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**REPORT ON 2016-17 ARTICLE VII BUDGET BILLS
BY THE CONSTRUCTION LAW COMMITTEE**

**A.9008-A/S.6408-B (PART B) TRANSPORTATION, ECONOMIC DEVELOPMENT
AND ENVIRONMENTAL CONSERVATION (“TEDEC”),
A.9008-A/S.6408-A (PART H), TEDEC, AND
A.9005-A/S.6405-A (PART I), PUBLIC PROTECTION AND GENERAL GOVERNMENT**

The Construction Law Committee (the “Committee”) of the New York City Bar Association addresses the legal and policy issues affecting all aspects of the construction industry. The Committee respectfully submits this report concerning three items in the proposed Executive Budget: (1) the MTA procurement reforms for its 2015-2019 Capital Plan (Part B of the Transportation, Economic Development and Environmental Conservation (“TEDEC”) Budget); (2) the Transformational Economic Development Infrastructure and Revitalization Projects Act (Part H of the TEDEC Budget; the “TEDIRP Act”); and (3) the New York State Design and Construction Corporation Act (Part I of the Public Protection and General Government Budget; the “DCC Act”; and, collectively, the “Budget bills”). Since the Governor’s introduction of the Budget bills, both the Senate and Assembly have taken various actions with respect thereto. Before anything is finalized, the Committee would like to present its concerns and recommendations for the benefit of the Executive and Legislative branches.

The Committee is pleased that the Governor and the Legislature have moved in the direction of improving efficiency and effectiveness in public works construction projects. Yet, we do not believe that these Budget bills go far enough or deep enough to achieve the changes in construction practices necessary to drive the desired economic benefits from public investments in infrastructure. As elaborated below, we suggest additional ways to focus these efforts to increase the efficiency of all construction programs at the state and local government levels.

Since 2008, the Committee has published several reports¹ and held a number of educational events to advance the proposition that New York State’s built environment laws, including its public construction procurement laws, for all public owners across the state at all levels of government, are archaic and at odds with the needs of modern capital projects and the economy they support. These outdated laws prohibit the efficient matching of service delivery methodologies to project needs for the vast majority of public owners in the state, thus limiting the positive economic benefits of the public capital spent at all levels of the state economy. The

¹ See e.g. the Committee’s most recent report (November 2014) at:

<http://www2.nycbar.org/pdf/report/uploads/20072665-21stCenturyConstruction20thCenturyLawUpdated.pdf>

Committee has consistently made specific recommendations, and the three budget items at issue each touch on various aspects of our earlier reports and recommendations.

1. REJECT REVERSE AUCTION ELECTRONIC BIDDING AS INAPPROPRIATE FOR PUBLIC CONSTRUCTION PROJECTS

According to the Governor’s Memorandum in Support of the TEDEC Budget, the MTA procurement reforms “would create savings and speed procurements for the [MTA]” by, in part, expanding the use of reverse auctions using electronic bidding apparently to include construction projects. The text of the bill provides that the MTA may use an “electronic bidding system that may inform bidders whether their bid is the current low bid, and allow bidders to submit new bids before the date and time assigned for the opening of bids.” While the text adds that this “procedure shall not constitute disclosure of bids in violation of [the Public Authorities Law § 2878],” the Committee nevertheless finds this proposed change problematic.

The lowest competitive bid requirement of the mandated design-bid-build methodology treats a construction product as a commodity for which price is the only valid consideration and assumes that the constructor does not possess skills and judgment to contribute to a project in the same manner the law expects of licensed professionals. Whatever shortcomings the design-bid-build methodology possesses (*see* the Committee’s November, 2014 Report, *supra*), the “reverse auction” electronic bidding currently used for vendor selection would make the current paradigm even worse for MTA construction projects.

While construction of a built structure is a *type* of manufacturing process, it is not the kind of manufacturing process for which “reverse auction” is appropriate. The construction process is development of a particular built item—manufacturing the product from within the product—on a particular site, according to particular owner specifications, involving a mix of construction services and building materials and systems, and subject to high levels of change and risk—all aspects very dissimilar from those involved in the manufacture of commodities within a factory. Moreover, an electronic system which reveals the status of a current bid is likely to dis-incentivize contractors from beginning—and ending—with a legitimate, responsible bid. The auction mechanism takes the gaming of the lowest-competitive-bid mechanism to a level inappropriate for construction, which will increase the magnitude of change orders over those generated after the current lowest-competitive-bid process. Ultimately, it is better for the taxpayers if bids begin and end with realistic proposals. For all the reasons above, the Committee recommends that this proposal be tabled in favor of an effort to modernize the entire public construction procurement laws for all New York public owners, as described in greater detail below.

