

# STATE OF NEW YORK

7136

2023-2024 Regular Sessions

## IN ASSEMBLY

May 11, 2023

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on Local Governments

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 "county public works investment act".

3 § 2. For the purposes of this act:

4 (a) "Authorized entity" shall mean any county within the state having  
5 a population of one million or more persons.

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

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

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

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

14 (4) The proposer's record of performing previous projects on budget  
15 and ability to minimize cost overruns;

16 (5) The proposer's ability to limit change orders;

17 (6) The proposer's ability to prepare appropriate project plans;

18 (7) The proposer's technical capacities;

19 (8) The individual qualifications of the proposer's key personnel;

20 (9) The proposer's ability to assess and manage risk and minimize risk  
21 impact;

22 (10) The proposer's financial capability;

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

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

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

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

14 (14) A quantitative factor to be used in evaluation of bids or offers  
15 for awarding of contracts for bidders or offerers that are certified as  
16 minority- or women-owned business enterprises pursuant to article 15-A  
17 of the executive law, and certified pursuant to local law as minority-  
18 or women-owned business enterprises. Where an agency identifies a quan-  
19 titative factor pursuant to this paragraph, the agency must specify that  
20 businesses certified as minority- or women-owned business enterprises  
21 pursuant to article 15-A of the executive law as well as those certified  
22 as minority- or women-owned business enterprises or pursuant to section  
23 1304 of the New York city charter are eligible to qualify for such  
24 factor. Nothing in this paragraph shall be construed as a requirement  
25 that such businesses be concurrently certified as minority- or women-  
26 owned business enterprises under both article 15-A of the executive law  
27 and section 1304 of the New York city charter to qualify for such quan-  
28 titative factors.

29 Such basis shall reflect, wherever possible, objective and quantifi-  
30 able analysis.

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

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

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

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

44 § 4. Notwithstanding any general, special or local law, rule or regu-  
45 lation to the contrary, including but not limited to section 7210 of the  
46 education law, article 5-A of the general municipal law and article 8 of  
47 the public housing law, and in conformity with the requirements of this  
48 act, for any public work that has an estimated cost of not less than 10  
49 million dollars and is undertaken pursuant to a project labor agreement  
50 in accordance with section 222 of the labor law, an authorized entity  
51 charged with awarding a contract for public work may use the alternative  
52 delivery method referred to as design-build contracts; provided that any  
53 authorized entity may use the alternative delivery method referred to as  
54 design-build contracts for any public work that has an estimated cost of  
55 not less than one million two hundred thousand dollars if such public  
56 work is otherwise in conformity with the requirements of this act and

1 primarily consists of: pedestrian ramps and similar infrastructure to  
2 improve access to sidewalks for people with disabilities; renovation and  
3 construction of cultural institutions located on publicly owned real  
4 property and of public libraries; or security infrastructure, including  
5 bollards, planters and other physical structures, designed to protect  
6 life and property from acts of terror or mass violence.

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

10 (1) Step one. Generation of a list of responding entities that have  
11 demonstrated the general capability to perform the design-build  
12 contract. Such list shall consist of a specified number of responding  
13 entities, as determined by an authorized entity, and shall be generated  
14 based upon the authorized entity's review of responses to a publicly  
15 advertised request for qualifications. The authorized entity's request  
16 for qualifications shall include a general description of the public  
17 work, the maximum number of responding entities to be included on the  
18 list, the selection criteria to be used and the relative weight of each  
19 criteria in generating the list. Such selection criteria shall include  
20 the qualifications and experience of the design and construction team,  
21 organization, demonstrated responsibility, ability of the team or of a  
22 member or members of the team to comply with applicable requirements,  
23 including the provisions of articles 145, 147 and 148 of the education  
24 law, past record of compliance with the labor law, and such other quali-  
25 fications the authorized entity deems appropriate, which may include but  
26 are not limited to project understanding, financial capability and  
27 record of past performance. The authorized entity shall evaluate and  
28 rate all responding entities to the request for qualifications. Based  
29 upon such ratings, the authorized entity shall list the responding enti-  
30 ties that shall receive a request for proposals in accordance with para-  
31 graph two of this subdivision. To the extent consistent with applicable  
32 federal law, the authorized entity shall consider, when awarding any  
33 contract pursuant to this section, the participation of (i) responding  
34 entities that are certified as minority- or women-owned business enter-  
35 prises pursuant to article 15-A of the executive law or certified pursu-  
36 ant to local law as minority- or women-owned business enterprises; and  
37 (ii) small business concerns identified pursuant to subdivision (b) of  
38 section 139-g of the state finance law. In addition, nothing in this  
39 section shall be deemed to supersede any pre-qualification guidelines or  
40 requirements otherwise authorized by law for an authorized entity.

