

STATE OF NEW YORK

6293--A

2019-2020 Regular Sessions

IN SENATE

June 3, 2019

Introduced by Sens. COMRIE, JACKSON, LIU -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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;
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;

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

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1 (7) The proposer's technical capacities;
2 (8) The individual qualifications of the proposer's key personnel;
3 (9) The proposer's ability to assess and manage risk and minimize risk
4 impact;

5 (10) The proposer's financial capability;

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

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

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

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

38 Such basis shall reflect, wherever possible, objective and quantifi-
39 able analysis.

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

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

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

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

53 § 4. Notwithstanding any general, special or local law, rule or regu-
54 lation to the contrary, including but not limited to section 7210 of the
55 education law, article 5-A of the general municipal law, article 8 of
56 the public housing law, sections 1734 and 1735 of the public authori-

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

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

30 (1) Step one. Generation of a list of responding entities that have
31 demonstrated the general capability to perform the design-build
32 contract. Such list shall consist of a specified number of responding
33 entities, as determined by an authorized entity, and shall be generated
34 based upon the authorized entity's review of responses to a publicly
35 advertised request for qualifications. The authorized entity's request
36 for qualifications shall include a general description of the public
37 work, the maximum number of responding entities to be included on the
38 list, the selection criteria to be used and the relative weight of each
39 criteria in generating the list. Such selection criteria shall include
40 the qualifications and experience of the design and construction team,
41 organization, demonstrated responsibility, ability of the team or of a
42 member or members of the team to comply with applicable requirements,
43 including the provisions of articles 145, 147 and 148 of the education
44 law, past record of compliance with the labor law, and such other quali-
45 fications the authorized entity deems appropriate, which may include but
46 are not limited to project understanding, financial capability and
47 record of past performance. The authorized entity shall evaluate and
48 rate all responding entities to the request for qualifications. Based
49 upon such ratings, the authorized entity shall list the responding enti-
50 ties that shall receive a request for proposals in accordance with para-
51 graph two of this subdivision. To the extent consistent with applicable
52 federal law, the authorized entity shall consider, when awarding any
53 contract pursuant to this section, the participation of (i) responding
54 entities that are certified as minority- or women-owned business enter-
55 prises pursuant to article 15-A of the executive law, or certified
56 pursuant to local law as minority- or women-owned business enterprises,

1 or, where the New York city school construction authority acts as the
2 authorized entity, certified pursuant to section 1743 of the public
3 authorities law; and (ii) small business concerns identified pursuant to
4 subdivision (b) of section 139-g of the state finance law. In addition,
5 nothing in this section shall be deemed to supersede any pre-qualifica-
6 tion guidelines or requirements otherwise authorized by law for an
7 authorized entity.

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

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

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

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

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

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

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

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

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

11 § 5. Any contract entered into pursuant to this act shall include a
12 clause requiring that any professional services regulated by articles
13 145, 147 and 148 of the education law shall be performed and stamped and
14 sealed, where appropriate, by a professional licensed in accordance with
15 the appropriate article.

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

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

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

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

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

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

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

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

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

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

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

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