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NYC Design-Build Law

Lowest Bid No Longer Ensures a Win

Thanks to the newly minted “New York City Public Works Investment Act,” seven NYC agencies have been granted the authority to use a Design-Build Contract model when putting their construction projects up for bid. This approach, in which one contract outlines both design and construction requirements, is meant to cut project costs and reduce timetables to completion. While agencies believe Design-Build to be a more efficient strategy, be aware that the lowest bidder is not king in this model, and the risks to the constructor are greater.

In this alert, we outline what it will take for contractors to earn a spot in this pageant. Prospective bidders will be required to undergo a two-step application process, by which the agency will determine which candidate offers the “Best Value.”

Step One

An agency will advertise a Request for Qualification, which will specify the criteria by which a prospective bidder can earn the “pre-qualified status” necessary to move onto Step Two. The criteria will include such categories as: qualifications and experience; demonstrated responsibility; ability to comply with the New York State Education Law; and past compliance with the Labor Law. A prospective bidder can be a single entity or a team comprised of multiple entities.

Step Two

The agency will then issue a Request for Proposal to the pre-qualified bidders. The RFP will specify the project’s scope of work and list the criteria by which a bidder will be evaluated. This will include the bidder’s proposed cost and quality of proposal solution (e.g. manner and schedule of project implementation).

The agency will evaluate a bidder’s ability to complete the work in a timely and satisfactory manner, as well as evaluate the proposed maintenance costs of the completed project and the proposed plans to address any impact on traffic and/or the community.

Best Value Analysis

Armed with subjective and objective information, the agency will seek to determine which bidder is in the best position to deliver optimal cost, efficiency, quality and performance. To make this determination, it will consider, among many other things, the quality and timeliness of a bidder’s performance on previous projects (e.g. does the bidder have a history of completing past projects within budget and with limited change orders, does the bidder have a record of compliance with wage and labor laws, etc.).

Always Read the Fine Print

Once a bidder is selected, the agency is still free to negotiate final contract terms and conditions, including, of course, cost. While this will come as little surprise to industry insiders, it’s important to note, nonetheless.

We have seen the Design-Build model utilized in NYC before - in such specific instances as the Rikers Island Jail Complex Replacement Act; the Housing Authority Modernization Investment Act; and the BQE Design-Build Act - but this is the first time it has been sanctioned for broad use by city agencies.

The \$10 Million Restriction & PLA Requirement

Projects under the new law must have a Project Labor Agreement (a pre-hire agreement with a bona fide building and construction trade labor organization) in accordance with Section 222 of the Labor Law and have an estimated contract value of at least \$10 million.

The \$1.2 Million Exception

There are several types of projects that are permitted to use the Design-Build model and are only required to have an estimated contract value of at least \$1.2 million. These include projects on property under the jurisdiction of NYC Parks or NYCHA; projects that provide sidewalk access for the disabled; projects that involve the renovation or construction of cultural institutions; and projects designed to protect life and property from acts of terror or mass destruction.

On a Less Daunting Note

Thanks to the New York Court of Appeals' decision in *Charlebois v. J.M. Weller Associates, Inc.*, 72 N.Y.2d 587 (1988), contractors, architects and engineers can be reasonably assured that their performance of a Design-Build contract will not run afoul of New York State Education Law. The new law provides that any professional services regulated by articles 145, 147 or 148 of the Education Law "shall be performed and stamped and sealed...by a professional licensed in accordance with the appropriate article." The law also provides that "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." This does not mean, however, that constructors can perform the design services required by a Design-Build contract using in-house design resources. A New York licensed professional engineering firm will still be required.

And Finally

The new Design-Build law is currently in effect and will remain so until June 2022. The agencies authorized to take advantage of it include the Department of Design and Construction (DCC), Department of Environmental Protection (DEP), Department of Transportation (DOT), Department of Parks and Recreation (Parks), Health and Hospitals Corporation (HHC), School Construction Authority (SCA), and the Housing Authority (NYCHA).

More to come about what has gone wrong with Design-Build contracts, including unfair risk shifting to Design-Build teams.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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