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TRANSPORTATION, ECONOMIC DEVELOPMENT AND ENVIRONMENTAL
CONSERVATION AND 2015-16 APPROPRIATION BUDGET BILLS
AUTHORIZING THE USE OF THE
DESIGN-BUILD SERVICE DELIVERY METHODOLOGY**

The Construction Law Committee (the “Committee”) of the New York City Bar Association addresses the legal and policy issues affecting the construction industry. The Committee respectfully submits this report concerning the authorization of the use of design-build service delivery methodology (“design-build”) in the proposed Transportation, Economic Development and Environmental Conservation Budget and Appropriation Budget Bills (the “Budget Bills”) for 2015-16. Since 2008, the Committee has published several reports and held a number of educational events¹ 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 These outdated laws prohibit the efficient matching of service delivery methodologies to project needs for the vast majority of public owners in the State, thus limiting the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 spends at all levels of the state economy.

The Governor’s proposed Budget Bills authorize the use of design-build by various state-level agencies for horizontal infrastructure projects and other state level agencies for vertical building projects. Based on its research and analysis, as documented in its reports, the Committee believes the proposed Budget, while a good start, does not 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. The Budget does nothing to address the need for project service delivery flexibility at the local government level, which in the aggregate has a substantial state-wide economic impact. Design-build is a critical *modern* service delivery methodology that should be available to all public owners within the State. The Committee urges that the Budget Bills be amended to authorize the use of design-build service delivery methodology by all public owners across the state. At a minimum, the defined term “Authorized state entity” in the Budget Bills should be amended to become “Authorized entity” and should be further amended to include *all* public owners in New York State.

¹ Reports and event information available at <http://www.nycbar.org/legislative-affairs/policy-issues-aamp-advocacy/property/construction-law-committee/1025-construction-law-event-pg>.

From an immediate budget analysis perspective, design-build permits the constructor/builder entity to be identified before construction so that it can contribute its skill and judgment to the design process. This methodology can help prevent the types of errors and omissions made during the design phase and the related changes during construction that occur *as a result of the mandatory separation of designer and constructor/builder*, which 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. These are *avoidable* costs that can translate into future budget savings and/or additional available funds to allocate to more necessary projects. The use of building information model technology and related practices in a design-build environment can significantly deepen the elimination of *avoidable* costs. Among public owners unable to use design-build, applying design-bid-build to projects better suited to design-build will *waste* financial resources that could have been available to bring more public assets up to a state of good repair and/or expand public infrastructure and buildings to support local needs across the State. Later, the costs that *could* have been avoided but are not avoided due to statutory restrictions will end up as expense-funded debt service costs during the life of bonds that are used to pay for the initial project cost. Examples of such debt service, a portion of which relates to avoidable project costs under current law and for which the State subsidizes local governments, can be seen in the Aid to Localities Budget Bill (A.3003/S.2003), where several references propose state appropriations in order to reduce certain debt service payments (*e.g.*, school district projects financed through DASNY, housing authority projects, and Department of Mental Hygiene—OASAS projects financed through DASNY).

After the Legislature adopts the Budget, having considered our recommended amendments to expand the authorization of design-build to all New York public owners, we would suggest the Legislature continue to focus on broader reform of all the State’s built environment laws as the Committee’s work since 2008 has consistently advocated. The Committee has advanced several general propositions for built environment law reform in New York State, on which we request the Legislature to focus. 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 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. To become competitive in the 21st Century, New York needs modern built environment laws for itself and *all* its political subdivisions. The Committee had held out 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, as an excellent *modern* starting point for legislative reform.²

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' successful enactment of public construction procurement reform in 2004. A state similar in important ways to New York—a highly unionized construction labor market, dense built urban centers, with 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.³ 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. 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. 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.⁴

The Committee stands ready to assist during the 2015 legislative sessions.

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² 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).

³ 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 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-aamp-advocacy/property/construction-law-committee/2014-modernization-ny-built-environment-111214>.

⁴ Chp. 46, Sect. 138, of the Massachusetts Acts of 2003 available at <https://malegislature.gov/Laws/SessionLaws/Acts/2003/Chapter46>.