

# 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:

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

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

7 § 2. For the purposes of this act:

8 (a) "Authorized entity" shall mean the New York city department of  
9 design and construction, the New York city department of citywide admin-  
10 istrative services, the New York city department of environmental  
11 protection, the New York city department of transportation, the New York  
12 city department of parks and recreation, the New York city health and  
13 hospitals corporation, the New York city school construction authority  
14 and the New York city housing authority.

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

- 19 (1) The quality of the proposer's performance on previous projects;
- 20 (2) The timeliness of the proposer's performance on previous projects;
- 21 (3) The level of customer satisfaction with the proposer's performance  
22 on previous projects;
- 23 (4) The proposer's record of performing previous projects on budget  
24 and ability to minimize cost overruns;
- 25 (5) The proposer's ability to limit change orders;
- 26 (6) The proposer's ability to prepare appropriate project plans;
- 27 (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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1 (8) The individual qualifications of the proposer's key personnel;

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

4 (10) The proposer's financial capability;

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

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

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

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

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

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

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

45 (d-1) "Progressive design-build contract" shall mean a contract for  
46 the design and construction of a public work with a single entity,  
47 which may be a team comprised of separate entities, that is selected  
48 through a qualifications-based selection at the earliest feasible stage  
49 of the project.

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

54 (f) "Qualifications-based selection" means the process by which the  
55 authorized entity solicits for services from the progressive design-

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

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

7 § 4. Notwithstanding any general, special or local law, rule or regu-  
8 lation to the contrary, including but not limited to section 7210 of the  
9 education law, article 5-A of the general municipal law, article 8 of  
10 the public housing law, sections 1734 and 1735 of the public authori-  
11 ties law and section 8 of the New York city health and hospitals corpo-  
12 ration act, and in conformity with the requirements of this act, for any  
13 public work that has an estimated cost of not less than 10 million  
14 dollars and is undertaken pursuant to a project labor agreement in  
15 accordance with section 222 of the labor law, an authorized entity  
16 charged with awarding a contract for public work may use the alternative  
17 delivery [~~method~~] methods referred to as design-build or progressive  
18 design-build contracts. Provided, however, that any authorized entity  
19 charged with awarding a contract for public work in connection with  
20 property within the jurisdiction of the New York city department of  
21 parks and recreation or the New York city housing authority is author-  
22 ized to use the alternative delivery method referred to as design-build  
23 or progressive design-build contracts for any such public work that has  
24 an estimated cost of not less than one million two hundred thousand  
25 dollars if such public work is otherwise in conformity with the require-  
26 ments of this act. Provided further that any authorized entity may use  
27 the alternative delivery method referred to as design-build or progres-  
28 sive design-build contracts for any public work that has an estimated  
29 cost of not less than one million two hundred thousand dollars if such  
30 public work is otherwise in conformity with the requirements of this act  
31 and primarily consists of: pedestrian ramps and similar infrastructure  
32 to improve access to sidewalks in the city of New York for people with  
33 disabilities; renovation and construction of cultural institutions  
34 located on publicly owned real property and of public libraries in the  
35 city of New York; or security infrastructure, including bollards, plan-  
36 ters and other physical structures, designed to protect life and proper-  
37 ty from acts of terror or mass violence.

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

41 (1) Step one. Generation of a list of responding entities that have  
42 demonstrated the general capability to perform the design-build  
43 contract. Such list shall consist of a specified number of responding  
44 entities, as determined by an authorized entity, and shall be generated  
45 based upon the authorized entity's review of responses to a publicly  
46 advertised request for qualifications. The authorized entity's request  
47 for qualifications shall include a general description of the public  
48 work, the maximum number of responding entities to be included on the  
49 list, the selection criteria to be used and the relative weight of each  
50 criteria in generating the list. Such selection criteria shall include  
51 the qualifications and experience of the design and construction team,  
52 organization, demonstrated responsibility, ability of the team or of a  
53 member or members of the team to comply with applicable requirements,  
54 including the provisions of articles 145, 147 and 148 of the education  
55 law, past record of compliance with the labor law, and such other quali-  
56 fications the authorized entity deems appropriate, which may include but

