

First Regular Session
Seventy-third General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 21-0168.01 Jason Gelender x4330

SENATE BILL 21-165

SENATE SPONSORSHIP

Scott,

HOUSE SPONSORSHIP

(None),

Senate Committees
Transportation & Energy

House Committees

A BILL FOR AN ACT

101 CONCERNING METHODS OF PROCUREMENT USED BY THE DEPARTMENT
102 OF TRANSPORTATION WHEN SELECTING CONTRACTORS FOR
103 PUBLIC PROJECTS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

Section 2 of the bill requires the Colorado department of transportation (CDOT) to solicit construction contracts for public projects by invitation for bids, also known as the design bid build method of procurement, unless CDOT determines, based on specific written findings that CDOT posts on its website prior to awarding a contract, that it is not

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

feasible to do so and that soliciting the contract through an alternative procurement method authorized by law such as competitive sealed best value bidding, an integrated product delivery contract, a public-private initiative, or a design-build contract is likely to cause the project to be completed faster, at a lower cost, or to a higher standard of quality than if the project was solicited by an invitation for bids. **Section 4** prohibits CDOT from refusing to prequalify a contractor to bid on CDOT projects or reducing the scope of prequalification granted based on the contractor's lack of prior opportunity to demonstrate performance on past department contracts if the bidder can demonstrate its experience, past performance, expertise, and financial capacity through its work on construction contracts in other states or for county, municipal, or other local governments in Colorado.

Sections 3, 5, 6, 7, 9, 11, and 12 ensure that the requirements and prohibitions set forth in sections 2 and 4 apply to CDOT project procurement through the alternative methods of competitive sealed best value bidding, integrated product delivery contracts, public-private initiatives, and design-build contracts.

Section 8 requires CDOT to disclose to the public its rationale for selecting a specific participating entity to which it has awarded an integrated product delivery contract. **Section 10** requires CDOT to disclose to the public its rationale for entering into the public-private initiative agreement for a project in lieu of soliciting a contractor for the project by invitation for bids or for best value bids and its rationale for selecting each private or public entity that is a party to the agreement over any other unselected private or public entities that submitted comparable proposals.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Legislative declaration.** (1) The general assembly
3 hereby finds and declares that:

4 (a) For many years, state agencies, including the department of
5 transportation, contracted for the construction of public projects such as
6 roads, highways, and bridges by using design bid build contracting, also
7 known as low bid contracting or the traditional method of contracting;

8 (b) Design bid build contracting:

9 (I) Requires a state agency to first design or contract for the
10 design of a project and then solicit competitive bids for the construction

1 of the project;

2 (II) Is well understood by both state agencies and contractors; and

3 (III) Is intended to and typically does save the state money by
4 ensuring that multiple qualified contractors compete for contracts on the
5 basis of price and that the low responsible bidder for each project for
6 which a state agency solicits bids is awarded the contract for the project;

7 (c) More recently, the general assembly has authorized state
8 agencies, including the department of transportation, to contract for the
9 design and construction of public projects using alternative procurement
10 methods as follows:

11 (I) In 1995, the general assembly authorized the department of
12 transportation to solicit proposals for and consider and accept unsolicited
13 proposals for public-private initiatives for transportation system projects,
14 and in 2009, the general assembly specifically authorized and encouraged
15 the department's high performance transportation enterprise to seek out
16 opportunities for public-private partnerships to complete surface
17 transportation projects and specifically authorized the department's
18 statewide bridge enterprise to enter into public-private initiatives;

19 (II) In 1999, the general assembly authorized the department of
20 transportation to use an adjusted score design-build selection and
21 procurement process under specified circumstances to select for any given
22 project a single design-build contractor capable of both designing and
23 constructing the project;

24 (III) In 2007, the general assembly authorized state agencies,
25 including the department of transportation, to use the integrated project
26 delivery method to select contractors for public projects. Under this
27 procurement method, a request for qualifications is issued to prequalify

1 contractors to be allowed to respond to a subsequent request for
2 proposals. The agency then selects a single contractor to provide one or
3 more design, construction, alteration, operation, repair, improvement,
4 demolition, maintenance, or financing services for the project after
5 evaluating proposals using statutorily mandated and, at its discretion,
6 additional evaluation factors and subfactors.

