# STATE OF NEW YORK

9422

# IN ASSEMBLY

March 7, 2022

Introduced by M. of A. GIBBS -- 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 Assembly, do enact as follows:**

Section 1. This act shall be known and may be cited as the "Infrastructure investment act".

§ 2. The legislature hereby finds and declares as follows:

(1) Our state's aging infrastructure, the on-going economic crisis and the resulting increase in unemployment in the state have all contributed to a decline in our state's competitiveness and in a significant decrease in New York state tax revenues.

(2) Sufficient modern infrastructure is of paramount importance not only as a catalyst for job creation but also as a key driver for the state's economic performance and competitiveness and the health, safety, education and quality of life of our citizens and as the means to ensure the efficient movement of people and goods.

(3) Expediting the delivery of projects in New York state would lead directly to job creation and increases in the state's competitiveness.

(4) Businesses in New York state have extensive and diverse experience in alternative project delivery methods for the study, planning, design, development, financing, acquisition, installation, construction, reconstruction, improvement, maintenance and management of public infrastructure facilities. These alternative project delivery methods provide significant benefits to the public by:

(a) Reducing the public cost of delivering and obtaining services for infrastructure assets;

(b) Expediting project delivery;

(c) Encouraging life cycle efficiencies;

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

(e) Creating jobs;

(f) Promoting performance efficiencies; and

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

LBD03052-01-1

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

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

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

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

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

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

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

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

§ 3. For the purposes of this act:

(a) "authorized state entity" shall mean the New York state thruway authority, the department of transportation, the office of parks, recreation and historic preservation, the department of environmental conservation and the New York state bridge authority.

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

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

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

3. The level of customer satisfaction with the contractor's performance on previous projects;

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

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

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

7. The contractor's technical capacities;

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

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

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

Such basis shall reflect, wherever possible, objective and quantifiable analysis.

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

(d) "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.

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

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

§ 4. Notwithstanding the provisions of section 38 of the highway law, section 136-a of the state finance law, section 359 of the public authorities law, section 7210 of the education law, and the provisions of any other law to the contrary, and in conformity with the requirements of this act, an authorized state entity may utilize the alternative delivery method referred to as design-build contracts for capital projects related to the state's physical infrastructure, including, but not limited to, the state's highways, bridges, dams, flood control projects, canals, and parks, including, but not limited to, to repair damage caused by natural disaster, to correct health and safety defects, to comply with federal and state laws, standards, and regulations, to extend the useful life of or replace the state's highways, bridges, dams, flood control projects, canals, and parks or to improve or add to the state's highways, bridges, dams, flood control projects, canals, and parks; provided that for the contracts executed by the department of transportation, the office of parks, recreation and historic preservation, or the department of environmental conservation, the total cost of each such project shall not be less than one million two hundred thousand dollars ($1,200,000).

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

(a) Step one. Generation of a list of entities that have demonstrated the general capability to perform the design-build contract. Such list shall consist of a specified number of entities, as determined by an authorized state entity, and shall be generated based upon the authorized state entity's review of responses to a publicly advertised request for qualifications. The authorized state entity's request for qualifications shall include a general description of the project, the maximum number of entities to be included on the list, and the selection criteria to be used 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 state entity deems appropriate which may include but are not limited to project understanding, financial capability and record of past performance. The authorized state entity shall evaluate and rate all entities responding to the request for qualifications. Based upon such ratings, the authorized state entity shall list the entities that shall receive a request for proposals in accordance with subdivision (b) of this section. To the extent consistent with applicable federal law, the authorized state entity shall consider, when awarding any contract pursuant to this section, the participation of: (i) firms certified pursuant to article 15-A of the executive law as minority or women-owned businesses and the ability of other businesses under consideration to work with minority and women-owned businesses so as to promote and assist participation by such businesses; and (ii) small business concerns identified pursuant to subdivision (b) of section 139-g of the state finance law.

(b) Step two. Selection of the proposal which is the best value to the state. The authorized state entity shall issue a request for proposals to the entities listed pursuant to subdivision (a) of this section. If such an entity consists of a team of separate entities, the entities that comprise such a team must remain unchanged from the entity as list-

ed pursuant to subdivision (a) of this section unless otherwise approved by the authorized state entity. The request for proposals shall set forth the project's scope of work, and other requirements, as determined by the authorized state entity. The request for proposals shall specify the criteria to be used to evaluate the responses and the relative weight of each such criteria. Such criteria shall include the proposal's cost, the quality of the proposal's solution, the qualifications and experience of the design-build entity, and other factors deemed pertinent by the authorized state entity, which may include, but shall not be limited to, the proposal's project implementation, ability to complete the work in a timely and satisfactory manner, maintenance costs of the completed project, maintenance of traffic approach, and community impact. Any contract awarded pursuant to this act shall be awarded to a responsive and responsible entity that submits the proposal, which, in consideration of these and other specified criteria deemed pertinent to the project, offers the best value to the state, as determined by the authorized state entity. Nothing herein shall be construed to prohibit the authorized entity from negotiating final contract terms and conditions including cost.

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

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

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

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

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

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

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

§ 13. Nothing contained in this act shall limit the right or obligation of the authorized state entity to comply with the provisions of any existing contract, including any existing contract with or for the benefit of the holders of the obligations of the authorized state entity, or to award contracts as otherwise provided by law.

§ 14. Alternative construction awarding processes. (i) Notwithstanding the provisions of any other law to the contrary, the authorized state entity may award a construction contract:

1. To the contractor offering the best value; or

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

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

(b) include a detailed line item cost breakdown;

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

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

(e) include a schedule of unit prices; or

3. Utilizing 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 project.

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

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

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

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

§ 17. This act shall take effect immediately.