

# STATE OF NEW YORK

3023

2019-2020 Regular Sessions

## IN ASSEMBLY

January 28, 2019

Introduced by M. of A. RODRIGUEZ, L. ROSENTHAL -- Multi-Sponsored by --  
M. of A. COOK -- read once and referred to the Committee on Ways and  
Means

AN ACT permitting authorized state entities to utilize the design-build  
method for infrastructure projects

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

- 1 Section 1. This act shall be known and may be cited as the "Infras-  
2 tructure investment act".
- 3 § 2. The legislature hereby finds and declares as follows:
- 4 (1) Our state's aging infrastructure, the on-going economic crisis and  
5 the resulting increase in unemployment in the state have all contributed  
6 to a decline in our state's competitiveness and in a significant  
7 decrease in New York state tax revenues.
- 8 (2) Sufficient modern infrastructure is of paramount importance not  
9 only as a catalyst for job creation but also as a key driver for the  
10 state's economic performance and competitiveness and the health, safety,  
11 education and quality of life of our citizens and as the means to ensure  
12 the efficient movement of people and goods.
- 13 (3) Expediting the delivery of projects in New York state would lead  
14 directly to job creation and increases in the state's competitiveness.
- 15 (4) Businesses in New York state have extensive and diverse experience  
16 in alternative project delivery methods for the study, planning, design,  
17 development, financing, acquisition, installation, construction, recon-  
18 struction, improvement, maintenance and management of public infrastruc-  
19 ture facilities. These alternative project delivery methods provide  
20 significant benefits to the public by:
- 21 (a) Reducing the public cost of delivering and obtaining services for  
22 infrastructure assets;
- 23 (b) Expediting project delivery;
- 24 (c) Encouraging life cycle efficiencies;

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

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1 (d) Providing better use and leverage of public human and capital  
2 resources, and enhancing capital formation for large projects;

3 (e) Creating jobs;

4 (f) Promoting performance efficiencies; and

5 (g) Bringing additional innovative best practice contracting by the  
6 private sector to bear on public infrastructure needs within the state.

7 (5) For certain projects, the design-build project delivery method has  
8 the potential to achieve projects delivered on guaranteed or accelerated  
9 schedules, lower costs and risk shifting to the private sector generally  
10 retained in conventional design-bid-build projects as well as to accel-  
11 erate capital investments throughout the state.

12 (6) Recognizing the need to repair the state's aging infrastructure  
13 and maximize job creation in New York, the Governor and Legislature seek  
14 to:

15 (a) accelerate capital investment in New York state's infrastructure;

16 (b) coordinate among New York state's agencies and authorities on  
17 capital investment;

18 (c) encourage private sector capital investment in New York;

19 (d) ensure that job creation benefits New York workers; and

20 (e) assist the use of the most efficient and effective procurement and  
21 project management for infrastructure projects in the transportation,  
22 energy, environment, public facilities, and economic development  
23 sectors.

24 § 3. For the purposes of this act:

25 (a) "authorized state entity" shall mean the New York state thruway  
26 authority, the department of transportation, the office of parks, recre-  
27 ation and historic preservation, the department of environmental conser-  
28 vation and the New York state bridge authority.

29 (b) "best value" shall mean the basis for awarding contracts for  
30 services to the offerer that optimize quality, cost and efficiency,  
31 price and performance criteria, which may include, but is not limited  
32 to:

33 1. The quality of the contractor's performance on previous projects;

34 2. The timeliness of the contractor's performance on previous  
35 projects;

36 3. The level of customer satisfaction with the contractor's perform-  
37 ance on previous projects;

38 4. The contractor's record of performing previous projects on budget  
39 and ability to minimize cost overruns;

40 5. The contractor's ability to limit change orders;

41 6. The contractor's ability to prepare appropriate project plans;

42 7. The contractor's technical capacities;

43 8. The individual qualifications of the contractor's key personnel;

44 9. The contractor's ability to assess and manage risk and minimize  
45 risk impact; and

46 10. The contractor's past record of compliance with article 15-A of  
47 the executive law.

48 Such basis shall reflect, wherever possible, objective and quantifi-  
49 able analysis.

50 (c) "capital project" shall have the same meaning as such term is  
51 defined by subdivision 2-a of section 2 of the state finance law.

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

1 (e) "design-build contract" shall mean a contract for the design and  
2 construction of a capital project with a single entity, which may be a  
3 team comprised of separate entities.

4 (f) "procurement record" means documentation of the decisions made and  
5 the approach taken in the procurement process.

