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NEW YORK CITY BAR

BUILDING IN THE 21ST CENTURY: Public Construction Law Reform and Opportunities for Savings

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Introduction

On November 25, 2008, the New York City Bar Association (the City Bar Association) and the AIA New York State (AIANYS) co-sponsored a multi-disciplinary panel presentation on public construction law reform, designed as an educational resource for an audience of public policy makers that included staff members from various State executive agencies with a role in public construction (see Attachment 1). This event follows the release, in February 2008, of a report from the Construction Law Committee of the City Bar Association—*21st Century Construction, 20th Century Construction Law*.[1] The recent Wicks Law reform, representing a significant change in the political landscape, provides the foundation to complete the reform of public procurement laws, for State agencies and authorities, local governments and school districts, to promote flexibility and innovation and to reflect contemporary trends in service delivery methodology. An economy that continues to negatively impact public revenues, at a time when public infrastructure and facilities are insufficient to meet demand, provides the pressing need to expand and complete public construction procurement law reform.

The State's public procurement laws were enacted several decades ago under conditions and upon assumptions no longer applicable to the construction industry and its products. These laws embed delay into the design and construction of public projects with associated avoidable costs, and often require the sacrifice of designs and construction techniques that lead to long-term lower operation and maintenance costs. In a slower economy without reform, the public sector would be able to fund and complete fewer projects at a time when government's role as an economic stimulator is most needed. Further, associated future debt service would divert expense budget resources from programs and services. The State, as an economic policy maker, can increase the efficiency of whatever public capital funds are available by permitting State agencies and authorities, local governments and school districts, as project owners and clients of construction-related services, to have flexibility in deciding, like private owners, what service delivery methods are appropriate for various capital projects and what provides the best value to the public, while protecting the integrity of the process.

The City Bar Association recommended the creation of a multi-disciplinary, professionalized task force to assist the State in this important and complex reform. The AIANYS sent a letter, dated November 24, 2008 (see Attachment 2-a), urging the Governor to issue an Executive Order creating a task force focusing on public construction law to assess current statutory impediments and recommend changes during the next legislative session. The City Bar Association echoed this request, in a letter dated December 3, 2008 (see Attachment 2-b), standing by, along with AIANYS, to assist the Governor.

[1] For a copy of the full report, please go to: http://www.nycbar.org/pdf/report/ConstructionLaw.pdf.

Building in the 21st Century:
Public Construction Law Reform . . .
Opportunities for Savings

Introduction

Before introducing the panelists, the Moderator, Russ Davidson, prefaced the event as an educational program that he hoped would serve as a resource to those in the audience. He noted that is it necessary to move beyond the reform to the Wicks Law enacted earlier this year and focus on everything else we need to do to reform the rest of the public procurement laws. The Wicks Law had been such an obstruction to reform, that elected officials at both executive and legislative branches could initially be forgiven for thinking that they have "fixed it". But, Mr. Davidson note, more remains to be fixed—there are other issues, which the panelists would address in turn.

Why We Need to Do This: Cost Savings – Presentation by Mark Blumkin

Mark Blumkin summarized initial findings from a quantitative study on the drivers of construction costs that Deloitte Financial Advisory Services conducted on New York City construction projects, as a template for understanding the connection between the State's public procurement laws and avoidable costs on public construction projects. The analysis indicated that the State's inflexible and outdated procurement requirements were at the root of a significant number of the cost drivers on public projects. In particular, the study indicated that many of the public owner's responses to a mandatory system that does not reflect current needs are expressed in risk-shifting contract provisions and processes that, in aggregate, operate as impediments to project execution and increase costs.

The New York City Economic Development Corporation, on behalf of the City's Deputy Mayor for Economic Development and Rebuilding, commissioned Deloitte to identify some of the key drivers impacting the costs of construction in the City, which were greater than 50 percent higher than the national averages. Of that 50 percent premium, Deloitte estimated that labor and material costs accounted for approximately 30 percentage points and the remaining 20 points was due largely to the inefficiencies imposed by the City's and State's public procurement systems. Thus, for every $1 billion in public construction, there is up to $200,000,000 in potential avoidable costs attributable in some fashion to the public procurement laws and business practices. Should the magnitude of the public project premium be lower for those public owners outside the City, as well as for the City, reducing avoidable costs by increasing flexibility in public procurement laws would still permit reduction in construction costs and future debt services costs at a time of constrained budgets.

