

**ADOPTED REGULATION OF
THE DEPARTMENT OF TRANSPORTATION**

LCB File No. R049-26

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§ 1 and 2, NRS 408.100, 408.215, 408.388 and 408.3882; §§ 3-6, 10-12 and 14, NRS 408.100, 408.215, 408.388, 408.3882 and 408.3886; §§ 7-9, NRS 408.100, 408.215, 408.388, 408.3882 and 408.3883; § 13, NRS 408.100, 408.215, 408.388, 408.3882, 408.3883 and 408.3886.

A REGULATION relating to highways; establishing requirements for the Department of Transportation to request proposals and enter into contracts for the design and construction, reconstruction or improvement of a highway by a design-build team; establishing requirements for preliminary proposals and final proposals submitted by design-build teams; establishing the procedures for the Department to evaluate and rank preliminary and final proposals submitted by the design-build teams; establishing requirements for the submission of best and final offers by design-build teams under certain circumstances; providing for the reimbursement of certain costs incurred by unsuccessful design-build teams that submitted responsive final proposals; establishing the process for the Department to negotiate and enter into a design-build contract with a design-build team; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law authorizes the Department of Transportation, under certain circumstances, to enter into a design-build contract with a design-build team for a project to design and construct, reconstruct or improve a highway. (NRS 408.3879, 408.388) Existing law also establishes the procedures that the Department is required to use to select a design-build team to be awarded such a design-build contract. (NRS 408.3882-408.3886) Specifically, to select a design-build team, the Department is required to first: (1) advertise for preliminary proposals for the design and construction of a project by a design-build team in a newspaper of general circulation in this State; and (2) based on an evaluation of the qualifications of design-build teams that submit preliminary proposals, select at least three but not more than five finalists. (NRS 408.3883, 408.3885) If the Department does not receive at least three preliminary proposals from design-build teams that are qualified to participate in the design and construction of the project, the Department is prohibited from entering into a design-build contract for the project. (NRS 408.3885) After selecting the finalists, the Department is required to: (1) provide a request for final proposals to each finalist; and (2) select the most cost-effective and responsive final proposal, reject all the final proposals or request best and final offers from finalists in accordance with existing law. (NRS 408.3886) This regulation adopts procedures to carry out existing law governing the selection by the Department of a design-build team for a project.

Sections 2-7 of this regulation provide definitions of terms used in the selection of a design-build team for a project.

Section 8 of this regulation provides that before advertising for preliminary proposals for the design and construction of a project, the Department may issue a request for letters of interest in the project by design-build teams to provide early notification of the project and to allow design-build teams to begin teaming arrangements, financial arrangements and preliminary investigative work. **Section 8** also provides that in addition to advertising for preliminary proposals in a newspaper of general circulation in this State in accordance with existing law, the Department: (1) will provide notice of its request for preliminary proposals to each design-build team that responds to a request for letters of interest; and (2) may publish notice of the request for preliminary proposals for at least 30 days on the Department's Internet website. Finally, **section 8**: (1) provides that the Department may include certain information in its request for preliminary proposals in addition to the information required by existing law to be included in a request for preliminary proposals; (2) establishes a process for the submission of a request for additional information or clarification of a request for preliminary proposals; and (3) authorizes the Department to issue a formal addendum to a request for preliminary proposals to clarify the requirements for a preliminary proposal, correct errors or provide supplemental information.

Section 9 of this regulation prescribes the information that a design-build team must include in a preliminary proposal submitted to the Department and establishes the procedures for the Department to evaluate and rank preliminary proposals submitted by design-build teams. Under **section 9**, the Department will appoint a panel consisting of at least three members to evaluate and rank preliminary proposals. **Section 9** authorizes the panel, in evaluating preliminary proposals, to seek advice from and consult with representatives of and advisors to the Department who have experience and expertise in the subject matter of the proposal. **Section 9** requires the panel to recommend the finalists and authorizes the Department to accept the recommendations, reject the recommendations or request that the panel conduct further analysis and reconsider its recommendations.

