

CHAPTER 12

DESIGN-BUILD, DESIGN-BUILD-OPERATE-MAINTAIN & DESIGN-BUILD- FINANCE-OPERATE-MAINTAIN

Including Design-Build, Guaranteed Energy Savings Contracts

12.1 RELATED STATUTORY AUTHORITY

- 12.1.1 SC Code §§ 8-13-700 through 8-13-795 establishes the Rules of Ethical Conduct for public employees.
- 12.1.2 SC Code § 11-35-30 requires “good faith” in the negotiation of contracts.
- 12.1.3 SC Code § 11-35-1410 (7) defines a responsive offeror.
- 12.1.4 SC Code § 11-35-1520(3) & (10) requires that adequate public notice be given to given prospective proposers to respond to a solicitation and be notified of the award of that solicitation.
- 12.1.5 SC Code § 11-35-1530 outlines the use of Competitive Sealed Proposals.
- 12.1.6 SC Code §§ 11-35-1810 & 2410 outline responsibility determinations of offerors.
- 12.1.7 SC Code § 11-35-1830 addresses cost or pricing data for contracts and change orders awarded by RFP.
- 12.1.8 SC Code § 11-35-2430 and SC Regulation 19-445.2005(B) list the requirements for records retention.
- 12.1.9 SC Code § 11-35-2910(7)-(14) defines "Design-build," "Design-build-finance-operate-maintain," "Design-build-operate-maintain," "Design requirements," "Independent peer reviewer services," "Infrastructure facility," "Operations and maintenance," and "Proposal development documents."
- 12.1.10 SC Code § 11-35-3005(3) allows the consideration of a firm who participated in preparing design requirements to participate in a design-build proposal.
- 12.1.11 SC Code § 11-35-3010 requires the agency to make a written determination of the project delivery method that is most advantageous to the State and submit it for approval by the State Engineer.
- 12.1.12 SC Code §§ 11-35-3015 (5), (6) & (7) require the selection of design-build, design-build-operate-maintain, and design-build-finance-operate-maintain contracts be procured by competitive sealed proposals.
- 12.1.13 SC Code § 11-35-3023(A) allows prequalification of offerors.
- 12.1.14 SC Code § 11-35-3024(2) defines the required contents of a Request for Proposals.
- 12.1.15 SC Code § 11-35-3024(2)(c)(ii) allows shortlisting of proposals in response to a Request for Proposals
- 12.1.16 SC Code § 11-35-3024(2)(c)(iii) allows paying stipends to unsuccessful offerors for Design-Build
- 12.1.17 SC Code § 11-35-3024(3)(a) requires that the importance of certain selection factors be listed.
- 12.1.18 SC Code § 11-35-3024(3)(b) and SC Regulation 19-445.2145(A)(7) defines independent peer reviewer services and their use.
- 12.1.19 SC Code § 11-35-3024(4) requires OSE to “oversee the evaluation process for procurements of construction if factors other than price are considered in the evaluation of a proposal.”
- 12.1.20 SC Code § 11-35-3030 provides bonding and security requirements and limits the amount of retention that can be withheld from progress payments to three and one-half percent.
- 12.1.21 SC Code 40-11-10 et seq defines the licensing requirements for a Design-Builder.
- 12.1.22 SC Code § 48-52-670 allows governmental Agencies to award guaranteed energy, water or wastewater savings contracts pursuant to SC Code § 11-35-1530 and details the requirements for “guaranteed energy, water, or wastewater savings contracts.”
- 12.1.23 SC Regulation 19-445.2010 provides information about the disclosure of procurement information.
- 12.1.24 SC Regulation 19-445.2095 provides information about the request, receipt of, clarification, procedures, discussions, rejections of individual proposals, and cancellation of Competitive Sealed Proposals.
- 12.1.25 SC Regulation 19-445.2097 provides information about the rejection of proposals.
- 12.1.26 SC Regulation 19-445.2145(K) provides additional procedures for Design-Build; Design-Build-Operate-Maintain; and Design-Build-Finance-Operate-Maintain including content of the RFP; purpose of design requirements; purpose of requirements for proposal development documents and content of the RFP.
- 12.1.27 SC Regulation 19-445.2145(L) requires errors and omissions insurance requirements be included in the solicitation for design-build, design-build-operate-maintain, and design-build-operate-finance-maintain procurements.
- 12.1.28 SC Regulation 19-445.2145(M) provides requirements for operations period performance bonds for design-build-operate-maintain and design-build-finance-operate-maintain contracts.

12.2 DEFINITIONS

12.2.1 Design-Build

- A. "Design-build" (DB) is a project delivery method in which an Agency enters into a single contract for design and construction of an infrastructure facility. DB may include bundling additional services into a single contract. For purposes of the following portions of this chapter, the term DB includes the following:
 - 1. Guaranteed energy, water, and wastewater savings projects.
 - 2. Design-build-operate-maintain (DBOM): A project delivery method in which an Agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period.
 - 3. Design-build-finance-operate-maintain (DBFOM): A project delivery method in which an Agency enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period.
- B. "Design requirements" are the written requirements of the infrastructure facility an Agency intends to procure using DB, including:
 - 1. The features, functions, characteristics, qualities, and properties that the Agency and State require;
 - 2. The anticipated schedule, including start, duration, and completion; and
 - 3. The budgets, as applicable to the specific procurement, for design, construction, operation, and maintenance.
 - 4. The design requirements (commonly called programming) may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.
 - 5. Unless the Agency has the staff necessary to prepare the design requirements, it should hire a design firm to do so using one of the processes set forth in Chapter 4.
 - 6. Providing the minimum design requirements necessary to describe the infrastructure facility an Agency requires will allow the offerors the maximum flexibility and creativity to meet the Agency's needs within the budget constraints.
- C. "Independent peer reviewer services" are additional architectural and engineering services that an Agency must acquire, except as otherwise provided in this manual, in the procurement of DB services.
 - 1. The function of the independent peer reviewer (IPR) is to confirm that the key elements of the professional engineering and architectural design provided by the DB are in conformance with the applicable standard of care.
 - 2. If an Agency elects not to contract with the IPR proposed by the successful offeror, the Agency must select the IPR in accordance with Chapter 4.
- D. "Responsiveness" when used in DB procurement has a slightly different interpretation than in a design bid build project.
 - 1. A responsive proposal is one that is complete and conforms to all the material aspects of the solicitation.
 - 2. If mandatory requirements are not included the proposal it may be declared non-responsive.
 - 3. If minor information is omitted, clarification may be permitted and the proposal accepted as modified if it is otherwise acceptable. See 12.13 for permissible communication and discussions.
 - 4. The provisions of SC Code §§ 11-35-1520 (8) & (13) apply to minor informalities in proposals

