

RESOLUTION NO. 1290

**TO ADOPT A POLICY GOVERNING DESIGN-BUILD AND
CONSTRUCTION MANAGEMENT AT-RISK CONTRACTS**

WHEREAS, the City of Fairbury, Nebraska ("City") is a municipal corporation and political subdivision of the State of Nebraska; and

WHEREAS, the Political Subdivisions Construction Alternatives Act, Neb. Rev. Stat. §§ 13-2901 through 13-2914 ("Act"), sets forth the requirements for political subdivisions to enter into a design-build contract or a construction management at risk contract for a public project as an alternative to a public letting process; and

WHEREAS, the Act requires that the City, in order to utilize a design-build or construction management at risk process, adopt policies consistent with the requirements of the Act.

THEREFORE, BE IT RESOLVED by the Mayor and Council of the City of Fairbury, Nebraska:

Section 1. The document captioned "Policy Governing Design-Build and Construction Management At-Risk Contracts," a copy of which is marked as Exhibit A, attached hereto, and incorporated herein by this reference, be and hereby is adopted as a policy of the City.

Section 2. All other resolutions or parts of resolutions passed and adopted prior to the passage and adoption of this resolution that are in conflict herewith are hereby repealed.

Section 3. This resolution shall take effect and be in force immediately upon its passage and adoption.

Passed and adopted at 7:40 p.m. on the 19th day of November, 2024.



Spencer Brown, Mayor

ATTEST:



Erin Reimer, City Clerk



CITY OF FAIRBURY, NEBRASKA

**POLICY GOVERNING DESIGN-BUILD AND
CONSTRUCTION MANAGEMENT AT-RISK CONTRACTS**

Effective NOVEMBER 19, 2024
Adopted by City Council on NOVEMBER 19, 2024, Resolution 1290

A. PURPOSE

This policy sets forth the procedures that the City of Fairbury, Nebraska (the "City") will use, in accordance with and pursuant to the Political Subdivision Construction Alternatives Act, Neb. Rev. Stat. §§ 13-2901 through 13-2914 (the "Act"), when the City chooses to employ and utilize an alternative project delivery method authorized by the Act.

B. DEFINITIONS

For the purposes of this policy, the following terms, in accordance with the Act, shall mean:

- a. *Construction management at-risk contract* is a contract by which a construction manager (a) assumes the legal responsibility to deliver a construction project within a contracted price to the City, (b) acts as a construction consultant to the City during the design development phase of the project when the City's architect or engineer designs the project, and (c) is the builder during the construction phase of the project.
- b. *Construction manager* is the legal entity which proposes to enter into a construction management at-risk contract pursuant to the Act.
- c. *Design-build contract* is a contract which is subject to qualification-based selection between the City and a design-builder to furnish (a) architectural, engineering, and related design services for a project pursuant to the Act, and (b) labor, materials, supplies, equipment, and construction services for a project pursuant to the Act.
- d. *Design-builder* is a legal entity which proposes to enter into a design-build contract which is subject to qualification-based selection pursuant to the Act.
- e. *Letter of interest* is a statement indicating interest to enter into a design-build contract or a construction management at-risk contract for a project pursuant to the Act.
- f. *Performance-criteria developer* ("PCD") is any person licensed or any organization issued a certificate of authorization to practice architecture or engineering pursuant to the Engineers and Architects Regulation Act¹ who is selected by the City to assist the City in the development of project performance criteria, requests for proposals, evaluation of proposals, evaluation of the construction under a design-build contract to determine adherence to the performance criteria, and any additional services requested by the political subdivision to represent its interests in relation to a project.

¹ Neb. Rev. Stat. §§ 81-3401 through 81-3455

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- g. *Project performance criteria* are the performance requirements of the project suitable to allow the design-builder to make a proposal. Performance requirements include the following, if required by the project: capacity, durability, standards, ingress and egress requirements, description of the site, surveys, soil and environmental information concerning the site, interior space requirements, material quality standards, design and construction schedules, site development requirements, provisions for utilities, storm water retention and disposal, parking requirements, applicable governmental code requirements, and other criteria for the intended use of the project.
- h. *Proposal* is an offer in response to a request for proposals (a) by a design-builder to enter into a design-build contract for a project pursuant to the Act or (b) by a construction manager to enter into a construction management at-risk contract for a project pursuant to the Act.
- i. *Qualification-based selection process* is a process of selecting a design-builder based first on the qualifications of the design-builder and then on the design-builder's proposed approach to the design and construction of the project.
- j. *Request for letters of interest* is the documentation or publication by which the City solicits letters of interest.
- k. *Request for proposals* is the documentation by which the City solicits proposals.