Section 10 of this regulation establishes requirements for a request for final proposals provided by the Department to the finalists. Under **section 10**, the Department may issue a draft request for final proposals to allow the finalists to offer feedback on the quality of the request for final proposals and to provide early notice of the details of the request for final proposals. **Section 10** also establishes a process for the submission of requests for additional information or clarification concerning the request for final proposals and authorizes the Department to issue a formal addendum to a request for final proposals to clarify the requirements for final proposals, correct errors or provide supplemental information.

Section 11 of this regulation establishes the procedures for evaluating and ranking final proposals submitted by finalists. Under **section 11**, the Department will appoint: (1) a proposal selection committee consisting of at least three members to evaluate and score the technical aspects of each final proposal, which may seek advice from and consult with representatives of and advisors to the Department with experience and expertise in the subject matter of the project; and (2) a price proposal committee consisting of at least three members to evaluate the price proposal of each final proposal. Finally, **section 11** establishes the method for the scoring of final proposals and the selection of the most cost-effective and responsive final proposal.

Section 12 of this regulation provides procedures for the issuance by the Department of a request for best and final offers when none of the final proposals received by the Department is responsive to the request for final proposals or satisfactorily achieves the goals and needs of the

project. Under **section 12**, the Department will: (1) evaluate best and final offers in the same manner as the Department evaluates final proposals and rank each responsive best and final offer; and (2) select the most cost-effective and responsive offer or reject all best and final offers.

Under existing law, the Department is required to partially reimburse an unsuccessful finalist for the cost of preparing a final proposal or best and final offer, or both, in an amount not exceed 3 percent of the total amount to be paid to the design-build team as set forth in the design-build contract, if such partial reimbursement was provided for in the request for preliminary proposals. (NRS 408.3883, 408.3886) **Section 13** of this regulation adopts provisions governing the payment of such partial reimbursements.

Section 14 of this regulation provides that the Department will attempt to negotiate a contract with the preferred proposer, which is defined in **section 6** as the finalist whose final proposal or best and final offer is selected by the Department as the most cost-effective and responsive final proposal or best and final offer. Under **section 14**, if the Department is unable to negotiate a satisfactory design-build contract with the preferred proposer, the Department may suspend or end negotiations with the preferred proposer and initiate negotiations with the finalist ranked as the next best proposer. **Section 14** authorizes the Department to repeat this process until the Department has reached a satisfactory design-build contract or has attempted to negotiate with every finalist which the Department has ranked. Finally, **section 14** provides that the Department will conduct a public meeting after it has successfully negotiated a design-build contract to review and ratify the design-build contract and provide certain information to the public.

Section 1. Chapter 408 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 14, inclusive, of this regulation.

Sec. 2. *As used in sections 2 to 14, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 3 to 7, inclusive, of this regulation have the meanings ascribed to them in those sections.*

Sec. 3. *“Competitive range” means a list of the highest ranked final proposals, after the Department evaluates and ranks each final proposal against every other final proposal using the criteria for evaluation set forth in the Department’s request for final proposals.*

Sec. 4. *“Final proposal” means a proposal submitted by a finalist in response to a request for final proposals provided to each finalist by the Department pursuant to NRS 408.3886.*

Sec. 5. *“Finalist” means a design-build team that has submitted a preliminary proposal and, based on an evaluation of its preliminary proposal, is selected by the Department as eligible to submit a final proposal for a project.*

Sec. 6. *“Preferred proposer” means:*

- 1. The finalist whose final proposal is selected by the Department as the most cost-effective and responsive final proposal pursuant to section 11 of this regulation; or*
- 2. If the Department issues a request for best and final offers, the finalist whose best and final offer is selected by the Department as the most cost-effective and responsive best and final offer pursuant to section 12 of this regulation.*

Sec. 7. *“Preliminary proposal” means a proposal submitted by a design-build team in response to a request for preliminary proposals published by the Department pursuant to NRS 408.3883.*

