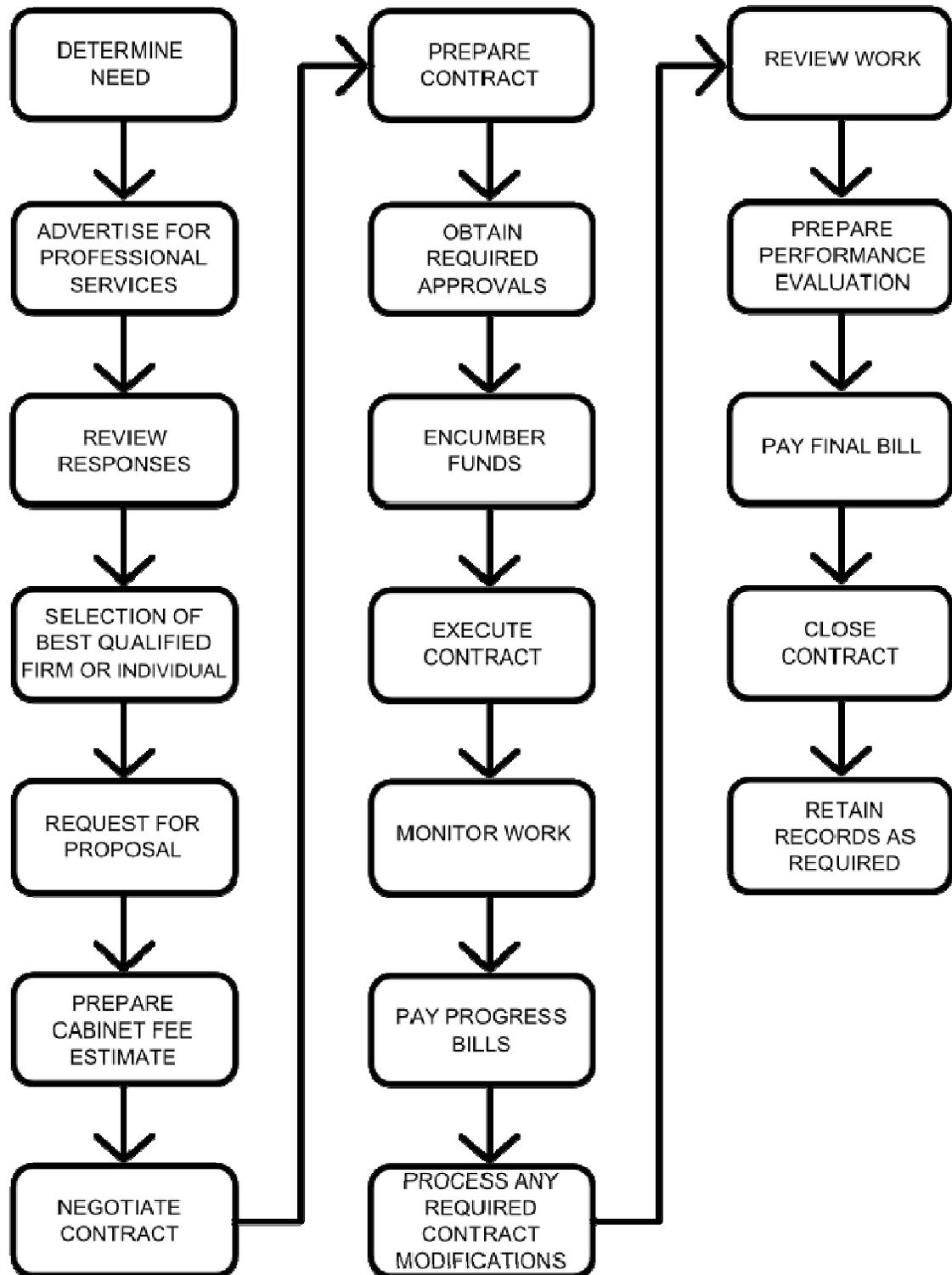


Figure 3. Flowchart for Professional Services Contract and Project Management Procurement Process

- 3) Pre-qualified firms prepare and submit their responses to the Division of Professional Services. In order to be considered for the project, the firm must be pre-qualified in the specified areas of prequalification prior to the response due date.
- 4) The Division of Professional Services prepares a list of all firms which responded on or before the deadline specified in the Procurement Bulletin.
- 5) A Professional Engineering and Related Services Selection Committee is formed to review the responses. The Committee shall consist of six members
- 6) The responses are reviewed by the Selection Committee to determine the best qualified firms, using the previously-approved evaluation criteria
- 7) The Chairman of the Selection Committee notifies the Director of Professional Services of the firms determined to be the three most qualified and the order of their ranking.
- 8) The Director of Professional Services notifies the top ranked firm of its selection and sends letters to all other firms that responded to the announcement.
- 9) The selected firm is asked to meet with the Cabinet to discuss in detail the scope of services to be provided by the firm for the project. After this meeting, a copy of the “units of work” is sent by the firm to the Cabinet. The firm also submits a fee proposal with supporting information.
- 10) After the Division of Professional Services requests a proposal and fee estimate from the firm, the user division prepares an estimate of resources required to complete the project. This resource estimate is sent directly to the Division of Professional Services to provide a “validity check” on the firm’s proposal and fee estimate.
- 11) The Cabinet negotiates a contract with the selected firm. The contract can be lump sum, cost plus a fixed fee, specific rates of compensation, or cost per unit of work.
- 12) Once agreement is reached, the contract is prepared, reviewed by the Division of Professional Services, and sent to the firm for signature. When signed by the firm, it is routed for approval within the Cabinet, and, if necessary, by FHWA.
- 13) Throughout the duration of the contract, the work is monitored, reviewed, and evaluated.

Advantages:

The process allows us to acquire competent consultants. We can get the right consultant at the right time at the right price.

It allows opportunity to be spread among consultants and promotes competition.

Process is non-bid. Selection is based on quality of the proposed service first, then fees are negotiated.

There is always a pre-design conference.

A well-established system. Supported by KRS and KAR.

Should result in selection of the best firm (if everyone on the selection panel is conscientious and honest).

Prequalification is essentially done in the user office, so the vendors are usually worthy of qualification.

Most providers/vendors are familiar with the process and know how to work with it.

Vendors on the prequalified list are usually good.

The process is reasonably flexible with regard to assigning the work, I.e., defining the scope of work. This suits ITS jobs well.

The procurement is not encumbered by station numbers, county lines, or other geographic boundaries.

The process lends itself well to task ordering. You can add tasks without having to do a whole new contract. This allows bite-sized chunks.

Disadvantages:

There are some processes that the Division of Professional Services does not control. They are handled out in Environmental, Geotech, Structures, and Planning. Then they come to DPS to be managed.

Need to update some of our processes to match how design is done today (i.e., computerized design.)

DPS is currently trying to get a more up-to-date estimate on person-hours for the types of work they typically need. Once this is done, everyone should know (within reason) how much they will get paid for a specific service. DPS plans to sit down with the division of Planning and Right-Of-Way to make sure they are consistent on these person-hours.

Need to have consistency in order to have efficiency of the process.

It's a long and arduous process. It takes months. Not quick; lots of steps in the process. You would be lucky to have someone under contract within six months.

Selection committee can be swayed by smoke and mirrors.

Modifying an existing contract goes through the same process as the original contract, and takes about 4-6 months.

Other Comments:

The Division of Professional Services has master agreements with some consultants to perform specific types of work, like photogrammetry, structures, etc. So, task orders for these specific types of work are automatically given to certain consultants.

2.1.4 Procurement Process Description

Process Name: Strategic Alliance Services, or SAS.

Managed by:

Commonwealth Office of Technology (COT); Office of Administrative Services.

Sources of Information:

Cheri Whitenack, Director, Division of Project Office and Integration, COT
Jim Ramsey, Executive Director, Office of Technology, KY Transportation Cabinet
John Crossfield, ITS Branch, Division of Operations, KY Transportation Cabinet
Leon Walden, ITS Branch, Division of Operations, KY Transportation Cabinet

Statutory or Regulatory Basis:

Kentucky Model Procurement Code (KRS 45A.005)
Agency Contact Memorandum #2003-0901

What is the "Strategic Alliance?"

- The Strategic Alliance is a state price contract with 19 information technology (IT) service providers (five full-service and 14 niche vendors) that allows Commonwealth agencies to procure IT services more quickly and competitively from expert providers.
- Other state, local government and educational agencies may also use this contract.

What are the benefits of the Strategic Alliance Services?

- A long-term relationship between the Commonwealth and industry leading IT service providers that have extensive experience, expertise and resources to apply to a state agency's business problem.
- A procurement process that integrates "best practices" and "best of the industry" to meet Commonwealth service delivery and business needs.
- A procurement process that is less prescriptive than the traditional RFP process. The new process allows vendors the freedom to propose creative solutions for the agency's business needs.
- Opportunities to engage providers in a variety of funding and risk sharing approaches.
- Niches and partnerships/subcontracts that allow access to expertise in the agency's service category within an adequate response time.

Used for:

Purchase of "project integration services." Procurement of "IT Services." Typically system integration.

May include hardware and software, when they are essential to the IT solution. In such cases, the main purpose of the contract will be to integrate and deploy the product in the commonwealth environment.

Need a waiver from Kentucky's CIO to not use the SAS process. In essence, using SAS for technical solutions is not optional. Any procurement involving IT systems and services (not primarily hardware) must use the SAS contracts.

Cannot be Used for:

Procurement of hardware or software, except as noted above.

Task-based hourly services.

Process Description (see Figure 4):

- 1) An agency has a business problem. They determine their general requirements.
- 2) The agency calls in COT for a collaborative effort. They discuss the agency's needs, do a requirements analysis, and determine if SAS is the best option.
- 3) If SAS is determined to be the best option, the agency develops a Strategic Alliance Services Request (SASR). The SASR looks like a streamlined RFP, but it is not as prescriptive as an RFP.
- 4) The SASR is issued to all vendors who qualify. There are currently five general service vendors and ten "niche" vendors who have been evaluated and placed under contract. COT makes the call on whether niche contractors qualify for this particular job. Note: the SASR is also placed on the SAS web page.
- 5) Usually, a vendor orientation is held to acquaint the vendors with the job.
- 6) Usually, vendors are asked to submit letters of intent to respond to the SASR.
- 7) The agency can (if desired) have interactive discussions (one on one) with each vendor that has submitted a letter of intent. These are non-evaluated give-and-take sessions.
- 8) The agency may choose to modify the SASR based on input from the interactive discussions.
- 9) The vendors submit written proposals. The proposals consist of answers to specific questions so they can be directly compared against each other.
- 10) The proposals are evaluated (by an evaluation team) in terms of previously established criteria. Each element of the criteria is assigned a level of risk. The intent is to have a "best-value" procurement. The agency has a good deal of flexibility in determining criteria.
- 11) Sometimes, will ask for a "best and final" response from one or more vendors. (Must state in the SASR that we maintain the option to do this.)
- 12) Based on the evaluation of the proposals, will enter into negotiations with the top vendor. If we cannot negotiate successfully with the top vendor, we can go down to the next one(s).
- 13) During this negotiation, we can drill down to project specifics. We get into their proposal and look at fuzzy areas. We usually ask for clarification—we ask a series of questions. We usually end up doing a lot of project planning during the negotiation.
- 14) Finally, we agree on the language for a delivery order. This has terms and conditions that are specific to this project. It is public, once awarded.

- 15) COT stays involved throughout, providing procurement management.
- 16) Every SASR has a Service Level Agreement. This is a way to measure time, budget, quality, etc. It measures customer satisfaction at the end. This is a great concept, but has not been well implemented yet.

There is potential for adding vendors to the Master Contract. This can be done if it is discovered that there is a certain technical area that is not covered. It would require an RFP, and it would need to be competitive.

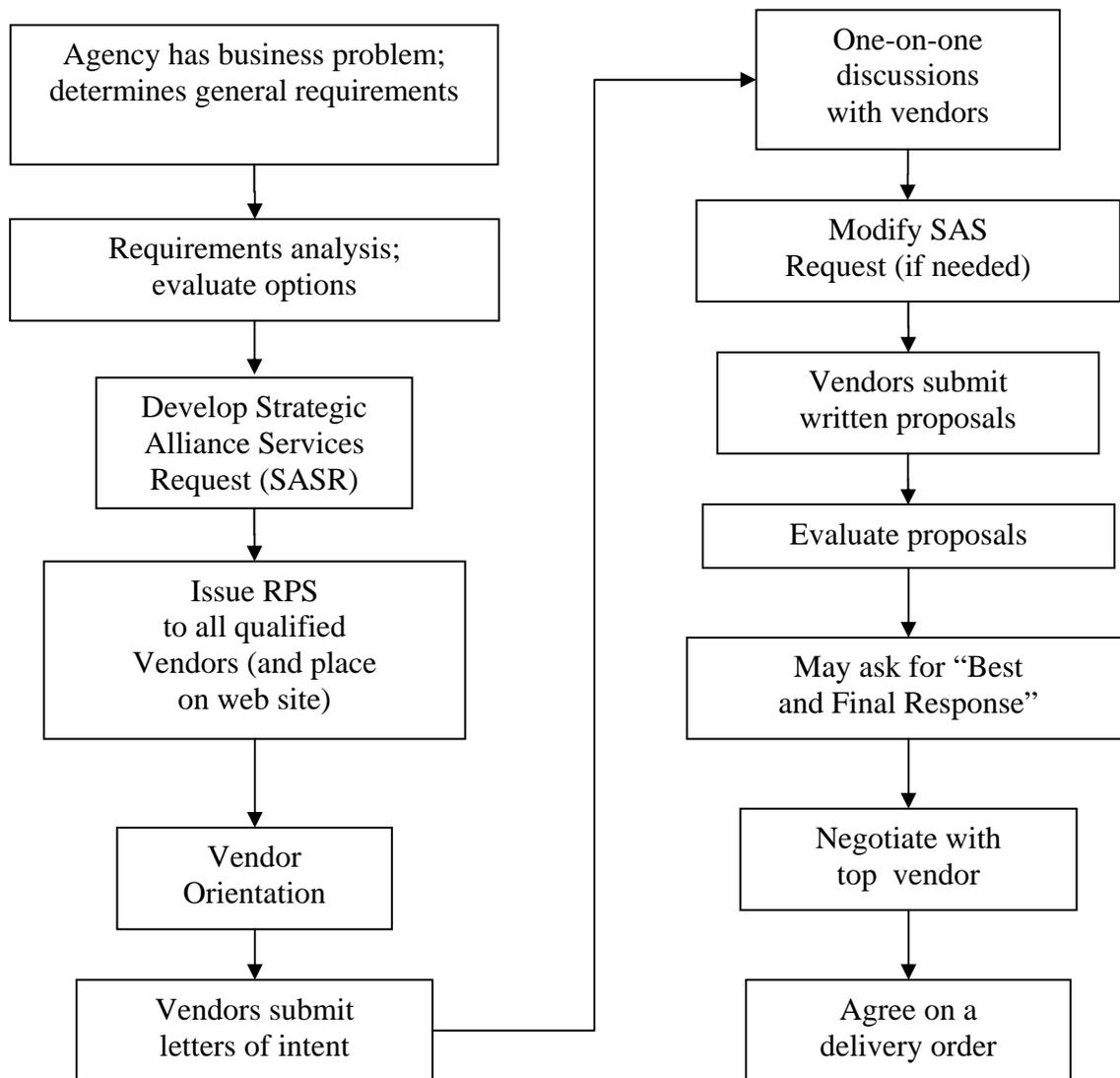


Figure 4. Flowchart for Strategic Alliance Services (SAS) Procurement Process

Advantages:

Collaboration with vendors. This is very good.

Streamlining of the procurement. Takes less time (compared with a full RFP).

Creates better working relationships with the vendors.

Have the best of industry available.

It allows a reduced number of companies to bid, so they can become familiar with the State's business.

Vendors are already selected and the process is set.

You can state your expectations and the vendors come to you with basic ideas. You don't prescribe the solution; you get the vendors to respond to a problem.

It's not low bid. It's a lot like procurement of engineering services.

It allows task orders. You can do bite-sized chunks.

The vendor selection is a consensus-type process.

The users develop the scoring method, and there is a lot of flexibility in this.

Disadvantages:

Niche areas need to be clarified and better defined.

Sometimes creates additional overhead expense for the agency. For example, if we are buying a business application, there may be a vendor who has the application and could do the integration. But, we can't go to them directly. Instead, we get the overhead of the SAS contractor.

Very limited hardware purchase.

Other Comments:

(None)

2.2 Analysis of Procurement Processes

2.2.1 Defining ITS

One of the challenges encountered in discussing ITS procurement is that it is difficult to define ITS precisely. Members of the project team have discussed the need for a definition several times during the study; however, a single definition of the term has failed to emerge. The project team's understanding of the term includes at least three types of procurements.

Integrated Systems. In an integrated systems procurement, the cabinet seeks a solution to a transportation problem through a procurement of a system that incorporates design, computer hardware and software, construction and maintenance, and training activities.

Maintenance and Staffing Activities. In this type of project the cabinet seeks to obtain services to maintain or operate existing ITS installations. These types of projects can include system management and operations (such as network administration), maintenance, and other staffing services. These types of procurements go a step beyond the acquisition of turn-key systems and can be thought of as an ongoing outsourcing of the cabinet's activities.