12.2.2 Operations and Maintenance

"Operations and Maintenance" is a project delivery method in which the Agency enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

12.2.3 Guaranteed Energy, Water, or Wastewater Savings Contracts

- A. "Guaranteed energy, water, or wastewater savings contracts" are DB contracts for the evaluation and recommendation of energy, water, or wastewater conservation measures and for implementation of one or more of these measures.
- B. Such contracts may include financing by providing that all payments to the DB (except obligations on termination of the contract before its expiration) will be made over time and the cost savings or billable revenue increases resulting from implementation of the energy, water, or wastewater conservation measures will be used to make payments for the energy, water, or wastewater conservation systems installed pursuant to the contract.

- C. For State Agencies the DB is paid for their energy audit and design work in a lump sum. During the construction phase they are paid construction progress payments with final payment for each, or each group, of savings measures after substantial completion of the energy improvements. This requires verification of the savings by testing prior to the signing of the Certificate of Substantial Completion.
- D. The Agency must procure such contracts using the Request for Proposal (RFP) process.
- E. The State Energy Office publishes information for Public entities to use in Performance Contracting at <http://www.energy.sc.gov/perfcont>. The State Energy Office website may be viewed at www.energy.sc.gov.

12.3 SOURCE SELECTION METHOD

- 12.3.1 In accordance with the requirements of Chapter 3, the Agency shall provide the State Engineer with a written determination that the use of DB will be the most advantageous to the State for the specific project. Upon approval by the State Engineer, the Agency will choose personnel to serve as the Selection Committee (Committee) to conduct the DB selection.
- 12.3.2 The process of selecting the most qualified DB takes a significant amount of time and resources. An Agency should consider as part of their determination if they have the level of staffing to dedicate the time to make the process successful.
- 12.3.3 The amount of time, effort and cost associated with preparing a proposal for a DB solicitation can be significant so a two phase RFQ/RFP selection process or short listing of an RFP should be considered when preparing the determination.
- 12.3.4 A single phase RFP process with or without shortlisting may be appropriate for more simple projects and may be considered in the determination.
- 12.3.5 An Agency should consider paying a stipend to prequalified offerors to ensure that they receive quality proposals.
- 12.3.6 The competitive sealed proposal source selection method is referred to throughout this document as the RFP Process and as discussed herein will consist of a two-phase selection process which includes both the Request for Qualifications (RFQ) and RFP.

12.4 SELECTION COMMITTEE STRUCTURE AND STAFFING FOR THE RFP PROCESS

12.4.1 Selection Committee Structure

- A. The Selection Committee (Committee) consists of voting and non-voting personal who evaluate proposals. They will make a selection based on their evaluations and assist the Agency Project Manager in reporting their decision to the final approving authority (Agency Head or a designee) at a management level above the Agency Project Manager.
- B. The Committee is chaired by a non-voting Chair appointed by the State Engineer, usually the OSE Project Manager assigned to the project.
- C. Voting and non-voting committee members are selected by the Agency Head or his designee and should include the Agency Project Manager and other state employees that are qualified to evaluate the proposals. OSE must concur with all Committee appointments.
- D. Technical advisors, usually non-voting members of the Committee, may be required to assist the Committee in the evaluation of proposals.
- E. The Committee should be comprised of a minimum of five voting members. While there is not a maximum number of voting, or non-voting, members on the Committee, it should be noted that as the number of members increases so does the difficulty to schedule committee meetings and interviews for selection.

12.4.2 Selection Committee Membership

- A. The voting members of the Committee shall be state employees. For the purpose of meeting this requirement, members of Agency Boards acting in their official capacity are considered state employees.
- B. Committee members are subject to the Ethics, Government Accountability and Campaign Reform Act of 1991. Committee members should become familiar with the requirements of this act and avoid any conflict of interest.
 - 1. Each Committee member must sign a Confidentiality & Conflict of Interest Policy (SE-714) as a means of confirming their acceptance of their responsibilities.

2. The Agency should also have other persons involved in the decision making process sign an SE-714. For example, the Agency Head is not a member of the Committee but has final say over the Committee's decision, so they must sign a SE-714. The same is true for members of a Board of Trustees and administrative associates who assist in document preparation and handling.
- C. The Committee must comply with the Freedom of Information Act; however committee members must not disclose confidential information derived from proposals and negotiations submitted by competing offerors during the selection process. There is a summary of the requirements of this act in Chapter 1.
- D. There are no requirements for who may be appointed to a committee. For large projects (\$5 million or more), the Agency appointed members should consist of:
1. A member of the board or commission governing the Agency or a designee;
 2. The Agency Head (secretary, executive director, president, or like officer) or their designee;
 3. One representative of the division, department, or program for which the project is being built;
 4. Agency Project Manager; and
 5. Agency Facilities Director or their designee.

