

**3043**  
**Design-Build Contracts**

This policy is adopted pursuant to the Political Subdivisions Construction Alternatives Act (NEB. REV. STAT. § 13-2901 through § 13-2914).

The board shall adopt a resolution by a two-thirds affirmative vote selecting the design-build contract delivery system prior to proceeding with any of the steps involved with solicitation or execution of any construction contract.

**Definitions.** For purposes of this policy:

1. Board means the District’s Board of Education.
2. Department means the Nebraska Department of Education.
3. Design-Build Contract (DB Contract) means a contract which is subject to qualification-based selection between the District and a Design-Builder to furnish (a) architectural, engineering, and related design services for a project pursuant to the Nebraska Political Subdivisions Construction Alternatives Act (Act) and (b) labor, materials, supplies, equipment, and construction services for a project pursuant to the Act.
4. Design-Builder means a legal entity which proposes to enter into a DB Contract which is subject to qualification-based selection pursuant to the Act.
5. District means Valentine Community Schools.
6. NEARA means the Nebraska Engineers and Architects Regulation Act.
7. Performance-Criteria Developer (PCD) means any person licensed or any organization issued a certificate of authorization to practice architecture or engineering pursuant to the NEARA who is selected by the District pursuant to this policy to assist the District in the development of Project Performance Criteria, Requests For Proposals, evaluation of Proposals, evaluation of construction under a DB Contract to determine adherence to the Project Performance Criteria, and any additional services requested by the District to represent its interests in relation to a project.
8. Project Performance Criteria means the performance requirements of the project suitable to allow the Design-Builder to make a Proposal.

45 Performance requirements include the following, if required by the  
46 project: capacity, durability, standards, ingress and egress  
47 requirements, description of the site, surveys, soil and  
48 environmental information concerning the site, interior space  
49 requirements, material quality standards, design and construction  
50 schedules, site development requirements, provisions for utilities,  
51 storm weather retention and disposal, parking requirements,  
52 applicable governmental code requirements, and other criteria for  
53 the intended use of the project.

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55 9. Proposal means an offer in response to a Request For Proposals  
56 ("RFP") by a Design-Builder to enter into a DB Contract for a  
57 project pursuant to the Act.

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59 10. Act means the Nebraska Political Subdivisions Construction  
60 Alternatives Act.

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62 11. Request for Proposals (RFP) means the documentation by which the  
63 District solicits Proposals.

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65 12. Superintendent means the District's Superintendent of Schools.

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67 **Procedures.** The District shall follow the procedures below in connection  
68 with any DB Contract.

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70 **1. Rules and Procedures for Selecting and Hiring a PCD for a**  
71 **Specific Project.**

72 A. The District shall encourage eligible persons or organizations  
73 who desire to provide services to the District as a PCD to  
74 submit a statement of qualifications and performance data to  
75 the District. At least thirty days prior to selecting and hiring a  
76 PCD, the District shall publish notice in a newspaper of  
77 general circulation in the District that it is seeking a PCD for a  
78 design-build project. The notice shall include the following:

- 79  
80 (1) A general description of the Design-Build project;  
81 (2) Directions regarding how interested persons or  
82 organizations can apply for consideration by the  
83 District;  
84 (3) The date by which persons or organizations must  
85 submit their applications; and  
86 (4) A statement that any person or organization applying  
87 for consideration by the District must obtain a copy