The analysis indicated that perceived onerous contract terms, in particular the "no damages for delay" clause, are related to a decrease in the number of bidders in a construction market when both public and private sector owners are heavily engaged

in the construction market. Further, the study found a reduction in the number of bidders, which also led to increased prices. Qualitative interviews confirmed that the multiple prime Wicks Law is an inefficient contracting method further driving contractors away from public projects. Other provisions of public construction law, such as the mandatory lowest competitive bidding requirement, were found to generate avoidable costs. While the initial cost of a public project awarded to the lowest competitive bid may appear to be the lowest, the cost of the project is often later increased over time by change orders during construction. Among the many causes of change orders, the mandatory service delivery method of design-bid-build, which separates the designer and engineer from the construction professional, drives some portion of avoidable costs that appear during construction. Other governmental inefficiencies—slow internal change order approval and payment processes and delays in project start-up and required inspections—drive higher general conditions costs. While the latter are, to some degree, within the total control of local governments, they are exacerbated by those inefficiencies imposed by State procurement requirements.

The Impediments Posed by New York State Laws – Presentation by Howard Rosen

Howard Rosen identified the impediments to efficient public project execution as the current statutory requirement of public sealed bidding on separate specifications with the award going to the lowest, responsible and responsive bid. Public sealed bidding based on specifications mandates the design-bid-build service delivery methodology irrespective of project needs and owner capacity. The requirement for separate specifications for multiple prime contracts exacerbates such inefficiency. Sections 101 and 103 of the General Municipal Law govern public projects of the State's local governments, while §§ 135 and 144 of the State Finance Law govern public projects of State agencies. These requirements grew inorganically for the State-created off-budget agencies and authorities that are, for the most part, governed by similar types of laws, if they are not governed by such laws by cross-reference.

The current set of laws represent 19th and mid-20th century thinking of how best to ameliorate past abuses in public procurement. The public interest was to guard against favoritism, improvidence, extravagance, fraud and corruption, and lawmakers did not trust public officials to obtain the best work at the lowest cost through negotiations. At the time, lawmakers viewed what we have now identified as impediments to efficient project execution as the best method of achieving those admirable ends. The only service delivery methodology permitted in these statutes—design-bid-build—depends on a full and complete design. Over time, alternatives to design-bid-build developed to respond to project needs for which a full and complete design is not practicable. Court decisions responding to legal challenges to variations to design-bid-build held that public procurements could not be challenged on the basis of bidders' rights but only on the basis of undermining public policy. The cumulative effect of public procurement case law has been to restrict public owner flexibility. The multiple prime Wicks Law further tightened the public owners' procurement straight jacket. The multiple prime requirement imposed the

responsibility upon the public owner to coordinate and supervise multiple prime contracts, responsibilities which, in most cases, the public owners were not capable of performing. Case law forbade the public owner from delegating such responsibilities to the general contractor, which led to public owners engaging construction managers as agents, for additional project costs, as well as imposing what is viewed as one-sided, protective contract provisions against contractor claims.

In 2008, however, public owners require changes to these outmoded procurement laws. Many public projects are huge, multi-phased projects with complex technologies and require sophisticated designing, engineering and construction management techniques. The mandated design-bid-build methodology no longer insures the best work at the best price which is the underlying basis for current law. The other modern service delivery methodologies can often better satisfy the public policy that underlies current law. Public policy safeguards can accompany reforms to permit public owner flexibility and include requirements that the public owner make a determination of the benefits of selecting the specific delivery system; that there be public advertising for any pre-qualification and that a pre-qualification process be based on published selection criteria and be documented by evaluations based on rating against such criteria; and, that any requests for proposal process (the alternative to sealed competitive bids) be similarly based on specific criteria and be documented to show the reasons for selection based on a rating system.

Most public owners have professional staff, project experience and in-house and outside oversight of evaluating competing proposals, which, for example, is the practice in public services provision. This level of professional experience and sophistication that was lacking when the current laws were enacted should give lawmakers and the public greater comfort in permitting more flexibility in selecting service delivery methodologies and the contractors who implement them. Further, the degree of subjectivity implicit in any modern procurement selection process is not inherently greater or different than the degree of subjectivity that is currently permitted by existing guidelines for determining bidder responsibility. Once the procurement straight jacket is loosened to correspond to modern construction reality, however, there must be a corresponding change in the mindset of public owners in reforming their contracts and practices to undo the many one-sided risk-shifting provisions drafted to protect public owners from the risks imposed by the outmoded procurement laws. A corresponding reform of contract provisions will be necessary to attract the best contractors and reap the rewards of procurement law reform.

