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State of Minnesota

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HOUSE OF REPRESENTATIVES

EIGHTY-FIFTH SESSION

HOUSE FILE No. 3301

February 21, 2008

Authored by Kalin and Beard

The bill was read for the first time and referred to the Committee on Finance

March 6, 2008

By motion, recalled and re-referred to the Committee on Public Safety and Civil Justice

March 18, 2008

Committee Recommendation and Adoption of Report:

To Pass as Amended and re-referred to the Committee on Finance

April 21, 2008

Committee Recommendation and Adoption of Report:

To Pass as Amended and re-referred to the Committee on Ways and Means

April 30, 2008

Committee Recommendation and Adoption of Report:

To Pass

Read Second Time

1.1 A bill for an act
1.2 relating to transportation; modifying provisions relating to design-build projects;
1.3 amending Minnesota Statutes 2006, sections 161.3412, subdivision 3; 161.3420,
1.4 subdivisions 2, 3, 4; 161.3422; 161.3426, subdivisions 1, 3, 4; repealing
1.5 Minnesota Statutes 2006, section 161.3426, subdivision 2.

1.6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.7 Section 1. Minnesota Statutes 2006, section 161.3412, subdivision 3, is amended to
1.8 read:

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

1.13 (b) The commissioner shall notify the chairs of the senate and house of
1.14 representatives committees with jurisdiction over transportation policy and transportation
1.15 finance each time the commissioner decides to use the design-build method of procurement
1.16 and. The notification must explain why that method was chosen, and provide the initial
1.17 cost estimate, the expected date of release for the RFP, and the expected stipulated fee.

1.18 (c) The commissioner shall notify the chairs of the senate and house of
1.19 representatives committees with jurisdiction over transportation policy and transportation
1.20 finance within three days of any change to the cost estimate or to the stipulated fee of a
1.21 design-build project.

1.22 Sec. 2. Minnesota Statutes 2006, section 161.3420, subdivision 2, is amended to read:

1.23 Subd. 2. Technical Review Committee. During the phase-one request for
1.24 qualifications (RFQ) and before solicitation, the commissioner shall appoint a Technical

2.1 Review Committee of at least five individuals. The Technical Review Committee must
2.2 include an individual whose name and qualifications are submitted to the commissioner
2.3 by the Minnesota chapter of the Associated General Contractors, after consultation with
2.4 other commercial contractor associations in the state. Members of the Technical Review
2.5 Committee who are not state employees are subject to the Minnesota Government Data
2.6 Practices Act and section 16C.06 to the same extent that state agencies are subject to those
2.7 provisions. The commissioner shall pay reasonable compensation to Technical Review
2.8 Committee members who are not public employees for their services. A minimum
2.9 of two state employees on the Technical Review Committee must be at the level of
2.10 senior administrative engineer or above. A Technical Review Committee member
2.11 may not participate in the review or discussion of responses to an RFQ or request for
2.12 proposals (RFP) when the member has a financial interest in any of the design-build
2.13 firms that respond to that RFQ or RFP. "Financial interest" includes, but is not limited
2.14 to, being or serving as an owner, employee, partner, limited liability partner, shareholder,
2.15 joint venturer, family member, officer, or director of a design-build firm responding to
2.16 an RFQ or RFP for a specific project, or having any other economic interest in that
2.17 design-build firm. The members of the Technical Review Committee must be treated as
2.18 state employees in the event of litigation resulting from any action arising out of their
2.19 service on the committee.

2.20 Sec. 3. Minnesota Statutes 2006, section 161.3420, subdivision 3, is amended to read:

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

2.23 (1) the minimum qualifications of design-builders necessary to meet the requirements
2.24 for acceptance;

2.25 (2) a scope of work statement and schedule;

2.26 (3) documents defining the project requirements;

2.27 (4) the form of contract to be awarded;

2.28 (5) the weighted selection criteria for compiling a short list and the number of firms
2.29 to be included in the short list, which must be at least two but not more than five;

2.30 (6) a description of the request for proposals (RFP) requirements;

2.31 (7) the maximum time allowed for design and construction;

2.32 (8) the commissioner's estimated cost of design and construction;

2.33 (9) requirements for construction experience, design experience, financial,
2.34 personnel, and equipment resources available from potential design-builders for the

3.1 project and experience in other design-build transportation projects or similar projects,
3.2 provided that these requirements may not unduly restrict competition; and

3.3 (10) a statement that "past performance₂" ~~or~~ "experience₂" or other criteria used in the
3.4 RFQ evaluation process does not include the exercise or assertion of a person's legal rights.

3.5 Sec. 4. Minnesota Statutes 2006, section 161.3420, subdivision 4, is amended to read:

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

3.12 Sec. 5. Minnesota Statutes 2006, section 161.3422, is amended to read:

3.13 **161.3422 RFP FOR DESIGN-BUILD.**

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

3.16 (1) the scope of work, including (i) performance and technical requirements, (ii)
3.17 conceptual design, (iii) specifications, and (iv) functional and operational elements for
3.18 the delivery of the completed project, which must be prepared by a registered or licensed
3.19 professional engineer;

3.20 (2) a description of the qualifications required of the design-builder and the selection
3.21 criteria, including the weight ~~or relative order, or both,~~ of each criterion and subcriterion;

3.22 (3) copies of the contract documents that the successful proposer will be expected to
3.23 sign;

3.24 (4) the maximum time allowable for design and construction;

3.25 (5) the road authority's estimated cost of design and construction;

3.26 (6) the requirement that a submitted proposal be segmented into two parts, a
3.27 technical proposal and a price proposal;

3.28 (7) the requirement that each proposal be in a separately sealed, clearly identified
3.29 package and include the date and time of the submittal deadline;

3.30 (8) the requirement that the technical proposal include a critical path method;
3.31 bar schedule of the work to be performed, or similar schematic; design plans and
3.32 specifications; technical reports; calculations; permit requirements; applicable
3.33 development fees; and other data requested in the RFP;

- 4.1 (9) the requirement that the price proposal contain all design, construction,
4.2 engineering, inspection, and construction costs of the proposed project;
- 4.3 (10) the date, time, and location of the public opening of the sealed price proposals;
4.4 ~~and~~
- 4.5 (11) other information relevant to the project; and
- 4.6 (12) a statement that "past performance," "experience," or other criteria used in the
4.7 RFP evaluation process does not include the exercise or assertion of a person's legal rights.