88 of the District's Design-Build Contract Policy from the  
89 Superintendent.  
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91 B. To apply to be the District's PCD, applicants must submit a  
92 current statement of qualifications and performance data to  
93 the District. The statement of qualifications must include  
94 evidence that the applicant is licensed or certified to practice  
95 architecture or engineering pursuant to the NEARA.  
96 Applicants must update any information provided to the  
97 District to reflect any changed conditions of the applicant.  
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99 C. Applicants shall first be certified by the Superintendent as  
100 qualified to act as a PCD for the District. In order to certify an  
101 applicant, the Superintendent shall make a finding that a PCD is  
102 fully qualified to render the required service. Factors to be  
103 considered in making this finding shall include capabilities to  
104 perform, adequacy of personnel, past record and performance,  
105 and experience; and may also include consideration of recent,  
106 current, and projected workloads; experience; equipment and  
107 facilities; promptness, and the quality of work previously done  
108 by applicant; suitability to the particular task; willingness to  
109 meet time and budget requirements; and such other qualities as  
110 are found necessary to consider in order to determine whether  
111 or not, if awarded the contract, the applicant could perform it  
112 strictly in accordance with its terms capabilities to perform.  
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114 D. The Board shall evaluate each qualified applicant's current  
115 statement of qualifications and performance data. The Board  
116 shall conduct discussions with, and may require public  
117 presentations by no less than three applicants regarding their  
118 qualifications, approach to the project, ability to furnish the  
119 required service, and other factors identified above.  
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121 E. The Board shall select, in order of preference, at least three  
122 applicants deemed to be most highly qualified to perform the  
123 required services after considering the factors outlined above.  
124

125 F. The Board shall negotiate a contract with the most qualified  
126 applicant for compensation which the Board determines is fair  
127 and reasonable. In making this determination, the Board shall  
128 conduct a detailed analysis of the cost of the professional  
129 services required in addition to considering their scope and  
130 complexity. For all lump-sum or cost-plus-a-fixed-fee  
131 professional service contracts, the Board shall require the

132 applicant receiving the award to execute a certificate stating that  
133 wage rates and other factual unit costs supporting the  
134 compensation are accurate, complete, and current at the time of  
135 contracting. Any contract under which such a certificate is  
136 required shall contain a provision that the original contract price  
137 and any additions thereto shall be adjusted to exclude any  
138 significant sums by which the Board determines the contract  
139 price had been increased due to inaccurate, incomplete, or  
140 noncurrent wage rates and other factual unit costs. All such  
141 contract adjustments shall be made within one year following the  
142 end of the contract.

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144 G. If the Board is unable to negotiate a satisfactory contract with  
145 the applicant considered to be the most qualified at a price the  
146 Board determines to be fair and reasonable, it shall terminate  
147 negotiations with that applicant. The Board may then undertake  
148 negotiations with the second most qualified applicant. If the  
149 Board fails to reach an agreement with the second most qualified  
150 applicant, it shall terminate negotiations with that applicant. The  
151 Board shall then undertake negotiations with the third most  
152 qualified applicant.

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154 H. If the Board is unable to negotiate a satisfactory contract with  
155 any of the selected applicants, it shall either select additional  
156 applicants in order of their competence and qualification and  
157 continue negotiations in accordance with this policy until an  
158 agreement is reached or review the agreement under negotiation  
159 to determine the possible cause for failure to achieve a  
160 negotiated agreement.

161  
162 I. The Board may designate a committee to carry out any or all of  
163 the Board's duties under the PCD selection section of this policy,  
164 provided that the Board must approve any agreement with an  
165 applicant prior to its execution. Any such committee must have  
166 among its membership at least one person who is licensed to  
167 practice architecture or engineering pursuant to the NEARA.

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169 J. The public shall not be excluded from the meetings or  
170 proceedings under this section of this policy in accordance with  
171 the Open Meetings Act.

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173 K. The contract between the District and the PCD shall contain a  
174 prohibition against contingent fees as follows: "The PCD  
175 warrants that it has not employed or retained any company or

176 person, other than a bona fide employee working solely for the  
177 PCD, to solicit or secure this agreement and that the PCD has  
178 not paid or agreed to pay any person, company, corporation,  
179 individual, or firm, other than a bona fide employee working  
180 solely for the PCD, any fee, commission, percentage, gift, or any  
181 other consideration contingent upon or resulting from the award  
182 or the making of this agreement." Upon violation of such  
183 provision, the District shall have the right to terminate the  
184 agreement without liability and, at its discretion, to deduct from  
185 the contract price, or otherwise recover, the full amount of such  
186 fee, commission, percentage, or consideration.