Potential for Improvement

ABA 2000 Model Procurement Code for State and Local Governments and 2007 Model Code for Public Infrastructure Procurement – Presentation by Dr. John Miller

John Miller summarized the analytical underpinnings of the construction-related provisions of the ABA 2000 Model Procurement Code for State and Local Governments, as restated in the 2007 Model Code for Public Infrastructure Procurement (referred to

as the Model Code). What he described as "one common platform for acquiring infrastructure services" has its origins in his doctoral work at MIT studying project delivery methods. Dr. Miller had earlier passed around the related textbooks.[2] After formulating an infrastructure delivery life-cycle to include repair, rehabilitation and replacement, what many see now as an infrastructure "mess" is both the natural result of 200 years of spectacular success in creating the nation's infrastructure and built environment as well as a genuine and exciting opportunity to reconfigure how government tackles this latest challenge. This is not the first time in the history of the nation that its infrastructure and built environment have been renewed.

In the traditional public project service delivery methodology—public sealed bidding on separate specifications with the award going to the lowest, responsible and responsive bid, or, design-bid-build—the ratio of life-cycle expenses for (a) design, (b) construction and (c) operation and maintenance (O&M), repairs and refurbishment is 1:10:100 (at least). This traditional service delivery methodology permits governmental funding decisions to focus on initial delivery costs and not long-term O&M costs. Statutory impediments to considering O&M costs as part of the investment/procurement decision are compounded by later political choices to defer necessary and proper O&M, thus further increasing the out-year burden of costs to repair and refurbish. For much of our existing infrastructure and built environment, we are facing the largest expense component of repairs and refurbishment, after a period of deferred maintenance and at a time when new needs are finding expression as well.

This normally expected demand for repairs and refurbishment nonetheless generates a crushing burden in highly developed industrial economies. After an analysis of delivery methods that underlies the Model Code found a 40 percent cost savings from changes in service delivery methodologies, a search commenced to characterize public projects in a way that makes sense for public policy makers, executive officials, legislators, companies, labor and citizens-taxpayers-voters—essentially all the stakeholders in the nation's infrastructure and built environment. By creating a matrix for service delivery methodologies along a vertical axis of how projects costs are paid, ranging from direct government finance to indirect government finance, and a horizontal axis of how project elements are delivered, ranging from segmented delivery of the three elements—design, construction and O&M—to combined delivery of those elements, it became possible to place the alphabet-soup litany of service delivery methodologies on the matrix as a tool to permit public owners to consider what project service delivery methodologies meet the needs of the proposed project. (See Attachment 3)

The exercise of examining the various service delivery methods to determine the optimum match with project needs—both financing and project execution—is termed

[2] Miller, John B., *Principles of Public and Private Infrastructure Delivery,* Kluwer Academic Publishers, November, 2000; Miller, John B., *Case Studies in Public Infrastructure Delivery,* Kluwer Academic Publishers, January, 2002.

"project positioning". In New York, public procurement law prohibits public owners from effective project positioning because it prohibits the selection of any method other than design-bid-build regardless of what the actual finance and project execution needs may be. In the Model Code, however, the model legal construct for public construction procurement is based upon the matrix of service delivery methodologies and permits project positioning. Dr. Miller pointed to the experience in Hong Kong to suggest that even with flexibility to use all available service delivery methods, in practice, the vast majority of public projects—80 percent in Hong Kong—are likely to be done via the traditional method of design-bid-build. Design-bid-build, appropriate for many public projects, will not be going away as a tool after the other tools become available for a public owner.

The Model Code authorizes and defines several methods of construction service delivery, and all methods depend upon the public owner first establishing the functional requirements of a project. These functional requirements, required to be part of any solicitation document, consist of the features, functions, characteristics, qualities and properties that are required by the public owner; the anticipated schedule, including, as a minimum, start, duration, and completion; and, estimated budgets for design, construction, operation and maintenance. The Model Code permits design-bid-build, as the time-tested and widely-used public procurement method, but adds the other service delivery methods expressed in general functional terms that can accommodate changes in practice over time. The additional service delivery categories are: construction-manager-at-risk (a variant of design-bid-build), design-build, design-build-finance-operate-maintain and design-build-operate-maintain. In a critical departure from the past statutory preference, which favored publicly-noticed competitive sealed bidding for construction services awarded to the lowest responsible and responsive bidder, the Model Code specifically authorizes and requires that the design-build, design-build-finance-operate-maintain and design-build-operate-maintain methods use competitive sealed proposals.

