

# STATE OF NEW YORK

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2019-2020 Regular Sessions

## IN ASSEMBLY

May 14, 2019

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Introduced by M. of A. BRAUNSTEIN, RODRIGUEZ -- read once and referred to the Committee on Cities

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

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;

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

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

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

22 (7) The proposer's technical capacities;

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

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

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

3 (10) The proposer's financial capability;

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

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

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

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

36 Such basis shall reflect, wherever possible, objective and quantifi-  
37 able analysis.

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

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

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

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

51 § 4. Notwithstanding any general, special or local law, rule or regu-  
52 lation to the contrary, including but not limited to section 7210 of the  
53 education law, article 5-A of the general municipal law, article 8 of  
54 the public housing law, sections 1734 and 1735 of the public authori-  
55 ties law and section 8 of the New York city health and hospitals corpo-  
56 ration act, and in conformity with the requirements of this act, for any

1 public work that has an estimated cost of not less than 1.2 million  
2 dollars and is undertaken pursuant to a project labor agreement in  
3 accordance with section 222 of the labor law, an authorized entity  
4 charged with awarding a contract for public work may use the alternative  
5 delivery method referred to as design-build contracts.

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

9 (1) Step one. Generation of a list of responding entities that have  
10 demonstrated the general capability to perform the design-build  
11 contract. Such list shall consist of a specified number of responding  
12 entities, as determined by an authorized entity, and shall be generated  
13 based upon the authorized entity's review of responses to a publicly  
14 advertised request for qualifications. The authorized entity's request  
15 for qualifications shall include a general description of the public  
16 work, the maximum number of responding entities to be included on the  
17 list, the selection criteria to be used and the relative weight of each  
18 criteria in generating the list. Such selection criteria shall include  
19 the qualifications and experience of the design and construction team,  
20 organization, demonstrated responsibility, ability of the team or of a  
21 member or members of the team to comply with applicable requirements,  
22 including the provisions of articles 145, 147 and 148 of the education  
23 law, past record of compliance with the labor law, and such other quali-  
24 fications the authorized entity deems appropriate, which may include but  
25 are not limited to project understanding, financial capability and  
26 record of past performance. The authorized entity shall evaluate and  
27 rate all responding entities to the request for qualifications. Based  
28 upon such ratings, the authorized entity shall list the responding enti-  
29 ties that shall receive a request for proposals in accordance with para-  
30 graph two of this subdivision. To the extent consistent with applicable  
31 federal law, the authorized entity shall consider, when awarding any  
32 contract pursuant to this section, the participation of (i) responding  
33 entities that are certified as minority- or women-owned business enter-  
34 prises pursuant to article 15-A of the executive law, or certified  
35 pursuant to local law as minority- or women-owned business enterprises,  
36 or, where the New York city school construction authority acts as the  
37 authorized entity, certified pursuant to section 1743 of the public  
38 authorities law; and (ii) small business concerns identified pursuant to  
39 subdivision (b) of section 139-g of the state finance law. In addition,  
40 nothing in this section shall be deemed to supersede any pre-qualifica-  
41 tion guidelines or requirements otherwise authorized by law for an  
42 authorized entity.

43 (2) Step two. Selection of the proposal which is the best value to the  
44 authorized entity. The authorized entity shall issue a request for  
45 proposals to the responding entities listed pursuant to paragraph one of  
46 this subdivision. If such a responding entity consists of a team of  
47 separate entities, the entities that comprise such a team must remain  
48 unchanged from the responding entity as listed pursuant to paragraph one  
49 of this subdivision unless otherwise approved by the authorized entity.  
50 The request for proposals shall set forth the public work's scope of  
51 work, and other requirements, as determined by the authorized entity,  
52 which may include separate goals for work under the contract to be  
53 performed by businesses certified as minority- or women-owned business  
54 enterprises pursuant to article 15-A of the executive law or section  
55 1743 of the public authorities law, or certified pursuant to local law  
56 as minority- or women-owned business enterprises. The request for

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

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

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

31 (i) Describe the scope of the work and the cost of performing such  
32 work,

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

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

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

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

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

44 § 5. Any contract entered into pursuant to this act shall include a  
45 clause requiring that any professional services regulated by articles  
46 145, 147 and 148 of the education law shall be performed and stamped and  
47 sealed, where appropriate, by a professional licensed in accordance with  
48 the appropriate article.

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

1 design builder to obligate every tier of contractor working on the  
2 public work to comply with the project labor agreement referenced in  
3 section three of this act, and shall include project labor agreement  
4 compliance monitoring and enforcement provisions consistent with the  
5 applicable project labor agreement.

6 § 7. Each contract entered into by an authorized entity pursuant to  
7 this act shall comply with the objectives and goals with regard to  
8 minority- and women-owned business enterprises pursuant to, as applica-  
9 ble, section 6-129 of the administrative code of the city of New York,  
10 subdivision 6 of section 8 of the New York city health and hospitals  
11 corporation act, section 1743 of the public authorities law, or, for  
12 projects or public works receiving federal aid, applicable federal  
13 requirements for disadvantaged business enterprises or minority- and  
14 women-owned business enterprises.

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

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

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

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

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

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

46 § 12. The authority conferred by this act shall be in addition to the  
47 authority conferred by any other law upon any authorized entity,  
48 provided that any public work covered by the New York city BQE design-  
49 build act, the New York city housing authority modernization investment  
50 act or the New York city Rikers Island jail complex replacement act  
51 shall continue to be governed by the provisions of such act while such  
52 provisions are in effect.

53 § 13. This act shall take effect immediately.