



The New York State Society of Professional Engineers, Inc.

The Founding Society of the National Society of Professional Engineers

March 11, 2014

Full Legislature

POSITION STATEMENT

S.6357-B /A.8557-B

2014 Design Build Budget Proposal

The 2014 budget proposal (S 6357-B/A8557-B) submitted by Governor Cuomo respecting design-build largely mirrors present law. (See Governor's 2011 Budget Bill (S 50002/A 40002).) The original statute authorized design-build infrastructure projects for a limited number of state entities including the State Thruway Authority, the Department of Transportation, the Office of Parks, Recreation and Historic Preservation, the Department of Environmental Conservation and the State Bridge Authority. The 2014 proposal retains the same litany of state entities and extends the current three-year sunset for three additional years.

The only significant amendment to existing law, other than the three-year extender, would require the use of project labor agreements for specified projects in excess of 10 million dollars as detailed in section 8 of the proposal. Attached is a copy of the 2011 statute with amendments proposed by both Governor Cuomo's Budget Bill S6357-B/A8557-B and NYSSPE. (The Governor's initial budget proposal would have extended the law to include large local municipalities and eliminated the sunset provision, but the proposal has been scaled back due to concerns that design build process can be subject to abuses and an additional period of time is needed to assess the use of design build in New York.)

NYSSPE originally voice concerns over the Governor's 2011 proposal, insofar as it failed to adequately insure that qualifications based selection would be utilized for all professional design services. In defining "best value" the 2011 law focused upon the general contractor's qualifications, and, while referencing the need to consider the qualifications of the design firm, the statute emphasized the qualifications of the general contractor. The bill should be amended to specifically add to the definition of "best value" consideration of the qualifications of all firms providing professional design services and the individual qualifications of licensees providing professional design services.

Moreover, and most critically, a number of additional quality assurance safeguards are needed to insure that public health, safety and welfare are not compromised in the design build process. While many of these safeguards were included in the procurement process employed in the wake of the 2011 law at the

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agency level, the absence of express statutory requirements threatens the potential effectiveness of the program. Reduction in cost, improved speed in project delivery and improved quality are touted as the benefits of design build. However, as noted above, the process is subject to abuses and safeguards must be employed to insure that projects are designed and constructed in a manner consistent with interests of project owners and the general public.

In furtherance of the foregoing objective it is essential that the project owner employ an "owner's design professional" (a licensed professional engineer or a registered architect) to act as the owner's expert. A statutory requirement respecting the engagement of an owner's design professional would mitigate, to a substantial degree, concerns regarding the ability of the contractor to exert undue influence upon a principal design firm (or team of design firms). The attached proposal details the duties to be carried out by the "owner's design professional". Further, an additional quality assurance provision should be included wherein the principal design firm is afforded unrestricted access to the project owner and the owner's design professional. (See section 6 of the attached draft.) Careful consideration should also be afforded the implementation of a licensure requirement for all contractors (and key principals) desirous of participating in the design build arena.

Finally, the legislation could be improved by incorporating a mandatory indemnification agreement which provides for fair and balanced contractual indemnification between the project owner and the design build participants. Presently, many governmental contracts place an undue burden upon design consulting firms and contractors for both damages and costs (including without limitation attorneys' fees). In the event the design build entity is comprised of a team of separate entities, incorporation of a mandatory indemnification agreement which insured fair and balanced contractual indemnification between the separate entities is advisable. For example, professional design firm should be accountable for design defects insurable under standard professional liability policy and should not be subject to contractual indemnification for wrongful acts and omissions committed by the general contractor or parties retained by the general contractor. See section 14 of the attached draft for specific indemnification language.

NYSSPE welcomes the opportunity to provide its perspective on this important alternative to the traditional design-bid-build project delivery methodology. Representatives of the Society are available to address any issues raised herein.

Respectfully submitted,

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Black = Design Build 3 year pilot (existing law)

Green (**BOLD**) = New language per 2014 Governor's Budget Bill (Section 8)

Red bracketed () = Language to be deleted

Blue (underlined) = New language per NYSSPE Recommendations (Sections 3, 6, 12 and 14)

S 6357-B / A 8557-B 2014

PART B

Section 1. This act shall be known and may be cited as the "Infrastructure investment act".