Cooperative Project Delivery – Presentation by Jeffrey Zogg

Jeffrey Zogg began by discussing an academic attempt, 15 years ago, to resolve the misperceptions of project delivery, when the Association of General Contractors worked with a professor from the University of Cincinnati to produce a textbook on service delivery.[3] After removing the labels from the alphabet-soup of methodologies, many of which are merely marketing devices with new names, what remains is a description of what the parties are doing and what how the risks are allocated among the parties. At the time of increasing analytical clarity, however, the multiple prime contracting requirement of the Wicks Law further clouded analysis of the issues in construction in New York. When, in the 1970s, the courts precluded public owners from delegating, to the general contractor, the coordination and management functions, public owners turned to construction managers as their agents

[3] Dorsey, Robert W., *Project Delivery Systems for Building Construction, 2nd ed.* (Arlington: Associated General Contractors of America, 1997).

to perform those functions more effectively. Instead, increasing the numbers of parties on public projects to include construction managers, as agent, only served to increase the level of blame and finger pointing when projects inevitably missed budget and the fundamentals of function and risk were overlooked.

Mr. Zogg reminded the audience of Mr. Miller's point that even with the panoply of modern service delivery methodologies available to government, the vast majority of public projects are delivered via the traditional design-bid-build methodology. There is a delivery system for every project. While many are served well by design-bid-build, there are those that for good reasons are not. For those projects whose size, technical complexity and time and/or financing constraints render the traditional methodology inadequate, other methodologies are critical, especially those methodologies that permit the construction "brains" to participate as early in the process as the project planning phase. Having the design and construction "brains" working together can benefit the public owner. While Mr. Zogg noted that the Governor's State Asset Maximization Commission was looking into the public-private-partnership methodology in its work of assessing new ways government can do its big projects, he cautioned that it is more helpful to focus on who is doing what and how they share the risks. Without getting caught up once again with delivery system marketing labels, we should focus on how the participants perceive their roles and functions and the risks they are taking, with a view to changing the collective mindset on projects to identify problems and more importantly solutions to the problems that inevitably occur on projects.

AIA Integrated Project Delivery – Presentation by Russell Davidson

Russell Davidson began with a picture of the Monadnock Building to show the state of architecture and construction around the time the State's public procurement laws were new and a picture of One Byrant Park, a LEED-certified building, to show the state of architecture and construction today. When our procurement laws were new, architects drew with graphite and ink on linen and buildings were of load-bearing masonry, not of steel, with no air conditioning or communications wiring. As early as 1931, the private sector has consistently out-performed public projects in terms of schedule and budget certainty—the Empire State Building was built in 16 months, a project duration still not often obtainable in the public sector.

In today's modern design and construction industry, when public owners are stuck with those same laws, computer-based design and drafting is well established, with young architects and engineers weaned on computers entering the workforce each year; building design is complex, requiring large project teams and coordination and new technologies; and, building products for these complex buildings are often unique—not standardized. The public sector's recent intense interest in sustainability will demand not only quality construction but also detailed commissioning, and the current state of public procurement laws do not support such conditions and often work against them. In particular, optimum modern construction requires the integration of owners, designers and constructors on collaborative working teams

from the beginning of project conception, with the owner's needs as the yardstick. The old service delivery methodology in public procurement law cannot deliver optimum modern construction for all types of public projects. Further, the integrated team approach to service delivery has been estimated in British studies to save from two to ten percent on single projects and up to 30 percent for multiple projects with the same team.

