



Comments to the State Asset Maximization  
Commission:

Modernizing Public Construction Procurement for  
New York's Public Owners—If Not Now, When?

Construction Law Committee

February 18, 2009

## Introduction

The Construction Law Committee (the "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 its written comments related to the State Asset Maximization ("SAM") Commission's current inquiry. We thank the SAM Commission for its important work. In connection with the Committee's work,<sup>1</sup> we have reviewed the Commission's preliminary report, dated December 15, 2008 (the "Preliminary Report"), as well as the testimony provided to the Commission by the broad and distinguished array of professionals engaged in all aspects of construction, including public works. Although we recognize that the choices to be made in these demanding fiscal times are difficult, the SAM Commission's preliminary findings and recommendations, accompanied by a strong consensus among those who provided testimony, suggest that legislative reforms to modernize public construction procurement for all New York public owners are now necessary and—we believe—possible.

The Committee believes that the current political and economic landscape should permit, and fully warrants, a productive public discussion about further reform to New York's public construction procurement laws with the ultimate goal of modernizing the State's public construction procurement laws. The Committee is not alone in that view. Moreover, recent efforts at the American Bar Association have led to the promulgation of the ABA 2000 Model Procurement Code for State and Local Governments, as restated in the 2007 Model Code for Public Infrastructure Procurement (the "Model Code"), that sets out an approach for modernization, based on earlier versions and the experience of states and local governments across the country. We urge the SAM Commission to consider the Model Code as a prototype for modernizing public construction as it completes its work and makes final recommendations to the Governor.

### Consensus on Public Procurement Reform

The Committee strongly agrees with the following preliminary principles stated in the Preliminary Report:

"The State must aim to provide more flexibility for building new infrastructure by allowing for innovative construction and financing methods. When managed correctly, this flexibility has proven to improve asset construction and management in other U.S. states as well

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<sup>1</sup> The February 2008 report of the Committee, *21st Century Construction, 20th Century Construction Law* ("21st Century Construction") is available on-line at: <http://www.nycbar.org/pdf/report/ConstructionLaw.pdf>. The record (the "Record") of a multi-disciplinary educational panel on public construction procurement reform, held on November 25, 2008 (the "November Event"), co-sponsored by the New York State chapter of the American Institute of Architects and the New York City Bar Association is available on-line at <http://www.nycbar.org/pdf/report/Proceedings.pdf>.

as in other countries by encouraging innovation."

"There may be opportunities for local governments to engage in asset maximization that, when combined with the State's initiatives, could produce regional economic development."

"Asset maximization projects must demonstrate clear and measurable advantages. For instance, many of the advantages provided by design-build procurement are achieved through award decisions based on "best value" rather than "lowest bid."<sup>2</sup>

These principles are consistent with the Committee's conclusion, in *21st Century Construction*, that the State would increase the economic efficiency of public capital programs across the State by reforming public procurement laws to grant State agencies and authorities, local governments and school districts, as public owners, greater flexibility in choosing, like private owners, the appropriate service delivery method for their various capital projects.

The Governor's Executive Order establishing the SAM Commission lists "strengthening the means by which the State finances and delivers infrastructure projects" and "development of "an appropriate procurement process . . . to maximize State assets" as goals of the SAM Commission.<sup>3</sup> The Committee believes the best way to achieve the Governor's overall goal of leveraging "the State's physical and human capital resources to ensure that funding is available for crucial long-term investments to sustain the high-level of economic growth the State needs to remain competitive"<sup>4</sup> is to focus broadly on increasing the efficiency of the capital programs of *all* the State's public owners—State agencies and authorities, local governments and schools districts—by looking at and modernizing the laws related to public construction, many of which are quite old.<sup>5</sup> As we discussed in *21st Century Construction*, the State's public construction laws, many expressed as public procurement laws, reduce the efficiency of public capital programs across the State as engines of economic development.<sup>6</sup>

The SAM Commission sets the stage for a legislative focus of this nature when it notes that "public-private partnerships are not the answer for all state assets" and that it is "seeking a broad and refined tool-kit."<sup>7</sup> The current concept of public-private partnerships in construction is a device imported from abroad that seamlessly blends two conceptual constructs—finance and procurement—that, in the United States, are

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<sup>2</sup> Preliminary Report, pp. 48-49.