§ 2. The legislature hereby finds and declares as follows:

- (1) Our state's aging infrastructure, the on-going economic crisis and the resulting increase in unemployment in the state have all contributed to a decline in our state's competitiveness and in a significant decrease in New York state tax revenues.
- (2) Sufficient modern infrastructure is of paramount importance not only as a catalyst for job creation but also as a key driver for the state's economic performance and competitiveness and the health, safety, education and quality of life of our citizens and as the means to ensure the efficient movement of people and goods.
- (3) Expediting the delivery of projects in New York state would lead directly to job creation and increases in the state's competitiveness.
- (4) Businesses in New York state have extensive and diverse experience in alternative project delivery methods for the study, planning, design, development, financing, acquisition, installation, construction, reconstruction, improvement, maintenance and management of public infrastructure facilities. These alternative project delivery methods provide significant benefits to the public by:
 - (a) Reducing the public cost of delivering and obtaining services for infrastructure assets;
 - (b) Expediting project delivery;
 - (c) Encouraging life cycle efficiencies;
 - (d) Providing better use and leverage of public human and capital resources, and enhancing capital formation for large projects;
 - (e) Creating jobs;
 - (f) Promoting performance efficiencies; and
 - (g) Bringing additional innovative best practice contracting by the private sector to bear on public infrastructure needs within the state.

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

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

- (a) accelerate capital investment in New York state's infrastructure;
- (b) coordinate among New York state's agencies and authorities on capital investment;
- (c) encourage private sector capital investment in New York;
- (d) ensure that job creation benefits New York workers; and
- (e) assist the use of the most efficient and effective procurement and project management for infrastructure projects in the transportation, energy, environment, public facilities, and economic development sectors.

§ 3. For the purposes of this act:

(a) "authorized state entity" shall mean the New York state thruway authority, the department of transportation, the office of parks, recreation and historic preservation, the department of environmental conservation and the New York state bridge authority.

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

1. The quality of the contractor's and design professional's performance on previous projects;
2. The timeliness of the contractor's and design professional's performance on previous projects;
3. The level of customer satisfaction with the contractor's and design professional's performance on previous projects;
4. The contractor's and design professional's record of performing previous projects on budget and ability to minimize cost overruns;
5. The contractor's and design professional's ability to limit change orders;
6. The contractor's and design professional's ability to prepare appropriate project plans;
7. The contractor's and design professional's technical capacities;
8. The individual qualifications of the contractor's key personnel;
9. The contractor's and design professional's ability to assess and risk and minimize risk impact; and
10. The contractor's and design professional's past record of compliance with article 15-A of the executive law.

Such basis shall reflect, wherever possible, objective and quantifi-

able analysis.

- (c) "capital project" shall have the same meaning as such term is defined by subdivision 2-a of section 2 of the state finance law.
- (d) "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.
- (e) "design-build contract" shall mean a contract for the design and construction of a capital project with a single entity, which may be a team comprised of separate entities.
- (f) "procurement record" means documentation of the decisions made and the approach taken in the procurement process.

§ 4. Notwithstanding the provisions of section 38 of the highway law, section 136-a of the state finance law, section 359 of the public authorities law, section 7210 of the education law, and the provisions of any other law to the contrary, and in conformity with the requirements of this act, an authorized state entity may utilize the alternative delivery method referred to as design-build contracts for capital projects related to the state's physical infrastructure, including, but not limited to, the state's highways, bridges, dams, flood control projects, canals, and parks, including, but not limited to, to repair damage caused by natural disaster, to correct health and safety defects, to comply with federal and state laws, standards, and regulations, to extend the useful life of or replace the state's highways, bridges, dams, flood control projects, canals, and parks or to improve or add to the state's or local entity's highways, bridges, dams, flood control projects, canals, and parks; provided that for the contracts executed by the department of transportation, the office of parks, recreation and historic preservation, or the department of environmental conservation, the total cost of each such project shall not be less than one million two hundred thousand dollars (\$1,200,000).

