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SENATE BILL 345

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Phil A. Griego

AN ACT

RELATING TO PROCUREMENT; AMENDING THE PROCUREMENT CODE TO
PROVIDE ALTERNATIVE PROJECT DELIVERY METHODS FOR CERTAIN
DEPARTMENT OF TRANSPORTATION PROJECTS; ENACTING THE
TRANSPORTATION PROCUREMENT ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of the Procurement Code is
enacted to read:

"[NEW MATERIAL] SHORT TITLE.--Sections 1 through 10 of
this act may be cited as the "Transportation Procurement Act"."

Section 2. A new section of the Procurement Code is
enacted to read:

"[NEW MATERIAL] DEFINITIONS.--Notwithstanding any other
definition in the Procurement Code, and as used in the
Transportation Procurement Act:

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1 A. "construction-manager-at-risk" means a project
2 delivery method in which:

3 (1) there is a contract for construction
4 services that is separate from the contract for design
5 services;

6 (2) design services are performed under a
7 separate procurement for professional design services,
8 performed with department employees or performed with a
9 combination of the two;

10 (3) the contractor assumes the risk for
11 construction at a contracted guaranteed maximum price and
12 provides consultation and collaboration regarding the
13 construction during and after design of the project;

14 (4) a contract for construction services is
15 entered into at the same time as the design services are
16 commenced or at a later time;

17 (5) design and construction of the project is
18 in sequential phases or concurrent phases; and

19 (6) finance services, maintenance services,
20 warranty services, preconstruction services other than design
21 services and other related services may be included;

22 B. "construction services" means:

23 (1) construction, excluding design services,
24 through either the construction-manager-at-risk or job-order-
25 contracting project delivery method; or

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1 (2) a combination of construction and one or
2 more related preconstruction and construction services, such as
3 finance services, maintenance services, warranty services,
4 construction management, third-party coordination,
5 constructability reviews, cost engineering reviews, cost
6 estimating, value engineering, scheduling, contract package
7 development, planning and design services and preconstruction
8 services, as those services are authorized by the construction-
9 manager-at-risk or job-order-contracting project delivery
10 method;

11 C. "contractor" means any individual, partnership,
12 joint venture, corporation or other legal entity that is
13 appropriately licensed in this state that has a contract with
14 the department;

15 D. "department" means the department of
16 transportation;

17 E. "design-build" means the process of entering
18 into and managing a lump-sum contract between the department
19 and a contractor in which the contractor agrees to both design
20 and build a highway, a structure, a facility or any other
21 project specified in the contract;

22 F. "design-build offeror" means a contractor that
23 offers to furnish the necessary design services, in addition to
24 construction of the work, whether by itself or through
25 subcontracts, including subcontracts for architectural and

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1 engineering services;

2 G. "design services" means engineer services,
3 survey services or landscape architect services;

4 H. "engineer services" means those professional
5 engineer services that are within the scope of engineering
6 practice as provided in Chapter 61, Article 23 NMSA 1978;

7 I. "finance services" means financing for a
8 construction services project;

9 J. "job-order-contracting" means a project delivery
10 method in which:

11 (1) the job-order contract is an indefinite
12 quantity construction contract or price agreement that requires
13 the contractor to furnish an indeterminate quantity of
14 specified construction services and that may include a
15 guaranteed minimum amount of work;

16 (2) the construction to be performed is
17 specified in job orders issued during the contract;

18 (3) the job-order contract is excluded from
19 the requirement of procurement through the state purchasing
20 agent pursuant to Section 13-1-99 NMSA 1978 but not from the
21 requirements of the Procurement Code; and

22 (4) finance services, maintenance services,
23 warranty services, preconstruction services, design services
24 and other related services may be included;

25 K. "landscape architect services" means those

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1 professional landscape architect services that are within the
2 scope of landscape architectural practice as provided in
3 Chapter 61, Article 24B NMSA 1978;

4 L. "maintenance services" means routine
5 maintenance, repair and replacement of existing facilities,
6 structures, buildings or real property;

7 M. "offeror" means any individual, partnership,
8 joint venture, corporation or other legal entity that is
9 appropriately licensed in this state that submits a response to
10 a request for qualifications or request for proposal;

11 N. "preconstruction services" means services during
12 the design phase;

13 O. "secretary" means the secretary of
14 transportation;

15 P. "stipend" means a fee paid to design-build
16 offerors that are selected by the department to submit a
17 proposal and that submit a proposal that is responsive to the
18 criteria set forth in the request for proposals but that are
19 not awarded the design-build contract;

20 Q. "subcontractor" means a person that contracts to
21 perform work or render service to a contractor or to another
22 subcontractor as a part of a contract with the department;

23 R. "survey services" means those professional
24 survey services that are within the scope of survey practice as
25 provided in Chapter 61, Article 23 NMSA 1978; and

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1 S. "warranty services" means a contract requirement
2 for the contractor to fix or repair specific items of
3 workmanship or material contained in the roadway prism that are
4 detailed in the warranty terms."

