



“Infrastructure Investment Act” Implements Design Build in New York

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On December 9, 2011, Governor Cuomo signed into law the “Infrastructure Investment Act,” New York’s first attempt at permitting design-build contracts for public works projects. The bill authorizes the Department of Transportation, Department of Parks, Recreation and Historic Preservation, Department of Environmental Conservation and two New York authorities, the Thruway Authority and the Bridge Authority, to utilize design-build contracts. However, such statutory grant of authority is limited to capital projects related to the state’s physical infrastructure. Physical infrastructure projects include, but are not limited to, the state’s highways, bridges, dams, flood control projects, canals and parks. If successful, there is little doubt that the design-build procurement method will expand beyond state infrastructure projects, impacting vertical building construction subcontractors more directly in the near future.

The goal of this new piece of legislation is to assist the State of New York in promoting innovation in the replacement or repair of the state’s aging infrastructure. Further, the bill cites 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.” Achievement of these goals certainly remains to be seen.

Procuring state agencies and public authorities will engage in a two-step process in awarding design-build contracts to single entities, or teams comprised of separate entities.

The first step will be the solicitation of a Request for Qualification (“RFQ”) for a proposed project. Contractors will be requested to provide information regarding the experience of their design and construction team, its organization, demonstrated responsibility, and the abilities of the team or of individual members. The procuring state entities will then generate a short list of contractors that have “demonstrated the general capability to perform the design-build contract.”

The second step calls for the procuring state entity to issue a Request for Proposals (“RFP”) from contractors on its short list, and to select the proposal that gives the “best value” to the state. A proposal that represents the “best value” means one that optimizes quality, cost and efficiency, price and performance criteria, which may include, but is not limited to:

1. The quality of the contractor’s performance on previous projects;
2. The timeliness of the contractor’s performance on previous projects;
3. The level of customer satisfaction with the contractor’s performance on previous projects;
4. The contractor’s record of performing previous projects on budget and ability to minimize cost overruns;
5. The contractor’s ability to limit change orders;
6. The contractor’s ability to prepare appropriate project plans;

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7. The contractor’s technical capacities;
8. The individual qualifications of the contractor’s key personnel;
9. The contractor’s ability to assess and manage risk and minimize risk impact; and
10. The contractor’s past record of compliance with article 15-A of the executive law.

The procuring state entity’s RFP will set forth the project’s scope of work and other requirements, as determined by the procuring state entity. The request for proposals will specify the criteria to be used to evaluate the responses, and the relative weight of each criterion. Such criteria will 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; these may include, 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. Contracts will only be awarded to a responsive and responsible entity that submits the “best” proposal.

For contracts executed by the Department of Transportation, the Departments of Parks, and the Department of Environmental Conservation, the total cost of projects must be at least \$1.2 million in order for these departments to utilize the design-build project delivery method. However, there is no minimum project cost requirement for the two authorized state authorities, Thruway and Bridge.

Significantly, the procuring state entity has discretion to establish payment and performance bonds for design-build projects “as it deems necessary.”

Work awarded pursuant to this bill is subject to current prevailing wage requirements (Labor Law §220), as

well as the Wicks Law obligations under §135 of NYS Finance Law, Project Labor Agreement requirements of §222 of the NYS Labor Law, Environmental Quality Review requirements of Article 7 of NYS Environmental Conservation Law, and the objectives and goals of minority and women-owned business enterprises under Article 15-A of the NYS Executive Law.

The new legislation took effect immediately after it was signed in December 2011, and will sunset three years after the date of enactment. However, procurements already in the process as of the sunset date will be permitted to proceed.

G& C Commentary

Although this new, enabling legislation allows design/build public works project delivery for the first time in New York, it only applies to “infrastructure projects”, basically those sponsored by the NYS-DOT and Thruway projects. Vertical building construction subcontractors, therefore, will not be directly involved to any great extent at this time. However, the current legislation may very well be a harbinger of things to come as design/build revolves in the public sector into categories of construction in NYS. One can only hope that when this occurs, future legislation or any such authority will be better conceived and drafted.

This legislation was clearly a “rush job” pushed out in the year-end chaos in Albany. It lacks the necessary detail and specifics in almost every respect and will no doubt lead to what will be avoidable controversies and, most likely, litigation.

Although presumably well-intended, the statute provides very little guidance for public owners in utilizing a design/build contracting approach for their projects. There are no standards with respect to the preparation of minimum project performance specifications and related criteria that must be developed by the public owner before soliciting bids for a design/build project.

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Furthermore, public owners, and, in particular their field level managers, will likely be very reluctant and unprepared to relinquish the majority of design control to contractors. Unless the minimum or baseline design criteria is carefully prepared prior to bid, any subsequent redesign or demands from the public owner will likely lead to conflict and dispute.

One woefully inadequate provision, that must be legislatively corrected, is the absence of a clear requirement for surety bonds. In fact, the act appears to leave that requirement completely up in the air, with sole discretion being left in the hands of a project's owner "as it deems necessary." This is direct contravention to State Finance Law §137 (which isn't even mentioned in the new legislation) which requires 100% payment bonds on all public works projects

over \$200,000.00 in New York State. The absence of a clear bonding requirement, eliminating a fundamental protection for both the owner and subcontractors and suppliers, is completely unacceptable.

We all hope, of course, that this initiative will be successful and that design/build, at least during the current economic downturn will be successful. Our concern is, however, that this legislation, while well intended, really ignored the time-tested axiom in the construction industry that the "devil is in the details."

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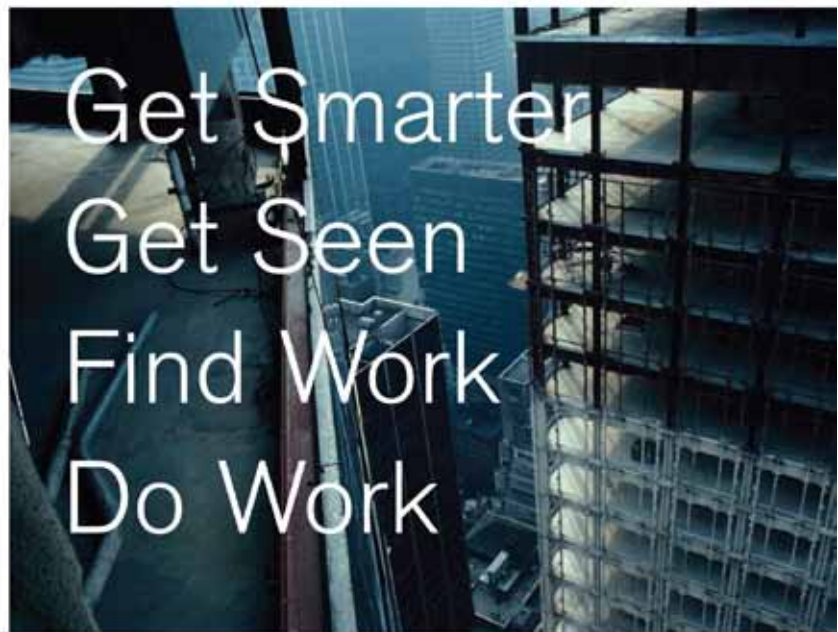
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