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

- (a) Step one. Generation of a list of entities that have demonstrated the general capability to perform the design-build contract. Such list shall consist of a specified number of entities, as determined by an authorized state entity, and shall be generated based upon the authorized state entity's review of responses to a publicly advertised request for qualifications. The authorized state entity's request for qualifications shall include a general description of the project, the maximum number of entities to be included on the list, and the selection criteria to be used in generating the list. Such selection criteria shall include the qualifications and experience of the design and construction team, organization, demonstrated responsi-

bility, 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 state or local entity deems appropriate which may include but are not limited to project understanding, financial capability and record of past performance. The authorized state shall evaluate and rate all entities responding to the request for qualifications. Based upon such ratings, the authorized state entity shall list the entities that shall receive a request for proposals in accordance with subdivision (b) of this section. To the extent consistent with applicable federal law, the authorized state entity shall consider, when awarding any contract pursuant to this section, the participation of: (i) firms certified pursuant to article 15-A of the executive law as minority or women-owned businesses and the ability of other businesses under consideration to work with minority and women-owned businesses so as to promote and assist participation by such businesses; and (ii) small business concerns identified pursuant to subdivision (b) of section 139-g of the state finance law.

(b) Step two. Selection of the proposal which is the best value to the state. The authorized state or local entity shall issue a request for proposals to the entities listed pursuant to subdivision (a) of this section. If such an entity consists of a team of separate entities, the entities that comprise such a team must remain unchanged from the entity as listed pursuant to subdivision (a) of this section unless otherwise approved by the authorized state entity. The

request for proposals shall set forth the project's scope of work, and other requirements, as determined by the authorized state entity. The request for proposals shall specify the criteria to be used to evaluate the responses and the relative weight of each such criteria. Such criteria shall include the proposal's cost, the quality of the proposal's solution, the qualifications and experience of the design-build entity, and other factors deemed pertinent by the authorized state entity, which may include, but shall not be limited to, the proposal's project implementation, ability to complete the work in a timely and satisfactory manner, maintenance costs of the completed project, maintenance of traffic approach, and community impact. Any contract awarded pursuant to this act shall be awarded to a responsive and responsible entity that submits the proposal, which, in consideration of these and other specified criteria deemed pertinent to the project, offers the best value to the state as determined by the authorized state or local entity. Nothing herein shall be construed to prohibit the authorized entity from negotiating final contract terms and conditions including cost.

§ 6. 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 such articles. With respect to services regulated pursuant to article 145 of the education law, said contracts shall require design professionals to furnish current New York state certificates of authorization. Licensees and authorized entities providing professional design services shall have unrestricted access to the project owner and the project owners design professional specified in section 12 of this act. The design-build entity may be comprised of a single entity if it is a general business corporation authorized to provide design services as specified in education law section 7209 subdivision 6 or education law section 7309 subdivision 4, or a majority of the entities ownership interest is held by design professionals licensed in New York state. Alternatively, the design-build entity shall be a joint venture comprised of two or more entities at least one of which shall be an individual or entity licensed or authorized to provide professional engineering and/or architectural services in New York state.

§ 7. Construction for each capital project undertaken by the authorized state 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 the labor law and enforcement of prevailing wage requirements by the New York state department of labor.

§ 8. If otherwise applicable, capital projects undertaken by the authorized state entity pursuant to this act shall be subject to section 135 of the state finance law and section 222 of the labor law. **For all capital projects using a design built contract that are estimated to cost in excess of \$10 million dollars, a project labor agreement shall be included in the request for proposals for the capital project unless, based upon a feasibility study examining the potential cost savings and efficiencies of a project labor agreement, the authorized state entity cannot determine that a project labor agreement would result in labor cost savings of at least five percent and that its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations, such as the impact of delay, and any history of labor unrest, are best met by requiring a project labor agreement. For all capital projects using a design-build contract that are estimated to cost \$10 million dollars or less, a project labor agreement feasibility study may be considered but is not required.**

§ 9. Each contract entered into by the authorized state entity pursuant to this section shall comply with the objectives and goals of minor-

ity and women-owned business enterprises pursuant to article 15-A of the executive law or, for projects receiving federal aid, shall comply with applicable federal requirements for disadvantaged business enterprises.

