

# 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:

- 1 Section 1. This act shall be known and may be cited as the "Infras-  
2 tructure investment act".
- 3 § 2. The legislature hereby finds and declares as follows:
- 4 (1) Our state's aging infrastructure, the on-going economic crisis and  
5 the resulting increase in unemployment in the state have all contributed  
6 to a decline in our state's competitiveness and in a significant  
7 decrease in New York state tax revenues.
- 8 (2) Sufficient modern infrastructure is of paramount importance not  
9 only as a catalyst for job creation but also as a key driver for the  
10 state's economic performance and competitiveness and the health, safety,  
11 education and quality of life of our citizens and as the means to ensure  
12 the efficient movement of people and goods.
- 13 (3) Expediting the delivery of projects in New York state would lead  
14 directly to job creation and increases in the state's competitiveness.
- 15 (4) Businesses in New York state have extensive and diverse experience  
16 in alternative project delivery methods for the study, planning, design,  
17 development, financing, acquisition, installation, construction, recon-  
18 struction, improvement, maintenance and management of public infrastruc-  
19 ture facilities. These alternative project delivery methods provide  
20 significant benefits to the public by:
- 21 (a) Reducing the public cost of delivering and obtaining services for  
22 infrastructure assets;
- 23 (b) Expediting project delivery;
- 24 (c) Encouraging life cycle efficiencies;
- 25 (d) Providing better use and leverage of public human and capital  
26 resources, and enhancing capital formation for large projects;
- 27 (e) Creating jobs;
- 28 (f) Promoting performance efficiencies; and

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

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

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

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

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

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

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

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

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

20 § 3. For the purposes of this act:

21 (a) "authorized state entity" shall mean the New York state thruway  
22 authority, the department of transportation, the office of parks, recre-  
23 ation and historic preservation, the department of environmental conser-  
24 vation and the New York state bridge authority.

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

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

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

32 3. The level of customer satisfaction with the contractor's perform-  
33 ance on previous projects;

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

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

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

38 7. The contractor's technical capacities;

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

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

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

44 Such basis shall reflect, wherever possible, objective and quantifi-  
45 able analysis.

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

48 (d) "cost plus" shall mean compensating a contractor for the cost to  
49 complete a contract by reimbursing actual costs for labor, equipment and  
50 materials plus an additional amount for overhead and profit.

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

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

1 § 4. Notwithstanding the provisions of section 38 of the highway law,  
2 section 136-a of the state finance law, section 359 of the public  
3 authorities law, section 7210 of the education law, and the provisions  
4 of any other law to the contrary, and in conformity with the require-  
5 ments of this act, an authorized state entity may utilize the alterna-  
6 tive delivery method referred to as design-build contracts for capital  
7 projects related to the state's physical infrastructure, including, but  
8 not limited to, the state's highways, bridges, dams, flood control  
9 projects, canals, and parks, including, but not limited to, to repair  
10 damage caused by natural disaster, to correct health and safety defects,  
11 to comply with federal and state laws, standards, and regulations, to  
12 extend the useful life of or replace the state's highways, bridges,  
13 dams, flood control projects, canals, and parks or to improve or add to  
14 the state's highways, bridges, dams, flood control projects, canals, and  
15 parks; provided that for the contracts executed by the department of  
16 transportation, the office of parks, recreation and historic preserva-  
17 tion, or the department of environmental conservation, the total cost of  
18 each such project shall not be less than one million two hundred thou-  
19 sand dollars (\$1,200,000).

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

23 (a) Step one. Generation of a list of entities that have demonstrated  
24 the general capability to perform the design-build contract. Such list  
25 shall consist of a specified number of entities, as determined by an  
26 authorized state entity, and shall be generated based upon the author-  
27 ized state entity's review of responses to a publicly advertised request  
28 for qualifications. The authorized state entity's request for qualifica-  
29 tions shall include a general description of the project, the maximum  
30 number of entities to be included on the list, and the selection crite-  
31 ria to be used in generating the list. Such selection criteria shall  
32 include the qualifications and experience of the design and construction  
33 team, organization, demonstrated responsibility, ability of the team or  
34 of a member or members of the team to comply with applicable require-  
35 ments, including the provisions of articles 145, 147 and 148 of the  
36 education law, past record of compliance with the labor law, and such  
37 other qualifications the authorized state entity deems appropriate which  
38 may include but are not limited to project understanding, financial  
39 capability and record of past performance. The authorized state entity  
40 shall evaluate and rate all entities responding to the request for qual-  
41 ifications. Based upon such ratings, the authorized state entity shall  
42 list the entities that shall receive a request for proposals in accord-  
43 ance with subdivision (b) of this section. To the extent consistent  
44 with applicable federal law, the authorized state entity shall consider,  
45 when awarding any contract pursuant to this section, the participation  
46 of: (i) firms certified pursuant to article 15-A of the executive law as  
47 minority or women-owned businesses and the ability of other businesses  
48 under consideration to work with minority and women-owned businesses so  
49 as to promote and assist participation by such businesses; and (ii)  
50 small business concerns identified pursuant to subdivision (b) of  
51 section 139-g of the state finance law.

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

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

20 § 6. Any contract entered into pursuant to this act shall include a  
21 clause requiring that any professional services regulated by articles  
22 145, 147 and 148 of the education law shall be performed and stamped and  
23 sealed, where appropriate, by a professional licensed in accordance with  
24 such articles.

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

31 § 8. If otherwise applicable, capital projects undertaken by the  
32 authorized state entity pursuant to this act shall be subject to section  
33 135 of the state finance law and section 222 of the labor law.

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

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

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

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

50 § 13. Nothing contained in this act shall limit the right or obli-  
51 gation of the authorized state entity to comply with the provisions of  
52 any existing contract, including any existing contract with or for the  
53 benefit of the holders of the obligations of the authorized state enti-  
54 ty, or to award contracts as otherwise provided by law.

1 § 14. Alternative construction awarding processes. (i) Notwithstand-  
2 ing the provisions of any other law to the contrary, the authorized  
3 state entity may award a construction contract:

4 1. To the contractor offering the best value; or

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

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

12 (b) include a detailed line item cost breakdown;

13 (c) include a list of all drawings, specifications and other informa-  
14 tion on which the guaranteed maximum price is based;

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

17 (e) include a schedule of unit prices; or

18 3. Utilizing a lump sum contract in which the contractor agrees to  
19 accept a set dollar amount for a contract which comprises a single bid  
20 without providing a cost breakdown for all costs such as for equipment,  
21 labor, materials, as well as such contractor's profit for completing all  
22 items of work comprising the project.

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

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

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

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

49 § 17. This act shall take effect immediately.