

# STATE OF NEW YORK

7636--B

2019-2020 Regular Sessions

## IN ASSEMBLY

May 14, 2019

Introduced by M. of A. BRAUNSTEIN, RODRIGUEZ, FALL, D. ROSENTHAL, WEPRIN, EICHENSTEIN -- read once and referred to the Committee on Cities -- reported and referred to the Committee on Ways and Means -- reported and referred to the Committee on Rules -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules

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 "New York city public works investment act".  
3 § 2. For the purposes of this act:  
4 (a) "Authorized entity" shall mean the New York city department of  
5 design and construction, the New York city department of environmental  
6 protection, the New York city department of transportation, the New York  
7 city department of parks and recreation, the New York city health and  
8 hospitals corporation, the New York city school construction authority  
9 and the New York city housing authority.  
10 (b) "Best value" shall mean the basis for awarding contracts for  
11 services to a proposer that optimizes quality, cost and efficiency,  
12 price and performance criteria, which may include, but is not limited  
13 to:  
14 (1) The quality of the proposer's performance on previous projects;  
15 (2) The timeliness of the proposer's performance on previous projects;  
16 (3) The level of customer satisfaction with the proposer's performance  
17 on previous projects;

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

LBD11524-05-9

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

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

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

5 (7) The proposer's technical capacities;

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

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

9 (10) The proposer's financial capability;

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

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

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

23 (14) A quantitative factor to be used in evaluation of bids or offers  
24 for awarding of contracts for bidders or offerers that are certified as  
25 minority- or women-owned business enterprises pursuant to article 15-A  
26 of the executive law, and certified pursuant to local law as minority-  
27 or women-owned business enterprises. Where an agency identifies a quan-  
28 titative factor pursuant to this paragraph, the agency must specify that  
29 businesses certified as minority- or women-owned business enterprises  
30 pursuant to article 15-A of the executive law as well as those certified  
31 as minority- or women-owned business enterprises or pursuant to section  
32 1304 of the New York city charter are eligible to qualify for such  
33 factor. Nothing in this paragraph shall be construed as a requirement  
34 that such businesses be concurrently certified as minority- or women-  
35 owned business enterprises under both article 15-A of the executive law  
36 and section 1304 of the New York city charter to qualify for such quan-  
37 titative factors. In addition, where the New York city school  
38 construction authority acts as the authorized entity, businesses certi-  
39 fied as minority- or women-owned business enterprises pursuant to  
40 section 1743 of the public authorities law shall be eligible to qualify  
41 for such factor.

42 Such basis shall reflect, wherever possible, objective and quantifi-  
43 able analysis.

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

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

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

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

1 § 4. Notwithstanding any general, special or local law, rule or regu-  
2 lation to the contrary, including but not limited to section 7210 of the  
3 education law, article 5-A of the general municipal law, article 8 of  
4 the public housing law, sections 1734 and 1735 of the public authori-  
5 ties law and section 8 of the New York city health and hospitals corpo-  
6 ration act, and in conformity with the requirements of this act, for any  
7 public work that has an estimated cost of not less than 10 million  
8 dollars and is undertaken pursuant to a project labor agreement in  
9 accordance with section 222 of the labor law, an authorized entity  
10 charged with awarding a contract for public work may use the alternative  
11 delivery method referred to as design-build contracts. Provided, howev-  
12 er, that any authorized entity charged with awarding a contract for  
13 public work in connection with property within the jurisdiction of the  
14 New York city department of parks and recreation or the New York city  
15 housing authority is authorized to use the alternative delivery method  
16 referred to as design-build contracts for any such public work that has  
17 an estimated cost of not less than one million two hundred thousand  
18 dollars if such public work is otherwise in conformity with the require-  
19 ments of this act. Provided further that any authorized entity may use  
20 the alternative delivery method referred to as design-build contracts  
21 for any public work that has an estimated cost of not less than one  
22 million two hundred thousand dollars if such public work is otherwise in  
23 conformity with the requirements of this act and primarily consists of:  
24 pedestrian ramps and similar infrastructure to improve access to side-  
25 walks in the city of New York for people with disabilities; renovation  
26 and construction of cultural institutions located on publicly owned real  
27 property and of public libraries in the city of New York; or security  
28 infrastructure, including bollards, planters and other physical struc-  
29 tures, designed to protect life and property from acts of terror or mass  
30 violence.