12.4.3 Changes in Committee Membership

An Agency may only make changes in the makeup of the Committee with the written approval of the Agency Head and OSE.

12.4.4 Committee Responsibilities

- A. Agency Head or their designee acting as the final selection authority, is responsible for the following:
1. Directing the Agency's efforts during the entire selection process.
 2. Reviewing and approving the Selection Plan.
 3. Appointing the members of the Committee, other than the Chair.
 4. Reviewing and approving the Committee's final report for selection and recommendation. The Agency Head may choose to reject the Committee's final choice by directing the Agency Project Manager to cancel the solicitation prior to award in accordance with the procedures set forth in SC Regulation 19-445.2097(B).
- B. Agency Project Manager, subject to the policies and procedures of a specific agency, is responsible for the following:
1. Preparing and submitting a draft of the Selection Plan to the Committee for its review;
 2. Preparing and submitting the final Selection Plan to the Agency Head for concurrence and the OSE Chairman for approval;
 3. Assuring that each Committee Member and any other appointed participant signs and returns an SE-714 before they are provided access to source selection information;
 4. Posting notices of Committee meetings in accordance with the Freedom of Information Act (FOIA) open meeting requirements;
 5. Preparing the RFQ and/or RFP outline;
 6. Coordinating the preparation and issuance of the RFQ and/or RFP with the OSE Chairman and Committee;
 7. Preparing advertisements for South Carolina Business Opportunities (SCBO) and any other publications;
 8. Conducting pre-submittal conferences;
 9. Issuing amendments to the RFQ or RFP with the OSE Chairman;
 10. Scheduling Selection Committee Meetings;
 11. Receiving and registering responding firms using the Register of Proposals – Design-Build (SE-711);
 12. Summarizing the RFQ evaluation data from the prequalification meeting of the Committee by using the Design-Build Selection Committee Report for RFQ Prequalification (SE-712);
 13. Notifying prequalified firms by using the Notification of Prequalification – Design Build (SE-713);
 14. Safeguarding confidential information and materials, including proposals and amendments;
 15. Conducting or coordinating cost or price analyses and documenting the results;
 16. Determining offeror responsiveness and responsibility;
 17. Conducting or controlling all discussions and negotiations with offerors

18. Maintaining written records of all discussions and negotiations with offerors;
 19. Promptly notifying all offerors eliminated from the competition;
 20. Requesting best and final offers (BAFO);
 21. Preparing the Selection Committee's report and recommendation to the Agency Head;
 22. Taking all necessary contractual actions; and
 23. Conducting the debriefing of unsuccessful offerors.
- C. The Committee Chair is a non-voting member appointed by the State Engineer. The Committee Chair's duties include the following:
1. Assisting the Agency Project Manager in scheduling and conducting Committee meetings and deliberations;
 2. Providing overall supervision, planning, direction, and execution of the Committee's activities.
 3. Assisting the Agency Project Manager in the determination of responsibility and responsiveness on individual proposals;
 4. Approving all competitive range determinations from the shortlisting list of offerors. The Chair may add offerors to the competitive range, but shall not remove them except for reasons of non-responsiveness.
 5. Summarizing the Committee members' raw evaluation data using the Design Build Selection Committee Summary – RFP (SE-717).
 6. Assisting the Agency Project Manager in debriefings and other matters, if requested.
- D. Voting Members duties include the following:
1. Independently review each proposal against the Plan criteria for the RFQ and RFP.
 2. Attend all Committee meetings.
 3. Participate in the prequalification selection for the RFQ; and
 4. Participate in the interview of each prequalified firm and complete the DB Selection Committee Member Evaluation – RFP (SE-715) taking into account both the written technical proposal and the interview presentation weighed against the evaluation factors in the Plan.
- E. Technical Advisors, Non-Voting Members
1. The Agency Head may appoint outside technical advisors with special expertise not available on the Committee but essential to the selection process.
 2. The Agency should use technical advisors in discrete areas such as reviewing technical aspects of proposals to assure compliance with the technical requirements of the RFP.
 3. The Agency should not give technical advisors access to information concerning overall Committee activities that they do not need to perform their advisory duties. Technical advisors should not attend Committee meetings unless specifically requested by the Committee Chair.

12.4.5 Conflicts of Interest

- A. The Committee Chair must instruct the committee members and technical advisors of the Procurement Code's requirements for ethical conduct, and require each member to sign an SE-714 stating that they have read and understand those standards of conduct and that they do not have an actual or apparent conflict of interest relating to the proposed acquisition.
- B. If a committee member has an actual or apparent conflict of interest related to a proposal under evaluation, the Chair must remove that member and, if a sufficient number of voting members do not remain, request the Agency Head to replace them with another.
- C. If a committee member has a current or past relationship with an offeror but does not believe the relationship creates a conflict of interest or is not sure, the member must notify the Committee Chair of the relationship for a determination as to whether or not an actual conflict of interest exists.

12.5 SELECTION COMMITTEE MEETINGS

- 12.5.1 Every meeting of public bodies must be open to the public unless closed pursuant to SC Code § 30-4-70. A Committee is a body subject to this requirement. Every meeting of the Committee must be publicly announced at least twenty-four hours before the meeting.
- 12.5.2 When a meeting is held to discuss source selection information such as ranking statements of qualifications and proposals, the meeting will open publicly and any item on the agenda which is not protected source selection information will be addressed publicly.

- 12.5.3** Thereafter, the Committee should adjourn to go into executive session to discuss source selection information. The public must be excluded from these executive sessions with no exceptions.