In the new world of integrated project delivery, the project team, established as early as the beginning of project conception, is integrated, inclusive and collaborative. The project team includes the owner, the end user(s), designers, constructors and appropriate governmental agencies. Team members share program information openly and use digitally-based, virtual Building Information Modeling (BIM) technology, which benefits the owner especially during project scope development as well as later throughout the process. Coordination of complex systems in advance, as permitting by BIM, saves time and money, including time and cost avoided by avoiding mistakes. Current law prohibits participation by the actual contractor during design and discourages participation by other contractors, thus depriving the design process of constructability feedback when it is most valuable and when changes based on constructability is practically cost-free. The team collectively manages and shares risk and bases decisions on value instead of costs alone, with team success tied to project success. The team can consider the project life-cycle costs from design and construction to O&M. Current procurement law prohibits consideration of long-term costs of the project as well as the quality of construction vendors during the contractor selection process—price, and initial price at that, is the only distinguishing consideration permitted. And, the related contracts must reflect collaborative sharing of risk and information. The public design and construction contract paradigm, primarily drafted in response to the straight-jacket imposed by antiquated public procurement laws, is completely at odds with these collaborative features.

To permit public owners to benefit from modern innovations in the practice of delivery public projects, it is necessary to reform New York State's public procurement law. The objectives sought by the antiquated laws are not often met because the design-bid-built methodology prohibits early involvement of the constructor to the detriment of what sometimes cannot be the final design. Lowest competitive bid requirements lead to contracts resulting in the opposite of collaborative working relationships with appropriately shared goals and risks. All of these factors contribute to delay and added costs to public sector projects.

Qualitative Implications of Change

Better Implementation of Complex and High Performance Building Systems – Presentation by Anthony Fisher

With some provisions from the first written construction law—Hammurabi Code—projected at the front of the room, Anthony Fisher began by establishing some

historical perspective. He noted that its requirement to put a builder to death should his improperly constructed building fall and kill the owner, at the least, led to over-designed buildings then. While New York's construction law is not that old, its antiquated provisions tend to discourage team collaboration as well as sustainability and lowest life-cycle costs on public works.

The design-bid-build methodology, by its nature, has a tendency to establish an adversarial "us versus them" relationship between the design professionals and the contractor, not to mention their relationships with the owner. On multiple prime projects required by the Wicks Law, the owner must take responsibility for coordination and management, tasks it may not be suited for as a practical matter. The likely results are delays, claims and litigation leading to increased costs. Lest we thought that the likelihood of adversarial relationships is a new phenomenon under old laws, Mr. Fisher projected a copy of Monthly Report No. 2, dated September 2, 1915, from George W. Fuller to the Board of Sewer Commissioners for the Huntington, New York. In his report, Mr. Fuller remarked:

> As you are informed, there has been a certain amount of friction between the Contractor and your engineers in regard to the conduct of the work. At the present writing we are pleased to state that relations are on a much more satisfactory basis.

The disadvantages of the design-bid-build that flow from its very nature have been apparent for some time. When paired with lowest competitive bidding, the methodology's tendency to "dumb down" buildings, however, have become more apparent since infrastructure and structures have become more complex and society has increased its focus on high performance and sustainability. If high performance building and systems designs that increase sustainability and lower life-cycle costs are not first eliminated by value engineering, the mandatory selection of the lowest competitive bidder who may be unfamiliar with complex systems or who may have had limited time during the bid process to understand the implications of such systems, may require substitute systems that correspond to the capacity of the selected contractor.

Echoing the themes noted earlier by Mr. Davidson, Mr. Fisher discussed the features of the integrated project delivery approach prohibited under current law. A project team consisting of the owner, design professionals, contractors and suppliers, collaborate early in project to develop a better understanding of what becomes the final design, obtaining "buy-in" from all parties of project design, constructability, O&M, cost and schedule. A process that permits early and joint consideration of project cost and schedule minimizes delay and increased costs. A process that permits consideration of O&M permits sustainable designs with lower life-cycle costs. This process also permits project teams to exploit the full potential of BIM technology at the earliest possible stage of project development. Mandated design-bid-build with the award going to the lowest competitive bidder makes these desirable ends

practically unobtainable for the State agencies and authorities, local governments and school districts stuck with current law.

While, the difficulties and limitations of design-bid-build are well recognized, and the benefits from integrated project delivery have been demonstrated, construction stakeholders, by and large, remain comfortable with a process they know, with long-established, though dysfunctional, relationships and onerous, though familiar, contract provisions. When thinking about reform, it is important to remember the old adage—better the devil you know—as illustrative of the likelihood that many people who will be working in the brave new world will be operating outside their daily routine and perhaps comfort level. Modern service delivery options, for many stakeholders in New York, will require not only a mindset of being open to change, but also changing habits and practices. The collaboration that increases the exchange of information for the benefit of the project and the owner will require changes from traditional rules of control, work flow and cash flow. On the ground, change in service delivery methodology will require change among the people doing the work, which should not be underestimated.