6 § 4. Notwithstanding the provisions of section 38 of the highway law,  
7 section 136-a of the state finance law, section 359 of the public  
8 authorities law, section 7210 of the education law, and the provisions  
9 of any other law to the contrary, and in conformity with the require-  
10 ments of this act, an authorized state entity may utilize the alterna-  
11 tive delivery method referred to as design-build contracts for capital  
12 projects related to the state's physical infrastructure, including, but  
13 not limited to, the state's highways, bridges, dams, flood control  
14 projects, canals, and parks, including, but not limited to, to repair  
15 damage caused by natural disaster, to correct health and safety defects,  
16 to comply with federal and state laws, standards, and regulations, to  
17 extend the useful life of or replace the state's highways, bridges,  
18 dams, flood control projects, canals, and parks or to improve or add to  
19 the state's highways, bridges, dams, flood control projects, canals, and  
20 parks; provided that for the contracts executed by the department of  
21 transportation, the office of parks, recreation and historic preserva-  
22 tion, or the department of environmental conservation, the total cost of  
23 each such project shall not be less than one million two hundred thou-  
24 sand dollars (\$1,200,000).

25 § 5. An entity selected by an authorized state entity to enter into a  
26 design-build contract shall be selected through a two-step method, as  
27 follows:

28 (a) Step one. Generation of a list of entities that have demonstrated  
29 the general capability to perform the design-build contract. Such list  
30 shall consist of a specified number of entities, as determined by an  
31 authorized state entity, and shall be generated based upon the author-  
32 ized state entity's review of responses to a publicly advertised request  
33 for qualifications. The authorized state entity's request for qualifica-  
34 tions shall include a general description of the project, the maximum  
35 number of entities to be included on the list, and the selection crite-  
36 ria to be used in generating the list. Such selection criteria shall  
37 include the qualifications and experience of the design and construction  
38 team, organization, demonstrated responsibility, ability of the team or  
39 of a member or members of the team to comply with applicable require-  
40 ments, including the provisions of articles 145, 147 and 148 of the  
41 education law, past record of compliance with the labor law, and such  
42 other qualifications the authorized state entity deems appropriate which  
43 may include but are not limited to project understanding, financial  
44 capability and record of past performance. The authorized state entity  
45 shall evaluate and rate all entities responding to the request for qual-  
46 ifications. Based upon such ratings, the authorized state entity shall  
47 list the entities that shall receive a request for proposals in accord-  
48 ance with subdivision (b) of this section. To the extent consistent  
49 with applicable federal law, the authorized state entity shall consider,  
50 when awarding any contract pursuant to this section, the participation  
51 of: (i) firms certified pursuant to article 15-A of the executive law as  
52 minority or women-owned businesses and the ability of other businesses  
53 under consideration to work with minority and women-owned businesses so  
54 as to promote and assist participation by such businesses; and (ii)  
55 small business concerns identified pursuant to subdivision (b) of  
56 section 139-g of the state finance law.

1 (b) Step two. Selection of the proposal which is the best value to the  
2 state. The authorized state entity shall issue a request for proposals  
3 to the entities listed pursuant to subdivision (a) of this section. If  
4 such an entity consists of a team of separate entities, the entities  
5 that comprise such a team must remain unchanged from the entity as list-  
6 ed pursuant to subdivision (a) of this section unless otherwise approved  
7 by the authorized state entity. The request for proposals shall set  
8 forth the project's scope of work, and other requirements, as determined  
9 by the authorized state entity. The request for proposals shall specify  
10 the criteria to be used to evaluate the responses and the relative  
11 weight of each such criteria. Such criteria shall include the  
12 proposal's cost, the quality of the proposal's solution, the qualifica-  
13 tions and experience of the design-build entity, and other factors  
14 deemed pertinent by the authorized state entity, which may include, but  
15 shall not be limited to, the proposal's project implementation, ability  
16 to complete the work in a timely and satisfactory manner, maintenance  
17 costs of the completed project, maintenance of traffic approach, and  
18 community impact. Any contract awarded pursuant to this act shall be  
19 awarded to a responsive and responsible entity that submits the  
20 proposal, which, in consideration of these and other specified criteria  
21 deemed pertinent to the project, offers the best value to the state, as  
22 determined by the authorized state entity. Nothing herein shall be  
23 construed to prohibit the authorized entity from negotiating final  
24 contract terms and conditions including cost.

25 § 6. Any contract entered into pursuant to this act shall include a  
26 clause requiring that any professional services regulated by articles  
27 145, 147 and 148 of the education law shall be performed and stamped and  
28 sealed, where appropriate, by a professional licensed in accordance with  
29 such articles.

