



SPONSOR: Sen. Poore & Rep. Jaques
Sens. Hansen, Henry, Walsh; Reps. Brady, Osienski

DELAWARE STATE SENATE
149th GENERAL ASSEMBLY

SENATE BILL NO. 208

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE RELATING TO PUBLIC WORKS CONTRACTING.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend § 6962, Title 29 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

3 § 6962. Large public works contract procedures.

4 (c) Bidder prequalification requirements. —

5 (3) The prequalification process shall include a requirement that the contractor or subcontractor submit a
6 statement under oath on a form designated by the Office. The form shall fully describe and establish the financial
7 ability, responsibility, plant and equipment, organization, ownership, relationships, and prior experience of the
8 contractor or subcontractor and any other pertinent and material facts as may be deemed necessary by the Office.
9 At the discretion of the Office, the submission shall include part or all of the following:

10 c. Performance reviews of the proposing contractor or subcontractor on previously awarded public
11 works or private sector construction projects within the last ~~10~~ 5 years;

12 (12)a. A Department of Transportation project, excluding a Community Transportation Fund or
13 municipal street aid contract, must include a performance-based rating system.

14 b. The Department of Transportation's performance-based rating system must be defined in
15 regulations promulgated by the Secretary of the Department of Transportation.

16 c. A contractor is eligible to bid as follows:

17 1. A contractor meeting or exceeding the minimum contractor's performance rating at the time
18 of bid, as determined by the Department's performance-based contractor evaluation system, is
19 eligible to bid.

20 2. A contractor who does not meet or exceed the minimum contractor's performance rating at the
21 time of bid is eligible to bid if the contractor agrees to allow the Department to retain 10% of the

22 payments to be made to the contractor for work performed under the contract under the procedures
23 provided in paragraph (d)(5)a.1. of this section.

24 (d) Bid specifications and plans requirements.

25 (13) Bid evaluation, contract award and execution procedure. —

26 a. The contracting agency shall award any public works contract within 30 days of the bid opening to
27 the lowest responsive and responsible bidder, unless the agency elects to award on the basis of best value,
28 in which case the election to award on the basis of best value shall be stated in the invitation to bid. Any
29 public school district and its board shall award public works contracts in accordance with this section's
30 requirements except it shall award the contract within 60 days of the bid opening. A contracting agency
31 shall extend the 30-day bid evaluation period by a total of 5 working days and a school district shall
32 extend the 60-day bid evaluation period by a total of 5 working days if a bid is nonresponsive or a bidder
33 is judged to be not responsible, and the bidder cannot be notified in writing a minimum of 5 days prior to
34 the end of the 30-day bid evaluation period in the case of an agency, or the 60-day bid evaluation period
35 in the case of a school district. Written notification to the bidder or bidders whose bid is non-responsive
36 or who have been determined to be not responsible shall be received at least 5 working days prior to the
37 end of the original or the extended evaluation period and shall specify the reason or reasons why the bid
38 is nonresponsive or the bidder determined to be not responsible. If the bid evaluation period is extended
39 by 5 working days, the contracting agency or school district shall notify each bidder in writing prior to the
40 end of the 30-day bid evaluation period in the case of an agency, or the 60-day bid evaluation period in
41 the case of a school district, that the bid evaluation period is being extended by 5 working days. The
42 written notification to all bidders shall include the calendar date by which the agency or school district
43 shall award a contract or reject all bids.

44 1. Each bid on any public works contract must be deemed responsive by the agency to be
45 considered for award. A responsive bid shall conform in all material respects to the requirements and
46 criteria set forth in the contract plans and specifications.

47 2. An agency shall determine that each bidder on any public works contract is responsible before
48 awarding the contract. Factors to be considered in determining the responsibility of a bidder include:

49 ~~1-~~ A. The bidder's financial, physical, personnel or other resources including subcontracts;

2. B. The bidder's record of performance on past public or private construction projects, including, but not limited to, defaults and/or final adjudication or admission of violations of prevailing wage laws in Delaware or any other state;

3. C. The bidder's written safety plan;

4. D. Whether the bidder is qualified legally to contract with the State;

5. E. Whether the bidder supplied all necessary information concerning its responsibility; and,

6. F. Any other specific criteria for a particular procurement, which an agency may establish; provided however, that, the criteria shall be set forth in the invitation to bid and is otherwise in conformity with state and/or federal law.