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- 188 L. The PCD is ineligible to be included as a provider of any services  
189 in a Proposal for the project on which it has acted as a PCD.
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- 191 M. A PCD may not be employed by or may not have a financial or  
192 other interest in a Design-Builder that will submit a Proposal.
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194 **2. Procedures and standards to be used to prequalify Design-**  
195 **Builders.**

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- 197 A. The District, with the help of the PCD, shall prepare a request for  
198 letters of interest. The request for letters of interest shall:
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  - 200 (1) Describe the project in sufficient detail to permit a  
201 Design-Builder to submit a letter of interest;
  - 202 (2) Be published in a newspaper of general circulation  
203 within the District at least 30 days prior to the deadline  
204 for receiving letters of interest; and
  - 205 (3) Be sent by first-class mail to any Design-Builder upon  
206 request.
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- 208 B. Letters of interest shall be reviewed by the District in  
209 consultation with the PCD. The District and the PCD will  
210 evaluate prospective Design-Builders based on the  
211 information submitted to the District in response to the  
212 request for letters of interest.
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- 214 C. The District shall select at least three prospective Design-  
215 Builders, except that if only two Design-Builders have  
216 submitted letters of interest, the District shall select at least  
217 two prospective Design-Builders. Such selected Design-  
218 Builders shall be considered prequalified and eligible to  
219 receive and respond to the RFP.

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D. The District and PCD shall use the following standards when selecting which prospective Design-Builders to prequalify: capabilities to perform, adequacy of personnel, past record and performance, and experience; and may also include consideration of recent, current, and projected workloads; experience; equipment and facilities; promptness, and the quality of work previously done by applicant; suitability to the particular task; willingness to meet time and budget requirements; and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, the applicant could perform it strictly in accordance with its terms capabilities to perform.

**3. Procedures for the preparation and content of RFPs.**

- A. The District, with the help of the PCD, shall prepare the RFP, which shall contain:
- (1) The identity of the school district for which the project will be built and will execute the Design-Build Contract;
  - (2) A copy of this Design-Build Contract Policy and all other policies adopted by the District relating to the DB Contract;
  - (3) The proposed terms and conditions of the DB Contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions shall be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in Nebraska. The proposed terms and conditions may set forth an initial determination of the manner by which the Design-Builder selects any subcontractor and may require that any work subcontracted be awarded by competitive bidding;
  - (4) A project statement which contains information about the scope and nature of the project;
  - (5) Project Performance Criteria;
  - (6) Budget parameters for the project;
  - (7) Any bonds or insurance required by law or as may be additionally required by the District;
  - (8) The criteria for evaluation of Proposals and the relative weight of each criterion;
  - (9) A requirement that the Design-Builder provide a written statement of its proposed approach to the design and

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- construction of the project, which may include graphic materials illustrating the proposed approach to design and construction but shall not include price proposals;
- (10) A requirement that the Design-Builder agree to the following conditions:
- (i) An architect or engineer licensed to practice in Nebraska will participate substantially in those aspects of the offering which involve architectural or engineering services;
  - (ii) At the time of the design-build offering, the Design-Builder will furnish to the Board a written statement identifying the architect or engineer who will perform the architectural or engineering work for the design-build project;
  - (iii) The architect or engineer engaged by the Design-Builder to perform the architectural or engineering work with respect to the design-build project will have direct supervision of such work and may not be removed by the Design-Builder prior to the completion of the project without the written consent of the Board;
  - (iv) A Design-Builder offering design-build services with its own employees who are design professionals licensed to practice in Nebraska will: (a) comply with the NEARA by procuring a certificate of authorization to practice architecture or engineering and (b) submit proof of sufficient professional liability insurance; and
  - (v) The rendering of architectural or engineering services by a licensed architect or engineer employed by the Design-Builder will conform to the NEARA and rules and regulations adopted under the Act; and
- (11) Other information the District chooses to require.
- B. At least 30 days prior to the deadline for receiving and opening Proposals, the notice of the RFP shall be:

- 308 (1) Published in a newspaper of general circulation within  
309 the District;  
310 (2) Filed with the Department; and  
311 (3) Sent by first-class mail to the prequalified Design-  
312 Builders only.