<sup>3</sup> Executive Order No. 11, dated October 2, 2008.

<sup>4</sup> Preliminary Report, p. 10.

<sup>5</sup> All public construction procurement in New York is governed by State law—that of State agencies and authorities, all local governments and all school districts. Any reform must be done at the level of State law.

<sup>6</sup> See *21st Century Construction*, pp. 9-12.

<sup>7</sup> Preliminary Report, pp. 3, 8.

two separate and distinct legal constructs. On the finance side of public-private partnerships, there appears to be considerable reluctance to “monetize” or “privatize” public assets in exchange for short-term financial gain.<sup>8</sup> On the procurement side of public-private partnership, in contrast, broader support appears to be gathering for authorizing the modern service delivery methods that have evolved since the advent of design-bid-build, the sole method of procurement generally available for public construction in New York.<sup>9</sup> By identifying three main classes of broad strategies as “Public-Private Partnerships, Public-Public Partnerships, and other innovative ideas”, the Commission echoes the well-known list of service delivery methodologies for construction set forth in the Model Code.<sup>10</sup> The modern methods that 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. Another variant of design-bid-build is known as *construction-management-at-risk*. The last methodology, *design-build-finance-operate-maintain*, is synonymous with public-private partnership.<sup>11</sup>

Our review of testimony to the SAM Commission reveals considerable consensus that New York's public owners require increased procurement flexibility to efficiently deliver their capital programs. Much of this testimony echoes the presentations made at the November Event. Several experts have testified at the various SAM Commission public hearings about expanding the tool-kit to include all modern service delivery methodologies. At the first hearing on November 6, 2008, Bob Dennison, the Chief Engineer for the New York State Department of Transportation, concluded that public owners “would benefit from having as many delivery methods as possible, Design Build, Construction Manger at Risk, Construction Manager - negotiated fixed fee and any other methods that will enable us to get a quality product at the lowest possible cost and expending the least amount of public resources possible . . .”. At the

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<sup>8</sup> The Citizens Budget Commission (CBC), in its report, *How Public-Private Partnerships Can Help New York Address Its Infrastructure Needs*, November 2008, cautioned against pursuing PPPs as new money for infrastructure (pp. 32-33). Kevin S. Corbett, Co-Chair of the Empire State Transportation Alliance, noted at the November 6, 2008 hearing, that “[a] good private partnership is about capturing efficiencies and innovation, not clever financial engineering.” John A. Corlett, Chairman of the Legislative Committee for the New York Chapter of the American Automobile Association, struck a cautionary note at the same hearing, observing that “P3’s are the invention of investment bankers who tend to view these transactions through a lens of ‘financial deals’ with their primary objective of raising money.” Finally, a New York Times editorial warned the Governor as “he considers raising money through private-public partnerships involving the leasing of state assets [to] tread carefully there. Unloading public assets can too easily be the sort of one-time budget gimmick that does little long-term good.” *The New York Times*, “Governor Paterson’s Budget Emergency,” July 31, 2008.

<sup>9</sup> 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.

<sup>10</sup> Preliminary Report, p. 12.

<sup>11</sup> 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.

following hearing on November 20, 2008, Steven Kantor, Tom Boast and Robert Flanagan, from First Southwest Company, echoed these comments, recommending reform of other bidding and contract rules for capital projects. At that same hearing, Leonard DePrima, P.E., Chairman, The FAIR Committee of Western New York, a professional engineer with nearly 40 years of experience in transportation and development in both the public and private sectors, remarked that “[a]ll over the world, innovative project delivery systems, such as design-build, finance-design-build, and finance-design-build-operate, have been deployed successfully. These alternatives should be considered for every new major project initiative.”<sup>12</sup> Kevin S. Corbett, Co-Chair of the Empire State Transportation Alliance, said at the earlier hearing that it is “surprising to many” that New York State “still does not have legislation that allows agencies to avail themselves” of design-build or design-build-operate-maintain methodologies, since elsewhere it is common to use them to “expedite construction and reduce overall costs” on large capital projects.<sup>13</sup>

