

The Construction Law Committee of
The New York City Bar Association

21st Century Construction
20th Century Construction Law
Update

Executive Summary

The need to modernize the State's archaic public construction procurement laws for all public owners continues. For some time now, the media has been reporting a "crisis" in infrastructure. The American Society of Civil Engineers released its most recent report on the state of American infrastructure in March 2009, the fifth in a series of infrastructure reviews since 1988.¹ While the state of the nation's infrastructure is reported to be increasingly worse over time, our nation's infrastructure was dismal over 20 years ago. The word "crisis" implies an acute episode. In the built environment dictionary, the collapsed I-35W Mississippi River bridge in Minnesota is the most recent picture beside the word "crisis." As a recent article in the City Journal suggests,² the Tappan Zee Bridge over the Hudson River may be next.

But in the context of this country's long history of financing and building public works, any single crisis is but an acute episode of a chronic civic condition. The causes of any single moment of crisis are not particularly new, nor are they unique to any particular jurisdiction. In New York a significant portion of the blame for our chronic civic condition can be laid at the feet of archaic laws governing construction – its participants, its processes and its products. While highly developed industrial economies face similar burdens of unmet public infrastructure needs – both necessary maintenance on existing assets and new asset needs – in New York, the backlog of deferred repair, rehabilitation and maintenance has been exacerbated, in part, by the mandated methodology for procuring construction-related services.³

The current laws prevent public owners from avoiding costs due to the mismatch between service delivery methodology and project needs. The laws' exclusive focus on initial project costs to the exclusion of life cycle costs contributes to the continuing pattern of delayed maintenance leading to increased capital needs over time. Ultimately, the public owner's inability to avoid costs in construction incrementally increases non-discretionary debt

¹ American Society of Civil Engineers, *2009 Report Card for America's Infrastructure*, March 25, 2009, Appendix A (www.asce.org/reportcard).

² http://www.city-journal.org/2011/21_2_tappan-zee-bridge.html

³ This mandated procurement methodology consists of the design-bid-build service delivery methodology with the award of the construction contract(s) to the bidder with the lowest competitive initial price, with no consideration of related life-cycle operation and maintenance costs allowed as part of the contracting decision.

service costs, which can crowd out discretionary – or programmatic costs – during times of budget stress.

Faced with these same concerns, other states have successfully modernized their public construction laws – most recently the Commonwealth of Massachusetts in 2004. The American Bar Association's Model Code for Public Infrastructure Procurement is one example of a modern public construction procurement statute. It appears as Appendix A. This Update also includes a conceptual road map for estimating the fiscal impact of public construction procurement reform legislation. This allows for an estimation of the impact from the capital budget to the expense budget.

New York must address the inefficiencies and hidden costs of its public construction laws now, before our reported “crisis” in infrastructure becomes a crisis we cannot prevent.