7 (IV) In 2013, the general assembly authorized state agencies,
8 including the department of transportation, to use competitive sealed best
9 value bidding to select contractors for public projects. Under this
10 procurement method, the procuring agency selects the contractor whose
11 bid offers the best overall value to the state, which may not be the lowest
12 responsible bid, after evaluating bids using statutorily mandated and, at
13 its discretion, additional evaluation factors.

14 (d) While the use of alternative procurement methods by the
15 department of transportation is sometimes appropriate, especially for
16 large and complex projects that can most effectively and efficiently be
17 completed by large contractors that have substantial financial resources
18 and the technical capacity to provide multiple kinds of design,
19 construction, and other services, for many public projects traditional
20 design bid build contracting remains the fairest, most competitive, most
21 transparent, and most cost-efficient means of procuring contracting
22 services.

23 (e) Overuse of alternative forms of procurement in lieu of
24 traditional design bid build procurement for department of transportation
25 contracts for which design bid build contracting is a feasible means of
26 procurement is problematic because it:

27 (I) Costs the state money and hinders the growth of Colorado

1 businesses by preventing Colorado-based contractors that are small or
2 medium-sized, recently established, or focused on a narrow range of
3 technical contracting capabilities from competing for contracts for
4 projects that they can efficiently and effectively complete against large,
5 experienced, out-of-state contractors on a transparent, objectively
6 evaluated low-cost basis; and

7 (II) By reducing the role of the department in designing and
8 engineering projects before soliciting bids for their construction, leads to
9 excessive reliance on expensive outside project design and engineering
10 consultants.

11 (2) The general assembly further finds and declares that it is
12 necessary, appropriate, and in the best interest of all Coloradans to ensure
13 that the state's limited transportation funding is expended efficiently,
14 increase competition for department of transportation project contracts,
15 expand contracting opportunities for Colorado-based contractors, and
16 improve contracting transparency by:

17 (a) Expressing the intent of the general assembly that the
18 department of transportation use design bid build procurement for all
19 projects for which it is a feasible and cost-efficient procurement method
20 and more clearly delineating in statute the circumstances in which the
21 department may use alternative procurement methods;

22 (b) Providing additional statutory guidance for the department to
23 rely on when weighing a contractor's experience and financial capacity
24 during the contractor prequalification process; and

25 (c) When the department uses an alternative procurement method,
26 ensuring that the department provides adequate disclosure concerning its
27 reasons for using the method and for selecting a particular contractor.

1 **SECTION 2.** In Colorado Revised Statutes, 24-92-103, **amend**
2 (1) as follows:

3 **24-92-103. Construction of public projects - invitation for**
4 **bids.** (1) All construction contracts for public projects that do not receive
5 federal ~~moneys~~ MONEY may be solicited by invitation for bids pursuant
6 to this section. THE DEPARTMENT OF TRANSPORTATION SHALL SOLICIT
7 SUCH CONSTRUCTION CONTRACTS FOR PUBLIC PROJECTS BY INVITATION
8 FOR BIDS PURSUANT TO THIS SECTION UNLESS THE DEPARTMENT
9 DETERMINES, BASED ON SPECIFIC WRITTEN FINDINGS THAT THE
10 DEPARTMENT POSTS ON ITS WEBSITE PRIOR TO AWARDING A CONTRACT,
11 THAT:

- 12 (a) IT IS NOT FEASIBLE TO DO SO; AND
- 13 (b) SOLICITING THE CONTRACT THROUGH AN ALTERNATIVE
14 PROCUREMENT METHOD SUCH AS COMPETITIVE SEALED BEST VALUE
15 BIDDING AUTHORIZED BY SECTION 24-92-103.5, AN INTEGRATED PRODUCT
16 DELIVERY CONTRACT AUTHORIZED BY ARTICLE 93 OF THIS TITLE 24, A
17 PUBLIC-PRIVATE INITIATIVE AUTHORIZED BY PART 12 OF ARTICLE 1 OF
18 TITLE 43, OR A DESIGN-BUILD CONTRACT AUTHORIZED BY PART 14 OF
19 ARTICLE 1 OF TITLE 43 IS LIKELY TO CAUSE THE PROJECT TO BE COMPLETED
20 MORE EFFICIENTLY THROUGH FASTER, LOWER COST, OR HIGHER QUALITY
21 EXECUTION OF THE PROJECT THAN IF THE PROJECT WAS SOLICITED BY
22 INVITATION FOR BIDS PURSUANT TO THIS SECTION.