12.6 SELECTION PLAN FOR THE RFP PROCESS

12.6.1 The Selection Plan

- A.** The Selection Plan (Plan) is the document that;
- 1.** Explains how the Agency will solicit statements of qualifications and proposals from DB and evaluate those statements and proposals in order to make the selection decision;
 - 2.** Establishes the required qualifications and the relative importance of those qualifications;
 - 3.** Outlines how the Agency will conduct negotiations,
 - 4.** Identifies the Chair and members of the Committee, and
 - 5.** Establishes milestone dates for the completion of the selection process.
- B.** The Plan is the Agency's statement to itself and to others as to how it intends to acquire what it needs. It distinguishes what is important from what is not and, by assigning weights, defines how important these distinctions are.

12.6.2 Minimum Requirements

The Plan must include the following, as a minimum:

- A.** Description of the facility to be constructed and the design requirements;
- B.** Description of the duties and responsibilities of the Committee. Include the nominations for Committee by attaching a roster of personnel by name, title, and agency to the Plan;
- C.** Schedules of key events or milestones that will occur between the time the Committee is organized and its adjournment, including proposed pre-solicitation activities such as the drafting and issuance of South Carolina Business Opportunities (SCBO) announcements or the convening of a pre-submittal conference;
- D.** Solicitation plan (i.e. advertising plan);
- 1.** This must include publication in South Carolina Business Opportunities (SCBO). However, the Procurement Code recognizes that this alone may not constitute adequate public notice. This is especially the case for unique projects such as DBFOM projects. Therefore, the Agency needs to develop a solicitation plan that provides adequate public notice for real competition on the project.
 - 2.** The Solicitation Plan must describe how the Agency will advertise for proposals and how the Agency intends to develop interest in the project other than through advertising in SCBO.
 - 3.** The Solicitation Plan must also set forth the minimum number of days that the Agency will advertise the project.
- E.** An explanation of the contract to be used, the proposed contract form, and the nature of any special features to be included in the contract;
- F.** Statement of the proposed RFQ and RFP evaluation factors and their relative importance;
- G.** Description of the evaluation process, methodology, and techniques; and
- H.** If the Agency determines the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement, the Plan may provide for the prequalification of offerors and may include the payment of a stipend to prequalified or shortlisted offerors who participate in the RFP and the terms under which the Agency will pay stipends.

12.6.3 Preparation and Approval of the Plan

- A.** The Agency Project Manager prepares and submits the Plan to the OSE Chairman and Committee for review.
- B.** The reviewed Plan is finalized and submitted to the Agency Head for approval.
- C.** The approved Plan must be reviewed and approved by the Committee Chairman before the Agency issues a solicitation or holds any pre-submittal conference.

12.7 REQUEST FOR QUALIFICATIONS (RFQ)

- 12.7.1** When the Plan provides for prequalification of DB, the criteria in the Plan must be used to evaluate the submittals received. Only those firms who are likely to be selected should be prequalified. A minimum of three firms should be prequalified and at least two firms must be interviewed.

- 12.7.2** If only one prospective offeror is qualified, the prequalification process must be canceled. In this event, the Agency may start the process over or publicly advertise a request for proposals from all interested parties.
- 12.7.3** The decision to not prequalify a particular firm is protestable. The standard of review is the same as for a determination of non-responsibility

12.7.4 The Solicitation and Contents for the RFQ

- A.** The Agency must give adequate notice to prospective offerors of any pre-submittal conference so that all who wish to attend may arrange for representation. The notice must define as explicitly as possible the nature and scope of the project.
- B.** Provide for prequalifying of responsive and responsible offerors determined to be reasonably susceptible of being selected for award before discussions and evaluations.
1. The RFQ shall not include the Plan.
 2. The RFQ must state the number of DB the Agency will prequalify;
 3. The Agency's determination of how many proposals to prequalify is not protestable.
 4. Must give the criteria and order of importance of the criteria to be used in evaluating the proposals;
 5. Must list any qualifications required of the DB including:
 - a. Offeror technical qualifications;
 - b. Bonding capacity and any other forms of security required;
 - c. Insurance requirements; and
 - d. License requirements.
 - e. Set forth the deadline for submission of the statements of qualifications; and
 - f. Must include the *Clauses for Use in Design-Build RFP*, these may be found in Appendix E.
- C.** The Agency must give prompt public notice of which proposals it prequalifies using the Notification of Prequalification – DB (SE-713). The SE-713 must be posted in the location announced in the solicitation and sent to all of the offerors who responded to the solicitation.

12.7.5 Licensing and Bonding Requirements for Design-Builders

- A.** The DB must comply with all licensing requirements of the SC Department of Labor, Licensing and Regulation as both a designer and contractor.
- B.** The DB must provide a Performance Bond and a Labor and Material Payment Bond, for 100% of the contract price, excluding costs for operation, maintenance and finance.
- C.** The Agency may require one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately or as one element of another project delivery method:
1. Operations period surety bonds that secure the performance of the DB operations and maintenance obligations;
 2. Letters of credit in an amount appropriate to cover the cost to the governmental body of preventing infrastructure service interruptions for a period up to twelve months; and
 3. Appropriate written surety bonds or guarantees from the DB, or depending upon the circumstances, from a parent corporation, to secure the recovery of re-procurement costs to the governmental body if the DB defaults in performance.

12.8 REQUEST FOR PROPOSALS (RFP)

12.8.1 The Solicitation and Contents of the RFP

- A.** The Agency must prepare a solicitation that will communicate to the offerors both the Agency's needs and the evaluation factors the Committee will use in evaluating the proposals.
- B.** The solicitation shall not include the Selection Plan.
- C.** The solicitation must:
1. Advise prospective offerors on how their proposals should be organized and arranged.
 2. Provide that offerors must submit the technical and price or cost portions of their proposals in separate sealed envelopes.
 3. Inform offerors of the evaluation factors for award and information on the source selection system the Agency will employ including a statement of all significant factors and sub-factors (including price) which the Committee will consider in evaluating proposals and the relative importance assigned to each of these factors.

