

NEW YORK CITY BAR

COMMITTEE ON CONSTRUCTION LAW

RICHARD R. VOLACK
CHAIR
41 MADISON AVENUE
20TH FLOOR
NEW YORK, NY 10010
Phone: (212) 382-0909
Fax: (212)382-3456
rvolack@pecklaw.com

DAVID FULTZ
SECRETARY
41 MADISON AVENUE
20TH FLOOR
NEW YORK, NY 10010
Phone: (212) 382-0909
Fax: (212)382-3456
dfultz@pecklaw.com

October 14, 2009

Hon. H. Carl McCall, Chair
New York State Commission on State Asset Maximization
c/o Empire State Development Corporation
633 Third Avenue, 35th Floor
New York, New York 10017

Samara Barend, Executive Director
New York State Commission on State Asset Maximization
c/o Empire State Development Corporation
633 Third Avenue, 35th Floor
New York, New York 10017

Dear Chair McCall and Ms. Barend:

The Construction Law Committee of the New York City Bar Association read your Commission's Final Report, dated June 1, 2009 with great interest. This Committee has been closely following the work of the New York State Commission on State Asset Maximization (the "SAM Commission"), having previously commented on the Commission's Preliminary Report.¹ Given the continuing economic and budgetary conditions that gave rise to the creation of the SAM Commission, we offer these additional comments, mindful that solutions outlined at the conclusion of the SAM Commission's work may need to be augmented by related reforms to meet the challenges ahead. We look forward to working with you and others in government in the coming months to explore expanding some aspects of your proposals.

In its Final Report, the SAM Commission picks up where its Preliminary Report left off. In its Preliminary Report, the SAM Commission examined the benefits of asset maximization for the

¹ See comments at <http://www.nysamcommission.org/pdf/ResponsetoSAMCommissionFINAL021809.pdf>

State, focusing in particular on maintaining and enhancing infrastructure and economic growth, articulated guiding principles for future public private partnership ("PPP") initiatives, and identified several asset classes to which it appeared fruitful to apply the PPP methodology.² At the conclusion of its work, the SAM Commission recommended the creation of an oversight board to formalize a consistent framework, which includes the guiding principles, to evaluate future public private partnership proposals and several pilot projects within the six previously identified asset classes for the State to begin expanding the use of PPPs.

Committee's Continued Concerns

As a result of the SAM Commission's narrow mandate to examine "asset maximization", a term which refers to public private partnerships, the Commission did not sufficiently embrace the need to overhaul the State's public procurement law, a need this Committee has recognized in several previous reports, including *Modernizing Public Construction Procurement for New York's Public Owners—If Not Now, When?*, dated February 18, 2009. This Committee continues to believe that the need for substantial reforms to increase the efficiency of maintaining and expanding public infrastructure by increasing the efficiency of the State's construction industries and processes remains paramount. No less than a complete modernization of the State's public construction procurement laws for *all* public owners within the State, including the PPP option as well as the other modern service delivery methodologies—reforms already set forth in the American Bar Association's recent Model Procurement Code—is required for meaningful adaptation to these parlous fiscal times.

In addition to this general comment, this Committee has two specific concerns regarding the SAM Commission's recommendations:

1. *The "Value for Money Analysis" in the Absence of Public Construction Procurement Reform.* A decision methodology that forces a comparison between public sector delivery, which is constrained by the sole design-bid-build process, and private sector delivery, which is able to use the PPP vehicle to incorporate alternatives to design-bid-build, is unfair to the public sector. Public sector delivery will almost always lose the contest, since projects proposed for PPP use will typically be complex projects where early integration of designer and builder - denied to the public builder under current law -- make for schedule and budget stability. As we said in *If Not Now, When?*:

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. 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.³

² Also referred to as "design-build-finance-operate-maintain" in the Model Procurement Code.

³ *Modernizing Public Construction Procurement for New York's Public Owners—If Not Now, When?*, dated February 18, 2009, p 10.

(http://www.nycbar.org/pdf/report/Modernizing_State_Procurement.pdf)

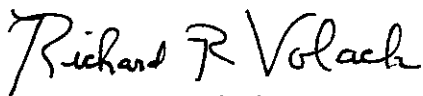
Not only does the "value for money analysis" not permit a comparison of "like to like", but it also skews the decision-making process toward the selection of the PPP methodology, placing many public projects wholly in the private sector simply because public sector owners in New York State are not permitted the same modern service delivery methods themselves under the State's dated public construction procurement laws.

2. *School District Pilot Excludes New York City Schools.* The SAM Commission's Final Report addresses the perennial problem the "Big Five" school districts face of not being able to spend enough capital funds on state of good repair or maintenance and new capacity. It also discusses alternative service delivery methods as one way to spend available money more efficiently. However, the Commission recommends instituting a pilot initiative to make design-build and construction-manager-at-risk procurement methodologies available *only* to Syracuse and Yonkers. With its large school capital program, New York City needs to be allowed the opportunity to increase the efficiency of its capital program in a similar manner.

On November 25, 2008, the City Bar Association and the AIA of New York State co-sponsored a multi-disciplinary panel program on public construction law reform, at which several participants noted that public construction procurement reform on a selective basis is not appropriate. Pilot programs often provide the illusion of action at a time when bolder action is needed and appropriate. The laws that govern public construction procurement for all public owners across the State are quite old, reflecting practices that are outmoded today for many types of public projects. When the mandated process is inappropriate for projects, it embeds schedule delay and avoidable costs into them, reducing available capital funds for equally needed projects. New York should not selectively authorize public procurement variations without looking at the larger picture of all public sector capital works programs across the State. If even slight procurement flexibility is good and appropriate for one or two authorities or one or two school districts, it is good enough to apply to all public owners. The time has passed for the "pilot" approach to reform.

The SAM Commission's inquiry established a foundation for reform of public construction procurement law for all public owners in New York State. Modernizing the way State agencies and authorities, local governments and school districts deliver their capital projects could avoid costs, at a fairly significant level, at a time when the economy puts a strain on public revenue.⁴ We look forward to continuing to work with you and others in government to modernize how all New York State's public owners build their public projects, minimizing avoidable costs imposed by archaic public construction methodologies.

Respectfully,



Richard R. Volack

⁴ See *BUILDING IN THE 21st CENTURY: Public Construction Law Reform and Opportunities for Savings*, Record of Proceedings, p. 13. (<http://www.nycbar.org/pdf/report/Proceedings.pdf>)