

**New York Building Congress
Task Force on Innovation and Best Practices**

**Government Procurement and Procedures Committee
Final Report**

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Committee Co-Chairmen

Jay Badame, Tishman Construction Corporation – An AECOM Company

Mark Blumkin, Deloitte Financial Advisory Services

Mysore Nagaraja, Spartan Solutions LLC

Milo E. Riverso, STV Group, Inc.

David Burney, FAIA, Consultant to the Committee

I. INTRODUCTION

Government agencies are responsible for a large capital construction program that has a significant impact on the local economy and on the "state of good repair" of the local infrastructure. However, the methods by which government agencies procure and manage this capital portfolio are often hampered by outdated and cumbersome regulations and methods that delay projects and increase the cost of work to the taxpayer.

The Government Procurement and Procedures Committee set out to identify the key drivers of construction costs and delivery delays for public agencies in New York City and propose reforms that are realistic and achievable. Understanding that costs are generally higher and project completion times longer for public works than for their private-sector equivalents, the Committee's goal was to identify ways in which taxpayer money might be saved and public projects delivered in shorter time. The Committee also sought to identify procedures that would create a more equitable risk balance with contractors, thus increasing the pool of bidders on public work, and to improve the public sector's capital planning process. In addition to its own expertise, the Committee met with the New York City Mayor's Office of Contract Services to discuss procurement policies and their legislative context.

Based on various studies performed by Deloitte Financial Advisory Services and others over the past decade, the Committee identified the following six key drivers that are consistently the cause of construction costs and delays on public works projects:

- (1) lack of adequate capital planning and preparation;
- (2) controls that are designed to prevent corruption but effectively create adversarial relationships between agencies and contractors, such as the City's divided management of public works projects and the approval processes for payments and change orders;
- (3) contract documents that shift most risk and liability to contractors;
- (4) insurance costs;
- (5) outdated project delivery methods; and
- (6) EEO/MWBE compliance.

II. KEY DRIVERS OF CONSTRUCTION COSTS AND DELAYS AND PROPOSED RECOMMENDATIONS

1. Preliminary Design, Scoping, and Estimating

Most capital projects procured by government agencies lack adequate preliminary scoping, design, and estimating. This is due to resource constraints within government agencies and the lack of funds available for consulting services until the project is funded. Thus project funding levels are established on relatively slender information, resulting in major "cost increases" when the appropriate consulting work is done and the true cost of the project revealed.

In recent years, the New York City Office of Management and Budget (OMB) addressed this problem by establishing the Capital Project Scoping Development Fund (CPSDF), a fund to be used for "pre-design and scoping services" for projects seeking capital funds. Although tax revenue dollars were required, the cost of these consulting services is a fraction of the cost incurred during the later phases of a project and are more than offset by the savings in cost and time needed to correct subsequent budget over-runs.

Recommendation:

The City should require that agencies in charge of capital projects use the CPSDF to conduct pre-design scoping, estimates, and preliminary designs for all major capital projects (e.g., any project with a preliminary budget estimate exceeding \$50 million). This "Phase 0" should be used to develop accurate project scopes, budgets, and timelines so that projects are planned appropriately and not approved with an arbitrary budget and schedule that are usually inaccurate. Upon approval of the project to proceed, the funds spent towards planning could be capitalized with the project cost. This would avoid the often experienced situation where project budgets are based on incomplete scopes and, as design progresses, construction estimates or bids are significantly higher than the project budget.

2. Project Management

Too often, management of a capital project is split between more than one government agency, slowing the approval processes and delaying project completion. While multiple agencies may be necessary in the lead-up phases to establishing a capital project (e.g., the "client" agency, the budget office, and the project delivery agency), once the capital project is funded and launched, the responsibility and authority for delivering the project should rest with only one agency. In this way, accountability is clear and finger-pointing can be reduced.