The design-build methodology, which several experts noted has been in wide use across the country,<sup>14</sup> and its “turnkey” variant also received support among the experts who testified. Support for authorizing design-build for New York public owners ranged across public interest groups, such as the Citizens Budget Commission and the New York City Partnership,<sup>15</sup> professional and trade organizations, such as American Institute of Architects, American Council of Engineering Companies, New York Building Congress, Associated General Contractors of New York State, American Society of Civil Engineers and General Contractors Association of New York,<sup>16</sup> and academics in various fields.<sup>17</sup> Most proponents of design-build and the design-build components of the other methodologies point to potential cost savings, in addition to

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<sup>12</sup> This is also known as “project positioning”--identifying the optimum service delivery methodology for a particular project based upon actual finance and project execution needs, as well as capacities of the owner. See Record pp. 7-8.

<sup>13</sup> See also November 6, 2008 testimony of David Kagan, Assistant Director of Properties, Business and Airport Development in the Aviation Department of the Port Authority, and of Robert D. Yaro, President of the Regional Plan Association, with respect to the design-build-operate-maintain methodology.

<sup>14</sup> See November 6, 2008 testimony of Michael Cuddy on behalf of the American Council of Engineering Companies, as well as December 3, 2008 testimony of Burton Roslyn, President of the New York State Chapter of the American Institute of Architects. See also December 3, 2008 testimony of John McKendrick, Senior Vice President of Project Delivery, Infrastructure Ontario.

<sup>15</sup> See December 2, 2008 testimony of Carole Kellerman, President of the Citizens Budget Commission; November 6, 2008 testimony of Kathryn Wylde, President & CEO of the Partnership for New York City.

<sup>16</sup> See December 2, 2008 testimony of Burton Roslyn, American Institute of Architects, New York State Chapter; November 6, 2008 testimony of Michael Cuddy, on behalf of the American Council of Engineering Companies; November 6, 2008 testimony of Richard Anderson, President of the New York Building Congress; November 20, 2008 testimony of Steve Stallmer, Vice President of Government & Public Affairs Associated General Contractors of New York State; November 20, 2008 testimony of Maria Lehman, P.E., F.ASCE, the National Chair of the American Society of Civil Engineers Committee on Government Affairs; and, November 6, 2008 testimony of Denise Richardson, Managing Director of the General Contractors Association of New York.

<sup>17</sup> See November 20, 2008 testimony of Kenneth W. Bond, Esq., Partner, Squire, Sanders & Dempsey, LLP and Adjunct Professor at Albany Law School; November 20, 2008 testimony of Dr. Stephen F. Mayer, P.E., Assistant Professor of Management, Niagara University College of Business.

faster schedules and higher quality—a version of the "better, cheaper, faster" proposition often used in favor of the private sector activity.<sup>18</sup> The November Event panelists also pointed to cost reductions from alternative service delivery methodologies, one panelist noting that an analysis of the delivery methods underlying the Model Code found a 40 percent cost savings from changes in service delivery methodologies.<sup>19</sup> Another panelist suggested that of an estimated 50 percent premium for public works projects, approximately 20 percentage points were estimated to be due largely to the inefficiencies imposed by the State's public procurement system.<sup>20</sup> A third panelist referred to British studies evaluating the integrated team approach to service delivery that estimated savings from two to ten percent on single projects and up to 30 percent for multiple projects with the same team.<sup>21</sup>

As important as it is to know that savings are possible from using the design-build model, it is equally important to know the reasons for construction cost savings. Public construction procurement reform can lead to cost savings—or avoided costs—by reducing schedule and budget volatility by permitting an optimum match among project needs, owner capacity and service delivery methodology. Eliminating the separation of designer and engineer from the construction professional that is mandated by the design-bid-build methodology, especially at the beginning of the design process, is also critical for avoiding later costs. Michael Cuddy, on behalf of American Council of Engineering Companies, comprehensively described, at the November 6, 2008 hearing, how the design-build model increases budget and schedule certainty and reduces avoidable costs:

By having one entity responsible for the design and construction of a project, the owner avoids disputes and claims that are the result of incomplete or faulty design documents, reduces the administration burden of managing separate design contracts and construction contracts, and the coordination between those two contracts. This form of project delivery lends itself to "fast tracking" of the construction by having the design-build team complete a portion of the design needed to start construction, and then completing the balance of the design while the initial construction is underway. The result is a significant reduction in the total project duration. And since this arrangement has the designer and the contractor working as a team, and the design utilizes techniques that that contractor has the most familiarity with, there is often a cost savings associated with the work. Even if there is no cost

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<sup>18</sup> See Preliminary Report, p. 2.

