

CHAPTER 365  
FORMERLY  
SENATE BILL NO. 208  
AS AMENDED BY  
SENATE AMENDMENT NO. 1

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:

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

§ 6962. Large public works contract procedures.

(c) Bidder prequalification requirements. —

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

c. Performance reviews of the proposing contractor or subcontractor on previously awarded public works or private sector construction projects within the last ~~40~~ 5 years;

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

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

c. A contractor is eligible to bid as follows:

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

2.A. A contractor who does not meet or exceed the minimum contractor's performance rating at the time of bid is eligible to bid if the contractor agrees to allow the Department to retain 5% of the payments to be made to the contractor for work performed under the contract under the procedures provided in paragraph (d)(5)a.1. of this section.

B. A contract under paragraph (c)(12)c.2. of this section must contain all of the following provisions:

I. A variable retainage in an amount that does not exceed 5%, that is established at the discretion of the Secretary.

II. When the project is at 50% completion, the contractor may request that the retainage be reduced to 2% after an interim evaluation of the current project.

III. The project completion percentage will be based on the actual work completed, excluding money paid for stored materials.

(d) Bid specifications and plans requirements.

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

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

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

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

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

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

- (1) The Secretary of the Department of Transportation, who is the Chair of the panel.
- (2) The Secretary of the Department of Labor.
- (3) The Chair of the Senate Transportation Committee.
- (4) The Chair of the House Transportation/Land Use and Infrastructure Committee.
- (5) One member, appointed by the Delaware State AFL-CIO.
- (6) One member, appointed by the Delaware Building and Construction Trades Council.
- (7) One member, appointed by the Delaware Contractors Association.
- (8) One member, appointed by the Associated Builders and Contractors, Inc.
- (9) One member of the public with experience in public works contracting, appointed by the President Pro Tem of the Senate.
- (10) One member of the public with experience in public works contracting, appointed by the Speaker of the House of Representatives.
- (11) The Chief Engineer of the Department of Transportation.
- (12) The Director of Finance of the Department of Transportation.

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

(1) Promulgation of regulations adopted under this chapter with notice to the Registrar of Regulations that this contingency under this Act has been fulfilled.

(2) January 1, 2019.

Approved July 25, 2018