



CITY OF RAPID CITY

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MEMORANDUM

TO: Common Council

FROM: Carla Cushman, Assistant City Attorney

DATE: February 11, 2014

RE: Procedures for Design-Build Procurement of Public Improvement Projects (Best Value Process)

Over the past ten months, I have worked with Alex DeSmidt at Parks & Recreation to review the statutory requirements for design-build procedures found in SDCL Chapter 5-18B. That section requires that, prior to seeking proposals for a design-build public improvement project, the City put into place comprehensive procedures for soliciting design-build contracts. The statutory requirements on these procedures are substantial, and Alex and I have worked together to craft procedures for the City that both meet the statutory requirements while also providing a workable and usable procedure for the City to use.

Following is an excerpt of a memo I drafted for Alex which discusses the statutory requirements for design-build RFPs and the necessary design-build procedures. If you have any questions regarding this memo or its contents, please feel free to talk to me or Joel about it.

A. Procedures For Solicitation and Award of Design-Build Contracts

Before issuing any design-build RFPs, the City must first “establish and publish procedures for the solicitation and award of design-build contracts.” *SDCL 5-18B-20*. Those procedures must include the following:

- (1) Procedure to select/designate a performance criteria developer using a qualification based process (*see section 2 below*);
- (2) Procedure to prepare performance criteria;
- (3) Procedure for preparation and contents of design-build RFPs;

- (4) Procedure for preparing and submitting proposals;
- (5) Procedures for evaluating proposals (*see section 1 below*);
- (6) Procedures for negotiations between City and those submitting proposals prior to acceptance of a proposal (containing safeguards to preserve confidential and proprietary information consistent with 5-18B-34);
- (7) Procedures for awarding and executing design-build contracts;
- (8) Procedures for awarding design-build contracts in the event of public emergencies under 5-18A-9; and
- (9) Procedures for acting on formal protests relating to solicitation / award of design-build contracts.

SDCL 5-18B-20. Some of these requirements are further explained below.

1. Requirements and pre-qualification for design-builders

There are several requirements for design-builders, or individuals who submit proposals for design-build RFPs. First, they must be either an architect, an engineer, or a general contractor. *SDCL 5-18B-21.* Design-builders may sublet responsibility for professional design services to others “licensed and registered to provide professional design services in this state.” *SDCL 5-18B-22.* And design-builders may also sublet responsibility for construction and other services to people who are registered, licensed, or otherwise qualified to do such work. *SDCL 5-18B-23.* Additionally, if a design-builder sublets all necessary professional and construction services for which he is not licensed, registered, or qualified, then a design-builder may contract with City even if the design-builder is not licensed, registered, or qualified himself/herself. *SDCL 5-18B-24.*

Unless otherwise permitted, design-builders must be prequalified in order to build on design-build RFPs and be awarded design-build RFPs. *SDCL 5-18B-29.* The City shall advertise its request for qualifications in accordance with advertising requirements under the bid law found in 5-18A-14. A request for qualification must include:

- (1) Identity of purchasing agency (i.e. the City);
- (2) Description of proposed public improvement;
- (3) Budget limits for proposed public improvement;
- (4) Requirements the design-builder will be required to have; and
- (5) Criteria and their relative weight for prequalification.

SDCL 5-18B-31.

1. Requirements for performance criteria developer and development of criteria

Design-build contracts require the City to select a performance criteria developer to assist in the design-build RFP process; this individual may be a City staff person, such as the project manager. The City, in consultation with the performance criteria developer, “shall determine the

scope and level of detail required for the performance criteria.” *SDCL 5-18B-28*. The criteria “shall be detailed enough to permit a person to submit a proposal in accordance with the design-build request for proposals, given the nature of the public project and the level of design to be provided in the proposal.” *Id.*

A performance criteria developer is the individual who develops performance criteria for any RFP. *SDCL 5-18B-25*. Notably, the performance criteria developer must be either an employee of the City or shall be hired in accordance with bid law concerning professional services. *SDCL 5-18B-27*. The performance criteria developer can subcontract specific aspects of the design criteria to other consultants. *Id.* If the project would require registered design professionals under chapter 36-18A, then the performance criteria developer must be a design professional registered under 36-18A. *SDCL 5-18B-25*. If the project is exempt from 36-18A, then the performance criteria developer “shall be hired on the basis of qualifications related to projects of similar scope” (such as through the City’s consultant selection process) *Id.*

If the performance criteria developer is not city staff, his/her contract terminates if a contract is awarded to the design-builder. *SDCL 5-18B-37*; but *SDCL 5-18B-25* (stating that the City can choose to retain the performance criteria developer under the design-build contract is completed). A performance criteria developer may not submit a proposal to the design-build RFP for which he/she develops the performance criteria, nor may the design-builder delegate or contract with the performance criteria developer. *SDCL 5-18B-26*.

