

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.