Sec. 8. *1. Before advertising for preliminary proposals for the design and construction of a project by a design-build team pursuant to NRS 408.3883, the Department may issue a request for letters of interest in the design and construction of the project by design-build teams to provide early notification of the project and to allow design-build teams to begin teaming arrangements, financial arrangements and preliminary investigative work. A request for letters of interest may include, without limitation:*

- (a) The general objectives of the project;*
- (b) The location of the project;*
- (c) The schedule of the project;*
- (d) An estimated budget for the completion of the project; and*
- (e) A general description of the scope of the work to be performed.*

2. *In addition to advertising for preliminary proposals in accordance with subsection 1 of NRS 408.3883, the Department will provide notice of the request for preliminary proposals to each design-build team that responds to a request for letters of interest issued pursuant to subsection 1 and may publish notice of the request for preliminary proposals for at least 30 days on the Department's website at the Internet address <https://www.dot.nv.gov> or any successor website used by the Department to advertise projects.*

3. *In addition to the information required by NRS 408.3883 to be included in a request for preliminary proposals, the Department may include in a request for preliminary proposals, without limitation:*

- (a) A description of the procurement process;*
- (b) The factors that the Department will use to evaluate design-build teams who submit a preliminary proposal and the relative weight assigned to each factor;*
- (c) The process that the Department will use to evaluate design-build teams who submit a preliminary proposal;*
- (d) The process for a design-build team to submit questions to the Department concerning the request for preliminary proposals or request clarification from the Department of any aspect of the request for preliminary proposals;*
- (e) The requirements for the format and submission of a preliminary proposal; and*
- (f) Any forms and questionnaires that the Department requires to be submitted as part of a preliminary proposal.*

4. *Upon issuance of a request for preliminary proposals, a design-build team may request from the Department additional information or clarification concerning the request for preliminary proposals. The Department will establish a deadline by which a design-build team*

must submit a request for additional information or clarification and a deadline by which the Department will provide a formal response to such a request. Unless providing notice of the formal response of the Department would result in the disclosure of confidential information, the Department may notify design-build teams that wish to submit a preliminary proposal of the formal response of the Department to a request for additional information or clarification by posting the response on the Department's website at the Internet address <https://www.dot.nv.gov> or any successor website used by the Department to advertise projects.

5. The Department may issue a formal addendum to a request for preliminary proposals to clarify the requirements for a preliminary proposal, correct errors or provide supplemental information.

Sec. 9. 1. *A preliminary proposal submitted by a design-build team must include, without limitation:*

(a) A statement of whether the design-build team satisfies the requirements of NRS 408.3884 to qualify to participate in the design and construction of the project;

(b) The information requested by the Department concerning the organization of the design-build team and each principal participant and major participant in the design-build team;

(c) Evidence satisfactory to the Department that the design-build team has obtained a surety bond that is in the amount required by the Department and executed by the design-build team as principal and by a surety company qualified and authorized to do business in this State as surety;

(d) The information requested by the Department concerning the plan of the design-build team to manage the design and construction of the project, including, without limitation, an

identification of the issues and risks associated with the project and the approach of the design-build team to managing those issues and risks;

(e) The information requested by the Department concerning the qualifications of the key personnel of the design-build team;

(f) The information requested by the Department concerning the experience and past performance of the members of the design-build team;

(g) The information requested by the Department concerning the safety programs established and the safety records accumulated by the members of the design-build team; and

(h) If the preference in bidding set forth in subsection 2 of NRS 408.3886 will apply to the project and the design-build team seeks to qualify for that preference in bidding:

(1) A copy of the certificate of eligibility to receive a preference in bidding issued to the prime contractor of the design-build team pursuant to NRS 338.1389 or 338.147;

(2) A copy of the certificate of eligibility to receive a preference when competing for public works issued pursuant to NRS 338.173 to those members of the design-build team who hold a certificate of registration to practice architecture or a license as a professional engineer; and

(3) A signed affidavit that meets the requirements of subsection 1 of NRS 338.0117.

2. The Department will appoint a panel consisting of at least three members to evaluate and rank preliminary proposals. In evaluating and ranking preliminary proposals, the panel may seek advice from and consult with representatives of and advisors to the Department who have experience and expertise in the subject matter of the project. The Department may refuse to submit a preliminary proposal to the panel for evaluation and ranking if the preliminary proposal does not include all the information necessary to complete the preliminary proposal.