30 § 7. Construction for each capital project undertaken by the author-  
31 ized state entity pursuant to this act shall be deemed a "public work"  
32 to be performed in accordance with the provisions of article 8 of the  
33 labor law, as well as subject to sections 200, 240, 241 and 242 of the  
34 labor law and enforcement of prevailing wage requirements by the New  
35 York state department of labor.

36 § 8. If otherwise applicable, capital projects undertaken by the  
37 authorized state entity pursuant to this act shall be subject to section  
38 135 of the state finance law and section 222 of the labor law.

39 § 9. Each contract entered into by the authorized state entity pursu-  
40 ant to this section shall comply with the objectives and goals of minor-  
41 ity and women-owned business enterprises pursuant to article 15-A of the  
42 executive law or, for projects receiving federal aid, shall comply with  
43 applicable federal requirements for disadvantaged business enterprises.

44 § 10. Capital projects undertaken by the authorized state entity  
45 pursuant to this act shall be subject to the requirements of article 8  
46 of the environmental conservation law, and, where applicable, the  
47 requirements of the national environmental policy act.

48 § 11. If otherwise applicable, capital projects undertaken by the  
49 authorized state entity pursuant to this act shall be governed by  
50 sections 139-d, 139-j, 139-k, paragraph f of subdivision 1 and paragraph  
51 g of subdivision 9 of section 163 of the state finance law.

52 § 12. The submission of a proposal or responses or the execution of a  
53 design-build contract pursuant to this act shall not be construed to be  
54 a violation of section 6512 of the education law.

55 § 13. Nothing contained in this act shall limit the right or obli-  
56 gation of the authorized state entity to comply with the provisions of

1 any existing contract, including any existing contract with or for the  
2 benefit of the holders of the obligations of the authorized state enti-  
3 ty, or to award contracts as otherwise provided by law.

4 § 14. Alternative construction awarding processes. (i) Notwithstand-  
5 ing the provisions of any other law to the contrary, the authorized  
6 state entity may award a construction contract:

7 1. To the contractor offering the best value; or

8 2. Utilizing a cost-plus not to exceed guaranteed maximum price form  
9 of contract in which the authorized state entity shall be entitled to  
10 monitor and audit all project costs. In establishing the schedule and  
11 process for determining a guaranteed maximum price, the contract between  
12 the authorized state entity and the contractor shall:

13 (a) describe the scope of the work and the cost of performing such  
14 work;

15 (b) include a detailed line item cost breakdown;

16 (c) include a list of all drawings, specifications and other informa-  
17 tion on which the guaranteed maximum price is based;

18 (d) include the dates for substantial and final completion on which  
19 the guaranteed maximum price is based; and

20 (e) include a schedule of unit prices; or

21 3. Utilizing a lump sum contract in which the contractor agrees to  
22 accept a set dollar amount for a contract which comprises a single bid  
23 without providing a cost breakdown for all costs such as for equipment,  
24 labor, materials, as well as such contractor's profit for completing all  
25 items of work comprising the project.

26 (ii) Capital projects undertaken by an authorized state entity may  
27 include an incentive clause in the contract for various performance  
28 objectives, but the incentive clause shall not include an incentive that  
29 exceeds the quantifiable value of the benefit received by the state. The  
30 authorized state entity shall establish such performance and payment  
31 bonds as it deems necessary.

32 § 15. Prequalified contractors. (a) Notwithstanding any other  
33 provision of law, the authorized state entity may maintain a list of  
34 prequalified contractors who are eligible to submit a proposal pursuant  
35 to this act and entry into such list shall be continuously available.  
36 Prospective contractors may be prequalified as contractors to provide  
37 particular types of construction, in accordance with general criteria  
38 established by the authorized state entity which may include, but shall  
39 not be limited to, the experience, past performance, ability to under-  
40 take the type and complexity of work, financial capability, responsibil-  
41 ity, compliance with equal employment opportunity requirements and anti-  
42 discrimination laws, and reliability. Such prequalification may be by  
43 categories designed by size and other factors.

44 (b) A contractor who is denied prequalification or whose prequalifica-  
45 tion is revoked or suspended by the authorized state entity may appeal  
46 such decision to the authorized state entity. If such a suspension  
47 extends for more than three months, it shall be deemed a revocation of  
48 the prequalification. The authorized state entity may proceed with the  
49 contract award during any appeal.

50 § 16. Nothing in this act shall affect existing powers of New York  
51 state public entities to use alternative project delivery methods.

52 § 17. This act shall take effect immediately.