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

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

§ 12. The submission of a proposal or responses or the execution of a design-build contract pursuant to this act shall not be construed to be a violation of section 6512 of the education law. Provided however that the project owner shall employ an “owner’s design professional” (a licensed professional engineer or a registered architect or firm authorized to provide professional engineering and/or architecture) to act as the owner’s expert during all phases of design and construction. The owner’s design professional may be either the owner’s in-house staff or a retained design professional or firm authorized to provide professional design services in New York, provided however that the owner’s design professional cannot participate in the project in any other design capacity. In selecting a retained owner’s design professional a state entity shall utilize a qualifications based selection methodology identical or substantially similar to the selection process specified in State Finance Law section 136-a. The owner’s design professional shall assist in the preparation of the request for proposals to allow the design build entity to submit a proposal that meets the requirements of the design build request for proposals, establish the quality assurance/control requirements for the design build entity and monitor the design build entity during design and construction. The owner’s design professional shall identify a preliminary list of permits required for each project, assist the owner with selection of design build entity, provide review for the owner while the design build entity advances the design, including the construction documents phase, construction phase, and the project closeout phase, to check compliance with request for proposal requirements and to ensure that the design intent is satisfied. The owner’s design professional shall provide requirements for requests for proposal submissions including: design performance criteria and design standards, quality assurance/control, inspection and oversight parameters, concept/schematic documents to establish design intent, scope of work and performance specifications and proposed project schedules for design and construction (in milestones).

§ 13. Nothing contained in this act shall limit the right or obligation of the authorized state entity to comply with the provisions of any existing contract, including any existing contract with or for the benefit of the holders of the obligations of the authorized state entity, or to award contracts as otherwise provided by law.

§ 14. (a) Definitions. As used in this section:

(i) The term "state department" shall mean those state government departments, agencies and authorities empowered to enter into design-build agreements pursuant to this act.

(ii) The term "professional design firm" shall mean an individual or sole proprietorship, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture, professional engineering or surveying.

(iii) The "contractor" shall mean individuals or entities providing construction and related services as a participant in a design build project pursuant to this act.

(b) All contracts subject to this act shall include the following language:

"To the fullest extent permitted by law, the professional design firm agrees to indemnify and hold the state department and the contractor, their officers, directors and employees harmless from all third party claims, liabilities, damages and costs (including all reasonable attorney's fees and cost of defense) to which the state department or the contractor, their officers, directors and employees may be subject to, arising out of the death or bodily injury to any person or the destruction or damage to any property to the extent caused by the negligent acts, errors or omissions, or willful misconduct of the professional firm's performance of professional services provided under this agreement and those of its sub-consultants or any one for whom the design consultant is legally liable."

"To the fullest extent permitted by law, the state department and the contractor agrees to indemnify and hold the professional design firm harmless from all third party claims, liabilities, damages and costs (including all reasonable attorney's fees and cost of defense) to the extent caused by the negligent acts, errors or omissions of the state department or the contractor, their consultants or anyone for whom the state department or contractor are legally liable."

(c) Nothing in this subdivision shall be construed as requiring a notice of claim or other condition precedent in litigation for any party not otherwise entitled to receive one, nor shall it require any action to be brought by or against any party in the court of claims unless such a requirement previously existed as to that party.

§ (14) 15. Alternative construction awarding processes. (i) Notwithstanding the provisions of any other law to the contrary, the authorized state entity may award a construction contract:

1. To the contractor offering the best value; or
2. Utilizing a cost-plus not to exceed guaranteed maximum price form of contract in which the authorized state entity shall be entitled to monitor and audit all project costs. In establishing the schedule and process for determining a guaranteed maximum price, the contract between the authorized state entity and the contractor shall:

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

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

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

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

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

3. Utilizing 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 project.

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

§ (15.) 16. Prequalified contractors. (a) Notwithstanding any other provision of law, the authorized state or local entity may maintain a list of prequalified contractors who are eligible to submit a proposal pursuant to this act and entry into such list shall be continuously available. Prospective contractors may be prequalified as contractors to provide particular types of construction, in accordance with general criteria established by the authorized state entity which may include, but shall not be limited to, the experience, past performance, ability to undertake the type and complexity of work, financial capability, responsibility, compliance with equal employment opportunity

requirements and anti-discrimination laws, and reliability. Such prequalification may be by categories designed by size and other factors.

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

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

§ (17) 18. This act shall take effect immediately and shall expire and be deemed repealed [3] 6 years after such date, provided that, projects with requests for qualifications issued prior to such repeal shall be permitted to continue under this act notwithstanding such repeal.

§ 2. Section 8 of (This) this act shall take effect immediately and sections 3, 6, 12 and 14 shall apply to all projects with requests for qualifications issued 120 days after such effective date.