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

34 (1) Step one. Generation of a list of responding entities that have  
35 demonstrated the general capability to perform the design-build  
36 contract. Such list shall consist of a specified number of responding  
37 entities, as determined by an authorized entity, and shall be generated  
38 based upon the authorized entity's review of responses to a publicly  
39 advertised request for qualifications. The authorized entity's request  
40 for qualifications shall include a general description of the public  
41 work, the maximum number of responding entities to be included on the  
42 list, the selection criteria to be used and the relative weight of each  
43 criteria in generating the list. Such selection criteria shall include  
44 the qualifications and experience of the design and construction team,  
45 organization, demonstrated responsibility, ability of the team or of a  
46 member or members of the team to comply with applicable requirements,  
47 including the provisions of articles 145, 147 and 148 of the education  
48 law, past record of compliance with the labor law, and such other quali-  
49 fications the authorized entity deems appropriate, which may include but  
50 are not limited to project understanding, financial capability and  
51 record of past performance. The authorized entity shall evaluate and  
52 rate all responding entities to the request for qualifications. Based  
53 upon such ratings, the authorized entity shall list the responding enti-  
54 ties that shall receive a request for proposals in accordance with para-  
55 graph two of this subdivision. To the extent consistent with applicable  
56 federal law, the authorized entity shall consider, when awarding any

1 contract pursuant to this section, the participation of (i) responding  
2 entities that are certified as minority- or women-owned business enter-  
3 prises pursuant to article 15-A of the executive law, or certified  
4 pursuant to local law as minority- or women-owned business enterprises,  
5 or, where the New York city school construction authority acts as the  
6 authorized entity, certified pursuant to section 1743 of the public  
7 authorities law; and (ii) small business concerns identified pursuant to  
8 subdivision (b) of section 139-g of the state finance law. In addition,  
9 nothing in this section shall be deemed to supersede any pre-qualifica-  
10 tion guidelines or requirements otherwise authorized by law for an  
11 authorized entity.

12 (2) Step two. Selection of the proposal which is the best value to the  
13 authorized entity. The authorized entity shall issue a request for  
14 proposals to the responding entities listed pursuant to paragraph one of  
15 this subdivision. If such a responding entity consists of a team of  
16 separate entities, the entities that comprise such a team must remain  
17 unchanged from the responding entity as listed pursuant to paragraph one  
18 of this subdivision unless otherwise approved by the authorized entity.  
19 The request for proposals shall set forth the public work's scope of  
20 work, and other requirements, as determined by the authorized entity,  
21 which may include separate goals for work under the contract to be  
22 performed by businesses certified as minority- or women-owned business  
23 enterprises pursuant to article 15-A of the executive law or section  
24 1743 of the public authorities law, or certified pursuant to local law  
25 as minority- or women-owned business enterprises. The request for  
26 proposals shall also specify the criteria to be used to evaluate the  
27 responses and the relative weight of each of such criteria. Such crite-  
28 ria shall include the proposal's cost, the quality of the proposal's  
29 solution, the qualifications and experience of the proposer, and other  
30 factors deemed pertinent by the authorized entity, which may include,  
31 but shall not be limited to, the proposal's manner and schedule of  
32 project implementation, the proposer's ability to complete the work in a  
33 timely and satisfactory manner, maintenance costs of the completed  
34 public work, maintenance of traffic approach, and community impact. Any  
35 contract awarded pursuant to this act shall be awarded to a responsive  
36 and responsible proposer, which, in consideration of these and other  
37 specified criteria deemed pertinent, offers the best value, as deter-  
38 mined by the authorized entity. The request for proposals shall include  
39 a statement that proposers shall designate in writing those portions of  
40 the proposal that contain trade secrets or other proprietary information  
41 that are to remain confidential; that the material designated as confi-  
42 dential shall be readily separable from the proposal. Nothing in this  
43 subdivision shall be construed to prohibit the authorized entity from  
44 negotiating final contract terms and conditions including cost. All  
45 proposals submitted shall be scored according to the criteria listed in  
46 the request for proposals and such final scores shall be published on  
47 the authorized entity's website after registration of such contract or  
48 the date upon which such contract may be implemented, if registration  
49 requirements do not apply.

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

53 (1) A cost-plus not to exceed guaranteed maximum price form of  
54 contract in which the authorized entity shall be entitled to monitor and  
55 audit all costs. In establishing the schedule and process for determin-

1 ing a guaranteed maximum price, the contract between the authorized  
2 entity and the contractor shall:

3 (i) Describe the scope of the work and the cost of performing such  
4 work,

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

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

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

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

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

16 § 5. Any contract entered into pursuant to this act shall include a  
17 clause requiring that any professional services regulated by articles  
18 145, 147 and 148 of the education law shall be performed and stamped and  
19 sealed, where appropriate, by a professional licensed in accordance with  
20 the appropriate article.

