

## Is 2018 the Year for Design-Build Legislation in New York? Updated July 2019

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### Client Advisory

July 23, 2019 by Christopher Rizzo

*Update: In late 2017, the outcome of various bills to permit design-build contracts in New York State and City was very much uncertain. On June 16, 2019, however, the State Legislature passed the "New York City Public Works Investment Act" to permit several city agencies to use design-build contracts. They include the Department of Design and Construction, Department of Environmental Protection, Department of Transportation, Department of Parks and Recreation, Health and Hospitals Corporation, School Construction Authority and Housing Authority. The authorization applies only to contracts valued at greater than \$1,200,000 and expires in June 2022. See N.Y. Senate Bill 6293a.*

In August 2017, Governor Cuomo opened the new Tappan Zee Bridge to traffic and touted the efficient design-build process the NYS Thruway Authority used for the project.[1] But the bridge is one of only a few public infrastructure projects in the state that have used the process. State law generally prohibits design-build contracts for state or local governments.

There is increasing consensus in New York, however, that laws requiring state agencies and municipalities to separate the design and construction phases of public projects are creating substantial inefficiencies in project schedules and costs. It is notable then that the state legislature has annually declined to pass a series of bills aimed at allowing "design-build" contracts. The state legislature will return to session on January 3, 2018 with several important bills still in committee. This advisory summarizes the state of the law.

### Background

Design-build contracts involve one contract for both design services (albeit architectural or engineering) and construction. These sorts of contracts certainly reduce the time associated with completing a project because the client does not need to issue a new request for proposals for construction after the design is completed and approved. The practice is likely to reduce costs as well because the designers and builders work as part of a team to minimize mistakes, delays, and the need for change orders. Licensed professionals, on the other hand, have historically been concerned that the practice will lead bidders to scrimp on design safety. Labor leaders have been concerned that the drive for low-cost, one-stop bidding will lead contractors to further reduce their use of union labor.

There is no law in New York specifically prohibiting design-build contracts in either the private or public sector. But a variety of laws make the practice hard for the private sector and impossible for the public sector.

- The Business Corporation Law prohibits professional corporations like architectural firms from engaging in rendering any services other than those for which it was incorporated. The Education Law permits only licensed architects, professional engineers, land surveyors and professional geologists to render services in their respective areas. Historically, these two laws have acted as a prohibition on allowing contractors to bid on public or private-sector contracts that include "design services." In a 1988 decision, the
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Court of Appeals permitted the practice (at least for private sector clients) so long as construction contracts explicitly require any design or engineering services to be subcontracted to a licensed professional.[2]

- State law has other limits, however, on design-build contracts for government entities. The State Finance Law requires state entities to issue separate contracts for different trades (e.g., electricians). And for each such trade, it requires “a contract for one or more buildings in any project [to be] awarded to the lowest responsible bidder for all the buildings included in the specifications.”[3] The General Municipal Law similarly requires municipalities to separately contract for the specified trades and select the lowest responsible bidder.[4] Courts have strictly interpreted the requirement to require that separate contracts be issued to the various trade contractors and that they be awarded to the lowest responsible bidder. In *AAA Carting and Rubbish Removal, Inc. v. Town of Southeast*, for example, the Court of Appeals re-affirmed the principle that municipalities must award contracts to the lowest bidder and may not otherwise evaluate among responsive proposals.[5] This and similar court decisions tend to discourage innovative design-build bidding processes.
- A number of state agencies have additional limits on design-build contracts in their enabling statutes.

### Limited Design-Build Authority

New York State points to the recently completed Tappan Zee Bridge replacement as a design-build success. The New York Thruway Authority has completed (almost) the project on time and for less than initially estimated. But it is one of the few important public projects completed with a design-build contract in the state. The project was allowed because in 2011 Governor Cuomo championed, and the state legislature approved, the New York State Infrastructure Investment Act to permit a handful of state agencies to use design-build contracts notwithstanding the limits in state law. They include the New York State Thruway Authority, Department of Transportation, Office of Parks Recreation and Historic Preservation, Department of Environmental Conservation and New York State Bridge Authority. The State has also extended design build authority on a one-time basis for several specific projects. In 2016, the State approved design-build contracting for the renovation of Penn Station, Farley Post Office/Moynihan Station and Javits Convention Center. In 2017, the State extended that authority on a one-time-only basis to eight special infrastructure projects in upstate New York.[6] But the State Legislature has declined to extend design-build authority more broadly to state agencies.

### Pending Bills

The 2017-2018 legislative session includes several bills to extend design build authority around the state. The most prominent bills deal with New York City and failed to make it out of committees to a vote in 2017.

- A06667 would extend authority to the New York City Department of Design and Construction, Department of Environmental Protection, Department of Parks and Recreation, Department of Transportation, Health and Hospitals Corporation, Housing Authority and School Construction Authority.
- A08134 and S06427 would extend authority to the New York City Department of Design and Construction, Department of Transportation and Health and Hospitals Corporation.
- A08239 and S05548 would extend authority only for the reconstruction of the Brooklyn Queens Expressway by the Department of Design and Construction and Department of Transportation. New York City has lobbied hard for the laws but so far has not convinced the legislators or governor to advance them out of legislative committee review.

According to the Design Build Institute of America, a nonprofit industry advocate, 43 states widely permit design-build contracts. New York and New Jersey (the most infrastructure dense states in the country) are among the seven exceptions. Some states are even going beyond design-

build contracts for public projects to “design-build-operate” contracts where costs are largely born by a developer in return for the right to operate the public infrastructure for some period of time to recoup the investment. The Port Authority of New York and New Jersey, a bi-state agency that claims various exemptions from state law, is using this method to replace the Goethals Bridge linking Staten Island to New Jersey. As the federal government delays decisions on important infrastructure funding, New York State may find itself in need of these sorts of innovative public private partnerships more and more.

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For more information concerning the matters discussed in this publication, please contact the author **Christopher Rizzo** (212-238-8677, [rizzo@clm.com](mailto:rizzo@clm.com)), or your regular Carter Ledyard attorney.

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[1] The Authority renamed the bridge the Mario M. Cuomo Bridge after the deceased governor.

[2] *Charlebois v. J.M. Weller Associates Inc*, 72 N.Y.2d 587 (1988).

[3] N.Y.S. State Finance Law § 135. This series of laws is often referred to as New York’s “Wick’s Law” named after former State Senator Arthur Wicks.

[4] N.Y.S. General Municipal Law §§ 101, 103.

[5] 17 N.Y.3d. 136 (2011) (finding the town arbitrary and capricious in its decision not to select the lowest bidder despite its finding the bidder to be responsible.).

[6] The extension was contained in the 2017 budget bills—A03009, S02009.

## related professionals

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