

Introduction

On March 31, 2014, the New York State Senate passed the state's 2014-15 Budget. The initial 2014 Budget proposal submitted by Governor Cuomo had included a reauthorization of the State's successful “design-build” procurement process for a further three years (see S6357/A8557). The State approved the limited use of “design-build” procurement as part of the Infrastructure Investment Act of 2011, but this authorization expires in December 2014. There had also been a proposal to include more wide ranging authorization for public private partnerships (P3s) in the Budget legislation.

The final Budget, however, failed to reauthorize “design-build” procurement or to authorize the use of P3s.

While “design-build” reauthorizing legislation may still be enacted before the end of the current legislative session in June, many in the public works sector had hoped that this issue would be addressed in the Budget legislation, especially given recent modifications to the reauthorizing bill proposed by Governor Cuomo in the hope of garnering further support for such reauthorization.

Background

In 2011, New York authorized the use of “design-build” procurement by the Department of Transportation (NY DOT), the Thruway Authority and certain other state agencies. This authorization allowed the specified agencies to award a single contract to a private sector team covering the design and construction phases of the project. Prior to the authorization of “design-build,” such agencies were required to use a “design-bid-build” process, whereby a design contract was awarded to one company and, once the design was completed, the construction phase of the project was bid out to be constructed by a separate entity under a separate contract.

Proponents of “design-build” argue that, by placing the entire project under one contract, engineers, architects and contractors are encouraged to collaborate to deliver more innovative and less costly projects on a faster schedule, as opposed to the frequent, time-consuming and costly change orders, cost overruns and schedule delays common under the traditional “design-bid-build” approach. Notwithstanding the benefits of “design-build,” this procurement method was only authorized for an initial three-year period in New York, with the authorization set to expire in December 2014.

Since 2011, the “design-build” method has been widely and successfully used in New York. As of March 2014, \$171.2 million of projects in the state have been completed using “design-build” procurement, with many more in process.¹ The completed projects include 32 bridges throughout the state and the acceleration, by 42 months, of repairs to the Kosciuszko Bridge.²

The new Tappan Zee Bridge was also procured on a “design-build” basis. The initial costs of this project were estimated by the state to be in excess of \$5 billion. The winning “design-build” bidder, however, is obligated to deliver the project on-schedule for \$3.4 billion. Notably, NY DOT has estimated that “design-build” projects are 27% less costly than those procured using traditional methods.³

Key Points of Reauthorization Bill

The proposed “design-build” reauthorization bill (S6357/A8557) that failed to pass the New York State Senate would have:

- authorized the use of “design-build” procurement through December 2017 (a three year extension of the current term);
- maintained the ability of NY DOT, the Thruway Authority, the Office of Parks, Recreation and Historic Preservation, the Department of Environmental Conservation and the New York State Bridge Authority to use “design-build” procurement; and
- continued the “best-value” method for selecting the winning bidder in a procurement. The proposed “design-build” reauthorization bill would not have expanded the use of “design-build” to local governments, as many “design-build” proponents had urged. An earlier version of the bill would have extended the use of “design-build,” as well as making this procurement option permanent.

In the hope of garnering support for the “design-build” reauthorization from organized labor, on February 20 Governor Cuomo modified the bill to require the use of a Project Labor Agreement (PLA) for “design-build” projects in excess of \$10 million. PLAs are collective bargaining agreements that establish terms and conditions of employment for a specific construction project through one or more labor organizations or unions. Such terms and conditions generally apply to all contractors and subcontractors on the project.

Governor Cuomo’s proposal for a design, build, finance, operate and maintain P3 with respect to the new \$600 million public health lab on the Harriman State Office Campus also failed to make it into the final Budget legislation.

Conclusion

Since the use of the “design-build” procurement was authorized in 2011, the relevant New York State agencies have used “design-build” to realize significant cost savings and to accelerate the timetables of several important construction projects. Many in the public works sector had pushed for the reauthorization of “design-build” procurement as part of the 2014-15 Budget, citing the successful use of this procurement method since 2011.

While many were disappointed by the reauthorization’s failure, the relevant bill may still be enacted before the current legislative session ends on June 30, 2014. If it is not, New York will become one of only five states that do not allow the use of “design-build” procurement to deliver certain public infrastructure projects.⁴

For further information regarding any of the issues raised herein, please contact one of the individuals listed in this publication.

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¹ Source: Citizens Budget Commission.

² Id.

³ Id.

⁴ Source: New York State Department of Transportation, “Building on Success: Infrastructure Investment Act of 2011 and NY Works 2012 through Present” (presented at the New NY Works Task Force, February 27, 2014).