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CITY BAR

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**Report of the Construction Law Committee to the
Joint Senate and Assembly Labor Committees**

Modernizing the State's Public Procurement Laws

The Construction Law Committee (the "Construction Law Committee") of the New York City Bar Association (the "City Bar Association"), whose mission includes addressing legal and policy issues affecting the construction industry, is pleased to offer the Joint Senate and Assembly Labor Committees (the "Labor Committees"), its written comments related to public works contracts. The Construction Law Committee's recent work has included issuance of a report on construction law reform ("21st Century Construction"), sponsorship of a multi-disciplinary educational forum conducted jointly with the New York State Chapter of the American Institute of Architects on November 25, 2008 (the "November Event"), and issuance of comments to the State Asset Maximization Commission in support of construction law reform.¹ As a result of this work, the Construction Law Committee believes that the current economic landscape should permit, and fully warrants, a productive public discussion about reforming New York's public construction procurement laws with the ultimate goal of modernizing them. Recent efforts at the American Bar Association have led to the promulgation of the ABA 2000 for State and Local Governments, as restated in the 2007 Model Procurement Code for Public Infrastructure Procurement (the "Model Code"), that sets out an appropriate approach for modernization.

We are encouraged by the Labor Committees' focus on public construction procurement, particularly in view of the recent infusion of federal stimulus funds for public works projects. However, we believe that a legislative inquiry focusing solely on one aspect of the public procurement statutory scheme instead of more broadly on the optimal procurement methodologies available to meet disparate project needs, misses an opportunity in this perfect storm on the public construction front. The economy is in recession, reducing tax revenues, which form the basis for public debt to finance projects, the public capital markets have been volatile, public construction costs have, until recently, been increasing, and existing public infrastructure and facilities have suffered from delayed maintenance or have been deemed insufficient to meet demand. These conditions change the political landscape, making it feasible to go beyond the recent reforms to the Wicks Law and reform the rest of the State's public procurement laws to permit modern service delivery methods for all public

¹ Please see <http://www.nycbar.org/Publications/reports/reportsbycom.php?com=67> to obtain copies of *21st Century Construction*, *20th Century Construction Law*, dated February 6, 2008, the record of the November Event (the "Record"), and the Construction Law Committee's Comments to the State Asset Maximization Commission: *Modernizing Public Construction Procurement for New York's Public Owners—If Not Now, When?*, dated February 18, 2009.

owners across the State.

The legal landscape in New York for public construction projects is, for the vast majority of public owners across the State, an authorization to use the design-bid-build service delivery methodology, in a public competitive bidding context, with the award going to the lowest responsible bidder. This is the single option for New York public owners to accomplish their capital programs regardless of the particular project needs and regardless of whether the methodology serves all public policy considerations, including those thought to be served by lowest competitive bidding requirements.² We urge the Labor Committees to expand their focus on the lowest responsible bidder methodology for public work contracts to include other appropriate methodologies set forth in the Model Code and modernize public construction options for all public owners in New York. During this difficult economic environment that puts stress on public budgets across the State, it is important for the Legislature to explore all feasible ways to achieve potential construction savings—or avoided costs—by eliminating delays caused by the now-mandated mismatch between project needs and service delivery methodology. In other words, reforming the laws to remove the inefficiencies embedded in the public construction process by the laws themselves could minimize the reduction in construction projects—and construction jobs—in a budget with flat, if not reduced, capital fund spending.³

The modern methods that would permit public owners to match project needs with the services of construction professionals include *design-build*, as well as *design-build-operate-maintain*, both of which require "best value" selection criteria that is currently not permitted under the mandated lowest competitive bid selection criterion. A modern variant of design-bid-build is known as *construction-management-at-risk*. The last methodology, *design-build-finance-operate-maintain*, is often viewed as synonymous with public-private partnership.⁴ The lowest responsible competitive bid selection criterion should not be the sole talisman for public construction to the exclusion of these modern methodologies. In a critical departure from the past statutory preference, the Model Code specifically authorizes and requires that the construction-management-at risk, design-build, design-build-finance-operate-maintain and design-build-operate-maintain methods use competitive sealed proposals for which the selection criteria include other variables in addition to price, a methodology often referred to as "best value".⁵

The problem with public sealed bidding with the award to the lowest responsible bidder is that it permits only a consideration of initial project costs in the decision

² See Sections 101 and 103 of the General Municipal Law governing public projects of local governments and school districts and Sections 135 and 144 of the State Finance law governing public projects of State agencies and public authorities generally.

³ In addition, avoided capital costs will reduce debt service in the out year expense budgets, at the local level reducing the level of property taxes need to pay debt service and for all public owners reducing expense competition for services and programs.

⁴ Also referred to as "life-cycle" methodology, design-build-finance-operate-maintain has two variants, the first having a mix of public and private finance components and the second having only private financing.

⁵ Model Code, Sections 3-101, 5-102 (2)(b), (3)-(6) and 3-103(1)(c).

making process and forbids a consideration of longer-term operation and maintenance ("O&M") costs. A mandated preference for considering short-term financial information over long-term financial information makes it extraordinarily difficult for public projects to use innovative design and engineering solutions and construction techniques and materials with higher initial costs but lower longer-term O&M costs. While highly developed industrial economies all face the same looming burden imposed by their already-built environment, in New York, the backlog of deferred repair, rehabilitation and maintenance has been exacerbated, in part, by the required design-bid-build methodology awarded to the lowest competitive price that forbids considering longer-term costs of O&M, which are significantly larger than initial costs.