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314 **4. Procedures for preparing and submitting Proposals.**

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316 A. Prequalified Design-Builders shall prepare and submit Proposals  
317 as required by the RFP.  
318 B. All Proposals shall be sealed. Proposals shall not be opened until  
319 expiration of the time established for making Proposals as set  
320 forth in the RFP.  
321 C. Proposals may be withdrawn at any time prior to acceptance.  
322 D. The District has the right to reject any and all Proposals except  
323 for the purpose of evading the law. The District may  
324 thereafter solicit new Proposals using the same or a different  
325 Project Performance Criteria.  
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327 **5. Procedures for evaluating Proposals.**

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329 A. The District may only proceed to negotiate and enter into a DB  
330 Contract if there are at least two proposals from prequalified  
331 Design-Builders.  
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333 B. The District shall refer the proposals for recommendation to a  
334 selection committee. The selection committee shall be a  
335 group of at least five persons designated by the District.  
336 Members of the selection committee shall include (1)  
337 members of the school board, (2) members of the school  
338 administration or staff, (3) the school's architect or engineer  
339 (4) any person having special expertise relevant to selection  
340 of a design-builder under the Act, and (5) a resident of the  
341 District other than an individual included in subdivisions (1)  
342 through (4) of this subsection. A member of the selection  
343 committee designated under subdivision (4) or (5) of this  
344 subsection shall not be employed by or have a financial or  
345 other interest in a design-builder who has a proposal being  
346 evaluated and shall not be employed by the District or the  
347 school's architect or engineer.  
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349 C. The selection committee and the District shall evaluate proposals  
350 taking into consideration the criteria enumerated in  
351 subdivisions (1) through (7) of this subsection with the

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maximum percentage of total points for evaluation which may be assigned to each criterion set forth following the criterion. (\*\*The percentages listed below must be modified so that they add up to 100%. This can be done at the time the school board designates the CM@R method for a specific project, or at a later time but before the RFP is published and sent out.) The following criteria shall be evaluated, when applicable:

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

The records of the selection committee in evaluating proposals and making recommendations shall be considered public records for purposes of NEB. REV. STAT. § 84-712.01.

- D. The District shall then evaluate and rank each proposal on the basis of best meeting the criteria in the request for proposals and taking into consideration the recommendation of the selection committee.

**6. Procedures for Negotiations between the District and Design-Builders Submitting Proposals Prior to the District's Acceptance of a Proposal.**

- 396 A. The District may attempt to negotiate a DB Contract with the  
397 highest ranked Design-Builder selected by the Board and may  
398 enter into a DB Contract after negotiations.
- 399 B. The negotiations shall include a final determination of the  
400 manner by which the design-builder selects a subcontractor.
- 401 C. If the District is unable to negotiate a satisfactory DB Contract  
402 with the highest ranked Design-Builder, it may terminate  
403 negotiations with that Design-Builder. The District may then  
404 undertake negotiations with the second highest ranked  
405 Design-Builder and may enter into a DB Contract with that  
406 Design-Builder after negotiations.
- 407 D. If the District is unable to negotiate a satisfactory DB Contract  
408 with the second highest ranked Design-Builder, it may  
409 terminate negotiations with that Design-Builder. The District  
410 may then undertake negotiations with the third highest  
411 ranked Design-Builder, if any, and may enter into a DB  
412 Contract with that Design-Builder after negotiations.
- 413 E. If the District is unable to negotiate a satisfactory DB Contract  
414 with any of the ranked Design-Builders, it may either revise  
415 the RFP and solicit new Proposals or cancel the design-build  
416 process.
- 417 F. If the District is able to negotiate a satisfactory contract with a  
418 design-builder, the District shall file a copy of all design-build  
419 contract documents with the State Department of Education  
420 within thirty days after their full execution. Within thirty days  
421 after completion of the project, the design-builder shall file a  
422 copy of all contract modifications and change orders with the  
423 State Department of Education.