3. If an agency determines that a bidder is nonresponsive and/or nonresponsible, the determination shall be in writing and set forth the basis for the determination. A copy of the determination shall be sent to the affected bidder within 5 working days of said determination. The final determination shall be made part of the procurement file.

4.A. If the agency elects to award on the basis of best value, the agency must determine that the successful bidder is responsive and responsible, as defined in this subsection. The determination of best value shall be based upon objective criteria that have been communicated to the bidders in the invitation to bid. The following objective criteria shall be assigned a weight consistent with all of the following:

(1) I. Price — must be at least 70% but no more than ~~90%; and~~ 90%.

(2) II. Schedule — must be at least 10% but no more than ~~30%; and~~ 20%.

III. Performance — must be at least 10% but no more than 20%.

B. Performance criterion must be based on a contractor's performance rating as determined by the agency's performance-based rating system. The agency's performance-based rating system must be based on previous contracting performance and may not be based on a set of prescriptive rules favoring a particular business model or business procedure. The performance-based rating system must be defined in regulations promulgated by the Secretary of the agency and must include a procedure for a contractor to appeal a performance-based rating.

C. A weighted average stated in the invitation to bid shall be applied to each criterion according to its importance to each project. The agency shall rank the bidder according to the

80 established criteria and award to the highest ranked bidder. Every state agency and school
81 district shall, on a yearly basis, file a report with every member of the General Assembly and the
82 Governor that states which projects were bid under best value and what contractor was awarded
83 each contract.

84 Section 2. The Department of Transportation must form a stakeholder panel for the sole purpose of advising the
85 Department on the content of the performance-based rating system regulations promulgated under § 6962 of Title 29 when
86 creating the regulations and when considering revisions to the regulations. The stakeholder panel must complete work on
87 the initial regulations by September 1, 2018. The stakeholder panel is composed of the following members or a designee
88 appointed by a member serving by virtue of position:

- 89 (1) The Secretary of the Department of Transportation, who is the Chair of the panel.
- 90 (2) The Secretary of the Department of Labor.
- 91 (3) The Chair of the Senate Transportation Committee.
- 92 (4) The Chair of the House Transportation/Land Use and Infrastructure Committee.
- 93 (5) One member, appointed by the Delaware State AFL-CIO.
- 94 (6) One member, appointed by the Delaware Building and Construction Trades Council.
- 95 (7) One member, appointed by the Delaware Contractors Association.
- 96 (8) One member, appointed by the Associated Builders and Contractors, Inc.
- 97 (9) One member of the public, appointed by the President Pro Tem of the Senate.
- 98 (10) One member of the public, appointed by the Speaker of the House of Representatives.
- 99 (11) The Chief Engineer of the Department of Transportation.
- 100 (12) The Director of Finance of the Department of Transportation.

101 Section 3. Section 1 of this Act takes effect upon one of the following, whichever occurs first:

- 102 (1) Promulgation of regulations adopted under this chapter with notice to the Registrar of Regulations that
103 this contingency under this Act has been fulfilled.
- 104 (2) January 1, 2019.

SYNOPSIS

This Act makes the following changes to the large public works contract procedures in subsection (c) and (d) of § 6962 of Title 29 for all State agencies:

1. Changes the requirement for the prequalification process so that submissions must contain performance reviews for previously awarded public works or private sector construction projects within the last 5 years instead of the last 10 years.
2. When an agency elects to award on the basis of best value, the maximum weight that can be assigned to the schedule is reduced from 30% to 20%.

3. When an agency elects to award on the basis of best value, performance is added as an objective criteria and must be given weight of at least 10% but no more than 20%.

4. Performance criterion is based on the contractor's performance rating, as determined under the agency's regulations.

This Act makes the following changes to the large public works contract procedures in subsection § 6962(c) of Title 29 for only Department of Transportation projects:

1. Adds a bidder prequalification requirement to projects other than Community Transportation Fund and municipal street aid contracts, so that the only contractors eligible to bid on projects are contractors that either meet or exceed the minimum contractor's performance rating or that will permit the Department to retain 10% of the payments to be made to the contractor.

2. Creates a stakeholder panel to advise the Department of Transportation on the content of the performance-based rating system regulations. Because the stakeholder panel only exists when the performance-based rating system regulations are promulgated or being revised, the stakeholder panel is codified in the Laws of Delaware instead of the Delaware Code.

This Act takes on January 1, 2019, or when the required regulations are promulgated, whichever occurs first.

This Act also makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual.

Author: Senator Poore