4. Inform offerors of minimum requirements that apply to particular evaluation factors.
5. Provide for short-listing of responsive and responsible offerors determined to be reasonably susceptible of being selected for award before discussions and evaluations.
 - a. The RFP states the number of proposals the Agency will short-list, and
 - b. The Agency gives prompt public notice of which proposals it short-lists.
6. If the Plan provides for the payment of stipends to unsuccessful offerors:
 - a. The RFP must include the amount of the stipend, and
 - b. The RFP must include the terms under which the Agency will pay stipends.
7. In addition to any other evaluation factors, must state the relative importance of the following required evaluation factors:
 - a. Demonstrated compliance with the design requirements;
 - b. Offeror qualifications
 - c. Financial Capacity
 - d. Project schedule;
 - e. Price, or, for DBOM or DBFOM, life-cycle price; and
 - f. Must require each offeror to identify an IPR and include the competence and qualifications of offerors proposed IPR if the offeror is required to provide an IPR as a part of its proposal.
8. Must include the Agency's design requirements.
9. Require that offerors submit proposal development documents.
10. Set forth the deadline for submission of proposals.
11. Include the *Clauses for Use in Design Build RFP* if a prequalification process is not used. These can be found in Appendix E.
12. Notify proposers that they must visibly mark as "confidential" each part of their proposal which they consider to be proprietary information.
13. Any other items required in the RFQ if a single phase selection process is used.

12.9 REQUIREMENT FOR AN INDEPENDENT PEER REVIEWER

- 12.9.1 An Agency must retain an IPR on each Design-Build project unless allowed to self-perform by OSE.
- 12.9.2 The DB can be required to propose an IPR as part of their contract or the IPR can be hired by the Agency using one of the methods in chapter 4.
- 12.9.3 If the Agency desires to forego an IPR, the Agency must submit to OSE a written determination that considering the nature, size, and scope of the project, the Agency has personnel on staff qualified to perform the functions of the IPR.
- 12.9.4 The Agency must include the qualifications of the personnel who will perform the functions of the IPR.
- 12.9.5 OSE will within 10 days of receipt of the Agency's determination, notify the Agency of their determination, in writing, whether to allow the Agency to self-perform IPR.

12.10 ADVERTISEMENT

- 12.10.1 Using the Invitation for Design Build Services (SE-710), the Agency must advertise in SCBO and any other publications identified in the Plan for interested firms to provide DB services for the project.
- 12.10.2 The Agency Project Manager will prepare the SE-710 and submit it in MS Word format to the OSE Project Manager. They will review the SE-710 and send an approved copy to SCBO and the Agency.
- 12.10.3 The Agency must give adequate public notice to prospective offerors so that all who wish to may arrange representation.
- 12.10.4 The Advertisement must state as explicitly as possible the nature and the scope of the project and of any pre-submittal conference that is being held.

12.11 PRE-SUBMITTAL CONFERENCES

- 12.11.1 The Agency may conduct pre-submittal conferences to explain design requirements, qualification requirements, proposal format, and other pertinent information to interested firms for the RFQ or the RFP or both.

- 12.11.2** When the Agency determines that pre-submittal conferences are in its best interest.
- A.** For a two-phase selection process;
 - 1. The Agency must notify advertise the pre-submittal conference in SCBO and in any other publications where public notice was given as part of the Plan for the RFQ;
 - 2. Any interested parties may attend a pre-submittal conference as part of an RFQ; and
 - 3. Attendance for a pre-submittal conference for an RFP must be limited to prequalified offerors and does not have to be advertised.
 - B.** For a single phase process;
 - 1. The Agency must notify advertise the pre-submittal conference in SCBO and in any other publications where public notice was given as part of the Plan for the RFP.
 - 2. Any interested parties may attend a pre-submittal conference as part of an RFP.
- 12.11.3** The Agency must make an amendment to the solicitation to document any changes or clarifications made during the pre-submittal conference.

12.12 POTENTIAL OFFEROR'S PARTICIPATION IN A REPORT OR STUDY USED IN PREPARATION OF DESIGN REQUIREMENTS

- 12.12.1** Participation in a report or study that is used in the preparation of design requirements for a project does not disqualify a firm from participating as a member of a proposing team in DB procurement unless the participation provides the business with a substantial competitive advantage.
- 12.12.2** A copy of a report or study that was prepared by a potential offer shall be given to all offerors.

12.13 RECEIPT, OPENING AND REGISTER OF PROPOSALS

- 12.13.1** The receipt of proposals is handled in the same way for both a one and two-phase process.
- 12.13.2** The Agency must time-stamp proposals and modifications upon receipt and hold them unopened (except as otherwise provided in the Procurement Regulations) in a secure place until the established due date.
- 12.13.3** The Agency's Project Manager (or designee) must open the proposals publicly in the presence of one or more State witnesses at the time and place designated in the solicitation for the RFP process.
- 12.13.4** The person opening the proposals should declare the arrival of the time for receipt of proposals, give their name and the names of the witnesses, and record this information on a Register of Proposals (SE-711).
- 12.13.5** The Agency must not disclose the contents and the identity of competing offers during the process of opening proposals.
- 12.13.6** If members of the public appear at the opening, the person opening the proposals should state that they will conduct the opening of proposals and recording of the names in silence on the SE-711 to protect confidential source information.
- 12.13.7** The Agency may not make the SE-711 open to public inspection until after the notification of intent to award, whichever is earlier.