23 **SECTION 3.** In Colorado Revised Statutes, 24-92-103.5, **amend**
24 (1) and (3)(c) as follows:

25 **24-92-103.5. Construction of public projects - invitation for**
26 **best value bids.** (1) All construction contracts for public projects that do
27 not receive federal ~~moneys~~ MONEY may be awarded through competitive

1 sealed best value bidding pursuant to this section; EXCEPT THAT THE
2 DEPARTMENT OF TRANSPORTATION MAY ONLY AWARD SUCH A CONTRACT
3 THROUGH COMPETITIVE SEALED BEST VALUE BIDDING IF IT FIRST MAKES
4 THE DETERMINATIONS AND TIMELY POSTS ON ITS WEBSITE THE SPECIFIC
5 WRITTEN FINDINGS REQUIRED BY SECTION 24-92-103 (1)(a) OR (1)(b) FOR
6 USE BY THE DEPARTMENT OF PROCUREMENT METHODS OTHER THAN
7 SOLICITATION BY INVITATION FOR BIDS.

8 (3) The invitation for competitive sealed best value bids must
9 identify the evaluation factors upon which the award will be made. When
10 making the award determination, the responsible officer shall evaluate the
11 factors specified in the invitation for bids and shall not evaluate any other
12 factors other than those specified in the invitation for bids. The factors
13 that must be included in the invitation for bids and that the responsible
14 officer shall consider include, but need not be limited to:

15 (c) The experience, past performance, and expertise of the bidder
16 and the bidder's primary subcontractors in connection with prior
17 construction contracts, including its performance in the areas of cost,
18 quality, schedule, safety, compliance with plans and specifications, and
19 adherence to applicable laws and regulations. IF THE PUBLIC PROJECT IS
20 A DEPARTMENT OF TRANSPORTATION PROJECT, A BIDDER'S LACK OF PAST
21 EXPERIENCE ON DEPARTMENT CONTRACTS SHALL NOT BE USED TO
22 DISADVANTAGE THE BIDDER IF THE BIDDER CAN DEMONSTRATE ITS
23 EXPERIENCE, PAST PERFORMANCE, EXPERTISE, AND FINANCIAL CAPACITY
24 AS EVIDENCED BY A SURETY BOND THROUGH ITS WORK ON CONSTRUCTION
25 CONTRACTS IN OTHER STATES OR FOR COUNTY, MUNICIPAL, OR OTHER
26 LOCAL GOVERNMENTS IN THE STATE.

27 **SECTION 4.** In Colorado Revised Statutes, **amend** 24-92-107 as

1 follows:

2 **24-92-107. Prequalification of contractors.** Prospective
3 contractors may be prequalified for particular types of construction, and
4 the method of compiling a list of and soliciting from such potential
5 contractors shall be pursuant to rules. THE DEPARTMENT OF
6 TRANSPORTATION SHALL NOT REFUSE TO PREQUALIFY A PROSPECTIVE
7 CONTRACTOR THAT WOULD OTHERWISE MEET THE DEPARTMENT'S
8 STANDARDS FOR PREQUALIFICATION OR REDUCE THE SCOPE OF
9 PREQUALIFICATION THAT IT WOULD OTHERWISE GRANT A CONTRACTOR
10 BASED ON THE CONTRACTOR'S LACK OF PRIOR OPPORTUNITY TO
11 DEMONSTRATE PERFORMANCE ON PAST DEPARTMENT CONTRACTS IF THE
12 CONTRACTOR CAN DEMONSTRATE ITS EXPERIENCE, PAST PERFORMANCE,
13 EXPERTISE, AND FINANCIAL CAPACITY AS EVIDENCED BY A SURETY BOND
14 THROUGH ITS WORK ON CONSTRUCTION CONTRACTS IN OTHER STATES OR
15 FOR COUNTY, MUNICIPAL, OR OTHER LOCAL GOVERNMENTS IN THE STATE.