C. AUTHORIZATION OF CONSTRUCTION DELIVERY METHOD

To initiate a project under this policy, the City Council must adopt a resolution to select and specifically authorize either a design-build or construction management at-risk contract approach for the project. The resolution shall require the affirmative vote of at least two-thirds (2/3) of the City Council. If the resolution is adopted, the City shall proceed as set forth in this policy for the authorized project.

Each project to be constructed under this policy must be authorized by a specific resolution.

The City shall not use a design-build or construction management at-risk contract for a project, in whole or in part, for road, street, highway, water, wastewater, utility, or sewer construction.

This policy does not limit or reduce statutory or regulatory requirements regarding bonding or insurance for any project of the City.

D. DESIGN-BUILD PROJECT

- a. Selection of PCD

The City, if wishing to select and hire a PCD to assist the City in soliciting and executing a design-build contract for a project, shall make such selection consistent with the Nebraska

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Consultants' Competitive Negotiation Act.² The selected PCD shall be recommended by the Public Works Committee to the City Council for approval.

A PCD shall be ineligible to be included as a provider of any services in a proposal for a project on which it has acted as a performance-criteria developer or is employed by or has a financial or other interest in a design-builder or construction manager who will submit a proposal.

An organization PCD shall agree and provide assurances to the City that its employees who are providing architectural or engineering professional services are licensed to practice in the State of Nebraska and will comply with the Engineers and Architects Regulation Act by procuring a certificate of authorization to practice architecture or engineering.

The PCD shall also submit proof of sufficient professional liability insurance.

b. Letters of Interest

The City shall prepare a request for letters of interest for design-build proposals and shall prequalify design-builder in accordance with this section. The request for letters of interest should describe the project in sufficient detail to permit a design-builder to submit a letter of interest.

The request for letters of interest shall be published in a newspaper of general circulation within the City at least thirty (30) days prior to the deadline for receiving letters of interest and shall be sent by first-class mail to any design-builder upon written request.

c. Prequalification Procedure

Letters of interest shall be reviewed by the City in consultation with the PCD. The City shall select prospective design-builders in accordance with the procedures and standards set forth in this policy. The City shall select at least three (3) prospective design-builders, except that if only two (2) design-builders have submitted letters of interest, the City shall select at least two (2) prospective design-builders. The selected design-builders shall be considered prequalified and eligible to receive a request for proposals.

d. Request for Proposals

The City shall prepare a request for proposals ("RFP") for each design-build contract in accordance with this section. Notice of the RFP shall be published in a newspaper of general circulation within the City at least thirty (30) days prior to the deadline for receiving and opening proposals.

The RFP shall contain the following elements:

- i. A statement that the City intends to build the project and that the City Council will execute a design-build contract;
- ii. A copy of this policy;

² Neb. Rev. Stat. §§ 81-1701 through 81-1721

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- iii. The proposed terms and conditions of the design-build contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions shall be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in the State of Nebraska. The proposed terms and conditions may set forth an initial determination of the manner by which the design-builder selects any subcontractor and may require that any work subcontracted be awarded by competitive bidding;
- iv. A project statement which contains information about the scope and nature of the project;
- v. Project performance criteria;
- vi. Budget parameters for the project;
- vii. Any bonds and insurance required by law or as may be required by the City;
- viii. The criteria for evaluation of proposals and the relative weight of each criterion;
- ix. A requirement that the design-builder provide a written statement of the design-builder's proposed approach to the design and construction of the project, which may include graphic materials illustrating the proposed approach to design and construction but shall not include price proposals;
- x. A requirement that the design-builder agree to the following conditions
 - 1. An architect or engineer licensed to practice in the State of Nebraska will participate substantially in those aspects of the offering which involve architectural or engineering services;
 - 2. At the time of the design-build offering, the design-builder will furnish to the City Council a written statement identifying the architect or engineer who will perform the architectural or engineering work for the design-build project;
 - 3. The architect or engineer engaged by the design-builder to perform the architectural or engineering work with respect to the design-build project will have direct supervision of such work and may not be removed by the design-builder prior to the completion of the project without the written consent of the City Council;
 - 4. A design-builder offering design-build services with its own employees who are design professionals licensed to practice in the State of Nebraska will (i) comply with the Engineers and Architects Regulation Act by procuring a certificate of authorization to practice architecture or engineering and (ii) submit proof of sufficient professional liability insurance; and
 - 5. The rendering of architectural or engineering services by a licensed architect or engineer employed by the design-builder will conform to the

