STATE OF NEW YORK

6293

2019-2020 Regular Sessions

IN SENATE

June 3, 2019

Introduced by Sens. COMRIE, JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, in relation to public work authorization and the effectiveness thereof and repealing certain provisions of such chapter relating thereto

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

Section 1. Section 1 of part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is amended to read as follows:

Section 1. This act shall be known and may be cited as the "New York city [~~BQE~~] Design-Build act".

§ 2. Section 2 of part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is amended to read as follows:

§ 2. For the purposes of this act:

(a) "Authorized entity" shall mean the New York city department of design and construction, [~~and~~] the New York city department of transportation**, the New York city department of environmental protection, the New York city school construction authority, the New York city department of parks and recreation, the New York city health and hospitals corporation, and New York city housing authority**.

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

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

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

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

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

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(4) The proposer's record of performing previous projects on budget and ability to minimize cost overruns;
(5) The proposer's ability to limit change orders;
(6) The proposer's ability to prepare appropriate project plans;
(7) The proposer's technical capacities;
(8) The individual qualifications of the proposer's key personnel;
(9) The proposer's ability to assess and manage risk and minimize risk impact;
(10) The proposer's financial capability;
(11) The proposer's ability to comply with applicable requirements, including the provisions of articles 145, 147 and 148 of the education law;
(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. **In addition, where the New York city school construction authority acts as the authorized entity, businesses certified as minority- or women-owned business enterprises pursuant to section 1743 of the public authorities law shall be eligible to qualify for such factor.** 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.
[~~**(f) "Public work" shall mean a public work in the city of New York related to the following, and shall refer to this public work; Brooklyn Queens Expressway, from the vicinity of Atlantic avenue to the vicinity of Sands street in Kings county.**~~]

§ 3. Section 4 of part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is amended to read as follows:

§ 4. Notwithstanding any general, special or local law, rule or regulation to the contrary, including but not limited to article 5-A of the general municipal law**, sections 1734 and 1735 of the public authorities law, article 8 of the public housing law, section 7210 of the education law, and section 8 of the New York city health and hospitals corporation act,** and in conformity with the requirements of this act, for any public work that has an estimated cost of not less than ten 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, however, that the New York city department of parks and recreation is authorized to use the alternative delivery method referred to as design-build contracts for any public work and the New York city department of design and construction is authorized to use design-build contracts for any municipally owned homeland security bollard, library, museum, or pedestrian ramp project 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.**

(a) A contractor selected by such 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.

(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, but shall not be limited to, the proposal's manner and schedule of project implementation, the proposer's ability to complete the work in a timely and satisfactory manner, maintenance costs of the completed public work, maintenance of traffic approach, and community impact. Any contract awarded pursuant to this act shall be awarded to a responsive and responsible proposer, which, in consideration of these and other specified criteria deemed pertinent, offers the best value, as determined by the authorized entity. The request for proposals shall include a statement that proposers shall designate in writing those portions of the proposal that contain trade secrets or other proprietary information that are to remain confidential; that the material designated as confidential shall be readily separable from the proposal. Nothing in this subdivision shall be construed to prohibit the authorized entity from negotiating final contract terms and conditions including cost. All proposals submitted shall be scored according to the criteria listed in the request for proposals and such final scores shall be published on the authorized entity's website.

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

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

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

(ii) Include a detailed line item cost breakdown,

(iii) Include a list of all drawings, specifications and other information on which the guaranteed maximum price is based,

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

(v) Include a schedule of unit prices; or

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

§ 4. Section 7 of part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is amended to read as follows:

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

§ 5. Section 9 of part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is amended by adding a new subdivision (d) to read as follows:

(d) Provided further that any design-build contract and project authorized pursuant to this act shall require quality assurance activities, including but not limited to construction inspection functions, to be performed by city employees or city workforce engineers through the project completion or final acceptance phase.

§ 6. Section 12 of part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is REPEALED and a new section 12 is added to read as follows:

§ 12. The authority conferred by this act shall not impact or impair the authorization granted to any public work covered by the New York city BQE Design-Build act, the New York city housing authority modernization investment act or the New York city Rikers Island jail complex replacement act shall continue to be governed by the provisions of such act while such provisions are in effect.

§ 7. Part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is amended by adding a new section 12-a to read as follows:

§ 12-a. A report shall be submitted no later than June 30, 2020 and annually thereafter, to the governor, the temporary president of the senate and the speaker of the assembly by the city of New York containing information on each authorized city entity that has entered into a design-build or best value contract pursuant to this act, which shall include, but not be limited to, a description of each project, procurement information including the short list of qualified bidders, the total cost of each project, the estimated cost and schedule savings of each project, an explanation of how the savings were determined, and the participation rate and total dollar value of expenditures on minority- and women-owned business enterprises for each contract.

§ 8. Section 13 of part QQQ of chapter 59 of the laws of 2018, constituting the New York city BQE Design-Build act, is amended to read as follows:

§ 13. This act shall take effect immediately and shall expire and be deemed repealed [~~**2 years after such date**~~] **July 1, 2022**, provided that, public works with requests for qualifications issued prior to such repeal shall be permitted to continue under this act notwithstanding such repeal.

§ 9. This act shall take effect immediately; provided, however that the amendments to the "New York city BQE Design-Build act" made by sections one, two, three, four, five, six, seven and eight of this act shall not affect the repeal of such act and shall be deemed repealed therewith.