

STATE OF NEW YORK

8174

IN SENATE

January 11, 2024

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Procurement and Contracts

AN ACT to authorize, for certain public works undertaken pursuant to project labor agreements, use of the alternative delivery method known as design-build contracts; and providing for the repeal of such provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "county public works investment act".

3 § 2. For the purposes of this act:

4 (a) "Authorized entity" shall mean any county within the state having
5 a population of one million or more persons.

6 (b) "Best value" shall mean the basis for awarding contracts for
7 services to a proposer that optimizes quality, cost and efficiency,
8 price and performance criteria, which may include, but is not limited
9 to:

10 (1) The quality of the proposer's performance on previous projects;

11 (2) The timeliness of the proposer's performance on previous projects;

12 (3) The level of customer satisfaction with the proposer's performance
13 on previous projects;

14 (4) The proposer's record of performing previous projects on budget
15 and ability to minimize cost overruns;

16 (5) The proposer's ability to limit change orders;

17 (6) The proposer's ability to prepare appropriate project plans;

18 (7) The proposer's technical capacities;

19 (8) The individual qualifications of the proposer's key personnel;

20 (9) The proposer's ability to assess and manage risk and minimize risk
21 impact;

22 (10) The proposer's financial capability;

23 (11) The proposer's ability to comply with applicable requirements,
24 including the provisions of articles 145, 147 and 148 of the education
25 law;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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(12) The proposer's past record of compliance with federal, state and local laws, rules, licensing requirements, where applicable, and executive orders, including but not limited to compliance with the labor law and other applicable labor and prevailing wage laws, article 15-A of the executive law, and any other applicable laws concerning minority- and women-owned business enterprise participation;

(13) The proposer's record of complying with existing labor standards, maintaining harmonious labor relations, and protecting the health and safety of workers and payment of wages above any locally-defined living wage; and

(14) A quantitative factor to be used in evaluation of bids or offers for awarding of contracts for bidders or offerers that are certified as minority- or women-owned business enterprises pursuant to article 15-A of the executive law, and certified pursuant to local law as minority- or women-owned business enterprises. Where an agency identifies a quantitative factor pursuant to this paragraph, the agency must specify that businesses certified as minority- or women-owned business enterprises pursuant to article 15-A of the executive law as well as those certified as minority- or women-owned business enterprises or pursuant to section 1304 of the New York city charter are eligible to qualify for such factor. Nothing in this paragraph shall be construed as a requirement that such businesses be concurrently certified as minority- or women-owned business enterprises under both article 15-A of the executive law and section 1304 of the New York city charter to qualify for such quantitative factors.

Such basis shall reflect, wherever possible, objective and quantifiable analysis.

(c) "Cost plus" shall mean compensating a contractor for the cost to complete a contract by reimbursing actual costs for labor, equipment and materials plus an additional amount for overhead and profit.

(d) "Design-build contract" shall mean a contract for the design and construction of a public work with a single entity, which may be a team comprised of separate entities.

(e) "Project labor agreement" shall have the meaning set forth in subdivision 1 of section 222 of the labor law. A project labor agreement shall require participation in apprentice training programs in accordance with paragraph (e) of subdivision 2 of such section.

§ 3. Any contract for a public work undertaken pursuant to a project labor agreement in accordance with section 222 of the labor law may be a design-build contract in accordance with this act.

§ 4. Notwithstanding any general, special or local law, rule or regulation to the contrary, including but not limited to section 7210 of the education law, article 5-A of the general municipal law and article 8 of the public housing law, and in conformity with the requirements of this act, for any public work that has an estimated cost of not less than 10 million dollars and is undertaken pursuant to a project labor agreement in accordance with section 222 of the labor law, an authorized entity charged with awarding a contract for public work may use the alternative delivery method referred to as design-build contracts; provided that any authorized entity may use the alternative delivery method referred to as design-build contracts for any public work that has an estimated cost of not less than one million two hundred thousand dollars if such public work is otherwise in conformity with the requirements of this act and primarily consists of: pedestrian ramps and similar infrastructure to improve access to sidewalks for people with disabilities; renovation and construction of cultural institutions located on publicly owned real

property and of public libraries; or security infrastructure, including bollards, planters and other physical structures, designed to protect life and property from acts of terror or mass violence.