Recommendations

Once the budget and contingency have been set, the agency managing the project should be responsible for oversight. There should be visibility so that monitoring is improved, but without multiple layers of oversight. There are several areas where this oversight authority is currently split and should be reformed:

- The managing agency should be assigned responsibility for budget control with a 10 percent budget contingency to cover change orders (10 percent contingency is an industry standard). Post-construction audits should provide sufficient monitoring to ensure that the contingency sum is being expended appropriately, consistent with the contract terms and agency guidelines. In the event the managing agency needs to exceed the 10 percent contingency, then additional oversight should be introduced. Internal agency thresholds for reviews of commitments and payments by the Agency's Engineering Audit Officers, OMB, and the Comptroller's Office should be reviewed and increased to coordinate the

controls and reduce duplication and delay. In addition, a level of accountability should be built into the review process establishing mandatory review cycle times

- The managing agency should establish a contingency management plan that includes monitoring of expenditures as the project progresses. Any expenditure that exceeds the plan should trigger review by the agency's Engineering Audit Officers, OMB, and the Comptroller's Office.
- Each agency should develop a project management plan that establishes mandatory review cycle time for processing change orders and payments as well as quarterly reviews of project costs, schedules, and safety. Currently, change order and payment processes are not timely, and contractors include additional costs in their bid prices to account for resulting cash-flow delays.

3. Review New York City Contract Terms & Conditions to Allocate Risk Fairly

Motivated by a desire to protect the public purse, government agencies have developed a standard construction contract that shifts project risk to the contractor rather than the government client. Contractors add to their bid prices to cover this, so that government ultimately pays unwittingly for this shift in risk. Much like the City recently eliminated the "no damage for delay" clause in its standard contracts, the City must conduct a comprehensive review with representatives of key stakeholders (e.g., contractors, subcontractors, and designers) to identify terms and conditions that unfairly allocate risk to one party, forcing contractors to add contingencies into their bids to account for this imbalance. The attached table identifies some of the most significant issues concerning the City's standard construction contract, together with recommended reforms.

4. Insurance Reform

Contractor Controlled Insurance Programs

Many public and private project owners use Contractor Controlled Insurance Programs (CCIP) to reduce the cost of providing insurance on a project while ensuring coverage by all subcontractors and coordinating the levels of protection offered to owners. By using its buying power, the contractor is able to reduce the overall cost of insurance to the owner while also providing an incentive to improve safety via a reduction in claim costs.

Labor Law 240: The Scaffold Law

New York State Labor Law 240, enacted in 1885 and commonly referred to as the Scaffold Law, requires the provision of scaffolding and other safety devices by all contractors and owners and their agents directing "the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure" so as to give proper protection to workers. The Law has remained static through the decades, despite the creation of the Federal Occupational Safety

and Health Administration (OSHA), which has its own detailed regulations on scaffolding, and the dissolution of similar laws in virtually every other state.

While the Law seems inarguably wise in theory, in practice the statute assigns absolute liability for worker injuries to the contractors and owners directing such work and does not allow for consideration of a worker's contribution to his or her injuries. Absolute liability nearly guarantees a settlement to the worker and is costly for the industry, the public sector, and taxpayers. Since 1990, lawsuits in New York State have increased 500%, despite a decreasing rate of injuries. The cost of insuring construction projects in New York State is approximately ten times higher than in other states.

Recommendations

- New York City has already implemented CCIP on several selected projects. The use of CCIP on these projects should be evaluated to ascertain the benefits, with an eye towards implementing the CCIP program throughout the City's capital program.
- As suggested in a New York Building Congress white paper on the Scaffold Law, all stakeholders should be encouraged to continue to work together to find a solution on how best to address rising insurance costs that can be proposed to elected officials.

5. Outdated Project Delivery Methods

The traditional "design-bid-build" methodology that forms the basis for almost all government procurement has been superseded in the private sector and in some government agencies by alternative methods that deliver better value in shorter time-frames. The Committee recommends adoption of several of the alternative procurement methods.