3. *The panel appointed pursuant to subsection 2 shall verify that each design-build team which submitted a preliminary proposal satisfies the requirements of NRS 408.3884, evaluate the qualifications of each design-build team that submitted a preliminary proposal and rank those preliminary proposals by evaluating the factors set forth in paragraph (b) of subsection 2 of NRS 408.3885. Except as otherwise provided in subsection 1 of NRS 408.3885, the panel shall recommend to the Department at least three but not more than five finalists from among the design-build teams that submitted preliminary proposals.*

4. *The Department may:*

(a) Accept the recommendations of the panel and select as finalists the design-build teams recommended by the panel;

(b) Reject the recommendations of the panel; or

(c) Request that the panel conduct further analysis and reconsider its recommendations.

Sec. 10. *1. The Department will provide to each finalist a request for final proposals for the project. A request for final proposals must include, without limitation:*

(a) Instructions to the finalists that establish the rules and procedures that the finalists must follow when preparing and submitting their final proposals and that define the manner in which the Department will review and evaluate final proposals;

(b) Information concerning the terms and conditions of the contract between the Department and the design-build team selected by the Department that will govern the project throughout each phase of the project;

(c) Technical provisions that provide the technical requirements for the design, construction and maintenance of the project; and

(d) Any information or documents that the Department determines will assist the finalists to understand the project and submit a final proposal.

2. The Department may issue a draft request for final proposals to each finalist to allow the finalists to offer feedback to the Department on the quality of the request for final proposals and to provide the finalists with early notice of the details of the request for final proposals, including, without limitation, the scope and the technical aspects of the project.

3. Upon issuance of a request for final proposals, each finalist may request from the Department additional information or clarification concerning the request for final proposals. The Department will establish a deadline by which finalists must submit a request for additional information or clarification and a deadline by which the Department will provide a formal response to a request for additional information or clarification. The Department will provide each finalist with any formal response to a request for additional information or clarification.

4. The Department may issue a formal addendum to a request for final proposals to clarify requirements for a final proposal, correct errors or provide supplemental information.

Sec. 11. 1. *To evaluate each final proposal, the Department will appoint:*

(a) A proposal selection committee consisting of at least three members to evaluate and score the technical aspects of each final proposal. In evaluating the technical aspects of a final proposal, a proposal selection committee may seek advice from and consult with representatives of and advisors to the Department who have experience and expertise in the subject matter of the project.

(b) A price proposal selection committee consisting of at least three members to evaluate the price proposal of each final proposal for balance and to calculate the price score assigned

to each final proposal. The price score assigned to a final proposal must be calculated by dividing the lowest price proposal submitted by the finalists by the price proposal of the final proposal being evaluated and multiplying that quotient by the number of points assigned by the panel to the price proposal of the final proposal being evaluated.

2. If the Department determines that a final proposal is nonresponsive because the final proposal does not satisfy requirements for the form of a final proposal, the timeliness of submitting a final proposal or the information requested in the instructions to proposers included in the request for proposals, the Department may:

- (a) Waive any minor deficiency;*
- (b) Allow a finalist to correct a deficiency or clarify or supplement the final proposal; or*
- (c) Reject the final proposal and refuse to submit the final proposal for the evaluation required by subsection 1.*

3. To determine the finalist that submitted the best value final proposal, the Department will combine the price score calculated pursuant to paragraph (b) of subsection 1 and the technical score assigned pursuant to paragraph (a) of subsection 1.