<sup>19</sup> See Record, p. 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.

<sup>20</sup> See Record, pp. 4.

<sup>21</sup> See Record, pp. 9-10.

savings there is most often price certainty for these projects due to the reduced numbers of claims and disputes that a public owner often faces and the practice of entering into a lump sum type of contract between the design-builder and the owner.<sup>22</sup>

Optimum efficiency and cost effectiveness in construction requires 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. This working environment is simply not possible for many public projects under the currently mandated design-bid-build scheme.<sup>23</sup> Jeffrey J. Zogg, the Chief Executive Officer of the Associated General Contractors of New York State (AGC NYS), urged caution, at the hearing on December 3, 2008, against summarily jettisoning the time-tested design-bid-build methodology "in favor of wholesale change", suggesting the use of pilots instead. As noted at the November Event, however, even in places where full service delivery flexibility exists, such as Hong Kong, the vast majority of public projects are likely to be done via design-bid-build.<sup>24</sup> Design-bid-build, appropriate for many public projects, will not disappear in the Model Code environment.

Several people testified about the successful experience of the City of Buffalo's school construction program after achieving legislative authorization to use the design-build methodology and negotiated contracts via competitive sealed proposals awarded on the basis of best value.<sup>25</sup> The Preliminary Report discusses the design-build methodology for the State's higher education facilities and for K-12 education facilities in school districts across the State.<sup>26</sup> The panelists and audience at the November Event discussed the Buffalo example as well as the State's habit of authorizing variations in public sector project delivery methodologies selectively, instead of looking at the larger picture of all public sector capital works programs across the State.<sup>27</sup> If authorization for design-build is good for some public owners in

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<sup>22</sup> See November 20, 2008 testimony of Ken Bond and November 6, 2008 testimony of Kathryn Wylde for a discussion of the best value criteria of design-build methodology leading to better alignment of risks and rewards to the potential benefit of public owners and private-sector designers, engineers and contractors; November 20, 2008 testimony of Steve Stallmer for a discussion of how overlapping design and construction can lead to shorter completion times; and November 6, 2008 testimony of Richard Anderson for a discussion of how the integration of design and construction aspects within a single entity "offers efficiencies through greater accountability by the service provider, a single point of contact and value-based project feedback that could reduce project delivery schedules and costs." See also November 6, 2008 testimony of Henry Perahia, Deputy Commissioner of the Division of Bridges of the New York City Department of Transportation (NYCDOT) and George Klein, NYCDOT's Deputy Chief Engineer for Specialty Engineering and Construction; and of Denise Richardson, Managing Director of the General Contractors Association of New York.

<sup>23</sup> See Record, pp. 9-10.

<sup>24</sup> Record, p. 8. In Hong Kong, 80% of public works use design-bid-build.

<sup>25</sup> See related November testimony of Gene Partridge, Executive Vice President, LP Ciminelli, Amy Solomon, Esq., and John Harris, Esq., McKenna, Long & Aldridge, LLP and Gary Crosby, Chief Financial and Operating Officer of Buffalo Public Schools.

<sup>26</sup> See Preliminary Report, pp. 27-38.

<sup>27</sup> See Record, p. 13.

the State, such as when school facilities within a school system have critical needs, then it should be available for all public owners across the State. The consensus among the panelists and audience was that comprehensive legislative reform of public construction procurement law is necessary now.

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 related to 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 conventional characterization of the public sector as inherently ineffective. Several union officials have testified before the SAM Commission, none of them supporting the advancement of alternatives to the traditional design-bid-build method awarded to the lowest responsible and responsive bidder.<sup>28</sup> 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 requirement often does 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 the stated public policy goals underlying the existing laws as well as to labor interests.