B. Elements of Design-Build RFPs

Once a minimum of three design-builders have been pre-qualified as described above, a design-build RFP is to be mailed to each pre-qualified design-builder. *SDCL 5-18B-29*. This minimum number is not needed if (a) the improvement project is complex in nature; (b) the project requires close coordination of design and construction expertise; and (c) project does not require significant structural changes, additions, reconstruction, or new construction. *Id.*

The design-build RFP shall be prepared for each design-build contract, and it shall contain the following elements:

- 1) The identity of the purchasing agency (i.e., the City);
- 2) The identity of the performance criteria developer;
- 3) The procedures to be followed for submitting proposals;
- 4) The criteria for evaluating proposals and its relative weight;
- 5) Procedures for making awards;
- 6) Proposed terms and conditions for design-build contract (i.e. draft of the contract);
- 7) Performance criteria, which shall include:
 - a. Owners preliminary program of space needs and special requirements;
 - b. Performance standards for materials and equipment; and
 - c. Minimum system requirements and efficiencies;

- 8) Description of drawings, specifications, or other submittals to be submitted with the proposal, with guidance as to how complete they need to be;
 - a. The RFP may not include “detailed designs or detailed drawings prepared by the performance criteria developer.” *SDCL 5-18B-30*. It may include “drawings of existing conditions and any preliminary conceptual sketches necessary to illustrate” the performance criteria. Conceptual drawings “shall contain the minimum information necessary to convey the requirements.” *Id.* RFP cannot include detailed construction specs, and any design and construction standards “shall be performance standards only.” *Id.*
- 9) Schedule for planned commencement and completion of project;
- 10) Budget limits for contract;
- 11) Affirmative action, disadvantaged business, or set-aside goals or requirements for contract, if any;
- 12) Requirements for performance and payment bonds;
- 13) Requirements for insurance;
- 14) Compensation, if any, to be given to design-builders who submit but are not awarded project;
- 15) If project financing is in place;
- 16) Schedule for payments to design-builder;
- 17) Site identification and geotechnical information if City owns site;
- 18) Location of existing utilities and their capacity if City owns site; and
- 19) Warranty and guarantee requirements.

SDCL 5-18B-29.

The proposals are to be sealed and only opened when time expires for making proposals, as discussed in the RFP. *SDCL 5-18B-33*. To the extent the RFP requires, the proposals shall identify subcontractors under the design-build contract, and at a minimum shall identify each person to whom the design-builder proposes to sublet design obligations or general construction obligations. *Id.* This person may only be replaced with approval of City. *Id.* Proposals shall establish a cost that may not be exceeded, but this cost may be converted to fixed prices by negotiation of the parties. *Id.*

Until the proposal is accepted, the contents of the proposal remain the property of the person making the proposal. *SDCL 5-18B-34*. City shall make reasonable efforts to maintain the secrecy and confidentiality of a proposal and may not disclose such information to design-builder’s competitors. *Id.* City cannot disclose confidential or proprietary information to the public until the proposal is accepted. *Id.*

All proposals under the design-build rules must include a deposit or bond under *SDCL 5-18B-2* that is forfeited if the design-builder fails to execute the design-build contract. *SDCL 5-18B-32*. Any proposal may be withdrawn by the proposer for any reason at any time prior to acceptance. *SDCL 5-18B-38*.

C. Award of Design-Build Contract

The performance criteria developer reviews all proposals, and he/she may seek clarification from proposer “to ensure conformance of any proposal with the performance criteria.” *SDCL 5-18B-35*. This person cannot disclose any aspect of one proposal to another design-builder. “No proposal may be considered until the performance criteria developer issues a written opinion that the proposal is consistent with the performance criteria.” *Id.* Once that written opinion is given, the proposal is submitted to the “governing body of the purchasing agency for review and evaluation.” *Id.* “No proposal or contract may be accepted unless [the City] determines there was adequate competition for the contract.” *Id.*

The City “may accept the proposal it considers most advantageous” to the City. *SDCL 5-18B-36*. Acceptance is made by written notice to design-builder, and at the same time the City shall inform in writing the other design-builders that their proposal was not accepted. *Id.* Unless all proposals were rejected, the City shall make a detailed breakdown of the evaluation criteria scores for each proposal available to the public after the design-build contract is executed. *Id.* The City may reject any and all design-build proposals, and may solicit new proposals using the same or different performance criteria, budget constraints, or qualifications. *SDCL 5-18B-37*.

D. Finding that Design-Build is in Best Interest of the Public.

Prior to advertising a design-build contract through an RFP, the City shall “make a determination that it is in the best interest of the public to enter into a design-build contract to complete the public improvement.” *SDCL 5-18B-20(2)*. One or more of the following criteria must be met:

- (1) City requires a project design and construction timeline that is faster than the traditional design/bid/build process would allow;
- (2) Complexity of the project requires close coordination of design and construction expertise or an extreme amount of coordination;
- (3) City requires early cost commitments; or
- (4) Project can be defined at an early stage and the City is able to specify all requirements.

Id. This determination and its basis must be either recorded in the project file, or recorded in the minutes of the Council meeting. *Id.*