



Design-build authority granted to New York City entities

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On December 31, 2019, New York Governor Andrew Cuomo signed the “New York City Public Works Investment Act” into law. The Act authorizes the following New York City entities to use design-build contracts for public works projects:

- New York City Department of Design and Construction
- New York City Department of Environmental Protection
- New York City Department of Transportation
- New York City Department of Parks and Recreation
- New York City Health and Hospitals Corporation
- New York City School Construction Authority
- New York City Housing Authority

The Act applies to any public work project by an authorized New York City entity that has an estimated cost of not less than \$10 million, or \$1.2 million in the case of the New York City Department of Parks and Recreation and the New York City Housing Authority, subject to certain exceptions (including for anti-terrorism projects).

The governor had been pressing for more comprehensive state-wide design-build authorization, allowing for the use of design-build contracting in place of the widely used design-bid-build approach.

Procurement process

The Act requires a two-step procurement process. In step one, the authorized NYC entity must issue a Request for Qualifications in order to generate a list of responding entities that have the capability to perform the design-build contract. Step two is the selection (pursuant to a Request for Proposals) of the proposal that provides the “best value” to the NYC entity.

The Act allows the NYC entity to negotiate the final contract terms and conditions with the winning DB team, including cost.

Payments and performance security

The Act does not specify the payment mechanisms to be included in the design-build contract, but does highlight the following permitted options:

- A cost-plus not to exceed guaranteed maximum price approach (based on a detailed line-item cost breakdown and a schedule of unit prices); or
- A lump-sum contract, covering all costs.

The Act does not specify a minimum coverage amount for payment and performance bonds, leaving this to the discretion of the procuring NYC entity. However, certain of the authorized NYC entities may have their own minimum coverage requirements separate and apart from the Act.

Labor matters

The design-build structure includes compliance with a project labor agreement. Every tier of sub-contractor under the design-build agreement must also comply with the project labor agreement, and the design-build agreement must include related compliance monitoring and enforcement provisions.

Design-build contracts entered into under the Act are also subject to applicable federal, state, and local requirements for disadvantaged business enterprises and minority and women-owned business enterprises.

Reporting requirements

No later than June 30, 2020, and annually thereafter, the relevant entities are required to submit to the governor (and others) an annual report with the following information:

- a description of each design-build contract
- information regarding the procurement process (including the list of responding entities)
- the total cost of each design-build contract
- an explanation of the estimated savings resulting from the design-build method
- the participation rate and total dollars paid to minority- and women-owned business enterprises under such design-build contract

Effectiveness and term

The Act was effective on December 31, 2019. Like the earlier 2011 design-build legislation, it has an automatic sunset in three years (unless renewed). Procurements that are underway prior to such sunset date can proceed.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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