One-Time IT Solutions. Perhaps a subset of integrated systems procurement, one-time IT solutions respond to a particular problem through the design of a particular item of hardware or software or through specified consulting or training activities which are directed toward resolving a problem that is not expected to be ongoing.

Perhaps the most important aspect of the definition lies in determining whether a particular project relates to "transportation" as opposed to the general management activities of the cabinet. This distinction is an important one because, as is discussed below, one of the important questions that must be addressed in any procurement process is which agency should have authority over the procurement. Under Kentucky law, as presently constituted, the Transportation Cabinet has authority over projects that involve the construction or maintenance of roads. In other procurements, the Finance and Administration Cabinet exercises authority and control over the process, unless that authority has been delegated to another department or cabinet.

2.2.2 Problems Inherent In ITS Procurements

Transportation Cabinet representatives have raised a number of problems they have encountered when procuring ITS using existing processes. In general, these problems revolve around the lack of continuity between components of an integrated project, a lack of flexibility to address change during a project, and the cumbersome nature of the existing procurement processes.

Lack of Continuity. Representatives of the Transportation Cabinet have identified a lack of continuity between the design and construction phase of a project as one of the principal problems encountered when using existing processes to purchase complex, integrated ITS. Procurements that separate the design phase from the construction and installation phases invite disputes between contractors in the various stages of the overall project. The failure of

a component of the system may be a result of poor design, defective hardware or software or inadequate construction or installation. A procurement system that separates these components and awards them to separate contractors may create difficulty in identifying the specific cause of the failure and assigning responsibility.

Transportation Cabinet representatives have also noted that the existing procurement processes raise coordination problems that may increase the cost of the procurement and involve delays. For example, an unanticipated problem in installation may require additional design work, requiring another round of contract negotiations and approvals with the system designer. Having two separate procurement agencies with different regulatory requirements will likely increase the time required to process the change.

Lack of Flexibility. The existing procurement processes are also faulted by representatives of the Transportation Cabinet as lacking sufficient flexibility to deal with technological and other changes that may develop during the life of a project. They cite the difficulty in processing change orders and the rigidity of project specifications as creating unnecessary administrative difficulties when technology changes and when other circumstances dictate a departure from the original planning. These problems are, of course, most prevalent in long-term projects.

Cumbersome Nature of Existing Processes. In a more generalized complaint about the existing processes, Transportation Cabinet officials cite the time and administrative burdens associated with the existing processes. Those officials state that the regulations dominate the procurement to such an extent that they interfere with the resolution of the underlying problem.

2.2.3 Analysis

The concerns raised in the previous section may stem from two separate features of the procurement system. The first is the need for accountability inherent in any public procurement system. Extensive bidding procedures and approval processes may slow a particular purchase and create administrative hurdles that interfere with desired flexibility, but such procedures and approvals may be necessary to assure the public that the funds entrusted to the government are wisely spent. The precise balance to be struck between public accountability and speed and flexibility raises political and administrative questions that are beyond the scope of this study.

A second feature of the transportation procurement system is historical. Twenty years ago, transportation projects did not involve the complex, interrelated technologies that comprise ITS projects today. Transportation meant roads and bridges and the transportation procurement system was addressed to the purely physical aspects of design and construction. Road design was a stable process that contemplated the use of fungible materials and construction methods and therefore could account for most of the problems encountered in the construction phase of the project. Accountability could be assured through physical measurements of the finished product. If a roadway does not live up to expectations, physical measurements are likely to answer the question of whether the failure is due to poor design or inadequate construction or maintenance. In a more complex ITS project, the precise cause of the failure of a project is less likely to be clearly ascertainable.

Study group discussions focused on this aspect of the problem and while no specific conclusions were reached, the group seemed to agree that one problem was that traditional design/bid/build transportation procurement systems were focused on purchasing a disaggregated set of tasks and materials that lead to a result rather than the purchase of the result itself. The integration of the design, installation and, sometimes, the maintenance and operation phases of ITS may require a procurement system that focuses on the result sought rather than the individual components that are necessary to that result. Such a process is commonly referred to as a “design-build” process. As the name suggests, this process places responsibility for achieving a result on one contractor rather than placing responsibility for components of the project on several contractors.

2.2.4 Statutory and Regulatory Analysis of Existing Procurement Processes

The following discussion analyzes the statutory and regulatory provisions applicable to the current procurement processes and provides some initial observations regarding the flexibility of those processes to accommodate a design-build type of process for ITS.

Highway Construction Projects

KRS 176.070(1) provides that the “bureau” may advertise for bids and contract for “all materials necessary for the construction and maintenance of roads.” Roads are defined by KRS 176.010(2) as including “highways, bridges, and bridge approaches.”¹ Road building and maintenance projects are therefore exempted from the provisions of the Model Procurement Code, KRS 45A.010, et. seq., that provide that the Finance and Administration Cabinet shall control all state procurement. *See* KRS 45A.050(1).² In addition, capital projects or bonds used directly in or for the construction or maintenance of roads are not subject to the provisions of KRS Chapter 45 that

¹ Other transportation-related chapters provide a similar definition. Chapter 175 contemplates “turnpike projects,” defined as any express highway or superhighway as may be constructed by the Turnpike Authority including highways, tunnels, etc as may be necessary for the operation of such project. KRS 175.410(3). Chapter 176 gives the Department of Highways the power to construct “roads,” which include highways, bridges, and bridge approaches. KRS 176.010. Chapter 177 has miscellaneous provisions covering the ability of the department to purchase right-of-ways, removal of snow, construction of railroad crossings, etc. Chapter 177 also gives the Department of Highways the authority to construct turnpikes and issue revenue bonds of Commonwealth to finance projects. KRS 177.400. Chapter 180 gives the Department of Highways authority to build or buy bridges and tunnels when necessary or desirable. *See* KRS 180.020 and 180.028.

² “Except as provided in KRS 45A.800 to 45A.835 and KRS Chapters 175, 176, 177, and 180, all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, sale, and disposal of supplies, services, and construction now vested in or exercised by any state agency under the several statutes relating thereto, are hereby transferred to the secretary of the Finance and Administration Cabinet as provided in this code, subject to the provisions of subsection (2) of this section.”

relate to capital construction projects.³

The Transportation Cabinet follows a pre-qualification process to determine the eligibility of bidders⁴ and the statute provides that the contract shall be awarded to the “lowest and best bidder”⁵ who is qualified to do the job.

The principal question raised by the application of the Highway Construction process to ITS projects is the breadth of the definition of the term “construction and maintenance of roads.” The statutes’ definition of “roads” as “highways, bridges, and bridge approaches” seems to require that any ITS project relate closely to the roadway itself – excluding the application of this process to projects that relate to transportation information or other general ITS applications.⁶ In addition, because the award selection is based on the “lowest and best bid” and because the process is dependant on fairly detailed specification of the work to be accomplished, the Highway Construction process may not accommodate the design and construction integration necessary for ITS projects.

Professional Services Contracts

KRS 45A.800-838 govern the procurement of Professional Architectural and Engineering Services. Like the provisions covering Highway Construction Projects, control over procurement of these services is vested in the Transportation Cabinet when the Transportation Cabinet is the procuring agency.⁷ KRS 45A.800(4) defines "Project" to mean “any undertaking requiring professional architectural, engineering, or engineering-related services, except as provided in KRS 45A.100.”⁸ Engineering services are defined as “specialized professional services performed by individuals, consultants, or other organizations of recognized technical competence, education, or experience that are involved in the planning, design, construction,

³ KRS 45.750 provides, “(3) KRS 45.760 to 45.810 shall not apply to. . . (a) Capital projects or bonds used directly in or for the construction or maintenance of roads, including, but not limited to, bulldozers, graders, earth movers, and real estate purchased for rights-of-way. . .”

⁴ KRS 176.130-220 and 603 KAR 2:015 govern the prequalification process.

⁵ KRS 176.080(3).

⁶ The Transportation Cabinet used this process in contracting for the operation and maintenance of the Cumberland Gap Tunnel, for example.

⁷ KRS 45A.800(3) (“‘Procuring agency’ means either the Finance and Administration Cabinet or the Transportation Cabinet”); KRS 45A.825(11)(“Notwithstanding the provisions of KRS 45A.045, when the Transportation Cabinet is the procuring agency, the negotiated contract shall take effect without the approval of the secretary of the Finance and Administration Cabinet.”); *see also*, KRS 45A.810(2)(c) (An engineering and engineering-related services selection committee created in the Transportation Cabinet shall participate in every instance of that cabinet's procuring engineering or engineering-related services.)

⁸ KRS 45A.100 governs small purchases.

maintenance, or operation of Kentucky's transportation systems or construction projects in accordance with applicable licensing statutes.”⁹ Contracts for these services are subject to the approval of the Government Contract Review Committee.¹⁰

The Transportation Cabinet has promulgated extensive administrative regulations governing the procurement of professional services which provide for pre-qualification, competitive negotiation and review.¹¹

The definition of “engineering-related services” in the statute and the regulations pretty clearly limits the use of this procurement method to services. In addition, the contractual requirements in the statute and regulations revolve around the use of hourly rates for such services,¹² implicitly limiting the ability to use this method for the acquisition of goods. This factor substantially limits the ability of the Transportation Cabinet to integrate the purchase of design work (for which this process is appropriate) with the acquisition of hardware and construction and installation services (for which the Highway Construction process or some other process may be appropriate). The upshot is that these independent processes address pieces of a project, but cannot accommodate the entire project.

Strategic Alliance Services

The Commonwealth Office of Technology administers the purchase of software systems through a special authority procurement process known as Strategic Alliance Services (“SAS”). The use of the SAS process is mandatory for the procurement of “project oriented IT services,” however, agencies may request a waiver from the Chief Information Officer when the approach does not fit their particular needs.¹³

SAS is a price contract that has been entered into between the Commonwealth and leading vendors of IT solutions. The approach permits a closer working relationship between potential contracting parties and the agencies than would be available under a more traditional request for proposal (“RFP”) method of procurement. The SAS Web Site promotes the use of SAS as a method that “allows vendors the freedom to propose creative solutions for [agencies’] business needs.”

A September 9, 2003 Agency Contact Memorandum written by the Chief Information Officer for the Commonwealth,¹⁴ sets out the operational process for SAS. In general, the process for

⁹ KRS 45A.800(7).

¹⁰ KRS 45A.830.

¹¹ See 600 KAR 6:010, *et. seq.*

¹² See 600 KAR 6:070.

¹³ See <http://technology.ky.gov/epmo/sas.htm> (hereinafter “SAS Web Site”)

¹⁴ Agency Contact Memorandum #2003-0901, Commonwealth Office of Technology,

projects over \$600,000 is controlled more closely by the SAS Contract Administrator. Projects under \$600,000 require only initial COT concurrence, which should allow the buying agency more flexibility in working with the SAS vendors.¹⁵

The principal limitation on the SAS process is that it allows only limited purchases of hardware. Hardware, including hardware leasing cost, is limited to a maximum of 25% of the original cost of the work.¹⁶ Thus, SAS may be of somewhat limited utility as a means of design-build procurement. On the other hand, the Study Advisory Committee seemed to hold a general consensus that the SAS process was an efficient procurement process.

The SAS process was used to procure the design of the Statewide Transportation Operations Center (“STOC”).¹⁷ Under the request, the vendors were invited to submit proposals that would provide functional design services, including recommendations regarding hardware purchases for all of the functions of the STOC. The successful bidder also provided project integration services to assist the Transportation Cabinet in the procurement of hardware.¹⁸

Finance Cabinet Procurement

With the exceptions noted above, the Finance and Administration Cabinet is the agency in charge of procurement of goods and services in the Commonwealth.¹⁹ This is the typical method of procuring goods (including IT hardware) and non-professional technical services.

Under the Model Procurement Code,²⁰ the preferred method for awarding contracts is through competitive sealed bidding. This method requires that each contract be awarded to the “responsive” and “responsible bidder” who offers “best value.”²¹ Awarding the contract to the

September 9, 2003 (hereinafter “SAS Memo”).

¹⁵ SAS Memo at 3-5 and Policy # CIO-075 Rev 18 Sep 07

¹⁶ SAS Memo at 5.

¹⁷ See *Statewide Transportation Operations Center and Traffic Management Integration Functional Design, Strategic Alliance Services Request*.

¹⁸ Per Jim Grider.

¹⁹ KRS 45A.050(1). The Transportation Cabinet controls the procurement of highway projects and Professional Services Contracts that relate to transportation. SAS is managed by the COT under special authority of the Finance and Administration Cabinet. (Per Hiram Desai). In addition, the Transportation Cabinet exercises authority over procurements under \$ 20,0000 under delegated authority of the Finance and Administration Cabinet.

²⁰ KRS 45A.010, *et.seq.*

²¹ KRS 45A.080. The terms “responsive”, “responsible bidder” and “best value” are all defined by the code. KRS 45A.070. These terms involve a considerable amount of business judgment.

bidder who offers “best value” does not simply mean the bidder who can accomplish the task at the lowest price. Price must be considered among other “objective and quantifiable” criteria.²² These criteria, or “specific business requirements” must be set forth in the invitation for bids.²³

The second method for awarding a contract is competitive negotiation. Competitive negotiation is the alternative method used after the purchasing officer determines in writing that competitive sealed bidding is not feasible. This method requires either that bids received after the call for competitive sealed bidding were unreasonable as to all or part of the requirements, or that bids were not reached independently in open competition. The award shall be made to the “responsible offeror whose award is most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals.”²⁴

The third method of awarding a contract is noncompetitive negotiation. This is the method generally used to procure professional services. It may be used only when competition is not feasible or when purchasing from the sole source. To purchase from the sole source means there is only one capable supplier or there is something unique about the nature of the requirement, the supplier, or market conditions.

The statute requires, if possible, the solicitation of no less than three suppliers to submit written or oral quotations. Among those solicited, the award goes to the supplier offering “best value”. KRS 45A.095. Again, best value means the supplier who meets predetermined “objective and quantifiable” criteria communicated in the solicitation of bids.²⁵

The Model Procurement Code provides the Finance and Administration Cabinet the ability to use design-build or construction management-at-risk bidding to procure capital construction projects.²⁶ KRS 45A.180 was amended by the 2003 General Assembly to require such contracts

²² KRS 45A.070 (3).

²³ The requirement that specific business requirements be set forth in the invitation for bids, as stated in the definition of “best value”, may be problematic for Intelligent Transportation System (ITS) procurements. A stated goal in the ITS study prospectus was to create a procurement system that takes advantage of technological advances. However, this requirement of “best value” may not allow technological advancements occurring after the invitation for bids but before the official selection of a bidder to be considered a factor for selection.

²⁴ KRS 45A.085.

²⁵ KRS 45A.070 (3).

²⁶ KRS 45A.045(11) provides:
For capital construction projects, subject to the provisions of this code and KRS 45A.180, the procurement may be on whichever of the following alternative project delivery methods, in the judgment of the secretary of the Finance and Administration Cabinet after first considering the traditional design-bid-build project delivery method, offers the best value to the taxpayer:

to be submitted to the Capital Projects and Bond Oversight Committee staff and to the Government Contract Review Committee for review.

Regulations approved by the Finance and Administration Cabinet on February 13, 2004 provide that the Cabinet in conjunction with the user agency will determine the appropriate project delivery method. Among other things the Finance and Administration Cabinet regulation²⁷ also provides a procurement process that includes an evaluation committee, that requires at least a 25% scoring weight for the qualifications and at least a 50% scoring weight for price, and that permits pre-proposal meetings among the agency and interested bidders.

2.2.5 Summary of Existing Methods

At present, the foregoing processes provide a number of alternative methods of procuring ITS. When a project involves “highways, bridges, and bridge approaches,” the Transportation Cabinet may use a traditional process under which the Professional Engineering Services process can be used for design work and the Highway Construction and Finance and Administration Cabinet processes can be used for acquisition of hardware, installation and related construction work.

Under current law, projects that are not fairly characterized as involving “highways, bridges and bridge approaches” are subject to the provisions of the Model Procurement Code and, unless the Finance and Administration Cabinet has delegated authority to the Transportation Cabinet, are subject to the Finance and Administration Cabinet or, where appropriate, the SAS processes.

The Finance and Administration Cabinet regulations offer a design-build process that may meet the needs of the Transportation Cabinet for the procurement of complex integrated systems. In addition, KRS 45A.045(3) permits the Finance and Administration Cabinet to delegate its authority over specific projects to any other spending agencies. The Transportation Cabinet operated under this delegated authority in procuring the design, equipment and installation, and integration for the Statewide Transportation Operations Center.²⁸

The SAS process may be useful for specific IT solutions which do not involve substantial hardware purchases or for systems integration in which specific recommended hardware may be purchased through the Finance and Administration Cabinet. Here again, the Statewide Transportation Operations Center can provide a model for the SAS process.

-
- (a) A design-build basis; or
 - (b) A construction management-at-risk basis.

Proposals shall be reviewed by the engineering staff to assure quality and value, and compliance with procurement procedures. All specifications shall be written to promote competition. Nothing in this section shall prohibit the procurement of phased bidding or construction manager-agency services.

²⁷ 200 KAR 5:360

²⁸ See Secretary’s Order SO3-003, Finance and Administration Cabinet, August 23, 2002.

In general, the statutes and the regulations provide the Transportation Cabinet, acting alone or in conjunction with another purchasing entity, considerable flexibility in procurement methods. Of course, while these processes may be sufficient for a particular project, the Transportation Cabinet lacks its own general design-build process that will permit an integrated procurement of an entire system.