As more fully described in the Record, the current scheme represents 19th and mid-20th century thinking about how best to avoid past abuses in public procurement by guarding against favoritism, improvidence, extravagance, fraud and corruption.<sup>29</sup> The current scheme evidences a strong bias against negotiation as a way to obtain the best work at the lowest cost, yet it has been demonstrated that this mandated methodology 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 traditional mandated approach. Process safeguards to promote these valid public policies are present in the Model Code and they accompany the authorization of the alternative construction methodologies.<sup>30</sup> These safeguards include ensuring that licensed design professionals remain responsible for the design aspects of the project and ensuring that designs meet all applicable building and life safety codes.<sup>31</sup> Moreover, since the State's public construction laws were enacted, most public owners employ professional staff with project experience and there exists an apparatus of in-house and outside oversight to evaluate competing proposals based on

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<sup>28</sup> See December 2, 2008 testimony of Civil Service Employees Union, Local 1000, and Ken Brynien, President, Public Employees Federation.

<sup>29</sup> See Record, pp. 5-6.

<sup>30</sup> Process safeguards in the Model Code will further the Commission's objectives to "uphold public policy goals, ensuring that necessary environmental and labor protections are preserved" and "to achieve an appropriate level of government oversight, transparency and input from the public and various stakeholders." Preliminary Report, pp. 2 and 6. Reforming public procurement laws for all public owners across the State will ensure "geographical balance." Preliminary Report, p. 2.

<sup>31</sup> See February 5, 2009 testimony of Robert Lopez on behalf of the State Education Department, Office of the Professions.

criteria in addition to price.<sup>32</sup> 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.

The Model Code, based upon the experiences of state and local governments across the country that enacted provisions from the earlier 1979 Model Code as well as upon academic research, provides model statutory language to authorize all available service delivery methods as the "tool-kit" the SAM Commission seeks for New York public owners,<sup>33</sup> whether at the state or local level. It expresses the options in the "tool-kit" in general functional terms that can accommodate changes in practice over time<sup>34</sup> and specifically authorizes public owners to use competitive sealed proposals awarded based on best value criteria.<sup>35</sup> All Model Code methods depend upon the public owner first establishing the functional requirements of a project,<sup>36</sup> which are to be part of any solicitation document. Implementing modern service delivery methodologies set out in the Model Code would not undo current labor protections. 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 can all continue under the Model Code approach.

### *Benefits of Broadening Scope*

New York public owners have been unable to use the modern successors to traditional design-bid-build that private owners have used for many years. The present conversation is reminiscent of the Rip Van Winkle story—the State, like Rip Van Winkle, has woken up, from a slumber during the days of design-bid-build, to see the end of the story as public-private partnerships, but it has missed the critical intervening time when other modern service delivery methods evolved. In some other jurisdictions, legislatures made the evolving service delivery methods available to public owners over time. The SAM Commission's focus on public-private partnerships renders what has been an evolutionary set of changes elsewhere appear here as a

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<sup>32</sup> 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.

<sup>33</sup> See Preliminary Report, p. 8. The legal construct in the Model Code would permit New York public owners to engage in "project positioning", which is identifying the optimum service delivery methodology for a particular project based upon actual finance and project execution needs, as well as capacities of the owner. See also pp. 6-8 of the Record.

<sup>34</sup> See Deloitte Research, *Closing America's Infrastructure Gap: The Role of Public Private Partnerships* (Washington: Deloitte Services, LP, 2007), pp. 8, 14-19.

<sup>35</sup> This preference represents in a critical departure from the 1979 Model Code, which had a statutory preference an award to the lowest responsible and responsive bidder.

<sup>36</sup> These consist of the features, functions, characteristics, qualities and properties that are required by the public owner, the anticipated schedule and estimated budgets for design, construction, operation and maintenance.

revolutionary one. Since most proposals resulting from the work of the SAM Commission will require legislative change,<sup>37</sup> broadening the focus to encompass all modern service delivery methods will make what is radical in isolation—public-private partnerships—less so when among a continuum of options.