21 § 6. Construction with respect to each contract entered into by an  
22 authorized entity pursuant to this act shall be deemed a "public work"  
23 to be performed in accordance with the provisions of article 8 of the  
24 labor law, as well as subject to sections 200, 240, 241 and 242 of such  
25 law and enforcement of prevailing wage requirements pursuant to applica-  
26 ble law or, for projects or public works receiving federal aid, applica-  
27 ble federal requirements for prevailing wage. Any contract entered into  
28 pursuant to this act shall include a clause requiring the selected  
29 design builder to obligate every tier of contractor working on the  
30 public work to comply with the project labor agreement referenced in  
31 section three of this act, and shall include project labor agreement  
32 compliance monitoring and enforcement provisions consistent with the  
33 applicable project labor agreement.

34 § 7. Each contract entered into by an authorized entity pursuant to  
35 this act shall comply with the objectives and goals relating to the  
36 performance of design and construction services by minority- and women-  
37 owned business enterprises pursuant to, as applicable, section 6-129 of  
38 the administrative code of the city of New York, subdivision 6 of  
39 section 8 of the New York city health and hospitals corporation act,  
40 section 1743 of the public authorities law, or, for projects or public  
41 works receiving federal aid, applicable federal requirements for disad-  
42 vantaged business enterprises or minority- and women-owned business  
43 enterprises.

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

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

54 (b) Nothing in this act shall result in the: (1) displacement of any  
55 currently employed worker or loss of position (including partial  
56 displacement such as a reduction in the hours of non-overtime work,

1 wages or employment benefits), or result in the impairment of existing  
2 collective bargaining agreements; and (2) transfer of existing duties  
3 and functions related to maintenance and operations currently performed  
4 by existing employees of authorized entities to a contractor.

5 (c) Employees of authorized entities using design-build contracts  
6 serving in positions in newly created titles shall be assigned to the  
7 appropriate bargaining unit. Nothing contained in this act shall be  
8 construed to affect (1) the existing rights of employees of such enti-  
9 ties pursuant to an existing collective bargaining agreement, (2) the  
10 existing representational relationships among employee organizations  
11 representing employees of such entities, or (3) the bargaining relation-  
12 ships between such entities and such employee organizations.

13 (d) Without limiting contractors' obligations under design-build  
14 contracts to issue their own initial certifications of substantial  
15 completion and final completion, public employees of authorized entities  
16 shall review and determine whether the work performed by contractors is  
17 acceptable and has been performed in accordance with the applicable  
18 design-build contracts, and if such public employees so determine, such  
19 public employees shall accept contractors' substantial or final  
20 completion of the public works as applicable. Performance by authorized  
21 entities of any review described in this subdivision shall not be  
22 construed to modify or limit contractors' obligations to perform the  
23 work in strict accordance with the applicable design-build contracts or  
24 the contractors' or any subcontractors' obligations or liabilities under  
25 any law.

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

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

32 § 12. The authority conferred by this act shall not impact or impair  
33 the application of section 1740 of the public authorities law concerning  
34 the use of outside design, drafting or inspection services, and shall be  
35 in addition to the authority conferred by any other law upon any author-  
36 ized entity, provided that any public work covered by the New York city  
37 BQE design-build act, the New York city housing authority modernization  
38 investment act or the New York city Rikers Island jail complex replace-  
39 ment act shall continue to be governed by the provisions of such act  
40 while such provisions are in effect.

41 § 13. A report shall be submitted no later than June 30, 2020 and  
42 annually thereafter, to the governor, the temporary president of the  
43 senate and the speaker of the assembly by the city of New York on behalf  
44 of its agencies, the New York city housing authority, the New York city  
45 school construction authority, and the New York city health and hospi-  
46 tals corporation containing information regarding each design-build  
47 contract procured pursuant to this act. Such report shall include a  
48 description of each such design-build contract, information regarding  
49 the procurement process for each such design-build contract including  
50 the list of responding entities that demonstrated the general capability  
51 to perform the design-build contract pursuant to paragraph (1) of subdi-  
52 vision (a) of section four of this act, the total cost of each design-  
53 build contract, an explanation of the estimated savings resulting from  
54 the design-build method, and the participation rate of and total dollar  
55 value of monies paid to minority- and women-owned business enterprises  
56 under such design-build contract.

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