In the 2000, 2003 and 2004 budget, however, the Transportation Cabinet was given authority to conduct five design-build projects per budget cycle under KRS.²⁹ The Transportation Cabinet Management Review, conducted in December, 2003 by Dye Management Group, Inc. for the Legislative Research Committee, states “[d]esign-build should be used selectively but has the potential to move projects quickly through to completion,” and also states that the Cabinet’s experience with design-build has been positive to date.³⁰

2.2.6 Other States’ Statutes Regarding Design-build Contracts in the Transportation Industry

The Study Advisory Committee asked the project team to provide some examples of statutes governing processes in other states. The design-build method is becoming increasingly popular across the country. The following discussion provides an overview of statutes that are currently in place in many states. Some states expressly prohibit design-build contracts. Others have statutes in place but there are substantial obstacles in the way of actually issuing a design-build contract. Several states have extensive statutes regarding the use of design-build contracts. This section examines those states’ statutes that expressly allow design-build contracts relating to transportation construction. Appendix B to this report provides excerpts from design-build statutes and notes compiled by research assistants at the UK College of Law.

Definitions for Design-build

Many states provide definitions for use in their design-build statutes. Arizona uses definitions that are common among those states. According to Arizona statutes “design-build” means the process of entering into and managing a contract between the department and another party in which the other party agrees to both design and build a highway, a structure, a facility or other items specified in the contract.³¹ “Design-builder” means any individual, partnership, joint venture, corporation or other legal entity that is appropriately licensed in this state and that furnishes the necessary design services, in addition to construction of the work, whether by itself or through subcontracts, including subcontracts for architectural and engineering services.³²

²⁹ 2000 Budget, Part IX.50(d); 2003 Budget, Part IX.63(d); 2004 Budget (HB 395) Part I K.4(13).

³⁰ *Transportation Cabinet Management Review*, Legislative Research Commission at 117 (December 2003).

³¹ A.R.S. § 28-7361.1

³² A.R.S. § 28-7361.2

Limits on Design-build Contracts

Several states provide extensive regulation of design-build contracts and include limits regarding costs and time allotted to design-build projects. Minnesota's statutes provide that the number of design-build contracts awarded by the commissioner of transportation in any fiscal year may not exceed ten percent of the total number of transportation construction contracts awarded by the commissioner in the previous year.³³

Arizona may not enter into contracts for more than two design-build projects in each fiscal year.³⁴ The state also has a minimum construction cost of \$40 million for a design-build contract.³⁵ The statute also has a time limit stating that the Department of Transportation may not commence any design-build project after June 30, 2007.³⁶

Colorado has no minimum or maximum cost restrictions.³⁷ Utah allows the Department of Transportation to award a design-build project contract for any transportation project that has an estimated cost of at least \$50 million.³⁸ Missouri is limited to a total of three design-build project contracts from 2003 to 2012.³⁹ Virginia's Commonwealth Transportation Board may annually award five design-build contracts valued at no more than \$20 million and additional design-build contracts valued at more than \$20 million, provided that no more than five of these types are in force at one time.⁴⁰ Washington's design-build project contracts must be over ten million dollars.⁴¹

³³ Minn. Stat. § 161.3412.3

³⁴ A.R.S. § 28-7363.A.2

³⁵ A.R.S. § 28-7363.A.3

³⁶ A.R.S. § 28-7363.A.4

³⁷ C.R.S. 43-1-1404.2

³⁸ Utah Code Ann. § 63-56-36.1.2

³⁹ R.S.Mo. § 227.107.1

⁴⁰ Va. Code Ann. § 33.1-12.2.b.

⁴¹ Rev. Code Wash. § 47.20.780

Purchasing Authority (Design-Build)

Most states rest the authority to enter into design-build contracts on the Department of Transportation. More specifically, in Minnesota the commissioner of transportation has the authority to solicit and award design-build contracts.⁴² The commissioner must notify the chairs of the senate and house committees with jurisdiction over transportation policy and finance each time the commissioner decides to use the design-build method of procurement and explain why that method was chosen.⁴³ In Arizona, the purchasing authority is vested in the director of the department of transportation and that director must report to the secretary of state yearly on the benefits associated with the use of design-build services.⁴⁴ Other states' statutes place this authority in the department of transportation or the transportation commission.

Procedure (Design-Build)

The states that have the most extensive procedures in their statutes all follow a two part process in awarding design-build contracts. The process provides a request for qualification (RFQ) phase followed by a request for proposals (RFP) phase. The statutes are all very similar. Arizona's statute is a typical procedural statute and is set out in Box 1. Other examples are those statutes in Minnesota,⁴⁵ Maine,⁴⁶ Colorado,⁴⁷ Utah⁴⁸ and Missouri.⁴⁹

BOX 1: Arizona

A.R.S. § 28-7365 (2003)

§ 28-7365. Design-build; two-phase solicitation

A. If the department determines that the design-build method of project delivery is appropriate, the department shall establish a two-phase procedure for awarding the design-build contract.

⁴² Minn. Stat. § 161.3412.1

⁴³ Minn. Stat. § 161.3412.3.b

⁴⁴ A.R.S § 28.7363.G

⁴⁵ Minn. Stat. § 161.3420, 3422, 3426

⁴⁶ 5 M.R.S. § 1743.5

⁴⁷ C.R.S. 43-1-1406

⁴⁸ Utah Code An. § 63-56-36.1.3-7

⁴⁹ R.S.Mo. § 227.107.6-7

B. During phase one, and before solicitation, the director shall appoint a selection team of at least three persons. At least one-half of the selection team shall be architects or engineers who are registered pursuant to section 32-121. The selection team members may be either department employees or outside consultants. The selection team shall also include a licensed contractor who is not involved in the project. Any architect or engineer who is serving on the selection team and who is not a department employee shall not be otherwise involved in the project. The department shall prepare documents for a request for qualifications.

C. The request for qualifications shall include all of the following:

1. The minimum qualifications of the design-builder.
2. A scope of work statement and schedule.
3. Documents defining the project requirements.
4. The form of contract to be awarded.
5. The selection criteria for compiling a short list and the number of firms to be included on the short list. At least three but not more than five firms shall be included on the short list.
6. A description of the phase two requirements and subsequent management needed to bring the project to completion.
7. The maximum time allowable for design and construction.
8. The department's estimated cost of design and construction.

D. The selection team shall evaluate the design-build qualifications of responding firms and shall compile a short list of firms in accordance with technical and qualifications-based criteria. The number of firms on the short list shall be the number of firms specified in the request for qualifications, except that, if a smaller number of firms responds to the solicitation or if one or more of the firms on the short list drop out so that only two firms remain on the short list, the selection team may proceed with the selection process with the remaining firms if at least two firms remain or the selection team may re-advertise as the selection team deems necessary.

E. During phase two, the department shall issue a request for proposals to the design-builders on the short list. The request shall include:

1. The scope of work, including programmatic, performance and technical requirements, conceptual design, specifications and functional and operational elements for the delivery of the completed project, which shall all be prepared by an architect or engineer, as appropriate, who is registered pursuant to section 32-121.
2. A description of the qualifications required of the design-builder and the selection criteria, including the weight or relative order, or both, of each criterion.
3. Copies of the contract documents that the successful proposer will be expected to sign.
4. The maximum time allowable for design and construction.
5. The department's estimated cost of design and construction.
6. The requirement that a proposal be segmented into two parts, a technical proposal and a price proposal. Each proposal shall be in a separately sealed, clearly identified package and shall include the date and time of the submittal deadline. The technical proposal shall include a schedule, schematic design plans and specifications, technical reports, calculations, permit

requirements, applicable development fees and other data requested in the request for proposals. The price proposal shall contain all design, construction, engineering, inspection and construction costs of the proposed project.

7. The date, time and location of the public opening of the sealed price proposals.
8. Other information relevant to the project.

F. After reviewing the proposals, the department shall proceed as follows:

1. The selection team shall score the technical proposals using the selection criteria in the request for proposals. The technical review team shall then submit a technical proposal score for each design-builder to the department. The technical review team shall reject any proposal it deems to be nonresponsive.

2. The department shall announce the technical proposal score for each design-builder, shall publicly open the sealed price proposals and shall divide each design-builder's price by the score that the selection team has given to it to obtain an adjusted score. The design-builder selected shall be that responsive and responsible design-builder whose adjusted score is the lowest.

Criteria for use of Design-build

Like the procedural process, the criteria for design-build contracts are generally consistent from state to state. Some states have broad criteria for awarding design-build contracts such as that they must “serve the public interest”⁵⁰ or be in the “best interest of the [transportation] department.”⁵¹ Most states have a numbered list of criteria that the commissioner or department must use as the minimum basis for determining when to use the design-build method. Common criteria are:

1. The extent to which the method can adequately define the project requirements,
2. The time constraints for completion of the project,
3. The capability and experience of potential design-build firms,
4. The suitability of the project for use of the design-build method of project delivery with respect to time, schedule, costs, and quality factors and/or
5. The capability of the department to oversee the project with persons who are familiar with the design-build method.

These statutes may provide useful models as the study group proceeds with its consideration of development of an ITS procurement process.

⁵⁰ Minn. Stat. § 161.3414.1

⁵¹ A.R.S. § 28-7363.A

CHAPTER THREE

CONCLUSIONS AND RECOMMENDATIONS

The Kentucky Transportation Cabinet has available several procurement processes that are suitable (to varying degrees) for ITS procurements. Several successful ITS projects have been carried out using existing processes. However, each of the existing processes has one or more weaknesses or drawbacks with regard to ITS procurements. These weaknesses make ITS procurements more difficult and cumbersome than they ideally should be, and, in some cases, the use of these processes may reduce the probability of a successful project. The weaknesses of the existing processes can be summarized as follows:

❖ Highway Construction Projects

- Current statutes limit this process to “all materials necessary for the construction and maintenance of roads⁵².” Many ITS projects would fall outside of this description.
- The award must be based on the “lowest and best bid,” and the process is dependent on detailed specification of the work to be accomplished. Therefore, this process may not accommodate the design and integration components that are essential to many ITS projects.

❖ Professional Services Contracts

- Current statutes and regulations limit this process to the procurement of services, thus restricting the use of this process for the procurement of hardware, installation, or construction, which are essential components of many ITS projects.

❖ Strategic Alliance Services

- This process currently allows only limited purchases of hardware. Hardware cannot be more than 25 percent of the total cost of the work. So, this process cannot be used for ITS projects that have a significant hardware component.

❖ Finance Cabinet Procurement:

- Above certain dollar figures, the procurement must go through the Finance and Administration Cabinet. Thus, it is subject to their priorities. As a general rule, they are not anxious to deal with unusual procurements.

Several of the weaknesses listed above could be addressed with revisions to the Kentucky Revised Statutes and the Kentucky Administrative Regulations. For example:

- the definition of Highway Construction Projects could be expanded to include construction, operation, and maintenance of roads;
- The definition of “roads” could be expanded to include the technologies and information systems used for safe and efficient operation of the roadways;
- The statutes governing Professional Services Contracts could be modified to allow some

⁵² KRS 176.070(1)

amount of hardware, installation, and construction to be included in the services contract;

- the regulations governing the SAS process could be modified to allow hardware to be a larger component of the total project; and
- the statutes governing design-build procurements could be modified to allow broader use of design-build procurements by the Transportation Cabinet for procurement of ITS.

These are just examples of changes that would provide the Transportation Cabinet with greater flexibility and greater efficiency in ITS procurements.

Recommendations

To build on the success of ITS deployments previously undertaken, it is recommended that the Kentucky Transportation Cabinet pursue the following course of action. Modify portions of KRS 45A.800-838 to strength and clarify the use of “engineering-related services” and “design-build”. Modify portions of KRS 45A.045(3) to ensure the Kentucky Transportation Cabinet may routinely use these methods of procurement. Create a new subsection of KRS 175,176,177,180 that would remove any prohibition to “design-build” or construction under KRS 45A. (This is course of action three, as listed above.)

KRS 45A.800-838 govern the procurement of Professional Architectural and Engineering Services. KRS 45A.800(4) defines "Project" to mean “any undertaking requiring professional architectural, engineering, or engineering-related services, except as provided in KRS 45A.100.⁵³ Engineering services are defined (KRS 45A.800(7) as “specialized professional services performed by individuals, consultants, or other organizations of recognized technical competence, education, or experience that are involved in the planning, design, construction, maintenance, or operation of Kentucky's transportation systems or construction projects in accordance with applicable licensing statutes.”⁵⁴ Contracts for these services are subject to the approval of the Government Contract Review Committee.⁵⁵

KRS 45A.800(7) should be modified to specifically include projects that require the application of advanced computing and communication technologies to the transportation field. These technologies should form part of a system to improve transportation operations. Further, the statute should state that these projects may include activities related to “designing and/or building and/or maintaining” the systems and technologies. These design/build/maintain activities may be managed by a single firm.

Any sections or subsection of the KRS relating to “Design-Build” should be modified to include **notwithstanding the definitions in KRS 45A.800(7).**

⁵³ KRS 45A.100 governs small purchases.

⁵⁴ KRS 45A.800(7).

⁵⁵ KRS 45A.830.

APPENDIX A

INTELLIGENT TRANSPORTATION SYSTEMS (ITS)

COURSE NUMBER: FHWA-NHI-137020

COURSE TITLE: Intelligent Transportation System (ITS) Procurement

DESCRIPTION:

Deployment of ITS introduces new challenges to State and local transportation agencies that operate under traditional procurement practices developed to support the design and construction of roads and bridges or to design and construct rail projects. The traditional practices do not readily accommodate the special needs of ITS procurement that is focused on operations. For this reason, the transportation professional must recognize the special considerations required in ITS procurements, and understand how they can be accommodated.

This course is intended to heighten awareness of the challenges in procuring ITS within the traditional construction project environment. It combines lectures with presentations of case studies to describe the lessons learned from past ITS projects and to help ensure successful ITS procurement.

This course is a companion course to, but not a prerequisite for, FHWA-NHI-137019 ITS Software Acquisition. This course is also part of the core ITS curriculum established by the ITS Professional Capacity Building (PCB) program. For more information on the core curriculum, go to <http://www.pcb.its.dot.gov/Catalogs/ITSCurriculum.htm#section2>.

OUTCOMES:

Upon completion of the course, participants will be able to:

- Describe the nature of intelligent transportation systems and explain why procuring intelligent transportation systems is different from traditional construction procurements
- Describe the potential barriers that may arise from procuring intelligent transportation systems within the traditional construction-oriented environment
- Describe lessons learned from previous ITS projects
- Apply innovative contracting mechanisms and flexibilities in existing regulations to mitigate barriers
- Apply lessons learned to existing policies and procedures to achieve improvements in procuring intelligent transportation systems

TARGET AUDIENCE:

Federal, State, and local transportation professionals who are directly involved in procuring ITS systems, specifically personnel responsible for developing and reviewing statements of work for ITS procurement, including program managers, contracting officers, and attorneys.

INTELLIGENT TRANSPORTATION SYSTEMS (ITS)

COURSE NUMBER: FHWA-NHI-137019

COURSE TITLE: ITS Software Acquisition

DESCRIPTION:

This course provides a general understanding of the many issues involved in intelligent transportation system (ITS) software development and acquisition processes. The course is focused specifically on ITS software issues.

This course is part of the core ITS curriculum established by the ITS Professional Capacity Building (PCB) program. For more information on the core curriculum, go to www.pcb.its.dot.gov/Catalogs/ITSCurriculum.htm#section2.

This course is a companion course to FHWA-NHI-137020 Intelligent Transportation System (ITS) Procurement.

OUTCOMES:

Upon completion of the course, participants will be able to:

- Describe the basic technologies used in software development
- Describe the private-sector view of software development
- Describe the intellectual property rights and how they must be considered
- Manage the procurement of ITS software
- Write a Request for Proposal for software procurement
- Describe quality assurance issues

TARGET AUDIENCE:

Federal, state, and local transportation professionals who are involved in the planning, decision making, and implementation of ITS projects which have a significant software component, or who are involved in coordinating these ITS projects.

APPENDIX B

Statutory Appendix Excerpts of Laws Relating to Design-build (with notes)

State statutes (in the following order from most to least comprehensive)

Minnesota

Arizona

Maine

Colorado

Utah

Missouri

Louisiana

North Carolina

Florida

Virginia

Washington

Wisconsin (only bridges)

MINNESOTA

NOTE: These are very comprehensive statutes regarding the procedures for design-build contracts. The state uses a scoring method and lists the appropriate hierarchy for a D-B contract to follow. (Similar to Arizona.)

161.3410 Design-build contracts; definitions
161.3412 Design-build authority
161.3414 Determination to use design-build selection method
161.3416 Design-build notice; report
161.3418 Licensing requirements
161.3420 Design-build RFQ (requests for qualifications); selection team; evaluation
161.3422 RFP (requests for proposals) for design-build
161.3424 Replacing team members
161.3426 Design-build award
161.3428 List of design-build contracts

MINNESOTA STATUTES 2002

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2002 LEGISLATION ***

Transportation

CHAPTER 161 TRUNK HIGHWAYS

CONSTRUCTION AND MAINTENANCE CONTRACTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Minn. Stat. § 161.3410 (2002)

161.3410 Design-build contracts; **definitions**

Subdivision 1. Scope. The terms used in sections 161.3410 to 161.3428 have the meanings given in this section.

Subd. 2. Commissioner. "Commissioner" means the commissioner of transportation.