While several of the presenters, including Mr. Fisher, pointed to the remarkable schedule and budget performance of the design-build contract based on best value for the $234 million I35W Bridge construction project in Minnesota, Mr. Fisher also presented a case study, closer to home, to illustrate the difficulties presented by change. This project, a $2.5 million expansion for a pre-school operated by a church, with construction commencing while school was still in session and to be completed before school resumed in September, employed the construction-management-at-risk with guaranteed maximum price methodology on an open book basis, in which the owner shared in cost savings. The methodology satisfied the schedule, site control and safety issues posed by this project, yet it was the participants' first experience with the approach. Both the contractor and the engineer (Mr. Fisher) on the project were members of the church, the owner, with the same interests in project success, on behalf of the owner, as church members. Yet Mr. Fisher found himself reverting to the old design-bid-build mindset during the process: he wondered how he could know for sure, in the absence of competitive bids, that the price was truly the best price—and this, a price from a fellow member of the church! Realizing this methodology was new and would require change on his part, Mr. Fisher kept himself from reverting to the conventional mindset by forcing himself to think before reacting and to remember that the relationships among the parties were in fact different. As a result of this alternative methodology, the project was completed on-time and under budget with no disruptions to pre-school activities—a success by all measures.

Improved Overall Quality of Construction – Presentation by Russell Davidson

At this point of the agenda, Mr. Davidson summarized the case that the panel had successfully developed; namely, that modern service delivery methodologies increase the potential for quality in construction as well as sustainable products with lower life-cycle costs and, the converse, that mandatory design-bid-build with the award to

the lowest competitive bidder decreases the potential for such public policy objectives. Further, public construction suffers qualitatively as a result. In his experience working with on public school projects, Mr. Davidson expressed no doubt that public owners are reluctant to try anything new because of the fear their vendor pool cannot execute innovative designs well. Picking up from Mr. Fisher's presentation, Mr. Davidson noted that the public procurement process often results in conventional, less efficient building systems designs that, while proven to meet the skills of a lowest responsible bidder vendor pool, often do not take advantage of newer technology or techniques that can reduce long-term operation and maintenance costs. As a result, the professional design community tends to look down its nose on public projects. In order to improve the quality of public project it is necessary to move to value-based construction.

Better Builders Will Become Involved in Public Sector Construction – Presentation by Jeffrey Zogg

Mr. Zogg focused on strategic reforms that would increase the chances of having better qualified contractors work on public projects. The first area for strategic reform would focus on ensuring that the contractor selection process is based on qualifications and on permitting the general contractor to "control the work" in order to build a team. The State's recently enacted procurement lobbying reform was a good step in the right direction with respect to selection based on qualifications, but additional work is necessary to assure that prequalification processes are done properly.

Open Discussion and Last Comments

After opening the floor to the audience members for questions and comments, there was some discussion about the recent example of public-private-partnership reform enacted for a few school districts, such as Buffalo. It was noted that while legislative reform is often the art of the possible, reform on a selective basis is not appropriate. New York State has a habit, especially in public sector project delivery, of authorizing variations selectively without looking at the larger picture of all public sector capital works programs across the State.

There was some discussion of the slight procurement flexibility permitted to a few authorities, present in the audience, under certain circumstances. It was suggested that 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 challenge for lawmakers at this juncture is to re-establish how we build in the State, across the variety of public owners, and to think creatively about how to achieve results. Re-establishing how the State agencies and authorities, local governments and school districts deliver their projects could save serious money at all levels of government. For purposes of getting a sense of scale, applying the

conservative 2 percent savings figure noted earlier to an estimated $1 billion of construction in New York,[4] would yield $32 million of avoided costs.

As for the authorities that have some flexibility, they feel what they have is insufficient and they need additional tools. It was also noted that, in view of the Dormitory Authority's ability to use design-build, construction-manager-at-risk and construction-manager-as-agent with a bonus clause, DASNY's baseline of projects presents an opportunity for quantitative analysis and evaluation of methodologies used to date in New York.