(a) A contractor selected by such an authorized entity to enter into a design-build contract shall be selected through a two-step method, as follows:

(1) Step one. Generation of a list of responding entities that have demonstrated the general capability to perform the design-build contract. Such list shall consist of a specified number of responding entities, as determined by an authorized entity, and shall be generated based upon the authorized entity's review of responses to a publicly advertised request for qualifications. The authorized entity's request for qualifications shall include a general description of the public work, the maximum number of responding entities to be included on the list, the selection criteria to be used and the relative weight of each criteria in generating the list. Such selection criteria shall include the qualifications and experience of the design and construction team, organization, demonstrated responsibility, ability of the team or of a member or members of the team to comply with applicable requirements, including the provisions of articles 145, 147 and 148 of the education law, past record of compliance with the labor law, and such other qualifications the authorized entity deems appropriate, which may include but are not limited to project understanding, financial capability and record of past performance. The authorized entity shall evaluate and rate all responding entities to the request for qualifications. Based upon such ratings, the authorized entity shall list the responding entities that shall receive a request for proposals in accordance with paragraph two of this subdivision. To the extent consistent with applicable federal law, the authorized entity shall consider, when awarding any contract pursuant to this section, the participation of (i) responding entities that are certified as minority- or women-owned business enterprises pursuant to article 15-A of the executive law or certified pursuant to local law as minority- or women-owned business enterprises; and (ii) small business concerns identified pursuant to subdivision (b) of section 139-g of the state finance law. In addition, nothing in this section shall be deemed to supersede any pre-qualification guidelines or requirements otherwise authorized by law for an authorized entity.

(2) Step two. Selection of the proposal which is the best value to the authorized entity. The authorized entity shall issue a request for proposals to the responding entities listed pursuant to paragraph one of this subdivision. If such a responding entity consists of a team of separate entities, the entities that comprise such a team must remain unchanged from the responding entity as listed pursuant to paragraph one of this subdivision unless otherwise approved by the authorized entity. The request for proposals shall set forth the public work's scope of work, and other requirements, as determined by the authorized entity, which may include separate goals for work under the contract to be performed by businesses certified as minority- or women-owned business enterprises pursuant to article 15-A of the executive law or section 1743 of the public authorities law, or certified pursuant to local law as minority- or women-owned business enterprises. The request for proposals shall also specify the criteria to be used to evaluate the responses and the relative weight of each of such criteria. Such criteria shall include the proposal's cost, the quality of the proposal's solution, the qualifications and experience of the proposer, and other factors deemed pertinent by the authorized entity, which may include,

1 but shall not be limited to, the proposal's manner and schedule of
2 project implementation, the proposer's ability to complete the work in a
3 timely and satisfactory manner, maintenance costs of the completed
4 public work, maintenance of traffic approach, and community impact. Any
5 contract awarded pursuant to this act shall be awarded to a responsive
6 and responsible proposer, which, in consideration of these and other
7 specified criteria deemed pertinent, offers the best value, as deter-
8 mined by the authorized entity. The request for proposals shall include
9 a statement that proposers shall designate in writing those portions of
10 the proposal that contain trade secrets or other proprietary information
11 that are to remain confidential; that the material designated as confi-
12 dential shall be readily separable from the proposal. Nothing in this
13 subdivision shall be construed to prohibit the authorized entity from
14 negotiating final contract terms and conditions including cost. All
15 proposals submitted shall be scored according to the criteria listed in
16 the request for proposals and such final scores shall be published on
17 the authorized entity's website after registration of such contract or
18 the date upon which such contract may be implemented, if registration
19 requirements do not apply.

20 (b) An authorized entity awarding a design-build contract to a
21 contractor offering the best value may but shall not be required to use
22 the following types of contracts:

23 (1) A cost-plus not to exceed guaranteed maximum price form of
24 contract in which the authorized entity shall be entitled to monitor and
25 audit all costs. In establishing the schedule and process for determin-
26 ing a guaranteed maximum price, the contract between the authorized
27 entity and the contractor shall:

28 (i) Describe the scope of the work and the cost of performing such
29 work,

30 (ii) Include a detailed line item cost breakdown,

31 (iii) Include a list of all drawings, specifications and other infor-
32 mation on which the guaranteed maximum price is based,

33 (iv) Include the dates of substantial and final completion on which
34 the guaranteed maximum price is based, and

35 (v) Include a schedule of unit prices; or

36 (2) A lump sum contract in which the contractor agrees to accept a set
37 dollar amount for a contract which comprises a single bid without
38 providing a cost breakdown for all costs such as for equipment, labor,
39 materials, as well as such contractor's profit for completing all items
40 of work comprising the public work.

41 § 5. Any contract entered into pursuant to this act shall include a
42 clause requiring that any professional services regulated by articles
43 145, 147 and 148 of the education law shall be performed and stamped and
44 sealed, where appropriate, by a professional licensed in accordance with
45 the appropriate article.