Subd. 3. Design-build contract. "Design-build contract" means a single contract between the department of transportation and a design-build company or firm to furnish the architectural or engineering and related design services as well as the labor, material, supplies, equipment, and construction services for the transportation project.

Subd. 4. Design-build firm. "Design-build firm" means a proprietorship, partnership, limited

liability partnership, joint venture, corporation, any type of limited liability company, professional corporation, or any legal entity.

Subd. 5. Design professional. "Design professional" means a person who holds a license under chapter 326 that is required to be registered under Minnesota law.

Subd. 6. Design-build transportation project. "Design-build transportation project" means the procurement of both the design and construction of a transportation project in a single contract with a company or companies capable of providing the necessary engineering services and construction.

Subd. 7. Design-builder. "Design-builder" means the design-build firm that proposes to design and build a transportation project governed by the procedures of this section.

Subd. 8. Request for proposals or RFP. "Request for proposals" or "RFP" means the document by which the commissioner solicits proposals from prequalified design-build firms to design and construct the transportation project.

Subd. 9. Request for qualifications or RFQ. "Request for qualifications" or "RFQ" means a document to prequalify and short-list potential design-build firms.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 1*

Minn. Stat. § 161.3412 (2002)

NOTE: Must tell why and get permission from house or senate committee. May not exceed 10% of total construction contracts from the previous year.

161.3412 Design-build authority

Subdivision 1. Best value selection. Notwithstanding sections 16C.25, 161.32, and 161.321, or any other law to the contrary, the commissioner may solicit and award a design-build contract for a project on the basis of a best value selection process. Section 16C.08 does not apply to design-build contracts to which the commissioner is a party.

Subd. 2. Competitive, open process. Sections 161.3410 to 161.3428 apply only to transportation projects using the two-step competitive process utilizing public solicitation for design-build services.

Subd. 3. Restriction; reports. (a) The number of design-build contracts awarded by the commissioner in any fiscal year may not exceed ten percent of the total number of transportation construction contracts awarded by the commissioner in the previous fiscal year.

(b) The commissioner shall notify the chairs of the senate and house of representatives committees with jurisdiction over transportation policy and transportation finance each time the commissioner decides to use the design-build method of procurement and explain why that method was chosen.

Subd. 4. Municipal consent. Use of the design-build method of state transportation project delivery is subject to state law concerning municipal consent to highways in municipalities.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 2*

Minn. Stat. § 161.3414 (2002)

161.3414 Determination to use design-build selection method

Subdivision 1. General criteria. A design-build contracting procedure authorized under sections 161.3410 to 161.3428 may be used for a specific project only after the commissioner determines that awarding a design-build contract will serve the public interest.

Subd. 2. Specific criteria. The commissioner shall use the following criteria as the minimum basis for determining when to use the design-build method of project delivery:

- (1) the extent to which it can adequately define the project requirements in a proposed scope of the design and construction desired;
- (2) the time constraints for delivery of the project;
- (3) the capability and experience of potential contractors with the design-build method of project delivery or similar experience;
- (4) the suitability of the project for use of the design-build method of project delivery with respect to time, schedule, costs, and quality factors;
- (5) the capability of the department of transportation to manage the project, including the employment of experienced personnel or outside consultants;
- (6) the capability of the department of transportation to oversee the project with individuals or design-build firms who are familiar and experienced with the design-build method of project delivery or similar experience;
- (7) the lack of ability and availability of any current state employee to perform the services called for by the contract;
- (8) the original character of the product or the services;
- (9) the work to be performed on the project is necessary to the agency's achievement of its statutory responsibilities and there is statutory authority to enter into the contract; and
- (10) other criteria the commissioner deems relevant and states in writing in its determination to utilize the design-build method of project delivery.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 3*

Minn. Stat. § 161.3416 (2002)

161.3416 Design-build notice; report

Subdivision 1. Summary report of reasons for determination. The commissioner shall summarize in a written statement its reasons for using the design-build construction contracting procedure. This statement, along with other relevant information describing the project, must be made available upon request to interested parties.

Subd. 2. Final determination authority. Final determination to use a design-build construction contracting procedure may be made only by the commissioner.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 4*

Minn. Stat. § 161.3418 (2002)

161.3418 Licensing requirements

Subdivision 1. Licensed professional required. Each design-builder shall employ, or have as a partner, member, officer, coventurer, or subcontractor, a person duly licensed and registered to provide the design services required to complete the project and do business in the state.

Subd. 2. Contracting for licensed professional. A design-builder may enter into a contract to provide professional or construction services for a project that the design-builder is not licensed, registered, or qualified to perform, so long as the design-builder provides those services through subcontractors with duly licensed, registered, or otherwise qualified individuals in accordance with sections 161.3410 to 161.3428.

Subd. 3. Liability. (a) Nothing in this section authorizing design-build contracts is intended to limit or eliminate the responsibility or liability owed by a professional on a design-build project to the state, county, or city, or other third parties under existing law.

(b) The design service portion of a design-build contract must be considered a service and not a product.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 5*

Minn. Stat. § 161.3420 (2002)

161.3420 Design-build RFQ (requests for qualifications); selection team; evaluation

Subdivision 1. Two-phase procedure. If the commissioner determines that the design-build best value method of project delivery is appropriate for a project, the commissioner shall establish a two-phase procedure for awarding the design-build contract, as described in this subdivision and section 161.3422.

Subd. 2. Technical review committee. During the phase-one request for qualifications (RFQ) and before solicitation, the commissioner shall appoint a technical review committee of at least five individuals. The technical review committee must include an individual whose name and qualifications are submitted to the commissioner by the Minnesota chapter of the Associated General Contractors, after consultation with other commercial contractor associations in the state. Members of the technical review committee who are not state employees are subject to the Minnesota Government Data Practices Act and section 16C.06 to the same extent that state agencies are subject to those provisions. A technical review committee member may not participate in the review or discussion of responses to an RFQ or request for proposals (RFP) when the member has a financial interest in any of the design-build firms that respond to that RFQ or RFP. "Financial interest" includes, but is not limited to, being or serving as an owner, employee, partner, limited liability partner, shareholder, joint venturer, family member, officer, or director of a design-build firm responding to an RFQ or RFP for a specific project, or having any other economic interest in that design-build firm. The members of the technical review committee must be treated as state employees in the event of litigation resulting from any action arising out of their service on the committee.

Subd. 3. Contents. The commissioner shall prepare or have prepared an RFQ. The RFQ must include the following:

- (1) the minimum qualifications of design-builders necessary to meet the requirements for acceptance;
- (2) a scope of work statement and schedule;
- (3) documents defining the project requirements;
- (4) the form of contract to be awarded;
- (5) the weighted selection criteria for compiling a short list and the number of firms to be included in the short list, which must be at least two but not more than five;
- (6) a description of the request for proposals (RF)P requirements;
- (7) the maximum time allowed for design and construction;
- (8) the commissioner's estimated cost of design and construction;
- (9) requirements for construction experience, design experience, financial, personnel, and equipment resources available from potential design-builders for the project and experience in other design-build transportation projects or similar projects, provided that these requirements may not unduly restrict competition; and
- (10) a statement that "past performance" or "experience" does not include the exercise or assertion of a person's legal rights.

Subd. 4. Evaluation. The selection team shall evaluate the design-build qualifications of responding firms and shall compile a short list of no more than five most highly qualified firms in accordance with qualifications criteria described in the request for qualifications (RFQ). If only one design-build firm responds to the RFQ or remains on the short list, the commissioner may readvertise or cancel the project as the commissioner deems necessary.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 6*

Minn. Stat. § 161.3422 (2002)

161.3422 RFP (requests for proposals) for design-build

During phase two, the commissioner shall issue a request for proposals (RFP) to the design-builders on the short list. The request must include:

- (1) the scope of work, including (i) performance and technical requirements, (ii) conceptual design, (iii) specifications, and (iv) functional and operational elements for the delivery of the completed project, which must be prepared by a registered or licensed professional engineer;
- (2) a description of the qualifications required of the design-builder and the selection criteria, including the weight or relative order, or both, of each criterion;
- (3) copies of the contract documents that the successful proposer will be expected to sign;
- (4) the maximum time allowable for design and construction;
- (5) the road authority's estimated cost of design and construction;
- (6) the requirement that a submitted proposal be segmented into two parts, a technical proposal and a price proposal;
- (7) the requirement that each proposal be in a separately sealed, clearly identified package and include the date and time of the submittal deadline;
- (8) the requirement that the technical proposal include a critical path method; bar schedule of the work to be performed, or similar schematic; design plans and specifications; technical reports; calculations; permit requirements; applicable development fees; and other data requested in the RFP;
- (9) the requirement that the price proposal contain all design, construction, engineering, inspection, and construction costs of the proposed project;
- (10) the date, time, and location of the public opening of the sealed price proposals; and
- (11) other information relevant to the project.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 7*

Minn. Stat. § 161.3424 (2002)

161.3424 Replacing team members

An individual or a design-build firm identified in a response to a request for qualifications (RFQ) or a request for proposals (RFP) may not be replaced without the written approval of the commissioner. The commissioner may revoke an awarded contract if an individual or a design-build firm identified in a response to an RFQ or RFP is replaced without the commissioner's written approval. To qualify for the commissioner's approval, the written request must document that the proposed replacement individual or design-build firm will be equal to or better than that described in the response to the RFQ or RFP. The commissioner shall use the criteria specified in the RFQ or RFP to evaluate the request.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 8*

Minn. Stat. § 161.3426 (2002)

161.3426 Design-build award

Subdivision 1. Award; computation; announcement. Except as provided in subdivision 2, a design-build contract shall be awarded as follows:

(a) The technical review committee shall score the technical proposals using the selection criteria in the request for proposals (RFP). The technical review committee shall then submit a technical proposal score for each design-builder to the commissioner. The technical review committee shall reject any proposal it deems nonresponsive.

(b) The commissioner shall announce the technical proposal score for each design-builder and shall publicly open the sealed price proposals and shall divide each design-builder's price by the technical score that the technical review committee has given to it to obtain an adjusted score. The design-builder selected must be that responsive and responsible design-builder whose adjusted score is the lowest.

(c) If a time factor is included with the selection criteria in the RFP package, the commissioner may also adjust the bids using a value of the time factor established by the commissioner. The value of the time factor must be expressed as a value per day. The adjustment must be based on the total time value. The total time value is the design-builder's total number of days to complete the project multiplied by the factor. The time-adjusted price is the total time value plus the bid amount. This adjustment must be used for selection purposes only, and must not affect the department of transportation's liquidated damages schedule or incentive or disincentive program. An adjusted score must then be obtained by dividing each design-builder's time-adjusted price by the score given by the technical review team. The commissioner shall select the responsive and responsible design-builder whose adjusted score is the lowest.

(d) Unless all proposals are rejected, the commissioner shall award the contract to the responsive and responsible design-builder with the lowest adjusted score. The commissioner shall reserve the right to reject all proposals.

Subd. 2. Alternative process for certain contracts. (a) The commissioner may elect to use the process in paragraph (b) for a design-build contract for a project with an estimated project cost of less than \$ 5,000,000.

(b) The commissioner shall give the lowest cost proposal the full number of price points defined in the request for proposals (RFP). The commissioner shall award each of the other proposals a percentage of the price points based on a ratio of the lowest price divided by the responder's price. The commissioner shall add the technical score and price score and award the contract to the responder with the highest total score.

Subd. 3. Stipulated fee. The commissioner shall award a stipulated fee not less than two-tenths of one percent of the department's estimated cost of design and construction to each short-listed, responsible proposer who provides a responsive but unsuccessful proposal. If the commissioner does not award a contract, all short-listed proposers must receive the stipulated

fee. If the commissioner cancels the contract before reviewing the technical proposals, the commissioner shall award each design-builder on the short list a stipulated fee of not less than two-tenths of one percent of the commissioner's estimated cost of design and construction. The commissioner shall pay the stipulated fee to each proposer within 90 days after the award of the contract or the decision not to award a contract. In consideration for paying the stipulated fee, the commissioner may use any ideas or information contained in the proposals in connection with any contract awarded for the project or in connection with a subsequent procurement, without any obligation to pay any additional compensation to the unsuccessful proposers. Notwithstanding the other provisions of this subdivision, an unsuccessful short-list proposer may elect to waive the stipulated fee. If an unsuccessful short-list proposer elects to waive the stipulated fee, the commissioner may not use ideas and information contained in that proposer's proposal. Upon the request of the commissioner, a proposer who waived a stipulated fee may withdraw the waiver, in which case the commissioner shall pay the stipulated fee to the proposer and thereafter may use ideas and information in the proposer's proposal.

Subd. 4. Low-bid design-build process. (a) The commissioner may also use low-bid, design-build procedures to award a design-build contract where the scope of the work can be clearly defined.

(b) Low-bid design-build projects may require a request for qualifications (RFQ) and short-listing, and must require a request for proposals (RFP).

(c) Submitted proposals under this subdivision must include separately a technical proposal and a price proposal. The low-bid, design-build procedures must follow a two-step process for review of the responses to the RFP as follows:

(1) The first step is the review of the technical proposal by the technical review committee as provided in section 161.3420, subdivision 2. The technical review committee must open the technical proposal first and must determine if it complies with the requirements of the RFP and is responsive. The technical review committee may not perform any ranking or scoring of the technical proposals.

(2) The second step is the determination of the low bidder based on the price proposal. The commissioner may not open the price proposal until the review of the technical proposal is complete.

(d) The contract award under low-bid, design-build procedures must be made to the proposer whose sealed bid is responsive to the technical requirements as determined by the technical review committee and that is also the lowest bid.

(e) A stipulated fee may be paid for unsuccessful bids on low-bid, design-build projects only when the commissioner has required an RFQ and short-listed the most highly qualified responsive bidders.

Subd. 5. Rejection of bids. The commissioner may reject all bids under this section.

HISTORY: HISTORY: *1Sp2001 c 8 art 3 s 9*

Minn. Stat. § 161.3428 (2002)
161.3428 List of design-build contracts

Beginning September 1, 2002, and every subsequent year on September 1, the commissioner shall submit to the governor, the chairs of the house of representatives ways and means and senate finance committees, the chairs of the house of representatives and senate committees having jurisdiction over transportation policy and finance, and the legislative reference library, a yearly listing of all executed design-build contracts. The report must identify the contractor, contract amount, duration, and services to be provided. The list and summary must:

- (1) be sorted by contractor;
- (2) show the aggregate value of contracts issued by the commissioner of transportation and issued to each contractor; and
- (3) state the termination date of each contract.

ARIZONA

NOTE: Very comprehensive statutes. Similar to Minnesota in that design-build contracts go through a 2 phase process; first being the team selection process and the second being the proposal process.

ARIZONA REVISED STATUTES
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CURRENT THRU THE 2002 SECOND REGULAR AND SIXTH SPECIAL SESSIONS OF
THE 45TH LEGISLATURE
(INCLUDES ANNOTATIONS CURRENTLY POSTED TO LEXIS-NEXIS.COM THRU
JANUARY 17, 2003

TITLE 28. TRANSPORTATION

CHAPTER 20. STATE HIGHWAYS AND ROUTES

ARTICLE 13. ALTERNATIVE CONTRACTING PROCEDURES

A.R.S. § 28-7361 (2003)

§ 28-7361. Definitions

In this article, unless the context otherwise requires:

1. "Design-build" means the process of entering into and managing a contract between the department and another party in which the other party agrees to both design and build a highway, a structure, a facility or other items specified in the contract.
2. "Design-builder" means any individual, partnership, joint venture, corporation or other legal entity that is appropriately licensed in this state and that furnishes the necessary design services, in addition to construction of the work, whether by itself or through subcontracts, including subcontracts for architectural and engineering services.
3. "Emergency" means an immediate threat to public health, welfare or safety caused by flood, earthquake, hurricane, tornado, explosion, fire or other catastrophe such that compliance with normal bidding procedures for repair or reconstruction of transportation facilities would be impracticable or contrary to the public interest.

HISTORY: Laws 2000, Ch. 135, § 5.

A.R.S. § 28-7363 (2003)

§ 28-7363. Design-build method of project delivery; report

A. Notwithstanding any other law, the department may use the design-build method of project delivery on a project if the department makes a determination in writing that it is appropriate and in the best interests of the department to use the design-build method of project delivery for that project, except that:

1. The department shall not enter into a contract to operate any structure, facility or other item pursuant to this article.

2. The department shall not enter into contracts for more than two design-build projects in each fiscal year.

3. Each design-build project shall be a specific, single project with a minimum construction cost of forty million dollars. The department shall not artificially combine or aggregate projects in order to circumvent the minimum construction cost requirement. For the purposes of this paragraph, "specific, single project" means a project that is constructed at a single location, at a common location or for a common purpose.

4. The department shall not commence any design-build project after June 30, 2007. For the purposes of this paragraph, a project is commenced on the date the department and design-builder execute the contract for the project. If the department and design-builder execute a design-build contract on or before June 30, 2007, services and construction under the contract may be rendered in whole or in part after June 30, 2007.

B. The estimated cost of the project shall not include the cost to procure any right-of-way or other cost of condemnation. The cost to procure any right-of-way or other cost of condemnation remains at all times the responsibility of the department. The department shall obtain all necessary rights-of-way.

C. The department is responsible for preparation and acquisition of all environmental documents, including the scope of any remediation and required clearances.

D. If construction of a design-build project involves railroad facilities, the railroad shall approve the use of the design-build delivery method before the department awards the design-build contract.