12.14 PERMISSIBLE COMMUNICATIONS WITH OFFERORS AFTER OPENING BUT BEFORE AWARD

- 12.14.1** The Chief Procurement Officers have jointly published guidelines for communications with offerors after opening proposals but prior to award. Such discussions include clarification discussions and negotiations. These guidelines are found in Appendix I.
- 12.14.2** This document also addresses BAFO. The Agency must conduct discussion and any BAFO process in accordance with these guidelines.
- 12.14.3** Seeking clarification of statements of qualifications or proposals is permitted.
- 12.14.4** Negotiations with the highest ranked offeror is permitted after evaluation and ranking.
- A.** Negotiations are permitted on price and
 - B.** Scope of the contract so long as the changes are within the general scope of the RFP,
 - C.** Or on both price and scope.

12.15 REJECTION OF PROPOSALS, WITHDRAWAL OF PROPOSALS AND CANCELLATION OF SOLICITATION

12.15.1 Rejection of Individual Proposals:

- A. The Agency does not need to accept proposals unconditionally without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. The Agency must consider this flexibility in determining whether reasons exist for rejecting all or any part of a proposal.
- B. Reasons for rejecting proposals include but are not limited to the following:
 - 1. The business that submitted the proposal is non-responsible as determined under SC Code § 11-35-1810;
 - 2. The proposal ultimately (after an opportunity, if any is offered, for clarifying the proposal has passed) fails to meet the announced requirements of the State in some material respect; or
 - 3. The proposed price is clearly unreasonable.
- C. The Agency must document the reasons for cancellation or rejection and make the documentation a part of the procurement file available for public inspection.

12.15.2 Withdrawal of Individual Proposals

In rare instances an offeror may request to withdraw their proposal. This might occur at any stage of the process for a variety of reasons. The request for withdrawal from the offeror should be in writing and acceptance of the withdrawal should also be documented in writing. Copies of both documents should be included in the procurement file.

12.15.3 Rejection of Proposals – Cancellation of Solicitation Prior to Award

- A. Unless there is a compelling reason to reject all proposals, the Agency, after receiving and opening proposals, must award a contract to the highest ranked responsible offeror.
- B. Should the Agency decide to cancel a solicitation after opening proposals but before award, the Agency must determine in writing that:
 - 1. Inadequate or ambiguous specifications were cited in the solicitation;
 - 2. Specifications have been revised;
 - 3. The infrastructure facility being procured is no longer required;
 - 4. The solicitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
 - 5. Proposals received indicate that the needs of the State can be satisfied by a less expensive alternative differing from that on which the proposals were requested;
 - 6. All otherwise acceptable proposals received are at unreasonable prices;
 - 7. The proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or
 - 8. For other reasons, cancellation is clearly in the best interest of the State.
- C. Any determination to cancel the solicitation must be made in good faith. The Agency must document the reasons for cancellation or rejection and make the documentation a part of the procurement file available for public inspection.

12.16 EVALUATION AND RANKING OF PROPOSALS

12.16.1 Ranking by Individual Committee Members

- A. Each member of the Committee must examine each proposal in detail to measure its contents against the evaluation factors.
- B. For an RFQ
 - 1. Mandatory requirements may be evaluated first to determine the responsibility of offerors.
 - 2. Submittals may be initially classified as:
 - a. Acceptable (reasonably susceptible of being selected for award);
 - b. Potentially acceptable (reasonably susceptible of being made acceptable through discussions);or
 - c. Unacceptable.
 - 3. Only firms that are determined to be reasonably susceptible or being selected for award should be prequalified.
 - 4. Only the number of firms stated in the RFQ may be prequalified.

- C. For an RFP
 1. Each voting member of the Committee must evaluate each proposal, both written and oral, assign a numerical score to each evaluation criteria, and record this information on the DB Selection Committee Member Evaluation – RFP (SE-715).
 2. If a voting committee member determines two firms to be equally qualified, the committee member must re-evaluate their rankings to break any ties in scores prior to submitting the SE-715 to the Committee Chair.

12.16.2 Consensus of Selection Committee

- A. After the voting members have separately evaluated the technical proposals including the interviews for an RFP, the Committee must meet and formulate its collective conclusions. The Committee must discuss significant variations in voting members' scores or assessments of technical merit and resolve discrepancies or fully explain them in the record.
- B. The Committee should use the DB Selection Committee Report for RFQ Selection (SE-712) to document the firms prequalified and the reasons for that prequalification based on the RFQ evaluation criteria.
- C. Each voting member must turn their signed evaluation into the Chair who will compile the individual evaluations onto a DB Selection Committee Summary – RFP (SE-717).
- D. If after compiling the SE-717 the Committee determines two firms to be equally qualified; the Committee must re-evaluate their rankings to break any ties in final rankings. This can be done by:
 1. If one firm is a resident firm and the other is a non-resident firm, the committee must rank the resident firm higher than the non-resident firm; or
 2. One or more Committee members revising their scores after additional discussions about the firms who are tied;
 3. Or by Committee consensus on which proposal is the most advantageous to the State.
 4. If the breaking of the tie is not clearly indicated on a SE-715, the breaking of the tie must be documented and made part of the procurement file.
- E. The Committee assigns the final ranking by consensus.

12.16.3 Selection Committee Report and Recommendation

- A. After the Committee evaluates the proposals, the Agency Project Manager must prepare a report for the Agency Head. The Chair and each Committee member must sign the report.
- B. The report must include the Committee's recommendation regarding the source(s) the Agency should select for award or negotiation.
- C. The report includes the ranking of each offeror's proposal from the most advantageous to the least advantageous. For each offeror, the report should provide the final score and a summary of each proposal including an assessment of the offeror's compliance with the requirements of the solicitation, any changes to the technical evaluation scores and a narrative to support the changes.
- D. The Committee must support a recommendation to award to or negotiate with a higher priced, higher scored offeror with a written finding that the technical superiority of the higher priced offer relative to other offers, warrants the additional cost.
- E. The Committee must document the rationale for the finding of technical superiority in detail. Unsupported conclusory statements are not acceptable.