In order to advance reform of the public procurement scheme to address modern needs, it is critical that the proposals directly address how they are superior to the existing laws in meeting the public policies and safeguards underlying the existing laws. The Model Code, provisions of which have been enacted across the country, has demonstrated its ability over time to advance New York's public policy objectives, which it shares with other States that have moved their laws to meet modern construction needs. Changing law is one difficult thing, but changing public sector mind sets and practices is as important and as difficult—one-sided contracts responsive to the old laws would need to change as well as the responses of the agency staff who manage such contracts.

Conclusions and Next Steps

Mr. Davidson concluded by noting that the timing for comprehensive reform to public construction project delivery could not be better. In the room where the event took place, four professional associations representing architects, engineers, builders and construction attorneys have all expressed similar viewpoints on how to best improve the way public projects are delivered to the significant benefit of the taxpayers of New York State. He suggested that we seize this opportunity to both reduce the cost of public construction while maintaining and most likely improving the quality of the built environment for all residents of New York State. With a cooperative effort of the professional associations gathered on November 25th and the agency representatives in attendance, Mr. Davidson expressed no doubt that an acceptable set of reforms could be presented to lawmakers with considerable grassroots support. He suggested all present form the coalition necessary to move this reform initiative forward.

[4] The New York Building Congress estimates $17 billion in overall public construction activity in the City for 2008. The Office of the State Comptroller's Annual Financial statement for New York State reports $87 billion as of 2008, though excluding artwork/historical treasures and equipment/library books (two categories in their calculation), the total figure stands closer to $86 billion.

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Letter from AIA NYS

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November 25, 2008

Governor David Paterson
Executive Chamber
State Capitol
Albany, NY 12224

Re: Public Construction Law Reform

Dear Governor Paterson:

I am writing to urge you to issue an Executive Order creating a Task Force on Public Construction Law to assess the current statutory impediments and recommend changes during the next legislative session. At a time when the state and local governments are facing looming deficits, representatives of the built environment are recommending that New York's archaic public construction laws be reformed in order to maximize public dollars.

In New York State, the state and local governments have access to only one service delivery model, "design-bid-build" which awards the lowest responsible competitive bidder. This single service delivery methodology embeds delay and exacerbates cost increases for some types of public projects. The current public works statutes for both state and local governments, enacted well before the end of the last century, are based on assumptions about construction that are no longer valid.

Modernizing the state's public construction law would help the state and its local governments avoid non-productive costs and use their public capital more efficiently. In the absence of reform in a slower economy, fewer projects will be able to be funded and built during a time when government's role as an economic stimulator is most needed. And, the future debt service associated with costs resulting from outmoded practices will divert expense budget resources from programs and services at both State and local government levels.

We are available to assist you in any manner in accomplishing this objective.

Sincerely,

Edward C. Farrell
Executive Director

Letter from NYC Bar Association

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December 3, 2008

The Honorable David Paterson
Executive Chamber
State Capitol
Albany, NY 12224

Re: Creation of Multi-disciplinary Task Force on Public Construction Law Reform

Dear Governor Paterson:

I write to urge you to appoint a multi-disciplinary task force to assist the State in the important and complex task of reforming public construction law in New York with the goal of increasing efficiency, saving money, and enhancing public projects overall. This recommendation is an outgrowth of work the New York City Bar Association has been doing on public construction law reform. On November 25th, the Association and AIA New York State co-sponsored a multi-disciplinary panel presentation on the topic, designed to be an educational resource for an audience of public policy makers that included staff members from various State executive agencies with a role in public construction. This event follows the release, in February 2008, of a report from the Association's Construction Law Committee —*21st Century Construction, 20th Century Construction Law.* (Executive Summary enclosed.)

The recent Wicks Law reform, representing a significant change in the political landscape, provides the foundation to complete the reform of public procurement laws, for State agencies and authorities, local governments and school districts, to promote flexibility and innovation and reflect contemporary trends in service delivery methodology. An economy that continues to negatively impact public revenues, at a time when public infrastructure and facilities are insufficient to meet demand, provides the pressing need to expand and complete reform.

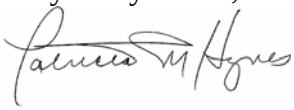
The State's public procurement laws were enacted several decades ago under conditions and upon assumptions no longer applicable to the construction industry and its products. These laws embed delay into the design and construction of public projects with associated avoidable costs,

and often require the sacrifice of designs and construction techniques that otherwise would reduce operation and maintenance costs in the long-term. The absence of reform in a slower economy to increase flexibility in public procurement laws will mean the public sector will fund and complete fewer projects at a time when government's role as an economic stimulator is most needed. Further, associated future debt service will divert expense budget resources from programs and services.