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Engineers and Architects Regulation Act and rules and regulations adopted under the act; and

xi. Such other information as the City chooses to require for the project.

e. Proposals

Proposals submitted for a design-build contract shall be sealed and shall not be opened until expiration of the time established for making proposals as set forth in the RFP.

Proposals may be withdrawn at any time prior to acceptance. The City shall have the right to reject any and all proposals except for the purpose of evading the provisions and policies of the Act. The City may thereafter solicit new proposals using the same or different project performance criteria.

f. Evaluation of Proposals

Proposals for design-build contracts shall be evaluated in accordance with the "PROPOSAL EVALUATION" section of this policy.

g. Contract Negotiation

The City shall attempt to negotiate a design-build contract with the highest ranked design-builder and may enter into a design-build contract after negotiations. The negotiations shall include a final determination of the manner by which the design-builder selects a subcontractor.

If the City is unable to negotiate a satisfactory contract with the highest design-builder, the City may terminate negotiations with that design-builder. The City may then undertake negotiations with the second highest ranked design-builder and may enter into a design-build contract after negotiations. If the City is unable to negotiate a satisfactory contract with the second highest ranked design-builder, the City may undertake negotiations with the third highest ranked design-builder, if any, and may enter into a design-build contract after negotiations.

If the City is unable to negotiate a satisfactory contract with any of the ranked design-builders, the City may either revise the request for proposals and solicit new proposals or cancel the design-build process.

A design-build contract may be conditioned upon later refinements in scope and price and may permit the City in agreement with the design-builder to make changes in the project without invalidating the contract. Later refinements shall not exceed the scope of the project statement contained in the request for proposals.

h. Evaluation of Design-Build Project

The PCD shall, as part of the request for proposals, develop performance or product criteria that will be used to evaluate the construction under a design-build contract.

The PCD may refer to standard specifications or other specifications depending upon the project.

To ensure adherence to the performance criteria, the PCD will conduct site visits at critical times to measure, observe, or count the material being placed in the design-build project. Project labels will be checked against performance criteria. Shop drawings will be required for adherence to the performance criteria.

E. CONSTRUCTION MANAGEMENT AT-RISK CONTRACTS

a. Letters of Interest

The City shall prepare a request for letters of interest for construction management at-risk proposals and shall prequalify construction management at-risk applicants in accordance with this policy. The request for letters of interest shall describe the project in sufficient detail to permit a construction manager to submit a letter of interest.

The request for letters of interest shall be published in a newspaper of general circulation within the City for at least thirty (30) days prior to the deadline for receipt of letters of interest and shall be sent by first-class mail to any construction manager upon written request.

b. Prequalification Procedure

Letters of interest shall be reviewed by the City in consultation with the architect/engineer. The City shall select prospective construction managers in accordance with the procedures and standards set forth in this policy. The City shall select at least three (3) prospective construction managers, except that if only two (2) prospective construction managers have submitted letters of interest, the City shall select at least two (2) prospective construction managers. The selected construction managers shall be considered prequalified and eligible to receive a request for proposals.

c. Requests for Proposals

The City shall prepare a request for proposal ("RFP") for each construction management at-risk contract. Construction managers shall submit proposals as required by the request for proposals as set forth below.

Notice of the RFP shall be published in a newspaper of general circulation within the City's jurisdiction at least thirty (30) days prior to the deadline for receipt and opening of proposals.

The RFP shall contain the following elements:

- i. The City intends to build the project and that the City will execute a construction management at-risk contract.
- ii. A copy of this policy;

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- iii. The proposed terms and conditions of the contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions shall be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in the State of Nebraska. The proposed terms and conditions may set forth an initial determination of the manner by which the construction manager selects any subcontractor and may require that any work subcontracted be awarded by competitive bidding;
- iv. Any bonds and insurance required by law or as may be required by the City;
- v. General information about the project which will assist the City in its selection of the construction manager, including a project statement which contains information about the scope and nature of the project, the project site, the schedule, and the estimated budget;
- vi. The criteria for evaluation of proposals and the relative weight of each criterion; and
- vii. Such other information as the City chooses to require for the project.

d. Evaluation of Proposals

Proposals for construction management at-risk contracts shall be evaluated in accordance with the "PROPOSAL EVALUATION" section of this policy.

e. Contract Negotiation

The City shall attempt to negotiate a construction management at-risk contract with the highest ranked construction manager and may enter into a construction management at-risk contract after negotiations. The negotiations shall include a final determination of the manner by which the construction manager selects a subcontractor.