5 Section 3. A new section of the Procurement Code is
6 enacted to read:

7 "[NEW MATERIAL] DESIGN-BUILD METHOD OF PROJECT DELIVERY.--

8 A. Notwithstanding any other law, the department
9 may use the design-build method of project delivery on a
10 project with a maximum allowable construction cost of more than
11 fifty million dollars (\$50,000,000) pursuant to the
12 Transportation Procurement Act if the department makes a
13 determination in writing that the method is appropriate and in
14 the best interests of the state for that project, except that
15 the department shall not utilize the design-build method of
16 project delivery to operate any structure, facility or other
17 item.

18 B. The estimated cost of the project shall not
19 include the cost to procure any right of way or other cost of
20 condemnation, which costs shall remain at all times the
21 responsibility of the department. The department shall obtain
22 all necessary rights of way but may utilize the design-build
23 contractor to provide right-of-way support services to the
24 department.

25 C. The department shall be responsible for

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1 preparation of all environmental studies, documentation and
2 required clearances, including the scope of any environmental
3 remediation. The department shall obtain all necessary
4 environmental clearances but may utilize a design-build
5 contractor to provide investigation and remediation support
6 services to the department.

7 D. The secretary shall make and adopt rules for
8 procuring a project using the design-build method of project
9 delivery, which shall be designed to ensure fair, uniform,
10 clear and effective delivery of a quality project on time and
11 within budget. The department shall solicit input from
12 industry stakeholders during the rulemaking process. The rules
13 shall establish criteria for the amount of the stipend to be
14 awarded, which criteria shall include the amount of information
15 supplied by the department, the complexity of the project and
16 the estimated cost of design and construction."

17 Section 4. A new section of the Procurement Code is
18 enacted to read:

19 "[NEW MATERIAL] DESIGN-BUILD METHOD CRITERIA.--The
20 department shall use the following criteria as the minimum
21 basis for determining when to use the design-build method of
22 project delivery:

23 A. the extent to which the department can
24 adequately define the project requirements;

25 B. the time constraints for delivery of the

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1 project;

2 C. the capability and experience of potential
3 teams;

4 D. the suitability of the project for use of the
5 design-build method of project delivery in the areas of time,
6 schedule, costs and quality;

7 E. the capability of the department to manage and
8 oversee the project, including the employment of experienced
9 personnel or outside consultants; and

10 F. other criteria the department deems relevant."

11 Section 5. A new section of the Procurement Code is
12 enacted to read:

13 "[NEW MATERIAL] DESIGN-BUILD METHOD--TWO-PHASE
14 PROCEDURE.--If the department determines that the design-build
15 method of project delivery is appropriate, the department shall
16 implement a two-phase procedure for awarding the design-build
17 contract, which shall be as follows:

18 A. During phase one, and before solicitation:

19 (1) the secretary shall appoint a selection
20 team of at least three members. At least one-half of the
21 selection team shall be architects or engineers who are
22 registered pursuant to Chapter 61, Article 23 NMSA 1978 or
23 Chapter 61, Article 15 NMSA 1978, respectively. The selection
24 team members may be either department employees, outside
25 consultants or licensed contractors. A consultant or

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1 contractor who is serving on the selection team and who is not
2 a department employee shall not be otherwise involved in the
3 project as part of any offeror's team;

4 (2) the department shall prepare a request for
5 qualifications, which shall include:

6 (a) the minimum qualifications of the
7 design-build offeror;

8 (b) a scope-of-work statement and
9 schedule;

10 (c) documents defining the project
11 requirements;

12 (d) the form of contract to be awarded;

13 (e) the selection criteria for compiling
14 a short list of no more than five offerors;

15 (f) the amount of the stipend;

16 (g) a description of the phase-two
17 evaluation factors and selection process;

18 (h) the maximum time allowable for
19 design and construction; and

20 (i) the department's estimated budget
21 for design and construction; and

22 (3) the selection team in a design-build
23 procurement shall evaluate the design-build qualifications of
24 responding offerors and shall compile a short list of offerors
25 in accordance with technical and qualifications-based criteria.