E. To ensure fair, uniform, clear and effective procedures that will deliver a quality project on time and within budget, the director, in conjunction with the appropriate and affected professionals and contractors, may adopt procedures for procuring a project using the design-build method of project delivery.

F. The provisions of sections 28-6923 and 28-6924 relating to bid, performance and payment bonds and to change orders, progress payments, contract retentions, definitions and authority to award

contracts apply to department design-build projects for transportation facilities pursuant to this

article.

G. On or before January 15 of each year, the director of the department of transportation shall transmit to the secretary of state a report on the benefits associated with the use of design-build in procuring construction services. The report shall include the number of projects completed in the preceding calendar year using design-build, the cost and description of each project and an estimate of any cost savings or other benefits realized through the use of that procurement method.

A.R.S. § 28-7364 (2003)

§ 28-7364. Design-build criteria

The department shall use the following criteria as the minimum basis for determining when to use the design-build method of project delivery:

1. The extent to which it can adequately define the project requirements.
2. The time constraints for delivery of the project.
3. The capability and experience of potential teams with the design-build method of project delivery.
4. The suitability of the project for use of the design-build method of project delivery in the areas of time, schedule, costs and quality.
5. The capability of the department to manage the project, including the employment of experienced personnel or outside consultants.
6. The capability of the department to oversee the project with persons who are familiar with the design-build method of project delivery.
7. Other criteria the department deems relevant.

A.R.S. § 28-7365 (2003)

§ 28-7365. Design-build; two-phase solicitation

A. If the department determines that the design-build method of project delivery is appropriate, the department shall establish a two-phase procedure for awarding the design-build contract.

B. During **phase one**, and before solicitation, the director shall appoint a selection team of at least three persons. At least one-half of the selection team shall be architects or engineers who are registered pursuant to section 32-121. The selection team members may be either department employees or outside consultants. The selection team shall also include a licensed contractor who is not involved in the project. Any architect or engineer who is serving on the selection team and who is not a department employee shall not be otherwise involved in the project. The department shall prepare documents for a request for qualifications.

C. The request for qualifications shall include all of the following:

1. The minimum qualifications of the design-builder.

2. A scope of work statement and schedule.
3. Documents defining the project requirements.
4. The form of contract to be awarded.

5. The selection criteria for compiling a short list and the number of firms to be included on the short list. At least three but not more than five firms shall be included on the short list.

6. A description of the phase two requirements and subsequent management needed to bring the project to completion.

7. The maximum time allowable for design and construction.

8. The department's estimated cost of design and construction.

D. The selection team shall evaluate the design-build qualifications of responding firms and shall compile a short list of firms in accordance with technical and qualifications-based criteria. The number of firms on the short list shall be the number of firms specified in the request for qualifications, except that, if a smaller number of firms responds to the solicitation or if one or more of the firms on the short list drop out so that only two firms remain on the short list, the selection team may proceed with the selection process with the remaining firms if at least two firms remain or the selection team may readvertise as the selection team deems necessary.

E. During **phase two**, the department shall issue a request for proposals to the design-builders on the short list. The request shall include:

1. The scope of work, including programmatic, performance and technical requirements, conceptual design, specifications and functional and operational elements for the delivery of the completed project, which shall all be prepared by an architect or engineer, as appropriate, who is registered pursuant to section 32-121.

2. A description of the qualifications required of the design-builder and the selection criteria, including the weight or relative order, or both, of each criterion.

3. Copies of the contract documents that the successful proposer will be expected to sign.

4. The maximum time allowable for design and construction.

5. The department's estimated cost of design and construction.

6. The requirement that a proposal be segmented into two parts, a technical proposal and a price proposal. Each proposal shall be in a separately sealed, clearly identified package and shall include the date and time of the submittal deadline. The technical proposal shall include a schedule, schematic design plans and specifications, technical reports, calculations, permit requirements, applicable development fees and other data requested in the request for proposals. The price proposal shall contain all design, construction, engineering, inspection and construction costs of the proposed project.

7. The date, time and location of the public opening of the sealed price proposals.

8. Other information relevant to the project.

F. After reviewing the proposals, the department shall proceed as follows:

1. The selection team shall score the technical proposals using the selection criteria in the request for proposals. The technical review team shall then submit a technical proposal score for

each design-builder to the department. The technical review team shall reject any proposal it deems to be nonresponsive.

2. The department shall announce the technical proposal score for each design-builder, shall publicly open the sealed price proposals and shall divide each design-builder's price by the score that the selection team has given to it to obtain an adjusted score. The design-builder selected shall be that responsive and responsible design-builder whose adjusted score is the lowest.

3. If a time factor is included with the selection criteria in the request for proposals package, the department may also adjust the bids using a value of the time factor established by the department. The value of the time factor shall be a value per day. The adjustment shall be based on the total time value. The total time value is the design-builder's proposed number of days to complete the project multiplied by the factor. The time adjusted price is the total time value plus the bid amount. This adjustment shall be used for selection purposes only and shall not affect the department's liquidated damages schedule or incentive and disincentive program. An adjusted score shall then be obtained by dividing each design-builder's time adjusted price by the score given by the technical review team. The department shall select the responsive and responsible design-builder whose adjusted score is the lowest.

4. Unless all proposals are rejected, the board shall award the contract to the responsive and responsible design-builder with the lowest adjusted score. The board reserves the right to reject all proposals.

5. The department shall award a stipulated fee equal to two-tenths of one per cent of the department's estimated cost of design and construction to each short list responsible proposer who provides a responsive, but unsuccessful proposal. If the department does not award a contract, all responsive proposers shall receive the stipulated fee. If the department cancels the contract before reviewing the technical proposals, the department shall award each design-builder on the selected short list a stipulated fee equal to two-tenths of one per cent of the department's estimated cost of design and construction. The department shall pay the stipulated fee to each proposer within ninety days after the award of the contract or the decision not to award a contract. In consideration for paying the stipulated fee, the department may use any ideas or information contained in the proposals in connection with any contract awarded for the project, or in connection with a subsequent procurement, without any obligation to pay any additional compensation to the unsuccessful proposers. Notwithstanding the other provisions of this paragraph, an unsuccessful short list proposer may elect to waive the stipulated fee. If an unsuccessful short list proposer elects to waive the stipulated fee, the department may not use ideas and information contained in the proposer's proposal, except that this restriction does not prevent the department from using any idea or information if the idea or information is also included in a proposal of a short list proposer that accepts the stipulated fee.

MAINE

NOTE: This is an excellent description of the procedure for design-build contracts. There are two statutes, one from Title 5: Administrative procedures for public improvement and another from Title 23: Highways; Construction.

MAINE REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH 2003 ME. CH. 3, 2/19/03 ***

TITLE 23. HIGHWAYS

PART 1. STATE HIGHWAY LAW

CHAPTER 13. CONSTRUCTION, MAINTENANCE AND REPAIRS

SUBCHAPTER II. STATE HIGHWAYS

23 M.R.S. § 753-A (2003)

§ 753-A. Design-build contracts

1. DEFINITIONS. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Best value" means the highest overall value to the State, considering quality and cost.

B. "Department" means the Department of Transportation.

C. "Design-build contracting" means a method of project delivery whereby a single firm is contractually responsible to perform design, construction and related services.

D. "Major participant" means any firm that would have a major role in the design or construction of the project as specified by the department in the request for proposals.

E. "Project" means the highway, bridge, railroad, pier, airport, trail, ferry vessel, building or other improvement being constructed or rehabilitated, including all professional services, labor, equipment, materials, tools, supplies, warranties and incidentals needed for a complete and functioning product.

F. "Proposal" means an offer by the proposer to design and construct the project in accordance with all request-for-proposals provisions for the price contained in the proposal.

G. "Proposer" means an individual, firm, corporation, limited liability company, partnership, joint venture, sole proprietorship or other entity that submits a proposal. After contract execution, the successful proposer is the design-builder.

H. "Quality" means those features that the department determines are most important to the project. Quality criteria may include quality of design, constructability, long-term maintenance costs, aesthetics, local impacts, traveler and other user costs, service life, time to construct and other factors that the department considers to be in the best interest of the State.

2. AUTHORIZATION. Notwithstanding section 753 or any other provision of law, the department may use design-build contracting to deliver projects. The department may evaluate and select proposals on either a best-value or low-bid basis. If the scope of work requires substantial engineering judgment, the quality of which may vary significantly as determined by the department, then the basis of award must be best value.

The department shall identify in its planning process those projects it believes are candidates for design-build contracting. The failure of the department to identify such projects does not prevent the department from using design-build contracting in extraordinary circumstances including emergency work, unscheduled projects or loss of funding.

The department retains the authority to terminate the contracting process at any time, to reject any proposal, to waive technicalities or to advertise for new proposals if the department determines that it is in the best interest of the State.

3. PREQUALIFICATION. The department may require that firms be prequalified to submit proposals. If the department requires prequalification, it shall give public notice requesting qualifications from interested firms in at least 2 newspapers distributed in the State. The department shall issue a request-for-qualifications package to all firms requesting one in accordance with the notice.

Interested firms shall supply, for themselves and all major participants, all information required by the department. The department may investigate and verify all information received. All financial information, trade secrets or other information customarily regarded as confidential business information submitted to the department is confidential.

The department shall evaluate and rate all firms submitting a conforming statement of qualifications and select the most qualified firms to each receive a request for proposals. The

department may select any number of firms, except that, if the department fails to prequalify at least 2 firms, the department shall readvertise the project.

4. **REQUEST FOR PROPOSALS.** If the department requires prequalification, it shall issue a draft request for proposals to those firms prequalified. The department shall give prequalified firms adequate time to review and comment on a draft request for proposals. The department shall consider those comments in the best interest of the State before issuing the request for proposals. If the department does not require prequalification, it shall give public notice of the request for proposals in at least 2 newspapers distributed in the State.

The request for proposals must set forth the scope of work, design parameters, construction requirements, time constraints and all other requirements that have a substantial impact on the cost or quality of the project and the project development process, as determined by the department. The request for proposals must include the criteria for acceptable proposals. For projects to be awarded on a best-value basis, the scoring process and quality criteria must also be contained in the request for proposals. In the department's discretion, the request for proposals may provide for a process, including the establishment of a team to review proposals, for the department to review conceptual technical elements of each proposal before full proposal submittal for the purposes of identifying defects that would cause rejection of the proposal as nonresponsive. The majority of the members of the team reviewing proposals for responsiveness must be persons not employed by the department. Rejection of any proposal as nonresponsive requires a unanimous vote of the review team. All such conceptual submittals and responses are confidential until award of the contract. Upon award of the contract and after resolution of any procurement disputes, the department shall return documents submitted by unsuccessful proposers upon request. The request for proposals may also provide for a stipend upon specified terms to unsuccessful proposers that submit proposals conforming to all request-for-proposals requirements.

5. **LOW-BID AWARD.** If the basis of the award of responsive proposals is lowest cost, then each proposal, including the price or prices, must be sealed by the proposer and submitted to the department as one complete package. The department shall award the design-build contract to the proposer that submits a responsive proposal with the lowest price, if the proposal meets all request-for-proposals requirements.

6. **BEST-VALUE AWARD.** If the basis of the award of responsive proposals is best value, then each proposal must be submitted by the proposer to the department in 2 separate components, which are a sealed technical proposal and a sealed price proposal. These 2 components must be submitted simultaneously.

The department shall first open, evaluate and score each responsive technical proposal, based on the quality criteria contained in the request for proposals. The request for proposals may provide that the range between the highest and lowest quality score of responsive technical proposals must be limited to an amount certain. During this evaluation process, the price proposals will remain sealed and all technical proposals are confidential.

After completion of the evaluation of the technical proposals, the department shall publicly open and read each price proposal. The department shall calculate the overall value rating for each

proposal, which is the total price divided by the quality score. The department shall award the contract to the proposer with the lowest price per quality score point, provided that the proposal meets all request-for-proposals requirements.

7. **PROCUREMENT DISPUTES.** The request for proposals must provide for resolution of disputes that may arise before award of the contract by including a dispute review board procedure in accordance with the department's standard specifications and a provision that provides that the procurement process must be suspended pending final resolution of such disputes. This subsection does not prevent an aggrieved party from seeking judicial review.

MAINE REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH 2003 ME. CH. 3, 2/19/03 ***

TITLE 5. ADMINISTRATIVE PROCEDURES AND SERVICES

PART 4. FINANCE

CHAPTER 153. PUBLIC IMPROVEMENTS

SUBCHAPTER I. POWERS; BIDS AND CONTRACTS GENERALLY

5 M.R.S. § 1743 (2003)

§ 1743. Public improvement construction contracts

The Department of Administrative and Financial Services through the Bureau of General Services shall award a contract in accordance with this section for any public improvement that the State or any of its agencies hold in fee involving a total cost in excess of \$ 100,000, except contracts for professional, architectural and engineering services. The bureau may reject any public improvement bid, qualification package or proposal when it determines that to do so is in the best interests of the State.

The contract must be awarded by competitive bid as provided in subsection 2 or by the bid method provided in subsections 3 to 7 for alternative methods of project delivery.

1. **DEFINITIONS.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Bureau" means the Bureau of General Services.

B. "Construction-manager-advisor method" means a method of project delivery in which the bureau engages a single firm for a fee to advise and consult with the bureau as to design and construction and

may include consultation as to the selection of one or more design professionals to furnish the design when trade contracts for performance are held directly by the bureau. The firm is contractually bound to manage the schedule and budget to ensure adherence to both by the trade contractors.

C. "Construction-manager-at-risk method" means a method of project delivery in which the bureau engages a single firm for a fee to advise and consult with the bureau as to design and construction and separately engages one or more design professionals to furnish the design, and in which the firm is responsible to the bureau for schedule and price. The firm engaged to act as construction manager at-risk may perform all or a portion of the work on the project at the bureau's discretion.

D. "Design-build method" means a method of project delivery in which a single firm is contractually responsible to perform design, construction and related services.

E. "Design-build team" means representatives of an individual, firm, corporation, limited liability company, partnership, joint venture, sole proprietorship or other entity that submits a prequalification package in response to a request for qualifications under subsection 5, paragraph A, subparagraph (2).

F. "Director" means the Director of the Bureau of General Services.

G. "Proposer" means an individual, firm, corporation, limited liability company, partnership, joint venture, sole proprietorship or other entity that submits a proposal.

H. "Quality" means those features that the bureau determines are most important to the project. "Quality" includes design quality; feasibility of construction; long-term maintenance costs; life-cycle costs, particularly energy efficiency; service life; and other factors the bureau determines in the best interest of the State.

I. "Review panel" means the Alternative Delivery System Review Panel established in subsection 4.

2. **COMPETITIVE BIDS.** A public improvement contract may be awarded under a system of competitive bidding in accordance with this Part and such other conditions as the Governor may prescribe.

3. **ALTERNATIVE METHODS OF PROJECT DELIVERY.** As an alternative to the competitive bid method provided in subsection 2, a public improvement contract may be

undertaken using the construction-manager-advisor, construction-manager-at-risk or design-build method of construction.

A. To the extent the provisions of this section do not address specific alternative delivery procurement, award or administration issues, the provisions may be supplemented at the discretion of the director with the concepts contained in the Bureau's architect-engineer selection procedures that are designed to achieve quality-based selection and with policies and procedures adopted by rule of the bureau with the advice of the review panel.

B. After award of a contract or contracts for a project under an alternative method of delivery, the bureau shall notify all unsuccessful proposers in writing within a reasonable amount of time of the final selection and award, and make available to them all scoring information used in the selection process. Upon award of the contract or contracts and after resolution of any procurement disputes, the bureau shall return documents submitted by unsuccessful proposers upon request.

C. Using the time frames and procedures established in section 1749, this paragraph governs appeals from decisions on alternative methods of project delivery.

- 1) Resolution of disputes must be by appeal to the director, whose decision is the final administrative appeal.
- 2) Nothing in this paragraph prevents an aggrieved party from seeking judicial review, which may include a request for stay of award pursuant to applicable laws, judicial decisions, rules and any other applicable procedures.

D. The director may adopt rules necessary to implement the provisions for alternative project delivery methods set out in this section in accordance with the Maine Administrative Procedure Act. Prior to the procurement or award of any contract under an alternative delivery method, the director shall adopt by rule policies and procedures to implement that method. Rules adopted under this subsection are routine technical rules pursuant to chapter 375, subchapter II-A.

4. ALTERNATIVE DELIVERY SYSTEM REVIEW PANEL. The director shall establish the Alternative Delivery System Review Panel to advise the director in developing alternative project delivery policies, procedures and rules and in selecting public improvement projects for construction under an alternative delivery method.

A. The review panel is composed of 6 members as follows:

- 1) Two representatives of the bureau designated by the Commissioner of Administrative and Financial Services;
- 2) Two representatives of the construction trade, one of whom is a building contractor designated by the president of a state-based organization that represents building contractors and one of whom is designated by the president of a state-based organization that represents specialty contractors;
- 3) One representative designated by the president of a state-based organization that represents architects; and
- 4) One representative designated by the president of a state-based organization that represents consulting engineers.

The private sector members serve terms of 3 years each and each appointing authority shall designate an alternate who shall serve in the event of a conflict of interest.

B. In making a recommendation on selection of projects to the bureau, the review panel shall consider the following criteria:

- 1) Technical complexity of the project;
- 2) Substantial time or schedule savings that are necessary to the success of the project;
- 3) Project cost control;
- 4) The bureau's capacity to plan and manage the selected alternative project delivery method of construction, either in house or through outside contract;
- 5) Consistency and fairness in the procurement process;
- 6) Assurance of competition; and
- 7) Advancement of the public interest.