16 **SECTION 5.** In Colorado Revised Statutes, 24-93-104, **amend**
17 (1) as follows:

18 **24-93-104. Integrated project delivery contracts -**
19 **authorization - effect of other laws.** (1) (a) EXCEPT AS OTHERWISE
20 PROVIDED IN SUBSECTION (1)(b) OF THIS SECTION AND notwithstanding
21 any other provision of law, any agency may award an IPD contract for a
22 public project in accordance with the provisions of this article upon the
23 determination by ~~such~~ THE agency that integrated project delivery
24 represents a timely or cost-effective alternative for a public project.

25 (b) THE DEPARTMENT OF TRANSPORTATION MAY ONLY AWARD AN
26 IPD CONTRACT FOR A PUBLIC PROJECT IF IT FIRST MAKES THE
27 DETERMINATIONS AND TIMELY POSTS ON ITS WEBSITE THE SPECIFIC

1 WRITTEN FINDINGS REQUIRED BY SECTION 24-92-103 (1)(a) OR (1)(b) FOR
2 USE BY THE DEPARTMENT OF PROCUREMENT METHODS OTHER THAN
3 SOLICITATION BY INVITATION FOR BIDS.

4 **SECTION 6.** In Colorado Revised Statutes, 24-93-105, **amend**
5 (1)(d) as follows:

6 **24-93-105. Integrated project delivery contracting process -**
7 **prequalification of participating entities - apprentice training.** (1) An
8 agency may prequalify participating entities for IPD contracts by public
9 notice of its request for qualifications prior to the date set forth in the
10 notice. Any such request for qualifications may contain the following
11 elements and such additional information as may be requested by the
12 agency:

13 (d) The criteria for prequalification. IF THE PREQUALIFYING
14 AGENCY IS THE DEPARTMENT OF TRANSPORTATION, IT SHALL NOT REFUSE
15 TO PREQUALIFY A PARTICIPATING ENTITY ON THE BASIS OF THE
16 PARTICIPATING ENTITY'S LACK OF EXPERIENCE ON PAST DEPARTMENT
17 CONTRACTS IF THE PARTICIPATING ENTITY CAN DEMONSTRATE ITS
18 EXPERIENCE, PAST PERFORMANCE, EXPERTISE, AND FINANCIAL CAPACITY
19 AS EVIDENCED BY A SURETY BOND THROUGH ITS WORK ON PUBLIC
20 PROJECTS IN OTHER STATES OR FOR COUNTY, MUNICIPAL, OR OTHER LOCAL
21 GOVERNMENTS IN THE STATE.

22 **SECTION 7.** In Colorado Revised Statutes, 24-93-106, **amend**
23 (1)(c) as follows:

24 **24-93-106. Requests for proposals - evaluation and award of**
25 **integrated project delivery contracts.** (1) (c) Past performance and
26 experience; EXCEPT THAT, IF THE AGENCY IS THE DEPARTMENT OF
27 TRANSPORTATION, A PARTICIPATING ENTITY'S LACK OF PAST EXPERIENCE

1 ON DEPARTMENT CONTRACTS SHALL NOT BE USED TO DISADVANTAGE THE
2 PARTICIPATING ENTITY IF THE PARTICIPATING ENTITY CAN DEMONSTRATE
3 ITS EXPERIENCE, PAST PERFORMANCE, EXPERTISE, AND FINANCIAL
4 CAPACITY AS EVIDENCED THROUGH ITS WORK ON PUBLIC CONTRACTS IN
5 OTHER STATES OR FOR COUNTY, MUNICIPAL, OR OTHER LOCAL
6 GOVERNMENTS IN THE STATE.