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425 **7. Procedures for Filing and Acting on Formal Protests Relating to**  
426 **the Solicitation or Execution of DB Contracts.**  
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428 A. Definitions.

- 429 (1) Interested party shall mean an actual or prospective  
430 bidder whose direct economic interest would be affected  
431 by the award of a contract by the District to another  
432 party or by the failure of the District to award a contract  
433 to such actual or prospective bidder.
- 434 (2) Protest shall mean a written objection by an interested  
435 party on any phase of the bidding process, including  
436 specification, preparation, bid solicitation, and intent to  
437 award.  
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B. Right to Protest. An interested party may protest to the Superintendent. The protest shall be submitted in writing on company letterhead within five working days after public notice of the bid. Protests based on alleged apparent improprieties in a solicitation or other request for proposals must be filed before bid opening or the closing date for receipt of proposals. In all other cases, the protest must be filed within five working days following the selection of the design-builder. To expedite handling of protests, the envelope containing the protest should be clearly labeled "Protest". The written protest shall include as a minimum the following:

- (1) The name and address of the interested party;
- (2) Appropriate identification of the relevant solicitation, and if a bid has been opened, its number, and date of opening;
- (3) A detailed statement of reasons for the protest;
- (4) Supporting, exhibits, evidence, or documents to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated; and a list of all persons who have knowledge of facts relevant to the protest; and
- (5) The action(s) the protestor desires the school district to take to resolve the protest.

The Superintendent will immediately decide upon receipt of the protest whether or not the award of a contract shall be delayed, or if the protest is timely received after the award, whether the performance of the contract should be suspended. The school district shall not proceed further with the solicitation or with the award of the contract and shall suspend performance under the contract, if awarded, unless the Superintendent makes a written determination that the protest is clearly without merit or that award of the contract without delay is necessary to protect the substantial interests of the District.

C. Authority to Resolve Protests. Prior to the commencement of an administrative review by the Board concerning any protest, the Superintendent shall attempt to resolve any protest filed by an interested party concerning any solicitation. If the protest is not resolved by mutual agreement, the Superintendent shall create and deliver a

483 Decision to the protestor within a reasonable time after the  
484 written protest was received. The Decision shall include a  
485 written summary of the Superintendent’s investigation and  
486 a recommendation regarding the outcome of the protest.  
487 The Decision shall (1) state the reasons for the action  
488 taken, and (2) inform the interested party of their right to  
489 the administrative review by the Board. A copy of the  
490 Decision shall be mailed or otherwise furnished  
491 immediately to the interested party and any other party  
492 intervening protester and all other bidders. If not satisfied  
493 with the decision of the Superintendent, any interested  
494 party protester may appeal to the Board, but the decision  
495 shall be final unless the interested party protester files a  
496 timely appeal with the  
497 Board.

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499 D. Board Appeal Procedures. Any interested party protester,  
500 within five working days of receipt of a decision of the  
501 Superintendent, may file with the Superintendent a written  
502 notice of appeal for an administrative review before the  
503 Board. The Notice of Appeal must clearly state the action  
504 protested and the basis of appeal. The Board will conduct  
505 an administrative review at its next regularly scheduled  
506 meeting or at a special meeting. The school district board  
507 of education shall consider the Decision of the  
508 Superintendent and shall make the final decision on the  
509 protest. The school district board of education’s decision  
510 shall be final.

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512 **8. Refinements and Changes.** A DB Contract may be conditioned upon  
513 later refinements in scope and price and may permit the District, in  
514 agreement with the Design-Builder, to make changes in the project  
515 without invalidating the DB Contract. Later refinements shall not,  
516 however, exceed the scope of the project statement contained in  
517 the RFP.

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519 **9. Projects Excluded.** The District shall not use a design-build contract  
520 for any construction project excluded by NEB. REV. STAT. § 13-  
521 2914 or any other applicable law.

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524 Revised on: December 11, 2018  
525 Reviewed on: July 13, 2017; December 11, 2018  
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