5. DESIGN-BUILD METHOD. The design-build method must be consistent with guidelines approved by a national architect, general contractor or design-build organization or a combined or modified version of the guidelines approved by those entities, with the final design-build procedures and documents to be determined at the discretion of the bureau. The bureau may prequalify design-build teams using criteria that must include at a minimum those set forth in section 1747 and may also include additional criteria considered appropriate by the director.

A. Selection of the design-build teams is governed by this paragraph.

1) Prior to publication of a request for qualifications, the bureau shall develop concept and schematic designs incorporating a detailed set of program requirements for the project using the services of a qualified architect, engineer or other professional who is selected using the bureau's architect-engineer selection rules. Individuals who are involved in developing the project's program requirements may not participate in the design-build teams.

2) For each project, the bureau shall publish a request for qualifications in at least 2 newspapers distributed in the State, one of which must be the Kennebec Journal. The bureau shall issue a request-for-qualifications package to all firms requesting one in accordance with the notice. The bureau shall evaluate and rate all firms submitting a responsive statement of qualifications and select the most qualified firms to receive a request for proposals. Selection criteria at this stage include at a minimum the ability of the competitor to satisfactorily carry out the project design and construction requirements, past performance, relevant experience and financial capacity to perform. The bureau may select a short list of 3 to 5 firms. The bureau may pay a reasonable stipend to all responsive proposers who were not selected. The amount of the stipend must be published together with the evaluation criteria in the request for proposals.

3) The request for proposals must set forth the scope of work, design parameters, construction requirements, time constraints and all other requirements that the bureau determines have a substantial impact on the cost or quality of the project and the project development process. The request for proposals must include the criteria for acceptable proposals and state clearly what weight will be assigned to each criterion. A description of the scoring process and quality criteria to be used to judge the proposals must also be contained in the request for proposals. As part of the selection process, proposers must make oral presentations to the selection panel established under subparagraph (4).

4) The director shall appoint members of a selection panel for each project. The selection panel in both the request-for-qualifications and request-for-proposals phases must include design and construction professionals from within the

bureau, design and construction professionals from outside the bureau and individuals who will use the facility.

5) Each proposal must be submitted to the bureau in 2 separate components; a sealed technical proposal and a sealed price proposal. These 2 components must be submitted simultaneously. The selection panel shall first open and evaluate and score each responsive technical proposal based on the quality criteria contained in the request for proposals. Nonresponsive proposals must be rejected. During this evaluation process, the price proposals must remain sealed and all technical proposals are confidential. After completion of the evaluation of the technical proposals, the selection panel shall publicly open and read each price proposal. The bureau shall award the contract to the proposer with the lowest price per quality score point, as long as that proposal meets all request-for-proposals requirements. The bureau shall be permitted to modify the scoring of price and quality in accordance with rules adopted by the bureau.

6. CONSTRUCTION-MANAGER-AT-RISK METHOD. The construction-manager-at-risk method must be consistent with the concepts set forth in a standard form of agreement between an owner and a construction manager when the construction manager is also the constructor as established by national architect or general contractor organizations. The final procedures and documents for this method of delivery are determined at the discretion of the director.

A. The bureau shall publish in at least 2 newspapers distributed in the State, one of which must be the Kennebec Journal, a request for qualifications that must contain the evaluation criteria upon which proposals are evaluated. Evaluation criteria include project size and scope, and relevant experience and financial and staff capability of proposers. The bureau shall evaluate the proposals and determine which proposers, if any, are qualified to perform the project. The bureau may select a short list of 3 to 5 firms.

B. Proposers determined to be qualified must be invited to submit a fee proposal. The bureau shall, in advance of soliciting a fee proposal, publish the evaluation criteria upon which the proposers are evaluated. Evaluation criteria at a minimum must include the following:

- 1) Fee;
- 2) Technical capacity;
- 3) Management plan and project schedule if available;

- 4) Experience;
- 5) Past performance;
- 6) Technical approach; and
- 7) Composition and qualifications of the proposers' workforce.

As part of the selection process, proposers must make oral presentations to the selection panel established under paragraph C.

C. The director shall appoint members of a selection panel for each project. The selection panel must include representatives of the owner, designer, if selected, and individuals who will use the facility. From among the proposals submitted, the bureau shall select the most advantageous proposal that meets the published evaluation criteria.

D. Subcontractors must be selected in accordance with the following provisions. The bureau shall create a subcontractor prequalification panel, composed of a representative from the designer, the construction manager and the bureau. The construction manager shall develop detailed bid packages based on the industry standard practice. The bureau shall advertise in at least 2 newspapers distributed in the State, one of which must be the Kennebec Journal, for requests for qualifications for each trade. The subcontractor prequalification panel shall, from the qualifications submitted, determine a short list of trade contractors who must be permitted to submit bids in accordance with the bid package requirements, pursuant to a publicly advertised process and deadline. Bids must be opened publicly and be awarded to the lowest responsive eligible bidder.

7. CONSTRUCTION-MANAGER-ADVISOR METHOD. The construction-manager-advisor method must be consistent with the standard scope of services employed by the bureau in public improvement projects.

A. The bureau shall publish in at least 2 newspapers distributed in the State, one of which must be the Kennebec Journal, a request for proposals that identifies the evaluation criteria upon which proposers are evaluated. Evaluation criteria must include:

- 1) Fee;
- 2) Technical capacity;

- 3) Management plan;
- 4) Experience;
- 5) Past performance; and
- 6) Composition of the project team, with individual resumes.

As part of the selection process, proposers must make oral presentations to the selection panel established under paragraph B.

B. The director shall appoint members of a selection panel for each project. The selection panel must include representatives of the owner, designer, if selected, and individuals who will use the facility. From among the proposals submitted, the bureau shall select the most advantageous proposal according to the published evaluation criteria.

C. The position of general contractor must be awarded to the lowest responsive and eligible bidder. Additional trade contracts, if any, must be awarded to the lowest responsive and eligible bidder or bidders.

8. OWNER'S REPRESENTATIVE. The bureau may employ a qualified individual to represent the owner on any public improvement project awarded under the competitive bid process provided in subsection 2 or an alternative method of project delivery provided in subsection 3. Owner's representative services must be consistent with the standard scope of services employed by the bureau. The services of the owner's representative must be procured in a manner consistent with the bureau's rules governing selection of architects and engineers or with policies and procedures adopted by rule of the bureau with the advice of the review panel. XLR.CJS C.J.S. States § § 160 to 167.

COLORADO

NOTE: Good, comprehensive statutes.

COLORADO REVISED STATUTES

*** THIS SECTION IS CURRENT THROUGH THE 2002 SUPPLEMENT
(2002 SESSIONS) ***

TITLE 43. TRANSPORTATION

GENERAL AND ADMINISTRATIVE

ARTICLE 1. GENERAL AND ADMINISTRATIVE

PART 14. DESIGN-BUILD CONTRACTS

C.R.S. 43-1-1401 (2002)

43-1-1401. Legislative declaration

(1) The general assembly hereby finds and declares that:

[REASONS]: (a) The increased population growth and economic activity within the state has resulted in the significant and growing demand for increased construction and reconstruction of highways and other transportation projects within the state to facilitate the movement of people, goods, and information;

(b) As a result of the increased federal and state funding provided to the department of transportation in recent years for transportation projects, together with the increasing number, size, and complexity of planned transportation projects, the department will benefit from the use of a faster, more efficient, and more cost-effective contractor selection and procurement process to design and construct transportation projects;

[BENEFITS]: (c) A design-build selection and procurement process will provide the department of transportation with: A savings of time, cost, and administrative burden; improved quality expectations with respect to the schedule and budget of transportation projects, as well as completion of such projects; and a reduction in the risks associated with transportation projects, including reduced duplication of expenses and improved coordination of efforts to meet the transportation needs of Colorado.

(2) The general assembly intends that this part 14 authorize the department of transportation to enter design-build contracts and to use an adjusted score design-build selection and procurement process for particular transportation projects regardless of the minimum or maximum cost of such projects, based on the individual needs and merits of such projects, and subject to approval by the transportation commission. The general assembly also intends that the department's use of an adjusted score design-build contract process shall not prohibit use of the low bid process currently used by the

department pursuant to part 1 of article 92 of title 24 and part 14 of article 30 of title 24, C.R.S.

C.R.S. 43-1-1402 (2002)

43-1-1402. Definitions

As used in this part 14:

(1) "Adjusted score design-build contract process" means a process to award contracts based on the lowest adjusted score of proposals submitted to the department.

(2) "Best value" means the overall maximum value of a proposal to the department after considering all of the evaluation factors described in the specifications for the transportation project or the request for proposals, including but not limited to the time needed for performance of the contract, innovative design approaches, the scope and quality of the work, work management, aesthetics, project control, and the total cost of the transportation project.

(3) "Design-build contract" means the procurement of both the design and the construction of a transportation project in a single contract with a single design-build firm or a combination of such firms that are capable of providing the necessary design and construction services.

(4) "Design-build firm" means any company, firm, partnership, corporation, association, joint venture, or other entity permitted by law to practice engineering, architecture, or construction contracting in the state of Colorado.

(4.5) "Force majeure" means fire, explosion, action of the elements, strike, interruption of transportation, rationing, shortage of labor, equipment, or materials, court action, illegality, unusually severe weather, act of God, act of war, or any other cause that is beyond the control of the party performing work on a design-build transportation or utility relocation project and that could not have been prevented by the party while exercising reasonable diligence.

(4.7) "Project specific utility relocation agreement" means an agreement entered into by the department and a utility company for the purpose of performing utility relocation work necessitated by a design-build transportation project. The agreement may incorporate reasonable and appropriate conditions, including, but not limited to, conditions for ensuring:

(a) The prompt performance of utility relocation work by either the utility company or the contractor for the design-build transportation project, as specified in the agreement;

(b) The cooperation of the utility company with the contractor for the design-build transportation project;

(c) The timely repayment of any funds advanced to the utility company for the relocation construction, including interest based on the costs incurred by the department for advancing the funds; and

(d) The payment by the utility company of any damages caused by the company's delay in the performance of the relocation work or interference with the performance of the project by any other contractor, except when such delay or interference is caused by a force majeure.

(5) "Transportation project" means any project that the department is authorized by law to undertake including but not limited to a highway, tollway, bridge, mass transit, intelligent transportation system, traffic management, traveler information services, or any other project for

transportation purposes.

(6) "Utility company" or "utility" shall have the same meaning as set forth in 23 C.F.R. 645.105 (m).

C.R.S. 43-1-1403 (2002)

43-1-1403. Authority to use a design-build contract process

Notwithstanding any other provision of law to the contrary, the department may select a design-build firm and award a design-build contract for a transportation project as provided in this part 14. The department may include a warranty provision in any design-build contract that requires the design-build firm to perform maintenance services on the completed transportation project.

C.R.S. 43-1-1404 (2002)

43-1-1404. Criteria

(1) The department may use a design-build contract for a transportation project if the design work for such project must be performed before a potential bidder can develop a price or cost proposal for such project and if the chief engineer of the engineering, design, and construction division determines that using a design-build contract is appropriate. The chief engineer shall consider the following factors in making a determination pursuant to this subsection (1):

- (a) The extent to which the transportation project requirements are adequately defined;
- (b) The time constraints for completing the transportation project;
- (c) The capability and experience of potential design-build firms;
- (d) The suitability of the transportation project to a design-build contract; and
- (e) The capability of the department to manage the design-build contract.

(2) The department may use a design-build contract regardless of the estimated minimum or maximum cost of a transportation project.

C.R.S. 43-1-1405 (2002)

43-1-1405. Public notice procedures

At least forty-five days prior to the anticipated date of selecting a design-build firm for a transportation project, the department shall publish a public notice at least twice in one or more daily newspapers of general circulation in the state. The public notice shall set forth a general description of the transportation project.

C.R.S. 43-1-1406 (2002)

43-1-1406. General procedures

(1) The department shall describe in the specifications for the transportation project the particular design-build contract and selection procedures to be used in awarding such contract, including but are not limited to the following:

(a) A scope of work statement that defines the transportation project and provides prospective design-build firms with sufficient information regarding the department's requirements for the transportation project;

(b) If the department uses an adjusted score design-build contract process to select a design-build firm, a scope of work statement that is flexible and that identifies the end result that the department wants to achieve. The department may determine the adjustment factors and methods it will use to adjust scores and shall state such factors and methods in the specifications for the transportation project. The department may also provide a general concept of the transportation project to potential design-build firms. Adjusted score design-build procedures shall consist of the following two phases:

(I) In the first phase, the department shall issue a request for qualifications within the time specified in section 43-1-1405 to solicit proposals that include information on the design-build firm's qualifications and its technical approach to the proposed transportation project. The department shall include appropriate evaluation factors in the request for qualifications, including the factors set forth in section 24-30-1403 (2), C.R.S. The department shall not include cost-related or price-related factors in the request for qualifications. In accordance with the time requirements specified in the department's rules, the department shall develop a short list of the highest qualified design-build firms from the proposals submitted in response to the request for qualifications.

(II) In the second phase, the department shall issue a request for proposals to the design-build firms included on the short list developed pursuant to subparagraph (I) of this paragraph (b) in accordance with the time requirements specified in the department's rules. The request for proposals shall include:

(A) A request to separately submit a sealed technical proposal and a sealed cost proposal for the transportation project;

(B) The required content of the technical proposal to be submitted by the design-build firm, including design concepts for the transportation project, the proposed solutions to the requirements addressed in the department's scope of work statement, or both;

(C) Any other evaluation factors the department considers appropriate, including the estimated cost of the transportation project; and

(D) Any formula the department determines is appropriate to adjust the total score of a design-build firm's proposal.

(2) Except as provided in this subsection (2), the department shall allow the preference to Colorado residents provided in section 8-19-101, C.R.S., in awarding an adjusted score design-build contract pursuant to this part 14. In evaluating and selecting a proposal for a design-build

contract under this part 14, the department shall assign greater value to a proposal in proportion to the extent such proposal commits to using Colorado residents to perform work on the transportation project. If, however, the department determines that compliance with this subsection (2) may cause the denial of federal moneys that would otherwise be available for the transportation project or if such compliance would otherwise be inconsistent with the requirements of federal law, the department shall suspend the preference granted under this subsection (2) only to the extent necessary to prevent denial of federal moneys or to eliminate the inconsistency with federal law.

(3) The department may use any basis for awarding a design-build contract pursuant to this part 14 that it deems appropriate so long as the basis for awarding such contract is adequately described in the specifications for the transportation project or the request for proposals. Such basis may include awarding a contract to the design-build firm whose proposal provides the best value to the department.

(4) The department may cancel any request for qualifications, request for proposals, or other solicitation issued pursuant to this part 14 or may reject any or all proposals in whole or in part when the department determines that such cancellation or rejection is in the best interest of the department.

(5) If the department awards a design-build contract pursuant to this part 14, the department shall execute a design-build contract with the successful design-build firm and shall give notice to said firm to commence work on the transportation project.

C.R.S. 43-1-1407 (2002)

43-1-1407. Stipulated fee

At its discretion, the department may award a stipulated fee to the design-build firms that submit responsive proposals but that are not awarded the design-build contract for a transportation project. The department shall not be required to award such stipulated fee, but if it elects to award such fee for a transportation project, the department shall identify the availability and the amount of such fee in its request for proposals.

C.R.S. 43-1-1408 (2002)

43-1-1408. Commission approval required

The department shall obtain approval from the transportation commission prior to using an adjusted score design-build contract process for any transportation project.

C.R.S. 43-1-1409 (2002)

43-1-1409. Rule-making authority

(1) The department may adopt rules in accordance with sections 43-1-110 and 24-4-103, C.R.S., to:

(a) Establish requirements for the procurement of design-build contracts that it determines necessary or appropriate, including but not limited to rules implementing the design-build

selection and contract procedures, subcontracting, and the warranty provisions of this part 14; and

(b) Further define and implement the processes and procedures for the performance of utility relocation work necessitated by a design-build transportation project, including, but not limited to, the allocation of responsibility for damages due to delay among the department, the design-build contractor, and utility companies that do not enter into project specific utility relocation agreements, and the creation of a forum and process to resolve changes in the conditions of the design-build transportation project that impact utility relocation work when the department and a utility company have not entered into a project specific utility relocation agreement.

UTAH

NOTE: Another good example, yet more brief than others.

UTAH CODE ANNOTATED
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*** STATUTES CURRENT THROUGH THE 2002 6TH SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2003 UT 1, 2003 UT APP 13 ***
*** AND JANUARY 17, 2003 (FEDERAL CASES) ***

TITLE 63. STATE AFFAIRS IN GENERAL

CHAPTER 56. UTAH PROCUREMENT CODE

PART E. PROCUREMENT OF CONSTRUCTION

Utah Code Ann. § 63-56-36.1 (2003)

§ 63-56-36.1. Procurement of design-build transportation project contracts

(1) As used in this section:

(a) "Design-build transportation project contract" means the procurement of both the design and construction of a transportation project in a single contract with a company or combination of companies capable of providing the necessary engineering services and construction.

(b) "Transportation agency" means:

(i) the Department of Transportation;

(ii) a county of the first or second class, as defined in Section 17-50-501;

(iii) a municipality of the first class, as defined in Section 10-2-301;

(iv) a public transit district that has more than 200,000 people residing within its boundaries; and

(v) a public airport authority, as created under Title 17A, Chapter 2, Part 15, Airport Authorities.