4. The Department may:

- (a) Accept the recommendations of the proposal selection committee and select the most cost-effective and responsive final proposal in accordance with that recommendation;*
- (b) Reject the recommendations of the panel;*
- (c) Request that the panel conduct further analysis and reconsider its recommendations; or*
- (d) Request best and final offers from all finalists in accordance with subsection 5 of NRS 408.3886 and section 12 of this regulation.*

Sec. 12. 1. The Department may issue a request for best and final offers if the

Department determines that:

(a) No final proposal received by the Department:

(1) Is responsive to the request for final proposals; or

(2) Satisfactorily achieves the goals and needs of the project for any reason, including, without limitation, the final proposals received:

(I) Are not cost effective;

(II) Exceed budget amounts or cost estimates; or

(III) Identify technical or scope ambiguities in the request for final proposals; and

(b) A request for best and final offers may result in the submission of a satisfactory final proposal.

2. The Department may issue a request for best and final offers to:

(a) Each finalist who submitted a final proposal for the project; or

(b) Only those finalists who submitted responsive final proposals within a competitive range.

3. The Department may, when preparing a request for best and final offers:

(a) Hold individual or joint meetings or discussions with finalists concerning the project;

(b) Modify the scope of the project;

(c) Modify the terms of any contract;

(d) Revise the estimates of costs of the project; or

(e) Revise the criteria for evaluation of final proposals and the relative weight assigned to each criterion.

4. *A request for best and final offers issued by the Department must set forth the date and time on which best and final offers must be submitted to the Department.*

5. *After receiving submissions of best and final offers, the Department will evaluate the best and final offers in the same manner as the Department evaluates a final proposal, including, without limitation, refusing to review a nonresponsive best and final offer, holding individual meetings with a proposer or joint meetings with multiple proposers and requesting clarifications or interviewing a proposer concerning the proposal.*

6. *After reviewing the best and final offers submitted for the project and any clarifications or additional information provided by a proposer pursuant to subsection 5, the Department may:*

(a) Rank each responsive best and final offer submitted, with the most cost-effective and responsive offer as the preferred proposer, and the next highest ranked offer as the second preferred proposer, and so on, for each offer; or

(b) Reject all best and final offers.

Sec. 13. 1. *Except as otherwise provided in this section, the Department and its agents, officers or employees are not liable for reimbursing a design-build team for the costs incurred by the design-build team in developing or negotiating a preliminary proposal, final proposal or best and final offer.*

2. *The Department may partially reimburse the unsuccessful finalists who submitted a responsive final proposal for the cost of preparing a final proposal or best and final offer, or both, if such partial reimbursement was provided for in the request for preliminary proposals pursuant to paragraph (f) of subsection 3 of NRS 408.3883.*

3. Pursuant to paragraph (b) of subsection 6 of NRS 408.3886, the amount of such reimbursement must not exceed, for each unsuccessful finalist, 3 percent of the total amount to be paid to the successful design-build team as set forth in the design-build contract.

4. Any reimbursement made pursuant to this section is payable in the manner set forth in the request for final proposals but, notwithstanding the request for proposals, is payable not later than the execution of the contract or financial close, whichever occurs later.

Sec. 14. 1. After determining the preferred proposer pursuant to section 11 or 12 of this regulation, the Department will attempt to negotiate a design-build contract with the preferred proposer.

2. If the Department cannot negotiate a satisfactory design-build contract, as determined by the Department, with the preferred proposer, the Department may suspend or end negotiations with the preferred proposer by notifying the preferred proposer in writing of the Department's decision to suspend or end negotiations.

3. If the Department suspends or ends negotiations with the preferred proposer, the Department may initiate negotiations with the finalist who was ranked as the next best proposer during the evaluation process. The Department may repeat the process of suspending or ending negotiations and beginning a negotiation with the next best proposer until the Department can reach a satisfactory design-build contract or until the Department has attempted to negotiate with every finalist which the Department ranked during the evaluation process.

4. If the Department successfully negotiates a design-build contract with a proposer, the Department will hold a public meeting pursuant to subsection 6 of NRS 408.3886 to:

(a) Review and ratify the selection of the proposer and the design-build contract.

Ratification of a contract requires approval by the Department and execution of the contract by the Chair of the Board.

(b) Make available to the public a summary setting forth the criteria used by the Department to select the preferred proposer and the ranking of the finalists who submitted final proposals and best and final offers, if applicable. The Department will not release to a third party, or otherwise make public, any financial information submitted by a proposer.