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B. During phase two:

(1) the department shall issue a request for proposals to the design-build offerors on the short list. The request for proposals shall include:

(a) 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 Chapter 61, Article 23 NMSA 1978 or Chapter 61, Article 15 NMSA 1978, respectively;

(b) a description of selection criteria;

(c) copies of the contract documents that the successful offeror will be expected to sign;

(d) the maximum time allowable for design and construction;

(e) the department's estimated budget for design and construction;

(f) the requirement that a proposal be segmented into two parts, a technical proposal and a price proposal, which shall each be in a separately sealed, clearly identified package and shall include the date and time of the submittal deadline;

(g) the amount of the stipend; and

(h) other information relevant to the

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1 project;

2 (2) if stated in the request for proposals,
3 the department may enter into a separate confidential
4 discussion with each offeror on the short list to discuss
5 alternative technical concepts that the offeror may propose in
6 order to inform each offeror whether the offeror's concept is
7 responsive to the request for proposals;

8 (3) the department:

9 (a) shall award the contract to the
10 responsive design-build offeror that represents the best value
11 to the state. The best value shall be determined based on
12 quality and price as defined in the request-for-proposals
13 selection criteria; or

14 (b) may cancel the procurement or reject
15 all proposals; and

16 (4) the department shall pay stipends within
17 ninety days after the award of the contract or the decision not
18 to award a contract."

19 Section 6. A new section of the Procurement Code is
20 enacted to read:

21 "[NEW MATERIAL] STIPEND.--In consideration for paying a
22 stipend to a contractor under the Transportation Procurement
23 Act, the department may use any ideas or information contained
24 in a proposal provided by that contractor."

25 Section 7. A new section of the Procurement Code is

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1 enacted to read:

2 "[NEW MATERIAL] CONSTRUCTION-MANAGER-AT-RISK CONSTRUCTION
3 SERVICES.--Notwithstanding any other law, the department may
4 procure construction-manager-at-risk construction services
5 pursuant to this section. The department shall provide notice
6 of each procurement of construction services prescribed in this
7 section and shall award contracts on the basis of demonstrated
8 competence and qualifications for the type of construction
9 services pursuant to the procedures prescribed in this section.
10 In the procurement of construction services pursuant to this
11 section:

12 A. the department shall issue a request for
13 qualifications for each contract and publish notice of the
14 request for qualifications. The request for qualifications
15 shall:

16 (1) state the criteria to be used by the
17 selection team to select the offeror to perform the
18 construction services; and

19 (2) state in a manner determined by the
20 department the relative weight of the selection criteria; and

21 B. the secretary shall appoint a selection team of
22 at least three members. At least one-half of the selection
23 team shall be architects or engineers who are registered
24 pursuant to Chapter 61, Article 23 NMSA 1978 or Chapter 61,
25 Article 15 NMSA 1978, respectively. The selection team members

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1 may be either department employees, outside consultants or
2 licensed contractors. A consultant or contractor who is
3 serving on the selection team and who is not a department
4 employee shall not be otherwise involved in the project as part
5 of any offeror's team."

6 Section 8. A new section of the Procurement Code is
7 enacted to read:

8 "[NEW MATERIAL] CONSTRUCTION-MANAGER-AT-RISK--CONTRACTOR
9 SELECTION--NEGOTIATION.--

10 A. The construction-manager-at-risk selection team
11 appointed by the secretary shall:

12 (1) evaluate the statements of qualifications
13 and performance data that are submitted in response to the
14 department's request for qualifications;

15 (2) determine if interviews are required and,
16 if required, conduct interviews with the final list of
17 offerors; and

18 (3) select the final list and rank the
19 offerors in order of preference.

20 B. The final list and order of preference shall be
21 based on demonstrated competence and qualifications only. The
22 department and the selection team shall not request or consider
23 fees, price, man-hours or any other cost information at any
24 point in the selection process, including the selection of the
25 offerors to be interviewed, the selection of the offerors to be

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1 on the final list and the determination of the order of
2 preference of offerors on the final list, or for any other
3 purpose in the selection process.