46 § 6. Construction with respect to each contract entered into by an
47 authorized entity pursuant to this act shall be deemed a "public work"
48 to be performed in accordance with the provisions of article 8 of the
49 labor law, as well as subject to sections 200, 240, 241 and 242 of such
50 law and enforcement of prevailing wage requirements pursuant to applica-
51 ble law or, for projects or public works receiving federal aid, applica-
52 ble federal requirements for prevailing wage. Any contract entered into
53 pursuant to this act shall include a clause requiring the selected
54 design builder to obligate every tier of contractor working on the
55 public work to comply with the project labor agreement referenced in
56 section three of this act, and shall include project labor agreement

1 compliance monitoring and enforcement provisions consistent with the
2 applicable project labor agreement.

3 § 7. Each contract entered into by an authorized entity pursuant to
4 this act shall comply with the objectives and goals relating to the
5 performance of design and construction services by minority- and women-
6 owned business enterprises, or, for projects or public works receiving
7 federal aid, applicable federal requirements for disadvantaged business
8 enterprises or minority- and women-owned business enterprises.

9 § 8. Public works undertaken by an authorized entity pursuant to this
10 act shall be subject to the requirements of article 8 of the environ-
11 mental conservation law, and, where applicable, the requirements of the
12 National Environmental Policy Act.

13 § 9. (a) Notwithstanding any provision of law to the contrary, all
14 rights or benefits, including terms and conditions of employment, and
15 protection of civil service and collective bargaining status of all
16 employees of authorized entities solely in connection with public work
17 undertaken by an authorized entity pursuant to this act, shall be
18 preserved and protected.

19 (b) Nothing in this act shall result in the: (1) displacement of any
20 currently employed worker or loss of position (including partial
21 displacement such as a reduction in the hours of non-overtime work,
22 wages or employment benefits), or result in the impairment of existing
23 collective bargaining agreements; and (2) transfer of existing duties
24 and functions related to maintenance and operations currently performed
25 by existing employees of authorized entities to a contractor.

26 (c) Employees of authorized entities using design-build contracts
27 serving in positions in newly created titles shall be assigned to the
28 appropriate bargaining unit. Nothing contained in this act shall be
29 construed to affect (1) the existing rights of employees of such enti-
30 ties pursuant to an existing collective bargaining agreement, (2) the
31 existing representational relationships among employee organizations
32 representing employees of such entities, or (3) the bargaining relation-
33 ships between such entities and such employee organizations.

34 (d) Without limiting contractors' obligations under design-build
35 contracts to issue their own initial certifications of substantial
36 completion and final completion, public employees of authorized entities
37 shall review and determine whether the work performed by contractors is
38 acceptable and has been performed in accordance with the applicable
39 design-build contracts, and if such public employees so determine, such
40 public employees shall accept contractors' substantial or final
41 completion of the public works as applicable. Performance by authorized
42 entities of any review described in this subdivision shall not be
43 construed to modify or limit contractors' obligations to perform the
44 work in strict accordance with the applicable design-build contracts or
45 the contractors' or any subcontractors' obligations or liabilities under
46 any law.

47 § 10. The submission of a proposal or responses or the execution of a
48 design-build contract pursuant to this act shall not be construed to be
49 a violation of section 6512 of the education law.

50 § 11. Nothing contained in this act shall limit the right or obli-
51 gation of any authorized entity to comply with the provisions of any
52 existing contract or to award contracts as otherwise provided by law.

53 § 12. A report shall be submitted no later than June 30, 2024 and
54 annually thereafter, to the governor, the temporary president of the
55 senate and the speaker of the assembly by each authorized entity
56 containing information regarding each design-build contract procured by

1 such authorized entity pursuant to this act. Such report shall include a
2 description of each such design-build contract, information regarding
3 the procurement process for each such design-build contract including
4 the list of responding entities that demonstrated the general capability
5 to perform the design-build contract pursuant to paragraph (1) of subdi-
6 vision (a) of section four of this act, the total cost of each design-
7 build contract, an explanation of the estimated savings resulting from
8 the design-build method, and the participation rate of and total dollar
9 value of monies paid to minority- and women-owned business enterprises
10 under such design-build contract.

11 § 13. This act shall take effect immediately and shall expire and be
12 deemed repealed three years after such date, provided that, public works
13 with requests for qualifications issued prior to such repeal shall be
14 permitted to continue under this act notwithstanding such repeal.