If the City is unable to negotiate a satisfactory contract with the highest ranked construction manager, the City may terminate negotiations with that construction manager. The City may then undertake negotiations with the second highest ranked construction manager and may enter into a construction management at-risk contract after negotiations. If the City is unable to negotiate a satisfactory contract with the second highest ranked construction manager, the City may undertake negotiations with the third highest ranked construction manager, if any, and may enter into a construction management at-risk contract after negotiations.

If the City is unable to negotiate a satisfactory contract with any of the ranked construction managers, the City may either revise the request for proposals and solicit new proposals or cancel the construction management at-risk process.

A construction management at-risk contract may be conditioned upon later refinements in scope and price and may permit the City in agreement with the construction manager to make changes in the project without invalidating the contract. Later refinements shall not exceed the scope of the project statement contained in the request for proposals.

F. PROPOSAL EVALUATION

a. Criteria

The selection committee and the City shall evaluate proposals taking into consideration the criteria listed below with a maximum percentage of total points for evaluation which may be assigned to each criterion as indicated below:

- (1) The financial resources of the design-builder or construction manager to complete the project, five percent (5%);
- (2) The ability of the proposed personnel of the design-builder or construction manager to perform, twenty percent (20%);
- (3) The character, integrity, reputation, judgment, experience, and efficiency of the design-builder or construction manager, twenty percent (20%);
- (4) The quality of performance on previous projects, twenty percent (20%);
- (5) The ability of the design-builder or construction manager to perform within the time specified, twenty percent (20%);
- (6) The previous and existing compliance of the design-builder or construction manager with laws relating to the contract, five percent (5%); and
- (7) Such other information as may be secured having a bearing on the selection, ten percent (10%).

b. Selection Committee

The City shall refer proposals for design-build contracts or construction management at-risk contracts to a selection committee for recommendation. The selection committee shall consist of five (5) individuals, as follows:

- i. The chair of the Public Works Committee of the City Council;
- ii. The Development Services Director of the City;
- iii. The PCD, when evaluating proposals from design-builders, or the City Engineer, when evaluating proposals from construction managers;
- iv. An individual appointed by the Mayor having special expertise relevant to selection of a design-builder or construction manager; and
- v. An individual appointed by the Mayor that resides within the City and is not otherwise listed above.

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A selection committee member designated under iv. or v. above shall not be employed by or have a financial or other interest in a design-builder or construction manager who has a proposal being evaluated and shall not be employed by the City or, in the case of a design-build project, the PCD.

The selection committee shall appoint a committee member or City employee to keep the minutes of the selection committee meetings, which shall be consistent in form and content with the minutes of committees of the City Council.

The records of the selection committee shall be considered public records.³

c. City Evaluation

The City shall evaluate and rank each proposal on the basis of best meeting the criteria in the RFP and take into consideration the recommendation of the selection committee.

The ranking of the City shall be the ranking which determines the order of contract negotiations for a design-build or construction manager-at risk process in accordance with this policy.

G. Procedures for Protests

Disputes relating to the execution or solicitation of design-build or construction management at-risk contracts shall be submitted to the City Council's designee in writing. The City Council designee will, within ten (10) business days, meet with the protesting party and attempt to resolve the issue. Within ten (10) business days after the meeting with the protesting party, the City Council designee will issue a decision.

If the protesting party is not satisfied with the decision, it can, in writing submitted to the City Clerk, ask for a hearing before the Public Works Committee of the City Council. This hearing will be scheduled within thirty (30) days of the written hearing request being received by the City Clerk. The Public Works Committee will hear the protest and issue a recommendation on the protest within thirty (30) days of the hearing. The City Council shall then vote on the Public Works Committee's recommendation at the next regularly scheduled City Council meeting.

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³ Neb. Rev. Stat. §§ 84-712 through 84-712.09