41 (2) Step two. Selection of the proposal which is the best value to the  
42 authorized entity. The authorized entity shall issue a request for  
43 proposals to the responding entities listed pursuant to paragraph one of  
44 this subdivision. If such a responding entity consists of a team of  
45 separate entities, the entities that comprise such a team must remain  
46 unchanged from the responding entity as listed pursuant to paragraph one  
47 of this subdivision unless otherwise approved by the authorized entity.  
48 The request for proposals shall set forth the public work's scope of  
49 work, and other requirements, as determined by the authorized entity,  
50 which may include separate goals for work under the contract to be  
51 performed by businesses certified as minority- or women-owned business  
52 enterprises pursuant to article 15-A of the executive law or section  
53 1743 of the public authorities law, or certified pursuant to local law  
54 as minority- or women-owned business enterprises. The request for  
55 proposals shall also specify the criteria to be used to evaluate the  
56 responses and the relative weight of each of such criteria. Such crite-

1 ria shall include the proposal's cost, the quality of the proposal's  
2 solution, the qualifications and experience of the proposer, and other  
3 factors deemed pertinent by the authorized entity, which may include,  
4 but shall not be limited to, the proposal's manner and schedule of  
5 project implementation, the proposer's ability to complete the work in a  
6 timely and satisfactory manner, maintenance costs of the completed  
7 public work, maintenance of traffic approach, and community impact. Any  
8 contract awarded pursuant to this act shall be awarded to a responsive  
9 and responsible proposer, which, in consideration of these and other  
10 specified criteria deemed pertinent, offers the best value, as deter-  
11 mined by the authorized entity. The request for proposals shall include  
12 a statement that proposers shall designate in writing those portions of  
13 the proposal that contain trade secrets or other proprietary information  
14 that are to remain confidential; that the material designated as confi-  
15 dential shall be readily separable from the proposal. Nothing in this  
16 subdivision shall be construed to prohibit the authorized entity from  
17 negotiating final contract terms and conditions including cost. All  
18 proposals submitted shall be scored according to the criteria listed in  
19 the request for proposals and such final scores shall be published on  
20 the authorized entity's website after registration of such contract or  
21 the date upon which such contract may be implemented, if registration  
22 requirements do not apply.

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

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

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

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

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

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

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

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

44 § 5. Any contract entered into pursuant to this act shall include a  
45 clause requiring that any professional services regulated by articles  
46 145, 147 and 148 of the education law shall be performed and stamped and  
47 sealed, where appropriate, by a professional licensed in accordance with  
48 the appropriate article.

49 § 6. Construction with respect to each contract entered into by an  
50 authorized entity pursuant to this act shall be deemed a "public work"  
51 to be performed in accordance with the provisions of article 8 of the  
52 labor law, as well as subject to sections 200, 240, 241 and 242 of such  
53 law and enforcement of prevailing wage requirements pursuant to applica-  
54 ble law or, for projects or public works receiving federal aid, applica-  
55 ble federal requirements for prevailing wage. Any contract entered into  
56 pursuant to this act shall include a clause requiring the selected

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

6 § 7. Each contract entered into by an authorized entity pursuant to  
7 this act shall comply with the objectives and goals relating to the  
8 performance of design and construction services by minority- and women-  
9 owned business enterprises, or, for projects or public works receiving  
10 federal aid, applicable federal requirements for disadvantaged business  
11 enterprises or minority- and women-owned business enterprises.

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

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

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

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

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

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

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

1 § 12. A report shall be submitted no later than June 30, 2024 and  
2 annually thereafter, to the governor, the temporary president of the  
3 senate and the speaker of the assembly by each authorized entity  
4 containing information regarding each design-build contract procured by  
5 such authorized entity pursuant to this act. Such report shall include a  
6 description of each such design-build contract, information regarding  
7 the procurement process for each such design-build contract including  
8 the list of responding entities that demonstrated the general capability  
9 to perform the design-build contract pursuant to paragraph (1) of subdi-  
10 vision (a) of section four of this act, the total cost of each design-  
11 build contract, an explanation of the estimated savings resulting from  
12 the design-build method, and the participation rate of and total dollar  
13 value of monies paid to minority- and women-owned business enterprises  
14 under such design-build contract.

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