(2) Except as provided in Subsection (3), a transportation agency may award a design-build transportation project contract for any transportation project that has an estimated cost of at least \$ 50,000,000 by following the requirements of this section.

(3) The Department of Transportation may:

(a) award a design-build transportation project contract for any transportation project by following the requirements of this section; and

(b) make rules, by following the procedures and requirements of Title 63, Chapter 46a, Utah Administrative Rulemaking Act, establishing requirements for the procurement of its design-build transportation project contracts in addition to those required by this section.

(4) (a) Before entering a design-build transportation project contract, a transportation agency may issue a request for qualifications to prequalify potential contractors.

(b) Public notice of the request for qualifications shall be given in accordance with policy board rules.

(c) A transportation agency shall require, as part of the qualifications specified in the request for qualifications, that potential contractors at least demonstrate their:

(i) construction experience;

(ii) design experience;

(iii) financial, manpower, and equipment resources available for the project; and

(iv) experience in other design-build transportation projects with attributes similar to the project being procured.

(d) The request for qualifications shall identify the number of eligible competing proposers that the transportation agency will select to submit a proposal, which must be at least two.

(5) (a) The transportation agency shall:

(i) evaluate the responses received from the request for qualifications;

(ii) select from their number those qualified to submit proposals; and

(iii) invite those respondents to submit proposals based upon the transportation agency's request for proposals.

(b) If the transportation agency fails to receive at least two qualified eligible competing proposers, the transportation agency shall readvertise the project.

(6) The transportation agency shall issue a request for proposals to those qualified respondents that:

(a) includes a scope of work statement constituting an information for proposal that may include:

(i) preliminary design concepts;

(ii) design criteria, needs, and objectives;

(iii) warranty and quality control requirements;

(iv) applicable standards;

(v) environmental documents;

(vi) constraints;

(vii) time expectations or limitations;

(viii) incentives or disincentives; and

(ix) other special considerations;

(b) requires submitters to provide:

(i) a sealed cost proposal;

(ii) a critical path matrix schedule, including cash flow requirements;

(iii) proposal security; and

(iv) other items required by the department for the project; and

(c) may include award of a stipulated fee to be paid to submitters who submit unsuccessful proposals.

(7) The transportation agency shall:

(a) evaluate the submissions received in response to the request for proposals from the prequalified proposers;

(b) comply with rules relating to discussion of proposals, best and final offers, and evaluations of the proposals submitted; and

(c) after considering price and other identified factors, award the contract to the responsible proposer whose proposal is most advantageous to the state.

MISSOURI

NOTE: See sections 15 and 16 for description of rules and reports.

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*** THIS SECTION IS CURRENT THROUGH THE SECOND REGULAR SESSION
OF THE 91ST GENERAL ASSEMBLY ***

TITLE 14. ROADS AND WATERWAYS

CHAPTER 227. STATE HIGHWAY SYSTEM

§ 227.107 R.S.Mo. (2003)

§ 227.107. Design-build project contracts permitted, limitations, definitions -- written procedures required -- submission of detailed disadvantaged business enterprise participation plan -- bid process -- rulemaking authority -- status report to general assembly -- cost estimates to be published

1. Notwithstanding any provision of section 227.100 to the contrary, as an alternative to the requirements and procedures specified by sections 227.040 to 227.100, the state highways and transportation commission is authorized to enter into highway design-build project contracts. The authority granted to the state highways and transportation commission by this section shall be limited to a total of three design-build project contracts. Two design-build projects authorized by this section shall be selected by the highways and transportation commission from 1992 fifteen year plan projects. Authority to enter into design-build projects granted by this section shall expire on July 1, 2012, unless extended by statute or upon completion of three projects, whichever is first.

2. For the purpose of this section a "design-builder" is defined as an individual, corporation, partnership, joint venture or other entity, including combinations of such entities making a proposal to perform or performing a design-build highway project contract.

3. For the purpose of this section, "design-build highway project contract" is defined as the procurement of all materials and services necessary for the design, construction, reconstruction or improvement of a state highway project in a single contract with a design-builder capable of providing the necessary materials and services.

4. For the purpose of this section, "highway project" is defined as the design, construction, reconstruction or improvement of highways or bridges under contract with the state highways and transportation commission, which is funded by state, federal or local funds or any

combination of such funds.

5. In using a design-build highway project contract, the commission shall establish a written procedure by rule for prequalifying design-builders before such design-builders will be allowed to make a proposal on the project.

6. In any design-build highway project contract, whether involving state or federal funds, the commission shall require that each person submitting a request for qualifications provide a detailed disadvantaged business enterprise participation plan. The plan shall provide information describing the experience of the person in meeting disadvantaged business enterprise participation goals, how the person will meet the department of transportation's disadvantaged business enterprise participation goal and such other qualifications that the commission considers to be in the best interest of the state.

7. The commission is authorized to issue a request for proposals to a maximum of five design-builders prequalified in accordance with subsection 5 of this section.

8. The commission may require approval of any person performing subcontract work on the design-build highway project.

9. The bid bond and performance bond requirements of section 227.100 and the payment bond requirements of section 107.170, RSMo, shall apply to the design-build highway project.

10. The commission is authorized to prescribe the form of the contracts for the work.

11. The commission is empowered to make all final decisions concerning the performance of the work under the design-build highway project contract, including claims for additional time and compensation.

12. The provisions of sections 8.285 to 8.291, RSMo, shall not apply to the procurement of architectural, engineering or land surveying services for the design-build highway project, except that any person providing architectural, engineering or land surveying services for the design-builder on the design-build highway project must be licensed in Missouri to provide such services.

13. The commission shall pay a reasonable stipend to prequalified responsive design-builders who submit a proposal, but are not awarded the design-build highway project.

14. The commission shall comply with the provisions of any act of congress or any regulations of any federal administrative agency which provides and authorizes the use of federal funds for highway projects using the design-build process.

15. The commission shall promulgate administrative rules to implement this section or to secure federal funds. Such rules shall be published for comment in the Missouri Register and shall include prequalification criteria, the make-up of the prequalification review team, specifications for the design criteria package, the method of advertising, receiving and evaluating proposals from design-builders, the criteria for awarding the design-build highway project based on the design criteria package and a separate proposal stating the cost of construction, and other methods, procedures and criteria necessary to administer this section.

16. The commission shall make a status report to the members of the general assembly and the governor following the award of the design-build project, as an individual component of the annual report submitted by the commission to the joint transportation oversight committee in

accordance with the provisions of section 21.795, RSMo. The annual report prior to advertisement of the design-build highway project contracts shall state the goals of the project in reducing costs and/or the time of completion for the project in comparison to the design-bid-build method of construction and objective measurements to be utilized in determining achievement of such goals. Subsequent annual reports shall include: the time estimated for design and construction of different phases or segments of the project and the actual time required to complete such work during the period; the amount of each progress payment to the design-builder during the period and the percentage and a description of the portion of the project completed regarding such payment; the number and a description of design change orders issued during the period and the cost of each such change order; upon substantial and final completion, the total cost of the design-build highway project with a breakdown of costs for design and construction; and such other measurements as specified by rule. The annual report immediately after final completion of the project shall state an assessment of the advantages and disadvantages of the design-build method of contracting for highway and bridge projects in comparison to the design- bid-build method of contracting and an assessment of whether the goals of the project in reducing costs and/or the time of completion of the project were met.

17. The commission shall give public notice of a request for qualifications in at least two public newspapers that are distributed wholly or in part in this state and at least one construction industry trade publication that is distributed nationally.

18. The commission shall publish its cost estimates of the design- build highway project award and the project completion date along with its public notice of a request for qualifications of the design-build project.

19. If the commission fails to receive at least two responsive submissions from design-builders considered qualified, submissions shall not be opened and it shall readvertise the project.

HISTORY: L. 2002 H.B. 1196

USER NOTE: For more generally applicable notes, see notes under the first section of this part, article, heading, chapter or title.

TITLE 22. OCCUPATIONS AND PROFESSIONS

CHAPTER 327. ARCHITECTS, PROFESSIONAL ENGINEERS, LAND SURVEYORS AND LANDSCAPE ARCHITECTS

GENERAL PROVISIONS

§ 327.465 R.S.Mo. (2003)

§ 327.465. Certificate of registration or authority not required, when -- definitions

1. As used in this section, the following terms shall mean:

(1) "Design-build", a project for which the design and construction services are furnished under one contract;

(2) "Design-build contract", a contract between the owner, owner's agent, tenant, or other party and a design-build contractor to furnish the architecture, engineering, and related design services, and the labor, materials, and other construction services required for a specific public or private construction project;

(3) "Design-build contractor", any individual, partnership, joint venture, corporation, or other legal entity that furnishes architecture or engineering services and construction services either directly or through subcontracts.

2. Any design-build contractor that enters into a design-build contract for public or private construction shall be exempt from the requirement that such person or entity hold a certificate of registration or such corporation hold a certificate of authority if the architectural, engineering, or land surveying services to be performed under the contract are performed through subcontracts with:

(1) Persons who hold a certificate of registration for the appropriate profession; or

(2) Corporations that hold current certificates of authority from the board for the appropriate profession.

3. Nothing in this chapter shall prohibit the enforcement of a design-build contract by a design-build contractor who only furnishes, but does not directly or through its employees perform the architectural, engineering, or surveying required by the contract and who does not hold itself out as able to perform such services.

LOUISIANA

NOTE: This is a good example of a pilot program's procedures.

LOUISIANA STATUTES, ANNOTATED BY LEXISNEXIS (TM)

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2002 SESSIONS ***

*** March 2003 Annotations Service ***

LOUISIANA REVISED STATUTES

TITLE 48. ROADS, BRIDGES AND FERRIES

CHAPTER 1. DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

PART XIII. OPERATION AND TECHNICAL FUNCTIONS

SUBPART A. CONTRACTS AND CONTRACTORS FOR DEPARTMENT PROJECTS

GO TO LOUISIANA STATUTES ARCHIVE DIRECTORY

La. R.S. 48:250.2 (2003)

§ 250.2 Design-build contracts; administration

A. Notwithstanding any law to the contrary or the requirements of this Part, if the secretary determines in his discretion that it is in the best interest of the taxpayers, the Department of Transportation and Development may formulate, develop, and implement a pilot program to study the feasibility of combining the design and construction phases of a transportation facility, including but not limited to highways, interchanges, bridges, or buildings into a single contract.

B. (1) The department shall adopt and promulgate rules in accordance with the Administrative Procedure Act [FN1] for administering the pilot program for design-build contracts. Such procedures shall include but not be limited to:

- (a) Prequalification requirements of competitors for design-build projects.**
- (b) Public announcement procedures for solicitation of interested design-build competitors.**
- (c) Scope of service requirements to be met by the successful designer-builder.**
- (d) Requirements of letters of interest by competitors for the design-build contract.**

(e) Criteria and procedures for choosing a short list from the interested competitors for requesting the submission of technical proposals.

(f) Requirements for bid proposals by competitors for design-build contracts.

(g) Composition and appointment by the secretary to the technical review committee grading and judging the technical proposals for ranking and recommendation to the chief engineer.

(h) Selection and process of award by the chief engineer and execution of the design-build contract by the secretary for a stipulated sum certain.

(2) The department shall report to the Senate and House Committees on Transportation, Highways and Public Works annually on the status of any and all projects undertaken under this pilot program.

C. This pilot program shall be limited in duration to allow only one project, at a cost not to exceed five million dollars for such project, to be performed under the design-build method.

D. There shall be no challenge by any legal process to the choice of the successful designer-builder other than for fraud, bias for pecuniary or personal reasons not related to the interest of the taxpayers, or arbitrary and capricious selection by the chief engineer. Once the designer-builder has been chosen and a contract or a stipulated sum certain executed, the price of the design-build contract shall not be increased other than for inflation as prescribed in the contract and for site or other conditions of which the designer-builder had no knowledge and should not have had knowledge as a reasonable possibility existing at the site or concerning the design and construction.

NORTH CAROLINA

NOTE: This isn't very helpful but it is interesting to note that there is a provision protecting NC's contracting and engineering firms, that special legislative permission is required for amounts greater than \$100 million and that design-build contracts can only be used when normal design and construction contracting procedures aren't appropriate.

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*** STATUTES CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 16, 2003 ***

CHAPTER 136. ROADS AND HIGHWAYS

ARTICLE 2. POWERS AND DUTIES OF DEPARTMENT AND BOARD OF TRANSPORTATION

N.C. Gen. Stat. § 136-28.11 (2003)

§ 136-28.11. Design-build construction of transportation projects

(a) Design-Build Contracts Authorized. -- Notwithstanding any other provision of law, the Board of Transportation may award contracts for 10 projects in fiscal year 2002-2003, and 25 projects in fiscal years 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, and 2008-2009 for construction of transportation projects on a design-build basis.

(b) Design-Build Contract Amounts; Basis of Award. -- The Department may award contracts for the construction of transportation projects on a design-build basis of any amount. The Department shall endeavor to ensure design-build projects are awarded on a basis to maximize participation, competition, and cost benefit. On any project for which the Department proposes to use the design-build contracting method, the Department shall attempt to structure and size the contracts for the project in order that contracting firms and engineering firms based in North Carolina have a fair and equal opportunity to compete for the contracts.

(c) Disadvantaged Business Participation Goals. -- The provisions of G.S. 136-28.4 and 49 C.F.R. Part 26 shall apply to the award of contracts under this section.

(d) Findings Required. -- These contracts may be awarded after a determination by the Department of Transportation that delivery of the projects must be expedited and that it is not in the public interest to comply with normal design and construction contracting procedures.

(e) Reporting Requirements. -- The Department, for any proposed design-build project projected to have a construction cost in excess of one hundred million dollars (\$ 100,000,000), shall present to the Joint Legislative Transportation Oversight Committee information on the scope and nature of the project and the reasons the development of the project on a design-build

basis will best serve the public interest. Prior to the award of a design-build contract, the Secretary of Transportation shall report to the Joint Legislative Transportation Oversight Committee and to the Joint Legislative Commission on Governmental Operations on the nature and scope of the project and the reasons an award on a design-build basis will best serve the public interest.

FLORIDA

NOTE: This statute doesn't tell too much, but just give guidelines. Note that it is not yet applicable to highway construction. Also, see the NOTE at the end of the statute for the 2003 amendment.

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TITLE 26. PUBLIC TRANSPORTATION

CHAPTER 337. CONTRACTING; ACQUISITION, DISPOSAL, AND USE OF PROPERTY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Fla. Stat. § 337.11 (2002)

§ 337.11. Contracting authority of department; bids; emergency repairs, supplemental agreements, and change orders; combined design and construction contracts; progress payments; records; requirements of vehicle registration

(1) The department shall have authority to enter into contracts for the construction and maintenance of all roads designated as part of the State Highway System or the State Park Road System or of any roads placed under its supervision by law. The department shall also have authority to enter into contracts for the construction and maintenance of rest areas, weigh stations, and other structures, including roads, parking areas, supporting facilities and associated buildings used in connection with such facilities. However, no such contract shall create any third-party beneficiary rights in any person not a party to the contract.

(2) The department shall ensure that all project descriptions, including design plans, are complete, accurate, and up to date prior to the advertisement for bids on such projects.

(3) (a) On all construction contracts of \$ 250,000 or less, the department shall advertise for bids in a newspaper having general circulation in the county where the proposed work is located. Publication shall be at least once a week for no less than 2 consecutive weeks, and the first publication shall be no less than 14 days prior to the date on which bids are to be received.

(b) On all construction contracts greater than \$ 250,000, the department shall provide a bid solicitation notice to all prequalified contractors at least 2 weeks before the date bids are scheduled to be received.

(c) No advertisement for bids shall be published and no bid solicitation notice shall be

provided until title to all necessary rights-of-way and easements for the construction of the project covered by such advertisement or notice has vested in the state or a local governmental entity, and all railroad crossing and utility agreements have been executed. The turnpike enterprise is exempt from this paragraph for a turnpike enterprise project. Title to all necessary rights-of-way shall be deemed to have been vested in the State of Florida when such title has been dedicated to the public or acquired by prescription.

(4) The department may award the proposed construction and maintenance work to the lowest responsible bidder, or in the instance of a time-plus-money contract, the lowest evaluated responsible bidder, or it may reject all bids and proceed to rebid the work in accordance with subsection (2) or otherwise perform the work.

(5) (a) Any person who files an action protesting a bid solicitation, a bid rejection, or an award pursuant to this section shall post with the department, at the time of filing a notice of protest, a bond payable to the department in the following amounts:

1. For an action protesting a bid solicitation that requires qualification of bidders, the bond shall be \$ 5,000.

2. For an action protesting a bid rejection or contract award that requires qualification of bidders, the bond shall be equal to 1 percent of the lowest bid submitted or \$ 5,000, whichever is greater.

3. For an action protesting a bid solicitation, bid rejection, or contract award that does not require qualification of bidders, the bond shall be \$ 2,500.

(b) The bond required by this subsection shall be conditioned upon the payment of all costs which may be adjudged against the person filing the protest in the administrative hearing in which the action is brought and any subsequent appellate court proceeding. If, after completion of the administrative hearing process and any appellate court proceedings, the department prevails, it shall recover all costs and charges which shall be included in the final order or judgment, excluding attorney's fees. Upon payment of such costs and charges by the person filing the protest, the bond shall be returned to him or her. If the person filing the protest prevails, he or she shall recover from the department all costs and charges which shall be included in the final order or judgment, excluding attorney's fees. The entire amount of the bond shall be forfeited if the administrative law judge determines that a protest was filed for a frivolous or improper purpose, including, but not limited to, the purpose of harassing, causing unnecessary delay, or causing needless cost for the department or parties.