2. AUTHORIZE DESIGN-BUILD FOR ALL STATE AND LOCAL GOVERNMENT OWNERS

The Governor’s proposed TEDIRP Act authorizes the use of design-build service delivery methodology (“design-build”) by the Empire State Development Corporation (ESDC), the New York Convention Center Development Corporation (NYCCDC) and their subsidiaries related to the Jacob V. Javits Convention Center, the Empire State Station Complex, the James

A. Farley Building Replacement, and the Pennsylvania Station New York Redevelopment projects. The service delivery methodology which the proposed Budget bill would authorize could include, as one contract structure, the award of a unitary design and construction contract to a single entity, increasing project efficiency and effectiveness.

In contrast to design-bid-build, design-build permits the constructor/builder entity to be identified during design and before construction so that it can contribute its skill and judgment to the design process. Collaboration between designer and constructor, as facilitated by this methodology, can help prevent the types of errors and omissions made during the design phase and the related changes at higher costs that occur as a result of the mandatory separation of designer and constructor/builder during construction. Earlier collaboration during design also reduces the likelihood of owner-initiated design changes during construction. Mandatory separation of designer from constructor is the essence of the “first generation” service delivery methodology “design-bid-build” that currently is the only tool available to the vast majority of public owners in the state for all project types regardless of what methodology is best suited for the project.

The ability to match project needs and project team capacities to the appropriate delivery methodology, leveraged by the use of building information model (“BIM”) technology and related practices in a design-build environment, would eliminate avoidable costs. The savings could be reallocated toward additional necessary projects, including bringing more public assets up to a state of good repair and/or expanding public infrastructure and buildings to support program needs across the state. Otherwise the *status quo* remains, with the costs that could have been avoided, but for the statutory restrictions, cost that end up as marginally increased expense-funded debt service costs during the life of bonds that are used to pay for the initial project cost, some of which debt service the state subsidizes via aid to local governments.

While the proposed Budget bill recognizes the value of design-build in optimizing efficiency, cost and quality, these benefits should be available to public owners across the state rather than restricted to two state-level entities. Moreover, it is unclear why authorizing design-build needs to be conditioned on the creation of a project labor agreement (PLA) for design-build projects. In 2008, when the state’s mandatory multiple prime contracting requirement (Wicks Law) was reformed to increase the threshold project amount to which it would apply, an exemption from the multiple prime contracting requirement was authorized upon the condition that a PLA be created for the project. While it may be true that all proposed public construction reform proposals since 2008 have contained a PLA requirement, there is no logical connection for tying PLAs to all construction reform proposals, including the authorization of design-build. Thus, the authorization of design-build should make reference to the inapplicability of Wicks Law, not necessarily mandate the use of PLAs.

In any event, the TEDIRJ Act does nothing to address the need for project service delivery flexibility at the local government level, whose projects in the aggregate have a substantial state-wide economic impact. The Committee urges that at a minimum, the defined term “Authorized state entity” in the TEDIRJ Act should be amended to become “Authorized

entity” and, consistent therewith, should be further amended to include all public owners in New York State.²

3. EXPERTISE IN DESIGN AND CONSTRUCTION CAN BE LEVERAGED WITHOUT ADDING A NEW FUNCTION TO DASNY AS CURRENTLY EXISTING UNDER ITS PATCHWORK STATUTE

The Governor’s proposed DCC Act would create the New York State Design and Construction Corporation (NYSDCC) as a subsidiary of the Dormitory Authority of the State of New York (DASNY) to provide project management expertise for state agencies, departments, public authorities, and public benefit corporations and oversight on their public works projects valued at \$50 million and above.

While we see the merit in a Budget bill which seeks to leverage expertise to optimize efficiency, cost and quality, we are concerned that the DCC Act would add yet another set of construction responsibilities to DASNY, an agency that is already authorized to both finance and construct projects. Having a centralized and professional public construction entity like the General Services Agency at the federal level, and the New York City Department of Design and Construction at the local government level, may, at some point, be appropriate. For now, however, expanding DASNY’s portfolio to include such wide-ranging projects while still retaining its financing responsibilities does not strike us as wise – particularly while other entities remain separated from the financing of their projects.

The idea behind this legislation does suggest that the time may be ripe for rethinking DASNY. Separating DASNY’s finance and construction functions into two separate agencies and, better yet, reforming DASNY’s patchwork of statutory authority, may be worth considering. While its original mission of financing and constructing dormitories is reflected in its name, DASNY has accreted, over the years, general authority to finance and construct facilities in several areas: healthcare, higher education, courthouses, along with a growing list of specially-authorized financings and construction projects added each year by the Legislature.

