STATE OF NEW YORK

9429

IN ASSEMBLY

March 14, 2024

Introduced by M. of A. RAJKUMAR -- read once and referred to the Committee on Cities

AN ACT to amend chapter 749 of the laws of 2019 constituting the New York city public works investment act, in relation to permitting progressive design build contracts for certain public works projects

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

Section 1. Chapter 749 of the laws of 2019 constituting the New York city public works investment act, subdivision (a) of section 2 and section 14 as amended by section 4 of part AA of chapter 58 of the laws of 2022, is amended to read as follows:

Section 1. Short title. This act shall be known and may be cited as the "New York city public works investment act".

§ 2. For the purposes of this act:

(a) "Authorized entity" shall mean the New York city department of design and construction, the New York city department of citywide administrative services, the New York city department of environmental protection, the New York city department of transportation, the New York city department of parks and recreation, the New York city health and hospitals corporation, the New York city school construction authority and the 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;

(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;

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

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(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.
(d-1) "Progressive 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, that is selected through a qualifications-based selection at the earliest feasible stage of the project.
(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) "Qualifications-based selection" means the process by which the authorized entity solicits for services from the progressive design-

build entities and that price is not the sole factor as the basis of award, or the cost range is not yet determined.

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

§ 4. Notwithstanding any general, special or local law, rule or regulation to the contrary, including but not limited to section 7210 of the education law, article 5-A of the general municipal law, article 8 of the public housing law, sections 1734 and 1735 of the public authorities 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 10 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~~] **methods** referred to as design-build **or progressive design-build** contracts. Provided, however, that any authorized entity charged with awarding a contract for public work in connection with property within the jurisdiction of the New York city department of parks and recreation or the New York city housing authority is authorized to use the alternative delivery method referred to as design-build **or progressive design-build** contracts for any such public work 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. Provided further that any authorized entity may use the alternative delivery method referred to as design-build **or progressive design-build** contracts for any public work 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 and primarily consists of: pedestrian ramps and similar infrastructure to improve access to sidewalks in the city of New York for people with disabilities; renovation and construction of cultural institutions located on publicly owned real property and of public libraries in the city of New York; or security infrastructure, including bollards, planters and other physical structures, designed to protect life and property from acts of terror or mass violence.

(a) A contractor selected by such an 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, or, where the New York city school construction authority acts as the authorized entity, certified pursuant to section 1743 of the public authorities law; and (ii) small business concerns identified pursuant to subdivision (b) of section 139-g of the state finance law. In addition, nothing in this section shall be deemed to supersede any pre-qualification guidelines or requirements otherwise authorized by law for an authorized entity.

(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 after registration of such contract or the date upon which such contract may be implemented, if registration requirements do not apply.

(b) The procurement process for progressive design-build projects shall progress as follows:

(1) The authorized entity shall prepare and issue a request for qualifications in order to select a progressive design-build entity to execute the project. The request for qualifications shall include, but is not limited to, the following elements:

(i) Documentation of the size, type, and desired design character of the project and any other information deemed necessary to describe adequately the authorized entity's needs, including the expected cost range, provided, however, that the authorized entity may determine these in consultation with the progressive design-build entity subsequent to the awarding of a contract; the methodology that will be used by the authorized entity to evaluate the progressive design-build entity's qualifications, the procedure for final selection of the progressive design-build entity, and any other information deemed necessary by the local agency to inform interested parties of the contracting opportunity.

(ii) Significant factors that the authorized entity reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, and all other non-price-related factors. The authorized entity may require that a preliminary cost estimate be included in the progressive design-build entities' responses and consider those costs in evaluating the statements of qualifications.

(iii) The relative importance or the weight assigned to each of the factors identified in the request for qualifications.

(iv) A standard template request for statements of qualifications prepared by the authorized entity. In preparing the standard template, the authorized entity may consult with the construction industry, the building trades and surety industry, and other local agencies interested in using the authorization provided by this act. The template shall require the following information:

(A) If the progressive design-build entity is a privately held corporation, limited liability company, partnership, or joint venture, a listing of all of the entity's shareholders, partners, or members known at the time of the statement of qualification submission who will perform work on the project;

(B) Evidence that the members of the progressive design-build team have completed, or have demonstrated the experience, competency, capability, and capacity to complete, projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the progressive design-build entity has the capacity to complete the project;

(C) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration;

(D) Evidence that establishes that the progressive design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance;

(E) Information concerning workers' compensation experience history and a worker safety program;

(F) If the proposed progressive design-build entity is a corporation, limited liability company, partnership, joint venture, or other legal entity, a copy of the organizational documents or agreement committing to form the organization; and

(G) An acceptable safety record. A proposer's safety record shall be deemed acceptable if its experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury or illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category or if the proposer is a party to an alternative dispute resolution system.

(v) The information required under this subdivision shall be certified under penalty of perjury by the progressive design-build entity and its general partners or joint venture members.

(2) At the close of the solicitation period, the authorized entity shall review the submissions. The authorized entity may evaluate submissions based solely upon the information provided in each progressive design-build entity's statement of qualifications. The authorized entity may also interview some or all of the progressive design-build entities to further evaluate their qualifications for the project.

(3) Upon issuance of a contract award, the authorized entity shall publicly announce its award, identifying the progressive design-build entity to which the award is made, along with a statement regarding the basis of the award. The statement regarding the authorized entity's contract award and the contract file shall provide sufficient information to satisfy an external audit.

(c) An authorized entity awarding a design-build or progressive 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.

§ 5. 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 the appropriate article.

§ 6. Construction with respect to each contract entered into by an authorized 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 such law and enforcement of prevailing wage requirements pursuant to applicable law or, for projects or public works receiving federal aid, applicable federal requirements for prevailing wage. Any contract entered into pursuant to this act shall include a clause requiring the selected

design builder to obligate every tier of contractor working on the public work to comply with the project labor agreement referenced in section three of this act, and shall include project labor agreement compliance monitoring and enforcement provisions consistent with the applicable project labor agreement.

§ 7. Each contract entered into by an authorized entity pursuant to this act shall comply with the objectives and goals relating to the performance of design and construction services by 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.

§ 8. Public works undertaken by an authorized 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.

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

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

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

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

§ 10. The submission of a proposal or responses or the execution of a design-build **or progressive design-build** contract pursuant to this act

shall not be construed to be a violation of section 6512 of the education law.

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

§ 12. The authority conferred by this act shall not impact or impair the application of section 1740 of the public authorities law concerning the use of outside design, drafting or inspection services, and shall be in addition to the authority conferred by any other law upon any authorized entity, provided that 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.

§ 13. 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 on behalf of its agencies, the New York city housing authority, the New York city school construction authority, and the New York city health and hospitals corporation containing information regarding each design-build **or progressive design-build** contract procured pursuant to this act. Such report shall include a description of each such design-build **and progressive design-build** contract, information regarding the procurement process for each such [~~**design-build**~~] contract including the list of responding entities that demonstrated the general capability to perform the design-build **or progressive design-build** contract pursuant to paragraph (1) of subdivision (a) **or subdivision (b)** of section four of this act, the total cost of each design-build **or progressive design-build** contract, an explanation of the estimated savings resulting from the design-build [~~**method**~~] **and progressive design-build methods**, and the participation rate of and total dollar value of monies paid to minority- and women-owned business enterprises under such design-build **or progressive design-build** contract.

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

§ 2. This act shall take effect immediately; provided, however, that the amendments to sections 1 through 13 of chapter 749 of the laws of 2019 constituting the New York city public works investment act made by section one of this act shall not affect the expiration of such sections and shall be deemed repealed therewith.