(c) As an alternative to any provision in *s. 120.57(3)(c)*, the department may proceed with the bid solicitation or contract award process when the head of the department sets forth in writing particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process in order to avoid a substantial loss of funding to the state.

(d) A person may not file a protest on any project for which he or she is not certified to bid pursuant to *s. 337.14*.

(6) (a) If the secretary determines that an emergency in regard to the restoration or repair of any state transportation facility exists such that the delay incident to giving opportunity for competitive bidding would be detrimental to the interests of the state, the provisions for competitive bidding do not apply; and the department may enter into contracts for restoration or repair without giving opportunity for competitive bidding on such contracts. Within 30 days after

such determination and contract execution, the head of the department shall file with the Executive Office of the Governor a written statement of the conditions and circumstances constituting such emergency.

(b) If the secretary determines that delays on a contract for maintenance exist due to administrative challenges, bid protests, defaults or terminations and the further delay would reduce safety on the transportation facility or seriously hinder the department's ability to preserve the state's investment in that facility, competitive bidding provisions may be waived and the department may enter into a contract for maintenance on the facility. However, contracts for maintenance executed under the provisions of this paragraph shall be interim in nature and shall be limited in duration to a period of time not to exceed the length of the delay necessary to complete the competitive bidding process and have the contract in place.

(c) When the department determines that it is in the best interest of the public for reasons of public concern, economy, improved operations or safety, and only when circumstances dictate rapid completion of the work, the department may, up to the amount of \$ 120,000, enter into contracts for construction and maintenance without advertising and receiving competitive bids. The department may enter into such contracts only upon a determination that the work is necessary for one of the following reasons:

1. To ensure timely completion of projects or avoidance of undue delay for other projects;
2. To accomplish minor repairs or construction and maintenance activities for which time is of the essence and for which significant cost savings would occur; or
3. To accomplish nonemergency work necessary to ensure avoidance of adverse conditions that affect the safe and efficient flow of traffic.

The department shall make a good faith effort to obtain two or more quotes, if available, from qualified contractors before entering into any contract. The department shall give consideration to disadvantaged business enterprise participation. However, when the work exists within the limits of an existing contract, the department shall make a good faith effort to negotiate and enter into a contract with the prime contractor on the existing contract.

***NOTE: see note at end of statute for amendment**

(7) (a) If the head of the department determines that it is in the best interests of the public, the department may combine the right-of-way services and design and construction phases of any project into a single contract, except for a resurfacing or minor bridge project the right-of-way services and design and construction phases of which may be combined under *s. 337.025*. Such contract is referred to as a design-build contract. Design-build contracts may be advertised and awarded notwithstanding the requirements of paragraph (3)(c). However, construction activities may not begin on any portion of such projects for which the department has not yet obtained title until title to the necessary rights-of-way and easements for the construction of that portion of the project has vested in the state or a local governmental entity and all railroad crossing and utility agreements have been executed. Title to rights-of-way shall be deemed to have vested in the state when the title has been dedicated to the public or acquired by prescription.

(b) The department shall adopt by rule procedures for administering design-build contracts. Such procedures shall include, but not be limited to:

1. **Prequalification requirements.**
2. **Public announcement procedures.**
3. **Scope of service requirements.**
4. **Letters of interest requirements.**

5. Short-listing criteria and procedures.

6. Bid proposal requirements.

7. Technical review committee.

8. Selection and award processes.

(c) The department must receive at least three letters of interest in order to proceed with a request for proposals. The department shall request proposals from no fewer than three of the design-build firms submitting letters of interest. If a design-build firm withdraws from consideration after the department requests proposals, the department may continue if at least two proposals are received.

(8) (a) The department shall permit the use of written supplemental agreements and written change orders to any contract entered into by the department. Any supplemental agreement shall be reduced to written contract form, approved by the contractor's surety, and executed by the contractor and the department. Any supplemental agreement modifying any item in the original contract must be approved by the head of the department, or his or her designee, and executed by the appropriate person designated by him or her.

(b) Supplemental agreements shall be used to clarify the plans and specifications of a contract; to provide for major quantity differences which result in the contractor's work effort exceeding the original contract amount by more than 5 percent; to provide for unforeseen work, grade changes, or alterations in plans which could not reasonably have been contemplated or foreseen in the original plans and specifications; to change the limits of construction to meet field conditions; to provide a safe and functional connection to an existing pavement; to settle contract claims; and to make the project functionally operational in accordance with the intent of the original contract. Supplemental agreements may be used to expand the physical limits of a project only to the extent necessary to make the project functionally operational in accordance with the intent of the original contract. The cost of any such agreement extending the physical limits of a project shall not exceed \$ 100,000 or 10 percent of the original contract price, whichever is greater.

(c) Written change orders may be issued by the department and accepted by the contractor covering minor changes in the plans, specifications, or quantities of work within the scope of a contract, when prices for the items of work affected are previously established in the contract, but in no event may such change orders extend the physical limits of the work.

(d) For the purpose of this section, the term "physical limits" means the length or width of any project and specifically includes drainage facilities not running parallel to the project. The length and width of temporary connections affected by such supplemental agreements shall be established in accordance with current engineering practice.

(e) Upon completion and final inspection of the contract work, the department may accept the improvement if it is in substantial compliance with the plans, specifications, special provisions, proposals, and contract and if a proper adjustment in the contract price is made.

(f) Any supplemental agreement or change order in violation of this section is null and void and unenforceable for payment.

(9) The department shall preserve all records which reflect the quantities of materials used in the construction of any road project supervised by the department for a period of 3 years after final acceptance. This requirement is equally binding when materials are purchased by prime contractors or subcontractors.

(10) (a) Every contract let by the department for the performance of work shall contain a provision requiring the prime contractor, before receipt of any progress payment under the

provisions of such contract, to certify that the prime contractor has disbursed to all subcontractors and suppliers having an interest in the contract their pro rata shares of the payment out of previous progress payments received by the prime contractor for all work completed and materials furnished in the previous period, less any retainage withheld by the prime contractor pursuant to an agreement with a subcontractor, as approved by the department for payment. The department shall not make any such progress payment before receipt of such certification, unless the contractor demonstrates good cause for not making any such required payment and furnishes written notification of any such good cause to both the department and the affected subcontractors and suppliers.

(b) Every contract let by the department for the performance of work shall contain a provision requiring the prime contractor, within 30 days of receipt of the final progress payment or any other payments received thereafter except the final payment, to pay all subcontractors and suppliers having an interest in the contract their pro rata shares of the payment for all work completed and materials furnished, unless the contractor demonstrates good cause for not making any such required payment and furnishes written notification of any such good cause to both the department and the affected subcontractors or suppliers within such 30-day period.

(c) The department shall document and monitor claims of nonpayment of prime contractors, subcontractors, and suppliers. The claims shall be submitted to the department in writing, and the department shall maintain, in a central file, a record of each claim, specifying the claimant and the nature and the resolution of the claim.

(11) Notwithstanding any other provision of law to the contrary, the department has unilateral authority to pay the contractor the sums the department determines to be due to the contractor for work performed on a project. This unilateral authority to pay by the department does not preclude or limit the rights of the department and the contractor to negotiate and agree to the amounts to be paid to the contractor. By acceptance of any such unilateral payment, the contractor does not waive any rights the contractor may have against the department for payment of any additional sums the contractor claims are due for the work.

(12) Each contract let by the department for the performance of road or bridge construction or maintenance work shall contain a provision requiring the contractor to provide proof to the department, in the form of a notarized affidavit from the contractor, that all motor vehicles that he or she operates or causes to be operated in this state are registered in compliance with chapter 320.

(13) Each contract let by the department for performance of road or bridge construction or maintenance work must contain a traffic maintenance plan which shows the appropriate regulatory speed signs and traffic control devices for the work zone area as defined in *s. 316.003*.

(14) When the department determines that it is in the best interest of the public, the department may enter into a contract with an electric utility as defined in *s. 366.02(2)* for the construction or maintenance of lighting on poles owned by the electric utility and located within a road right-of-way without competitive bidding. In any contract entered into without competition, the individuals taking part in the evaluation or award process shall attest in writing that they are independent of, and have no conflict of interest in, the entities evaluated and selected.

(15) The department shall have the authority to develop procedures for the administration of maintenance contracts. In addition to the other contract administration matters, the procedures shall address advertising and bid solicitation for maintenance contracts and each bid solicitation

notice shall contain specific requirements, if any are deemed necessary by the department for maintenance contractor eligibility.

HISTORY: s. 90, ch. 29965, 1955; s. 1, ch. 61-432; s. 1, ch. 61-443; s. 1, ch. 61-222; s. 1, ch. 65-4; s. 5, ch. 67-461; s. 1, ch. 69-315; s. 1, ch. 69-392; ss. 23, 35, ch. 69-106; s. 1, ch. 70-325; s. 114, ch. 71-377; s. 1, ch. 72-88; s. 1, ch. 75-6; s. 3, ch. 76-85; s. 1, ch. 84-277; s. 139, ch. 84-309; s. 32, ch. 86-243; s. 1, ch. 87-93; s. 5, ch. 87-100; s. 1, ch. 87-104; s. 1, ch. 87-162; s. 6, ch. 88-91; s. 5, ch. 88-93; s. 14, ch. 88-168; s. 1, ch. 89-160; s. 12, ch. 89-301; s. 46, ch. 90-136; s. 120, ch. 92-152; s. 27, ch. 93-164; s. 14, ch. 94-237; s. 963, ch. 95-148; s. 35, ch. 95-196; s. 26, ch. 95-257; s. 36, ch. 96-323; s. 70, ch. 96-410; s. 1, ch. 99-345; s. 18, ch. 99-385; ss. 2, 4, ch. 2001-350; ss. 10, 11, 12, ch. 2002-20.

NOTES:

NOTE.--A. Section 4, ch. 2001-350, and s. 11, ch. 2002-20, amended paragraph (7)(a), effective July 1, 2003, to read: (7)(a) If the head of the department determines that it is in the best interests of the public, the department may combine the right-of-way services and design and construction phases of a building, a major bridge, a limited access facility, or a rail corridor project into a single contract. Such contract is referred to as a design-build contract. Design-build contracts may be advertised and awarded notwithstanding the requirements of paragraph (3)(c). However, construction activities may not begin on any portion of such projects until title to the necessary rights-of-way and easements for the construction of that portion of the project has vested in the state or a local governmental entity and all railroad crossing and utility agreements have been executed. Title to rights-of-way vests in the state when the title has been dedicated to the public or acquired by prescription. B. Section 12, ch. 2002-20, amended paragraph (7)(a), effective July 1, 2005, to read: (7)(a) If the head of the department determines that it is in the best interests of the public, the department may combine the design and construction phases of a **building, a major bridge, a limited access facility, or a rail corridor** project into a single contract. Such contract is referred to as a design-build contract. Design-build contracts may be advertised and awarded notwithstanding the requirements of paragraph (3)(c). However, construction activities may not begin on any portion of such projects until title to the necessary rights-of-way and easements for the construction of that portion of the project has vested in the state or a local governmental entity and all railroad crossing and utility agreements have been executed. Title to rights-of-way vests in the state when the title has been dedicated to the public or acquired by prescription.

VIRGINIA

VIRGINIA ADVANCE LEGISLATIVE SERVICE

VIRGINIA 2003 SESSION

CHAPTER 281

SENATE BILL 977

2003 Va. ALS 281; 2003 Va. Acts 281; 2003 Va. Ch. 281; 2002 Va. SB 977

This is the senate bill regarding Va. Code Ann. § 33.1-12 (2003)

(b) The Commonwealth Transportation Board may award contracts for the construction of transportation projects on a design-build basis. The Board may annually award five design-build contracts valued no more than \$ 20 million. The Board may also award design-build contracts valued more than \$ 20 million, provided that no more than five of these latter contracts are in force at the same time. These contracts may be awarded after a written determination is made by the Commonwealth Transportation Commissioner, pursuant to objective criteria previously adopted by the Board regarding the use of design-build, that delivery of the projects must be expedited and that it is not in the public interest to comply with the design and construction contracting procedures normally followed. Such objective criteria will include requirements for prequalification of contractors and competitive bidding processes. These contracts shall be of such size and scope to encourage maximum competition and participation by agency prequalified and otherwise qualified contractors. Such determination shall be retained for public inspection in the official records of the Department of Transportation and shall include a description of the nature and scope of the project and the reasons for the Commissioner's determination that awarding a design-build contract will best serve the public interest. The provisions of this section shall supersede contrary provisions of subdivision 2 of subsection C of Section 11-41 and Section 11-41.2.

WASHINGTON

ANNOTATED REVISED CODE OF WASHINGTON
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*** (STATUTES CURRENT THROUGH CHAPTER 2 OF THE 2003 REGULAR SESSION)

*** ANNOTATIONS CURRENT THROUGH MARCH ADVANCE CODE SERVICE) ***

TITLE 47. PUBLIC HIGHWAYS AND TRANSPORTATION

CHAPTER 47.20. MISCELLANEOUS PROJECTS

Rev. Code Wash. (ARCW) § 47.20.780 (2003)

§ 47.20.780. Design-build -- Competitive bidding. (Expires April 30, 2008.)

The department of transportation shall develop a process for awarding competitively bid highway construction contracts for projects over ten million dollars that may be constructed using a design-build procedure. As used in this section and RCW 47.20.785, "design-build procedure" means a method of contracting under which the department of transportation contracts with another party for the party to both design and build the structures, facilities, and other items specified in the contract.

The process developed by the department must, at a minimum, include the scope of services required under the design-build procedure, contractor prequalification requirements, criteria for evaluating technical information and project costs, contractor selection criteria, and issue resolution procedures.

This section expires April 30, 2008.

NOTES:

FINDINGS -- PURPOSE -- 2001 C 226: "The legislature finds and declares that a contracting procedure that facilitates construction of transportation facilities in a more timely manner may occasionally be necessary to ensure that construction can proceed simultaneously with the design of the facility. The legislature further finds that the design-build process and other alternative project delivery concepts achieve the goals of time savings and avoidance of costly change orders.

The legislature finds and declares that a 2001 audit, conducted by Talbot, Korvola & Warwick, examining the Washington state ferries' capital program resulted in a recommendation for improvements and changes in auto ferry procurement processes. The auditors recommended that auto ferries be procured through use of a modified request for proposals process whereby the prevailing shipbuilder and Washington state ferries engage in a design and build partnership. This process promotes ownership of the design by the shipbuilder while using the department of

transportation's expertise in ferry design and operations. Alternative processes like design-build partnerships can promote innovation and create competitive incentives that increase the likelihood of finishing projects on time and within the budget.

The purpose of this act is to authorize the department's use of a modified request for proposals process for procurement of auto ferries, and to prescribe appropriate requirements and criteria to ensure that contracting procedures for this procurement process serve the public interest." [2001 c 226 § 1.]

Rev. Code Wash. (ARCW) § 47.20.785 (2003)

§ 47.20.785. Design-build -- Qualified projects. (Expires April 30, 2008.)

The department of transportation may use the design-build procedure for public works projects over ten million dollars where:

- (1) The construction activities are highly specialized and a design-build approach is critical in developing the construction methodology; or
- (2) The projects selected provide opportunity for greater innovation and efficiencies between the designer and the builder; or
- (3) Significant savings in project delivery time would be realized.

WISCONSIN

WISCONSIN STATUTES

*** THIS DOCUMENT IS CURRENT THRU THE 2001-2002 LEGISLATION ***

HIGHWAYS AND BRIDGES, DRAINS AND FENCES

CHAPTER 84. STATE TRUNK HIGHWAYS; FEDERAL AID

Wis. Stat. § 84.11 (2002)

84.11. Local bridge construction and reconstruction.

(1) DEFINITIONS. In this section:

(a) "Construction" includes reconstruction.

(b) "Local bridge" means a bridge which is not on the state trunk highway system or on marked routes of the state trunk highway system designated as connecting highways.

(1g) ...

...(5n) DESIGN-BUILD CONTRACTS.

(a) In this subsection, "design-build contract" means a contract for a project under which the engineering, design and construction services are provided by a single entity.

(b) Notwithstanding any other provision of this section and ss. 84.01 (13) and 84.06 (2), the department may enter into a design-build contract for the design and construction of a **bridge** for which funding is provided under s. 84.11 (5), 1993 stats., and for which no contract for construction is awarded before May 1, 1999. The department may enter into a contract under this paragraph only if all of the following conditions are met:

1. The design-build contract is awarded through a competitive selection process that utilizes, at a minimum, contractor qualifications, quality, completion time and cost as award criteria. In order to be eligible to participate in the selection process, the contractor must be prequalified by the department as a design consultant and as a contractor.

2. The design-build contract is approved by the secretary of the federal department of transportation under an experimental program described under section 1307 (d) of P.L. 105-178 pursuant to the authority granted under section 1307 (e) of P.L. 105-178

3. The design-build contract is approved by the governor.

(c) No later than 5 years after October 29, 1999, the department shall submit a report to the governor, and to the legislature under s. 13.172 (2), describing the effectiveness of the design-build process contracting procedures under this subsection.

(5r)

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