Accordingly, this may be a good time to review the structure and functioning of similar authorities elsewhere as a basis for reforming DASNY into a statewide professional construction agency that is distinct from a statewide financing authority. The more types of projects—and the greater number of projects—for which DASNY becomes responsible, the more carefully we must consider its organizational structure and its many functions in order for DASNY to perform its responsibilities efficiently and effectively. For now, however, it does not seem prudent to add another bureaucratic layer to DASNY before DASNY’s current patchwork of legislative authority and functions is examined, evaluated and, potentially, streamlined.

² The Committee’s November, 2014 Report, *supra*, also recommended authorizing the construction-management-at-risk project delivery methodology, a useful variation on design-bid-build that permits earlier identification of the constructor during the design phase, for all New York public owners.

4. CONCLUSION

After the Legislature adopts the Fiscal Year 2016-17 State budget, having considered our recommendations, we would suggest the Governor and Legislature continue to focus on broader reform of all the State's built environment laws as the Committee has consistently advocated since 2008. The Committee has advanced several general propositions for built environment law reform in New York State, which we request the Governor and Legislature to consider putting into action. First, New York State's built environment laws, including its public construction procurement laws for all New York public owners at all levels of government, are archaic and at odds with the needs of modern capital projects and the economy. As discussed above, these outdated laws prohibit the efficient matching of service delivery methodologies to project needs, thus wasting financial resources and reducing the positive economic benefits of public capital spending at all levels of the state's economy. The practice of the state has been to tinker on the margins of its old laws to provide marginal relief in scattered places, leaving an inadequate platform to move all of New York State into a leadership position in the 21st Century. Many of life's activities take place in built structures that are located on or near some form of transportation infrastructure and require supportive commodities and services that themselves require major infrastructure to transport them. In other words, "construction" involves more than the building structures; those structures also require the delivery of adequate transportation modes and utilities, both public and private, to function. Construction laws thus need to be modernized for both vertical and horizontal projects.

To become competitive in the 21st Century, New York needs modern built environment laws for itself and all its political subdivisions. The Committee had suggested that the American Bar Association's Model Code of Public Infrastructure Procurement (ABA MCPIP), which authorizes all the known service delivery methodologies ranging from design-bid-build, construction manager at risk and design-build to the three finance-based varieties of public-private partnerships, can serve as an excellent modern starting point for legislative reform.³

With the ABA MCPIP as a conceptual guide for reform, the Committee concludes by suggesting that the Legislature and the Governor pattern a reform effort after Massachusetts's successful enactment of public construction procurement reform in 2004. A state similar in important ways to New York—with a highly unionized construction labor market, dense built urban centers, aging building stock and infrastructure, and archaic laws that were at the time worse than New York's—Massachusetts managed to reform its archaic laws to permit modern service methodologies to all public owners across the Commonwealth. That story of the Massachusetts reform effort stands for the value of legislation, sponsored by both executive and legislative branches, to require all construction industry stakeholders to participate in a collaborative process to develop statutory reform that all stakeholders could support.⁴

³ American Bar Association 2007 Model Code for Public Infrastructure Procurement, available at http://www.americanbar.org/content/dam/aba/administrative/public_contract_law/2007_Feb_5_Final_6x9_MC_PIP_authcheckdam.pdf. See also 21st Century Construction, 20th Century Construction Law Update, Feb. 2014 at 3, <http://www2.nycbar.org/pdf/report/uploads/20072665-21stCenturyConstruction20thCenturyLawUpdated.pdf> (outlining the Committee's support for the ABA MCPIP and referencing past reports on the issue).

⁴ The New York City Bar Association convened a conference in Albany in November 2014 that brought together government and private sector professionals who were involved in the 2004 public construction law reform effort in

The idea of a big tent for statutory reform that everyone was obligated to participate in to benefit an entire industry and its end users was also a successful model New York City followed in the modernization of its outdated building codes during the last administration. The Committee recommends that the state recreate this successful approach and adopt legislation patterned on Chapter 46, Section 138, of the Massachusetts Acts of 2003 to create a special commission that brings all construction industry and public owner stakeholders to the table to hammer out a new public construction procurement code in order to modernize New York's built environment laws for all New York public owners.⁵

The Committee stands ready to assist during the 2016 legislative sessions and during the next fiscal year.

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Massachusetts to present their experience to New York professionals. For more information, see *Modernization of New York's Built Environment: If Not Now, When?, Panel 3: The Massachusetts Reform Approach and New York*, Nov. 12, 2014. Event materials and video available at <http://www.nycbar.org/legislative-affairs/policy-issues-aampadvocacy/property/construction-law-committee/2074-modernization-ny-built-environment-111214>.

⁵ Chp. 46, Sect. 138, of the Massachusetts Acts of 2003 available at <https://malegislature.gov/Laws/SessionLaws/Acts/2003/Chapter46>.