12.17 NEGOTIATION OF THE CONTRACT

12.17.1 OSE has not adopted any DB contract.

12.17.2 Any standard contract used must be modified to meet the requirements of the Procurement Code and other applicable state laws. The following items must be included in the contract:

- A. All of the *Clauses for Use in Design Build Contracts* found in Appendix E must be included in the contract.
- B. What submittals, shop drawings, etc. must be submitted to the IPR and the time allowed for those reviews.
- C. If liquidated damages will be assessed and the amount if they are deemed to be necessary.
- D. Any payments or performance bonds and other surety bonds or guarantees should be clearly identified and defined.
- E. The contract must clearly define OSE as the code authority for the project and provide for review and approval of the construction documents prior to commencement of construction.
- F. Peer review of the design documents must be specified.

12.17.3 Alternates and Allowances

- A. Alternates are not normally used in a DB contract in the traditional sense. The DB may propose alternatives during the development of the construction documents; however those that are accepted will be incorporated into the contract price and not priced as alternates. This allows the maximum amount of flexibility during the design process.
- B. Allowances may be used; however, the amounts must be carefully developed and considered so budget issues do not result towards the end of the project. If possible, allowances should be avoided by making material decisions early in the design process.

12.18 DECISION TO AWARD

- 12.18.1** The Agency Head or its governing body typically makes the final selection decision based on the Committee's recommendation.
- 12.18.2** The Agency Head or its governing body may not overturn the Committee's decision unless they determine in writing that there is no rational basis for the Committee's decision, the Committee did not follow the evaluation factors, or the Committee exercised its discretion in an arbitrary or capricious manner.
- 12.18.3** If the Agency Head or its governing body decides to reject the Committee's selection decision, the Agency must cancel the procurement action and start a new procurement process.
- 12.18.4** If the Agency rejects the decision of the committee and chooses to cancel the procurement, the agency must comply with the requirements 12.14.
- 12.18.5** After the Agency Head approves the award, the Agency Project Manager may submit the proposed contract, with supporting documentation, to OSE for review and approval.

12.19 NOTICE OF INTENT TO AWARD**12.19.1 Requirement of Posting**

- A. Once the Agency selection is final, it must post a Notice of Intent to Award DB Contract (SE-770).
- B. The Agency must post the SE-770 at the time and in the location announced in the solicitation. The Agency must also promptly mail a copy of the notice to each responsive offeror.
- C. If an Agency is unable to confirm intent to award on the posting date announced in the solicitation, it must post a notice on that date at the specified location stating the new date the Agency will post the SE-770.

12.19.2 OSE Concurrence with Posting

- A. OSE must concur in the posting of the SE-770 prior to the Agency posting and distribution.
- B. The Agency must submit a Request for Concurrence in Posting Notice of Intent to Award DB Contract (SE-760) to OSE with a copy of the proposed SE-770, proposed contract, and Committee report with supporting documentation.
- C. This submittal must be made after the Committee's final selection, completion of negotiations and approval of the Agency Head.
- D. OSE will have five working days from the date of receipt of the SE-760 and all required documentation for approval. If the Agency does not receive an objection from OSE within five working days from the date OSE receives the SE-760 and all required documentation, OSE will be deemed to have granted approval for the Agency to post the SE-770.
- E. To expedite this process, the Agency must email the OSE Project Manager and OSE Administrative Assistant PDF copies of the SE-760 and all required documentation.
- F. The requirement for a copy to the Administrative Assistant is to expedite the process in the event the OSE Project Manager is out of the office.

12.20 CONTRACT EXECUTION WAITING PERIOD

- 12.20.1** The Agency must wait ten days after posting the SE-770, before it may execute a contract with selected offeror.
- 12.20.2** During this time, any offeror who disagrees with the Agency's decision may protest the contract award.
 - A. If the State Engineer receives such a protest in writing during this period, the Agency may not execute a contract until the matter is resolved unless the Agency in accordance with the Procurement Code requests a lifting of the stay and CPOC grants the request.
 - B. If the State Engineer does not receive any protests, the Agency may execute a contract on the eleventh day after posting the SE-770.

12.21 EXECUTING THE CONTRACT

- 12.21.1** Once all conditions precedent to executing a contract have occurred, the Agency should submit an unsigned copy of the contract to the DB with a cover letter requiring the DB to execute the contract and return the original contract along with the following documents to the Agency within fourteen days:
- A. Certificates of insurance in the form of the latest edition of the ACORD 25S showing that the DB has Insurance meeting the requirements of the RFP in place for the project;
 - B. The Performance Bond (SE-355);
 - C. The Labor and Material Payment Bond (SE-357), and
 - D. Any other performance surety bonds or guarantees required by the contract.
- 12.21.2** Reviewing Certificates of Insurance and Performance and Payment Bonds
- A. After receiving the certificates of insurance and performance and payment bonds or other surety bonds or guarantees from the DB, the Agency should review them to determine that they are authentic and meet the requirements of the Procurement Code and Regulations.
 - B. The Agency is responsible to assure that it has the required labor and material payment bond in place before permitting the DB to start work. Failure to do so could make the Agency liable for the DB's failure to pay its subcontractors and suppliers.
- 12.21.3** The Agency may issue the Notice to Proceed – DB Contract (SE-790) after the contract has been signed by the Agency and a copy returned to the DB.

12.22 NOTIFICATION OF UNSUCCESSFUL OFFERORS

12.22.1 Prior to Notice of Award:

- A. When the Committee determines that an offeror's proposal is not acceptable, the Agency must notify the offeror in general terms that it is no longer under consideration for award and also inform the offeror that they will not consider a revision to the proposal.
- B. Such notice must not be in the form of a blanket notice to all offerors but must be an individual notice tailored to each offeror.
- C. Each individual notice must not inform the offeror of the status of any other offeror's proposal nor name any other offeror.