7 **SECTION 8.** In Colorado Revised Statutes, **amend** 24-93-109 as
8 follows:

9 **24-93-109. Disclosure.** The executive director of an agency or
10 president of an institution of higher education that enters into a
11 construction contract for a public project pursuant to this ~~article~~ ARTICLE
12 93 shall disclose to the public the agency's rationale or the institution's
13 rationale for selecting the integrated project delivery contracting process
14 pursuant to this ~~article~~ ARTICLE 93 for the public project. IF THE AGENCY
15 IS THE DEPARTMENT OF TRANSPORTATION, IT SHALL MAKE THE
16 DISCLOSURE BEFORE ENTERING INTO THE CONTRACT AND SHALL ALSO
17 DISCLOSE TO THE PUBLIC WHEN IT ENTERS INTO AN INTEGRATED PUBLIC
18 DELIVERY CONTRACT ITS RATIONALE FOR SELECTING THE SPECIFIC
19 PARTICIPATING ENTITY TO WHICH IT AWARDED THE CONTRACT. The
20 agency or institution shall post the disclosure on its website.

21 **SECTION 9.** In Colorado Revised Statutes, 43-1-1202, **amend**
22 (1) introductory portion; and **add** (1.5) as follows:

23 **43-1-1202. Department powers - definition.** (1) EXCEPT AS
24 OTHERWISE PROVIDED IN SUBSECTION (1.5) OF THIS SECTION AND
25 notwithstanding any other law, the department may:

26 (1.5) IF A PROJECT THAT MAY BE UNDERTAKEN THROUGH A
27 PUBLIC-PRIVATE INITIATIVE PURSUANT TO SUBSECTION (1)(a) OF THIS

1 SECTION IS A PUBLIC PROJECT, AS DEFINED IN SECTION 24-92-102 (8), THAT
2 IS NOT FUNDED IN ANY PART WITH FEDERAL MONEY, THE DEPARTMENT OF
3 TRANSPORTATION MAY ONLY SOLICIT PROPOSALS FOR, ACCEPT AN
4 UNSOLICITED PROPOSAL FOR, OR ENTER INTO AN AGREEMENT FOR A
5 PUBLIC-PRIVATE INITIATIVE TO UNDERTAKE THE PROJECT IF IT FIRST
6 MAKES THE DETERMINATIONS AND TIMELY POSTS ON ITS WEBSITE THE
7 SPECIFIC WRITTEN FINDINGS REQUIRED BY SECTION 24-92-103 (1)(a) OR
8 (1)(b) FOR USE BY THE DEPARTMENT OF PROCUREMENT METHODS OTHER
9 THAN SOLICITATION BY INVITATION FOR BIDS.

10 **SECTION 10.** In Colorado Revised Statutes, **add** 43-1-1210 as
11 follows:

12 **43-1-1210. Disclosure - public-private initiative - selection of**
13 **private or public entity.** IF THE DEPARTMENT INTENDS TO ENTER INTO A
14 PUBLIC-PRIVATE INITIATIVE AGREEMENT FOR A PROJECT THAT IS SUBJECT
15 TO THE REQUIREMENTS SET FORTH IN SECTION 43-1-1202 (1.5), IT SHALL
16 DISCLOSE TO THE PUBLIC ON ITS WEBSITE BEFORE ENTERING INTO THE
17 AGREEMENT ITS RATIONALE FOR ENTERING INTO THE AGREEMENT IN LIEU
18 OF SOLICITING A CONTRACTOR FOR THE PROJECT BY INVITATION FOR BIDS
19 PURSUANT TO SECTION 24-92-103 OR BY INVITATION FOR BEST VALUE BIDS
20 PURSUANT TO SECTION 24-92-103.5. THE DEPARTMENT SHALL ALSO
21 DISCLOSE TO THE PUBLIC ON ITS WEBSITE WHEN IT ENTERS INTO A
22 PUBLIC-PRIVATE INITIATIVE AGREEMENT ITS RATIONALE FOR SELECTING
23 EACH PRIVATE OR PUBLIC ENTITY THAT IS A PARTY TO THE AGREEMENT
24 OVER ANY OTHER UNSELECTED PRIVATE OR PUBLIC ENTITIES THAT
25 SUBMITTED COMPARABLE PROPOSALS.