4.8 Sec. 6. Minnesota Statutes 2006, section 161.3426, subdivision 1, is amended to read:

4.9 Subdivision 1. **Award; computation; announcement.** ~~Except as provided in~~
4.10 ~~subdivision 2,~~ A design-build contract shall be awarded as follows:

4.11 (a) The Technical Review Committee shall score the technical proposals using the
4.12 selection criteria in the request for proposals (RFP). The Technical Review Committee
4.13 shall then submit a technical proposal score for each design-builder to the commissioner.
4.14 The Technical Review Committee shall reject any ~~proposal it deems~~ nonresponsive
4.15 proposal.

4.16 (b) The commissioner shall announce the technical proposal score for each
4.17 design-builder and shall publicly open the sealed price proposals and shall divide each
4.18 design-builder's price by the technical score that the Technical Review Committee has
4.19 given to it to obtain an adjusted score. The design-builder selected must be that responsive
4.20 and responsible design-builder (1) whose adjusted score is the lowest, and (2) whose
4.21 price component does not exceed 120 percent of the lowest price that is submitted by a
4.22 responsive, responsible design-builder. The requirement in clause (2) of this paragraph
4.23 only applies if the project has a value in excess of \$25,000,000, as stated in the RFP.

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

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

5.4 (e) The commissioner shall not limit the ability of design-builders that have
5.5 submitted proposals to protest a contemplated or actual award by the commissioner
5.6 by, among other things, unreasonably restricting the time to protest, restricting the
5.7 right to seek judicial review of the commissioner's actions, attempting to change the
5.8 judicial standard of review, or attempting to shift the commissioner's costs or damages
5.9 from a protest to a protestor. Unless all design-builders that have submitted proposals
5.10 agree to execution of a contract for the project without a waiting period beforehand, the
5.11 commissioner shall wait at least seven days after both the award of the project and public
5.12 disclosure of the Technical Review Committee's scoring data and the successful proposal
5.13 before executing a contract for the project.

5.14 Sec. 7. Minnesota Statutes 2006, section 161.3426, subdivision 3, is amended to read:

5.15 Subd. 3. **Stipulated fee.** The commissioner shall award a stipulated fee not less than
5.16 two-tenths of one percent of the department's estimated cost of design and construction
5.17 to each short-listed, responsible proposer who provides a responsive but unsuccessful
5.18 proposal. Any increases to the stipulated fee must be made only by the commissioner and
5.19 the reasons for those changes must be publicly announced at the time of the change. If
5.20 the commissioner does not award a contract, all short-listed proposers must receive the
5.21 stipulated fee. If the commissioner cancels the contract before reviewing the technical
5.22 proposals, the commissioner shall award each design-builder on the short list a stipulated
5.23 fee of not less than two-tenths of one percent of the commissioner's estimated cost of
5.24 design and construction. The commissioner shall pay the stipulated fee to each proposer
5.25 within 90 days after the award of the contract or the decision not to award a contract
5.26 without conditions other than those stated in this subdivision. In consideration for paying
5.27 the stipulated fee, the commissioner may use any ideas or information contained in the
5.28 proposals in connection with any contract awarded for the project or in connection with a
5.29 subsequent procurement, without any obligation to pay any additional compensation to
5.30 the unsuccessful proposers. Notwithstanding the other provisions of this subdivision, an
5.31 unsuccessful short-list proposer may elect to waive the stipulated fee. If an unsuccessful
5.32 short-list proposer elects to waive the stipulated fee, the commissioner may not use
5.33 ideas and information contained in that proposer's proposal. Upon the request of the
5.34 commissioner, a proposer who waived a stipulated fee may withdraw the waiver, in which

6.1 case the commissioner shall pay the stipulated fee to the proposer and thereafter may use
6.2 ideas and information in the proposer's proposal.

6.3 Sec. 8. Minnesota Statutes 2006, section 161.3426, subdivision 4, is amended to read:

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

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

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

6.12 (1) The first step is the review of the technical proposal by the Technical Review
6.13 Committee as provided in section 161.3420, subdivision 2. The Technical Review
6.14 Committee must open the technical proposal first and must determine if it complies with
6.15 the requirements of the RFP and is responsive. The Technical Review Committee shall
6.16 reject any nonresponsive proposal. The Technical Review Committee may not perform
6.17 any ranking or scoring of the technical proposals.

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

6.21 (d) The contract award under low-bid, design-build procedures must be made to the
6.22 proposer whose sealed bid is responsive to the technical requirements ~~as determined by~~
6.23 ~~the Technical Review Committee~~ and that is also the lowest bid.

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

6.27 **EFFECTIVE DATE.** This section is effective the day following final enactment.

6.28 Sec. 9. **REPEALER.**

6.29 Minnesota Statutes 2006, section 161.3426, subdivision 2, is repealed.

APPENDIX
Repealed Minnesota Statutes: H3301-2

161.3426 DESIGN-BUILD AWARD.

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.