4 C. If only one offeror responds to a solicitation
5 for a contract to be negotiated pursuant to Subsection D of
6 this section, the department may proceed with only one offeror
7 in the selection process and may award the contract to a single
8 offeror if the department determines in writing:

9 (1) that the fee negotiated pursuant to
10 Subsection D of this section is fair and reasonable; and

11 (2) that other prospective persons or firms
12 had reasonable opportunity to respond or that there is not
13 adequate time for a resolicitation.

14 D. The department shall enter into negotiations for
15 the contract with the highest qualified offeror on the final
16 list for the construction services. The negotiations shall
17 include consideration of compensation and other contract terms
18 that the department determines to be fair and reasonable to the
19 state. In making its decision to accept an offer, the
20 department shall take into account the estimated value, scope,
21 complexity and nature of the construction services to be
22 rendered. If the department is not able to negotiate a
23 satisfactory contract with the highest qualified offeror on the
24 final list at compensation and on other contract terms that the
25 department determines to be fair and reasonable, the department

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1 shall formally terminate negotiations with that offeror. The
2 department may undertake negotiations with the next most
3 qualified offeror on the final list in sequence until an
4 agreement is reached or a determination is made to reject all
5 offerors on the final list.

6 E. If a contract for construction services is
7 entered into pursuant to this section:

8 (1) the department may enter into a
9 preconstruction services contract under which the department
10 shall pay the contractor a fee for preconstruction services in
11 an amount agreed to by the department and the contractor. The
12 department shall not request or obtain a fixed price or a
13 guaranteed maximum price for the construction from the
14 contractor or enter into a construction contract with the
15 contractor until after the department has entered into the
16 written contract for preconstruction services and a
17 preconstruction services fee; and

18 (2) construction shall not commence until the
19 department and the contractor agree in writing on a guaranteed
20 maximum price for the construction.

21 F. The department may cancel a solicitation if it
22 is in the best interest of the state.

23 G. The contractor for construction-manager-at-risk
24 construction services shall be licensed to perform construction
25 pursuant to Chapter 60, Article 13 NMSA 1978.

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1 H. Notwithstanding any other law, for each project
2 under a construction-manager-at-risk construction services
3 contract, the licensed contractor performing the contract shall
4 perform, with the contractor's own organization, construction
5 work that amounts to not less than fifty percent of the total
6 contract price for construction. For the purposes of this
7 subsection, the total contract price for construction does not
8 include the cost of preconstruction services, design services
9 or any other related services or the cost to procure any right
10 of way or other cost of condemnation."

11 Section 9. A new section of the Procurement Code is
12 enacted to read:

13 "[NEW MATERIAL] JOB-ORDER-CONTRACTING CONSTRUCTION
14 SERVICES--PROCEDURE.--Notwithstanding any other law, the
15 department may procure job-order-contracting construction
16 services pursuant to the Transportation Procurement Act. The
17 department shall provide notice of each procurement of
18 construction services prescribed in this section and shall
19 award contracts on the basis of demonstrated competence and
20 qualifications for the type of construction services pursuant
21 to the procedures prescribed in this section. In the
22 procurement of job-order-contracting construction services, the
23 department shall establish a two-phase procedure for awarding
24 the job-order-contracting construction services contract. The
25 procedure shall be as follows:

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A. during phase one:

(1) the department shall issue a request for qualifications for each contract and publish notice of the request for qualifications. The request for qualifications shall:

(a) include the number of offerors to be included on the final list;

(b) state the criteria to be used by the selection team to select the offeror to perform the construction services; and

(c) state the relative weight of the selection criteria in a manner determined by the department;

(2) the secretary shall appoint a selection team of at least three members. At least one-half of the selection team shall be architects or engineers who are registered pursuant to Chapter 61, Article 23 NMSA 1978 or Chapter 61, Article 15 NMSA 1978, respectively. The selection team members may be either department employees, outside consultants or licensed contractors. A consultant or contractor who is serving on the selection team and who is not a department employee shall not be otherwise involved in the project as part of any offeror's team;

(3) the selection team shall:

(a) evaluate the statements of qualifications and performance data that are submitted in

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1 response to the department's request for qualifications;

2 (b) select a final list and rank the
3 offerors in order of preference. The final list and order of
4 preference shall be based on demonstrated competence and
5 qualifications only. The department and the selection team
6 shall not request or consider fees, price, man-hours or any
7 other cost information at any point in the selection process
8 pursuant to this section, including the selection of the
9 offerors to be interviewed, the selection of the offerors to be
10 on the final list and the determination of the order of
11 preference of offerors on the final list, or for any other
12 purpose in the selection process; and