The State can increase the efficiency of whatever capital funds are available for public projects by amending construction laws to permit State agencies and authorities, local governments and school districts, as owners and clients, to have flexibility in deciding, like private owners, what service delivery methods are appropriate for various capital projects and what provides the best value to the public, while protecting the integrity of the process. The 2007 Model Code for Public Infrastructure Procurement serves as a well-researched and considered model for reform in New York. A flexible public procurement scheme that permits the variety of service delivery methodologies, including those in use now and those that will evolve, along a continuum of public-private relationships, would serve New York well in the 21st century.

Like AIANYS, the New York City Bar Association recommends the creation of a multi-disciplinary, professionalized task force to focus on reforming public construction law in New York, which will include assessing current statutory impediments and recommending changes during the next legislative session. We stand ready to assist your office in this endeavor.

Very Truly Yours,



Patricia M. Hynes

NEW YORK CITY BAR

EXECUTIVE SUMMARY OF CONSTRUCTION LAW COMMITTEE REPORT:

21st Century Construction
20th Century Construction Law

- The most recent Wicks Law reform suggests an opportunity is at hand to complete the reform of public procurement laws, for both the state and its local governments, to promote flexibility and innovation and reflect contemporary trends in service delivery methodology. The economy continues to negatively impact public revenues and public infrastructure and facilities are insufficient to meet demand, yet New York State and its local governments have access to one service delivery model—design-bid-build—with the award going to the lowest competitive bid.

- The current public works statutes for both State and local governments, enacted well before the end of the last century, are based on assumptions about construction that are no longer valid.

    - While mid-century design is currently popular and appears "modern," the corresponding mid-century service delivery method—design-bid-build—is no longer modern. Since the heyday of this model, the private sector has developed other service delivery methods that permit a better match with project needs and owner capabilities.

    - Further, the lowest price requirement applicable to all public works in New York reduces construction to a standard commodity and is less appropriate and more costly now than when the requirement was adopted. Modern building technology requires contractors to apply professional skills and make judgments, unlike their mid-century predecessors.

- The State, as an economic policy maker, can increase the efficiency of whatever capital funds the State and local governments are able to spend by reforming public procurement laws to permit the State and its local governments, as owners and clients, to have flexibility in deciding, like private owners, what service delivery methods are appropriate for various capital projects and what provides the best value to the public, while protecting the integrity of the process. As a model for change in this area, the Construction Law Committee suggests review and consideration of the 2000 Update to the American Bar Association's Model Procurement Code.

- Modernizing the State's public construction law would help the State and its local governments avoid non-productive costs. The single service delivery methodology embeds delay and exacerbates cost increases for some types of public projects. Protecting the public fisc during construction *and* while the projects are operated and maintained requires an evaluation of costs, in addition to the initial construction costs, that are directly related to the quality of design and construction.

- In the absence of reform in a slower economy, fewer projects will be able to be funded and built during a time when government's role as an economic stimulator is most needed. And, the future debt service associated with avoidable costs resulting from outmoded practices will divert expense budget resources from programs and services at both State and local government levels

- The Committee further believes the State must also go beyond full reform of the public procurement laws and engage in a rigorous review of the entire statutory scheme for construction and its products, both publicly and privately financed, to bring New York's construction industry into the 21st century, unleashing its economic potential.

- The construction industry is an important component of the overall economic performance and competitiveness of the State and local economies. Yet the fragmented nature of the construction industry makes government action a necessary condition for significant improvement. Appropriate governmental intervention can help to increase the efficiency of the construction industry and its products.

- Achieving the greatest possible level of efficiency will require review and reform of all regulations affecting construction industry performance. To that end, the Construction Law Committee suggests consideration of recent approaches taken in Great Britain and urges the State Legislature and the Governor to convene a multi-disciplinary, professionalized task force to study the statutory scheme covering construction in New York with a view to proposing reforms to help make the industry more efficient for the benefit of the State and local economies.

- For a copy of the full report, please contact Elizabeth Kocienda at ekocienda@nycbar.org or go to:

  http://www.nycbar.org/pdf/report/ConstructionLaw.pdf

  November 2008

Contact: Maria Cilenti, Director of Legislative Affairs, mcilenti@nycbar.org / (212) 382-6655

Six Key Strategies