12.22.2 After Notice of Award:

The Agency should provide unsuccessful offerors with a debriefing upon request.

12.23 INSPECTION AND TESTING SERVICES

- 12.23.1** During the construction period, OSE and any other legally constituted authorities have access to the project premises for periodic inspections.
- 12.23.2** The Agency must procure inspection and material testing services from firms on state contract to provide tests and inspections in accordance with Chapter 1 of each of the applicable International Code Council Series of Codes and with Chapter 17 of the International Building Code using the Inspection/Material Testing Order (SE-955) and the Inspection/Material Testing Order Negotiation Worksheet (SE-955A).
- 12.23.3** The requirements and procedures for using inspection and material testing services on a project are set forth in Appendix G. Statewide term contracts for inspection and material testing services, including services and fees, may be found at <https://procurement.sc.gov/files/contracts/bldginsp-s40%20october%202017.pdf> . The listing of Inspection and Testing Firms, including point of contact, phone numbers, and addresses, may be found at https://procurement.sc.gov/files/Copy%20of%20Inspections_Testing_Firms_050516%20updated%209.12.17.xls.
- 12.23.4** The Agency must procure inspection/material testing services before the start of construction.
- 12.23.5** Inspection and testing firms shall use and maintain, in the DB job trailer, the Project Inspection/Material Testing Log (SE-965), the Project Inspection/Material Testing Deficiency Log (SE-966), and a copy of the inspection/material testing report. Copies may be found in Appendix G.

12.24 BUILDING/CONSTRUCTION PERMIT

- 12.24.1** The Agency shall insert the applicable information in the spaces provided on the Building/Construction Permit (SE-580), sign the Agency Certification and submit it to OSE for approval. OSE will approve the permit by signing the SE-580 and returning a signed copy to the Agency.

- 12.24.2** The Agency must submit the SE-580 along with the SE-955, SE-955A and the Statement of Special Inspections Responsibilities (SE-962) to the OSE Project Manager for OSE approval prior to construction.

12.25 DESIGN DOCUMENT SUBMITTALS TO OSE

- 12.25.1** Agencies or the DB must submit Schematic Design and Construction Documents to OSE for their review and approval in accordance with the procedures of Chapter 5.
- 12.25.2** Design Documents must be submitted using the Design Document Transmittal Form DB (SE-771).
- 12.25.3** OSE will not review drawings and documents that are incomplete, ambiguous, or difficult to read. OSE will notify the DB and the Agency of such condition and ask for a revised submission.
- 12.25.4** OSE's statutory review period does not start to run until it receives a complete, unambiguous, and readable set of drawings and documents.
- 12.25.5** A SE-580 will not be issued until properly completed design documents have been reviewed and approved by both OSE and IPR.

12.26 CHANGE ORDERS

- 12.26.1** A change order may modify one or more of the following elements of the contract:
- A. Scope of Work
 - B. Contract Sum
 - C. Contract Time
- 12.26.2** It may be difficult on a DB project to determine if the DB is entitled to additional compensation or time for changes in the work since they are responsible for both the design and construction. For this reason a very thorough review of the proposed construction documents, both drawings and specifications, must be conducted so potential change orders can be avoided. Reviews should be performed by the Agency, OSE and IPR. Before the documents are finalized the Agency has much more ability to negotiate what is and what is not included in the contract price and duration. Change Orders for a DB contract are more likely to be related to a change from the original scope of work or unforeseen conditions. Up front planning, an ongoing working relationship with the DB and thorough review of the design documents will minimize the need for change orders and maximize the scope of the project within the budget.
- 12.26.3** Under no circumstances may the DB proceed with the work of a change order until it is approved.
- 12.26.4** If the amount of the change order exceeds the limit of the Agency's construction change order certification, OSE must authorize the change order before the DB may perform any work on the change order.
- 12.26.5** Change orders should be documented using the Change Order to DB Contract (SE-780).

12.27 CLAIMS AND DISPUTES

- 12.27.1** Because there is no independent A/E in a DB project to assist, the Agency Project Manager must assume a more active role in settling disputes before they become claims. See Claims and Dispute Resolution in the required contract clauses for DB.
- 12.27.2** The DB is responsible for resolving all claims between its suppliers and subcontractors.

12.28 PAYMENTS TO THE DB

The application and certification for payment, progress payments, withholding payment, and retained amount of payments shall be in accordance with the process noted in Chapter 7 of this manual.

12.29 SUBSTANTIAL COMPLETION

The inspections and declarations for Substantial Completion shall be in accordance with the process noted in Chapter 7 of this manual.

12.30 CERTIFICATE OF OCCUPANCY/USE

The issuance of the Certificate of Occupancy/Use (SE-585) shall be in accordance with the process noted in Chapter 7 of this manual.

12.31 RECORD DOCUMENTS

Record Documents shall be issued in accordance with the process noted in Chapter 7 of this manual.

12.32 FINAL COMPLETION

Final Completion declaration and inspection shall be in accordance with the process noted in Chapter 7 of this manual.

12.33 CONTRACT CLOSURE AND FINAL PAYMENT

Contract closure and final payment shall be in accordance with the process noted in Chapter 7 of this manual.

12.34 ONE YEAR CORRECTIVE WORK PERIOD

Corrective work of deficiencies noted within one year after the date of Substantial Completion shall be in accordance with the process noted in Chapter 7 of this manual.

12.35 PROJECT CLOSE OUT

When an Agency determines that a PIP project is complete, the Agency shall submit a Form A-1 to the Capital Budgeting Unit for approval to close out the project.

12.36 ADDITIONAL RESOURCES

Additional information, including best practices, may be found at the Design-Build Institute of America website: <https://www.dbia.org/Pages/default.aspx>.