26 **SECTION 11.** In Colorado Revised Statutes, **amend** 43-1-1403
27 as follows:

1 **43-1-1403. Authority to use a design-build contract process.**
2 NOTWITHSTANDING ANY OTHER PROVISION OF LAW TO THE CONTRARY,
3 THE DEPARTMENT MAY SELECT A DESIGN-BUILD FIRM AND AWARD A
4 DESIGN-BUILD CONTRACT FOR A TRANSPORTATION PROJECT AS PROVIDED
5 IN THIS PART 14; EXCEPT THAT, IF THE TRANSPORTATION PROJECT IS A
6 PUBLIC PROJECT, AS DEFINED IN SECTION 24-92-102 (8), THAT IS NOT
7 FUNDED IN ANY PART WITH FEDERAL MONEY, THE DEPARTMENT SHALL
8 MAKE THE DETERMINATIONS AND TIMELY POST ON ITS WEBSITE THE
9 SPECIFIC WRITTEN FINDINGS REQUIRED BY SECTION 24-92-103 (1)(a) OR
10 (1)(b) FOR USE BY THE DEPARTMENT OF A PROCUREMENT METHOD OTHER
11 THAN SOLICITATION BY INVITATION FOR BIDS BEFORE SELECTING A
12 DESIGN-BUILD FIRM AND AWARDING A DESIGN-BUILD CONTRACT. The
13 department may include a warranty provision in any design-build contract
14 that requires the design-build firm to perform maintenance services on the
15 completed transportation project.

16 **SECTION 12.** In Colorado Revised Statutes, 43-1-1406, **amend**
17 (1)(b)(I) as follows:

18 **43-1-1406. General procedures.** (1) The department shall
19 describe in the specifications for the transportation project the particular
20 design-build contract and selection procedures to be used in awarding
21 such contract, including but are not limited to the following:

22 (b) If the department uses an adjusted score design-build contract
23 process to select a design-build firm, a scope of work statement that is
24 flexible and that identifies the end result that the department wants to
25 achieve. The department may determine the adjustment factors and
26 methods it will use to adjust scores and shall state such factors and
27 methods in the specifications for the transportation project. The

1 department may also provide a general concept of the transportation
2 project to potential design-build firms. Adjusted score design-build
3 procedures shall consist of the following two phases:

4 (I) In the first phase, the department shall issue a request for
5 qualifications within the time specified in section 43-1-1405 to solicit
6 proposals that include information on the design-build firm's
7 qualifications and its technical approach to the proposed transportation
8 project. The department shall include appropriate evaluation factors in the
9 request for qualifications, including the factors set forth in section
10 24-30-1403 (2). ~~C.R.S.~~ THE DEPARTMENT SHALL NOT REFUSE TO
11 PREQUALIFY A PROSPECTIVE DESIGN-BUILD FIRM ON THE BASIS OF THE
12 PARTICIPATING ENTITY'S LACK OF EXPERIENCE ON PAST DEPARTMENT
13 PROJECTS IF THE FIRM CAN DEMONSTRATE ITS EXPERIENCE, PAST
14 PERFORMANCE, EXPERTISE, AND FINANCIAL CAPACITY AS EVIDENCED BY
15 A SURETY BOND THROUGH ITS WORK ON PUBLIC PROJECTS IN OTHER
16 STATES OR FOR COUNTY, MUNICIPAL, OR OTHER LOCAL GOVERNMENTS IN
17 THE STATE. The department shall not include cost-related or price-related
18 factors in the request for qualifications. In accordance with the time
19 requirements specified in the department's rules, the department shall
20 develop a short list of the highest qualified design-build firms from the
21 proposals submitted in response to the request for qualifications.

22 **SECTION 13. Act subject to petition - effective date -**
23 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
24 the expiration of the ninety-day period after final adjournment of the
25 general assembly; except that, if a referendum petition is filed pursuant
26 to section 1 (3) of article V of the state constitution against this act or an
27 item, section, or part of this act within such period, then the act, item,

1 section, or part will not take effect unless approved by the people at the
2 general election to be held in November 2022 and, in such case, will take
3 effect on the date of the official declaration of the vote thereon by the
4 governor.

5 (2) This act applies to contracts for public projects for which the
6 department of transportation initiates a procurement process on or after
7 the applicable effective date of this act.