Tying public owners solely to design-bid-build as a single delivery methodology also eliminates opportunities to contain schedule volatility due to the methodology itself and to avoid costs due to the delay. Proponents of modern service delivery methodologies often point to potential cost savings, and at the November Event, panelists discussed possible levels of cost reductions from authorizing alternative service delivery methodologies.⁶ As important as it is to know that savings are possible from using modern methods, however, it is equally important to know the reasons behind the ability to achieve savings. Optimum construction techniques for some, though not all, project types require the integration of owners, designers and constructors on collaborative teams from project conception until commissioning at project completion, focusing on the owner's needs as the yardstick against which to measure performance. An integrated working environment is not feasible for public projects under the currently mandated design-bid-build scheme.⁷

Allowing public owners to use the modern service delivery methods can lead to cost savings—or avoided costs—because optimal matching among project needs, owner capacity and service delivery methodology can reduce schedule and budget volatility. Eliminating the separation of designer and engineer from construction professionals that is mandated by the design-bid-build methodology, especially at the beginning of the design process, is also critical for avoiding later costs. A recent article in *The New York Times*, discussed an upstate New York hospital's experience with the significant cost savings possible with the design-build as compared to design-bid-build. Though the project is not complete and costs are not final, the design-build bid was less by almost a third than the design-bid-build bids. The construction company for the project pointed to the ability to closely integrate design and construction from the beginning of the project, eliminating the tension and disconnect that can exist on complex projects under the traditional methodology, as the primary source of savings.⁸ It cannot be understated, however, that design-bid-

⁶ See Record, pp. 4, 6. Possible savings from reform in public construction procurement is different than "new money" or obtaining private funds in addition to public investment. See CBC, pp. 1-2, for a good description of how private equity might be available to supplement public investment. The Commission has noted that "Asset maximization should provide suitable opportunities for the private sector to contribute expertise and, during these times of record fiscal deficits, much needed capital." Preliminary Record, p. 2; see also, p. 8.

⁷ See Record, pp. 9-10.

⁸ Alison Gregor, "Hospitals Merge Design and Building to Cut Costs", *The New York Times*, April 15, 2009, p. B7.

build, appropriate for many public projects, will not disappear in the Model Code environment. As noted at the November Event, even in places, such as Hong Kong, where full service delivery flexibility exists, the vast majority of public projects are likely to be done via design-bid-build.⁹

In 21st Century Construction, the Construction Law Committee noted that the State could increase the economic efficiency of public capital programs across the State to function effectively as economic development tools as well as to provide necessary programs to its citizens by granting, to all public owners across the State, flexibility in choosing, like private owners, the appropriate service delivery method for their various capital projects. Until lately it has not seemed possible to discuss alternative service delivery methods as legitimate options for public owners to consider as they spend scarce public resources on essential public projects. In the past, rhetoric surrounding alternative service delivery methodologies was often expressed, both positively and negatively, as an "end run" around the traditional public procurement laws, often based upon the characterization of the public sector as inherently ineffective. Several union officials testified before the SAM Commission and none of them supported the advancement of alternatives to the traditional design-bid-build method awarded to the lowest responsible bidder.¹⁰ While they focused on the public policy objectives behind the existing statutory scheme, they did not address present-day reality that design-bid-build and lowest bid requirements often do not meet those objectives for all types of projects. Defense of the *status quo* includes an assumption that any alternative service delivery methodology will be detrimental to stated public policy goals underlying the existing laws as well as to interests of labor.

It is important for legislators to know that authorizing modern service delivery methodologies would not undo any current labor protections. All existing New York labor laws applicable to public works, such as prevailing wage requirements, recent provisions enacted as part of the last Wicks Law reform and expanded opportunities for under-represented groups in construction would continue under the Model Code. Current law prohibits negotiation as a way to obtain the best work at the lowest cost—overall initial and O&M costs—yet it has been demonstrated that design-bid-build methodology awarded to the lowest competitive bidder no longer insures the best work at the lowest cost. For complex public projects, modern service delivery methodologies can often better satisfy the public policies that underlie current laws, in particular those related to costs, than the mandated traditional approach. The current scheme represents 19th and mid-20th century thinking about how best to avoid abuses in public procurement by guarding against favoritism, improvidence, extravagance, fraud and corruption.¹¹ The Model Code contains process safeguards to promote these valid public policies when public owners use alternative construction methodologies. Moreover, since these laws were enacted, the practice of most public owners is to employ professional staff with construction project experience and there exists in government—both at the line and oversight agencies—competence to

⁹ Record, p. 8. In Hong Kong, 80% of public works use design-bid-build.

¹⁰ See December 2, 2008 testimony of Civil Service Employees Union, Local 1000, and Ken Brynien, President, Public Employees Federation.

¹¹ See Record, pp. 5-6.

evaluate competing proposals based on criteria in addition to price.¹² This level of professional experience, sophistication and oversight that was lacking when the laws were originally enacted, together with tougher laws punishing those who violate the public trust, should give lawmakers and the public greater comfort in permitting more flexibility in selecting service delivery methodologies and the contractors who implement them.

Broad reform of public construction procurement laws, even when using the Model Code as a guide, is a complex endeavor. The City Bar Association stands ready to work with the Labor Committees, in conjunction with other appropriate legislative committees, to draft legislation to bring the State's public construction laws into the 21st century for all public owners across the State.

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¹² Awarding contracts by competitive sealed proposals (more commonly referred to as RFPs), based on criteria in addition to price, is the standard practice across the State for human or social services, but not for construction-related services.