Recommendations

- **Expand the use of Construction Management (CM) at Risk with a Guaranteed Maximum Price (GMP) and Design-Build.** The FY 2015-16 New York State Budget resolution authorized design-build contracting for a limited number of agencies (New York State Department of Transportation, New York State Thruway Authority, New York State Department of Parks, New York State Department of Environmental Conservation, and the New York State Bridge Authority) and only for the next two years. Used successfully by the private sector and many other federal and state governments, this contracting method has proven to save time, reduce costs, and minimize disputes. Authority to use design-build should be extended permanently to all State agencies and municipalities to provide the agencies with another alternative to deliver projects more efficiently.

CM-at-Risk-with-a-GMP contracting could benefit the City by improving coordination between contractors, reducing change orders and delays. Many other local agencies and jurisdictions, such as the Port Authority of New York and New Jersey, New York City

Economic Development Corporation, and the State of Massachusetts, use CM at Risk and have generated positive results.

There are several examples of successful projects that demonstrate the benefits of these alternative delivery strategies, which offer fair, competitive, and efficient methods of contracting. Examples include:

- MTA - #7 New York City Subway Line extension
 - MTA - Zerega Avenue Bus Maintenance Facility
 - NYC EDC – Harlem Hospital Project
 - Entire capital plan for the Commonwealth of MA (General Services)
- **Pilot Use of True “Integrated Project Delivery (IPD)” for Major Projects.** In an IPD contract arrangement all parties - owner, design team, construction team - share the profit /loss outcome of a project. The parties work together to establish the project construction cost and then commit by contract to that cost. This contract delivery method is increasingly being used outside of New York City.

Currently, Turner Construction Company is party to an IPD contract for a large hospital project. The post-project evaluation included comments such as: “Team Chemistry: They were able to develop a very good working relationship with their respective trade partners. There was a very productive give and take on coordination and design issues. Mutual respect was definitely developed between the partners and design team.”

Given its proven benefits in time- and cost-savings, IPD should be implemented for major government projects, beginning with a pilot program.

In addition to piloting one IPD Project, government agencies should consider adopting an "IPD-Lite" project delivery process for major projects (e.g., \$300 million or more). IPD-Lite would involve getting prequalified contractors (short-listed) and CMs involved during the design and construction document preparation stages and incorporating their comments into the documents. Bids would be solicited from the prequalified list and the lowest, responsible/responsive bidder would be awarded the contract. For pre-qualification, only contractors meeting all of the City's requirements would be eligible. Government agencies should also designate several large projects (e.g., greater than \$300M) for negotiated procurement. This also would require shortlisting qualified contractors, as with IPD-Lite, and issuing a request for proposals to the shortlisted group. Proposals, both technical and cost, would be evaluated by a selection committee. Based on the committee's recommendation, negotiations would follow with one or more of the proposers, and the best and final offer would be based on the Record of Negotiations. Contract documents would then be conformed to meet all negotiated items.

- **Execute and Update Previous Project Labor Agreement (PLA).** The current PLA contracts cover New York City projects until 2018. This PLA has benefited the City and other owners in this region by guaranteeing labor harmony, generating savings in labor rates, synchronizing and reforming some work rules, and, importantly, providing a waiver to the Wicks Law. The City should execute another long-term PLA and involve the BTEA to negotiate on behalf of the management of the contractors.

6. EEO/MWBE Compliance

The local public agency's requirements for EEO and MWBE compliance have become increasingly stringent and the percentages for meeting goals have steadily increased. It has become harder for prime contractors to meet these goals.

Recommendation

The Building Congress should meet with procurement officers of key City and State agencies and assist in the development of short- and longer-term strategies to address the requirements and enlarge the pool of qualified MWBE firms. These strategies could include replicating mentorship programs similar to those used by other large public agencies in the New York metro region (e.g. New York City School Construction Authority, Port Authority of New York and New Jersey, Metropolitan Transportation Authority).