1 are not limited to project understanding, financial capability and  
2 record of past performance. The authorized entity shall evaluate and  
3 rate all responding entities to the request for qualifications. Based  
4 upon such ratings, the authorized entity shall list the responding enti-  
5 ties that shall receive a request for proposals in accordance with para-  
6 graph two of this subdivision. To the extent consistent with applicable  
7 federal law, the authorized entity shall consider, when awarding any  
8 contract pursuant to this section, the participation of (i) responding  
9 entities that are certified as minority- or women-owned business enter-  
10 prises pursuant to article 15-A of the executive law, or certified  
11 pursuant to local law as minority- or women-owned business enterprises,  
12 or, where the New York city school construction authority acts as the  
13 authorized entity, certified pursuant to section 1743 of the public  
14 authorities law; and (ii) small business concerns identified pursuant to  
15 subdivision (b) of section 139-g of the state finance law. In addition,  
16 nothing in this section shall be deemed to supersede any pre-qualifica-  
17 tion guidelines or requirements otherwise authorized by law for an  
18 authorized entity.

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

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

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

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

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

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

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

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

37     **(B) Evidence that the members of the progressive design-build team**  
38 **have completed, or have demonstrated the experience, competency, capa-**  
39 **bility, and capacity to complete, projects of similar size, scope, or**  
40 **complexity, and that proposed key personnel have sufficient experience**  
41 **and training to competently manage and complete the design and**  
42 **construction of the project, and a financial statement that ensures that**  
43 **the progressive design-build entity has the capacity to complete the**  
44 **project;**

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

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

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

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

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

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

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

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

23 (c) An authorized entity awarding a design-build or progressive  
24 design-build contract to a contractor offering the best value may but  
25 shall not be required to use 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 pursuant to, as applicable, section 6-129 of  
10 the administrative code of the city of New York, subdivision 6 of  
11 section 8 of the New York city health and hospitals corporation act,  
12 section 1743 of the public authorities law, or, for projects or public  
13 works receiving federal aid, applicable federal requirements for disad-  
14 vantaged business enterprises or minority- and women-owned business  
15 enterprises.

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

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

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

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

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

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

1 shall not be construed to be a violation of section 6512 of the educa-  
2 tion law.

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

6 § 12. The authority conferred by this act shall not impact or impair  
7 the application of section 1740 of the public authorities law concerning  
8 the use of outside design, drafting or inspection services, and shall be  
9 in addition to the authority conferred by any other law upon any author-  
10 ized entity, provided that any public work covered by the New York city  
11 BQE design-build act, the New York city housing authority modernization  
12 investment act or the New York city Rikers Island jail complex replace-  
13 ment act shall continue to be governed by the provisions of such act  
14 while such provisions are in effect.

15 § 13. A report shall be submitted no later than June 30, 2020 and  
16 annually thereafter, to the governor, the temporary president of the  
17 senate and the speaker of the assembly by the city of New York on behalf  
18 of its agencies, the New York city housing authority, the New York city  
19 school construction authority, and the New York city health and hospi-  
20 tals corporation containing information regarding each design-build or  
21 progressive design-build contract procured pursuant to this act. Such  
22 report shall include a description of each such design-build and  
23 progressive design-build contract, information regarding the procurement  
24 process for each such [~~design-build~~] contract including the list of  
25 responding entities that demonstrated the general capability to perform  
26 the design-build or progressive design-build contract pursuant to para-  
27 graph (1) of subdivision (a) or subdivision (b) of section four of this  
28 act, the total cost of each design-build or progressive design-build  
29 contract, an explanation of the estimated savings resulting from the  
30 design-build [~~method~~] and progressive design-build methods, and the  
31 participation rate of and total dollar value of monies paid to minority-  
32 and women-owned business enterprises under such design-build or progres-  
33 sive design-build contract.

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

38 § 2. This act shall take effect immediately; provided, however, that  
39 the amendments to sections 1 through 13 of chapter 749 of the laws of  
40 2019 constituting the New York city public works investment act made by  
41 section one of this act shall not affect the expiration of such sections  
42 and shall be deemed repealed therewith.