Implicit and sometimes explicit in the advocacy for various types of public-private partnerships is the assumption that the private sector is more efficient and effective than the public sector. In New York, this criticism leveled at public owners for not producing results that the private sector can produce is largely due to the public sector being denied access to same methodologies to which the private sector has had access for some time.<sup>38</sup> If these modern methodologies are deemed sufficiently helpful to the construction process so that the State is considering permitting New York public owners to engage the private sector, which will use these very techniques, via public-private partnerships, it is not logical to continue to deny all public owners in New York *direct* access to them. The "operate & maintain" feature of the methodologies in the Model Code could help all public owners address the SAM Commission's concern that "the State has not consistently invested in [its] assets and has sometimes not spent efficiently to enhance their performance."<sup>39</sup> While highly developed industrial economies all face the same looming burden, 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 operation and maintenance, which are significantly larger than initial costs. Moreover, potential construction savings—or avoided costs—that can come from eliminating delays caused by the mandated mismatch between project needs and service delivery methodology could maximize the available capital funds. 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.<sup>40</sup> When the

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<sup>37</sup> Preliminary Report, p. 21.

<sup>38</sup> Almost a quarter century after Donald Trump famously rebuilt the Wollman Ice Skating Rink in Central Park in four months after the City had unsuccessfully attempted to do so for the preceding six years, the City and other public entities are still hamstrung by the same laws that contributed to those failures. See Finder, "New York Hopes to Learn from Rink Trump Fixed", The New York Times, November 21, 1986, Section B, Page 1, Column 4. As stated by a deputy mayor, describing the constraints of the design-bid-build methodology: "Sometimes the city does consult early on with a contractor. But to preserve competitive bidding, the city then forbids the contractor to work on the project." *Id.* As one city commissioner said at the time: "In the real world of business, people behave well because they make money that way . . . If a contractor pleases Trump, he will get more jobs. In the topsy-turvy world of government regulations, the contractor doesn't have to please anyone." *Id.* Thus, it may not be analytically valid, or fair, to compare schedule and budget metrics of New York public owners projects, largely limited to design-bid-build awarded to lowest competitive bid in a multiple prime environment, with those of private owner projects where there is freedom to choose among all service delivery methodologies, as the justification for authorizing public-private partnerships as the only way to increase efficiency on public projects.

<sup>39</sup> Preliminary Report, p. 7. See CBC report, pp. 15-16.

<sup>40</sup> 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

economy recovers, the increased efficiency would increase the number of projects—and jobs—within any funding parameter.

## Conclusion

The legal landscape for public construction permits the design-bid-build service delivery methodology, with the award going to the lowest competitive bidder, as the single option for most public owners in the State to accomplish their capital programs. There is a 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 and/or have been deemed insufficient to meet demand. These conditions change the political landscape, making it now feasible to go beyond the earlier 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 owners across the State.

It is possible to substitute "modern service delivery methodologies" for "asset maximization" in the SAM Commission's key preliminary findings and achieve the broader goals behind the SAM Commission's creation. Increasing public construction procurement flexibility to include modern service delivery methodologies for all public owners across the State can:

*Successfully achieve faster construction, cost savings and higher quality infrastructure.*

*Benefit the economy—both at the State and regional levels—and all New York taxpayers, creating jobs and increasing the health and safety of our residents.*

*Be utilized with appropriate government oversight, transparency and public input.*

*Reallocate risks between the public and private sectors to increase efficiency in public project delivery and long-term operation.*

*Position infrastructure project across the State to receive additional support from innovative federal transportation financing programs.*

*Hold labor and subcontractors harmless.*

*Permit existing inter-governmental and intra-governmental roles and responsibilities to continue.*

*Provide flexibility in construction and financing methods to improve initial*

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reducing expense competition for services and programs.

*construction and long-term management by encouraging innovation*<sup>41</sup>.

In view of recommendations from the SAM Commission's Preliminary Report that dovetail so very closely with the Committee's recommendations for construction law reform, in *21st Century Construction*, the Committee stands ready to assist the Commission during its remaining time as it develops its final recommendations to the Governor.

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<sup>41</sup> Preliminary Report, pp. 47-49.