13 (c) determine if interviews are required
14 and, if required, conduct interviews with the final list of
15 offerors; and

16 (4) if only one offeror responds to a
17 solicitation, the department may award the contract to a single
18 offeror if the department determines in writing:

19 (a) that the fee negotiated pursuant to
20 this section is fair and reasonable; and

21 (b) that other prospective offerors had
22 reasonable opportunity to respond or that there is not adequate
23 time for a resolicitation; and

24 B. during phase two:

25 (1) the department shall issue a request for

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1 proposals to the final list of offerors. The request for
2 proposals shall include:

- 3 (a) scope-of-work and bid items;
- 4 (b) a description of selection criteria;
- 5 and
- 6 (c) other information relevant to the
7 contract; and

8 (2) the department may award the contract to
9 one or more responsive offerors. The best value is determined
10 based on quality and price as defined in the request-for-
11 proposals selection criteria; or

12 (3) the department may reject all proposals."

13 Section 10. A new section of the Procurement Code is
14 enacted to read:

15 "[NEW MATERIAL] JOB-ORDER-CONTRACTING CONSTRUCTION
16 SERVICES--REQUIREMENTS FOR CONTRACTORS.--Notwithstanding any
17 other law:

18 A. for each project under a job-order-contracting
19 construction services contract, the licensed contractor
20 performing the contract shall perform, with the contractor's
21 own organization, construction work that amounts to not less
22 than fifty percent of the total contract price for
23 construction. For the purposes of this subsection, the total
24 contract price for construction does not include the cost of
25 preconstruction services, design services or any other related

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1 services or the cost to procure any right of way or other cost
2 of condemnation;

3 B. the contractor for job-order-contracting
4 construction services is not required to be registered to
5 perform design services pursuant to Chapter 61, Article 23 NMSA
6 1978 or Chapter 61, Article 24B NMSA 1978 if the offeror
7 actually performing the design services on behalf of the
8 contractor is appropriately registered;

9 C. a contract for construction services using the
10 job-order-contracting project delivery method may be entered
11 into for a period of up to four years, as deemed to be in the
12 best interest of the state, if the term of the contract and
13 conditions of renewal or extension, if any, are included in the
14 solicitation and funds are available for the first fiscal year
15 at the time of contracting. Payment and performance
16 obligations for succeeding fiscal years are subject to the
17 availability and appropriation of funds;

18 D. before the use of a multi-term job-order
19 contract, the department shall determine in writing that:

20 (1) estimated requirements cover the period of
21 the contract and are reasonable and continuing; and

22 (2) the contract serves the best interests of
23 the state by encouraging effective competition or otherwise
24 promoting economies in the department's procurement; and

25 E. if money is not appropriated or otherwise made

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1 available to support the continuation of performance in a
2 subsequent fiscal year, the contract shall be canceled and the
3 contractor may only be reimbursed for the reasonable value of
4 any nonrecurring costs that are incurred but not amortized in
5 the price of the construction services delivered under the
6 contract or that are otherwise not recoverable. The cost of
7 cancellation may be paid from any appropriations available for
8 these purposes. Contractors are not entitled to compensation
9 for a decision to not renew or extend a contract."

10 Section 11. Section 13-1-102 NMSA 1978 (being Laws 1984,
11 Chapter 65, Section 75, as amended) is amended to read:

12 "13-1-102. COMPETITIVE SEALED BIDS REQUIRED.--All
13 procurement shall be achieved by competitive sealed bid
14 pursuant to Sections 13-1-103 through 13-1-110 NMSA 1978,
15 except procurement achieved pursuant to the following sections
16 of the Procurement Code:

17 A. Sections 13-1-111 through 13-1-122 NMSA 1978,
18 competitive sealed proposals;

19 B. Section 13-1-125 NMSA 1978, small purchases;

20 C. Section 13-1-126 NMSA 1978, sole source
21 procurement;

22 D. Section 13-1-127 NMSA 1978, emergency
23 procurements;

24 E. Section 13-1-129 NMSA 1978, existing contracts;

25 F. Section 13-1-130 NMSA 1978, purchases from

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1 antipoverty program businesses; ~~and~~

2 G. the Educational Facility Construction Manager At
3 Risk Act; and

4 H. the Transportation Procurement Act."

5 Section 12. EFFECTIVE DATE.--The effective date of the
6 provisions of this act is July 1, 2009.

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