



LEGISLATIVE UPDATE

APRIL 2019

NYS Budget Passage

Early on April 1 the Legislature completed final passage of the 2019-2020 state budget. Below is a summary of the final agreement on issues of interest:

MWBE

Governor:

SS1508A/A2008A Part AA – Reauthorize and extend the provisions of law relating to participation by minority and women-owned business enterprises in state contracts and expands upon those provisions based upon the findings of the 2016 Disparity Study and extend the sunset provision to December 31, 2024.

The bill seeks to make several amendments, which include, but are not limited to, the following:

- Updates diversity practices definition to include diverse leadership of businesses and MWBE mentorship;
- Increases agency and authority discretionary purchasing threshold to \$400,000;
- Expands program requirements to include all municipalities on contracts let with appropriated state dollars and requires units of local government subject to Article 15-A to set goals on contracts and submit reports to the Director;
- Provides the Director the authority to set the personal net worth (“PNW”) requirement for MWBE certification via regulation, excludes holding companies from PNW, replaces exclusion of equity in personal residence exclusion with cash value of home;
- Creates a workforce program with goals for minority group members and women;
- Enhances opportunities for MWBE prime contractors by establishing bidding credits for low-bid construction projects of up to \$1.4 million and increases the size of procurements that can include bidding credits each year with inflation;

- Expands the authority of the Statewide Advocate to audit agencies and investigate complaints from MWBEs of violations of Article 15-A by agencies and contractors;
- Requires agencies to take into account findings of most recent Study in setting goals and removes references to the 2010 Study;
- Provides the Director with enhanced authority to define commercially useful function;
- Requires Tax & Finance and DOL to share records with the Division;
- Establishes MWBE fraud as a criminal offense and;
- Makes other additional technical changes.

In the thirty day amendments the Governor amended personal net worth definition by:

- a. reinserting the exclusion of the individual's "equity in his or her primary residence".
- b. limiting the exclusion of ownership interest of holding company to those companies that are "majority owned by the minority group members or women relied upon for certification" and
- c. increasing the threshold of qualified retirement savings plans or IRS from \$500,000 to \$750,000.

- Allows the director to revoke certification for any "convictions for fraudulently misrepresenting the status of minority or women-owned business enterprises" rather than limiting the director allowance to revoke solely for felony convictions.
- Extends the term for certifications from three years to five years.

Assembly:

Omitted. They want to take up the issue post budget.

Senate: S1508-B Part AA- The Senate modifies the Executive proposal to update provisions of law relating to participation by minority and women-owned business enterprises in state contracts based upon the 2016 Disparity Study.

FINAL:

No action was taken. It is likely, however, that both Houses will address some of these issues before they adjourn in June.

DESIGN-BUILD

Proposal 1

Governor: For a number of years, the Governor has attempted to greatly expand the use of design-build rather than traditional competitive bidding.

S 1508A/A2008A Part B –Would permanently authorize the Dormitory Authority of the State of New York (DASNY) to enter into design and construction management agreements with the Department of Environmental Conservation (DEC) and the Office of Parks, Recreation and Historic Preservation (OPRHP).

Assembly:

Omitted.

Senate: S1508-B PART B – The Senate modifies the Executive proposal by providing for a two-year extension of such authorization.

FINAL:

Extended for two years until April 1, 2021.

Proposal 2

Governor:

S 1508A/A2008A Part D – Extend the Infrastructure Investment Act and expand the definition of an authorized entity that may utilize design-build contracts and other alternative project delivery methods. This bill would expand the provisions of the Act to enable DASNY, UDC, OGS, DOH and ORDA to be added to the list of entities that are currently authorized to award a contract to a single entity for both the design and construction (design-build) aspects of a project in order to optimize quality, cost and efficiency. The bill would expand the types of contract that may be utilized under the Infrastructure Investment Act to also include construction manager-build and construction manager at risk. The bill would also add buildings and appurtenant structures to the infrastructure projects that may be subject to the provisions of the Act and would reduce the monetary threshold for contracts subject to project specific design build authority to \$1,200,000. In addition, the bill also requires authorized entities to consider to the availability of Service-Disabled Veteran-Owned Businesses to promote and assist in the participation of such businesses. The Act is currently set to expire in 2019; this bill would make it permanent.

S1508A/A2008A Part EE- MTA Design-Build. In the thirty-day amendments the Governor added a provision to require the MTA to use design-build for major projects and rationalizing the terms of MTA board members.

Assembly:

Omitted.

Senate:

S1508-B PART D -- The Senate modifies the Executive proposal to extend design-build procurement for existing agencies for an additional two years, clarifies project labor agreement usage and civil service protections, and provides similar authorization for New York City's infrastructure agencies. The Senate rejects expanding design-build to additional agencies and expanding alternative procurement methodologies, and seeks additional information regarding MWBE participation on current or completed design-build contracts. (Language attached)

FINAL:

No action was taken as to any expansion of design-build except that the MTA reform package requires it for all projects in excess of \$25 million

unless there is a written waiver by the State Budget Director. It is likely that additional expansion of design-build will be revisited before the end of session since there is an expectation that there will be a supplemental capital projects budget bill and NYC continues to want design-build.

MTA

Senate Proposal:

S1508-B PART EE -- The Senate rejects the Executive proposal permitting the MTA to assign, transfer, share, or consolidate any of its powers, duties, functions or activities, require design-build on unidentified major projects, and amend MTA Board appointees' terms. In its place, the Senate advances the MTA RAIL Act. The MTA RAIL Act introduces much needed reforms to the way the MTA operates, including an independent forensic audit of the MTA's procurements, improving long-term capital planning, providing MTA riders a voting voice, ensuring that MTA revenues are more likely to go to New York businesses, and overhauling the way the MTA analyzes itself. Simply put, transformative change to the MTA and how it does business and delivers services must occur as part of any congestion pricing proposal. The Senate awaits additional information regarding the Executive's proposal.

FINAL:

Some of this was included in the MTA reform package.

CONGESTION TOLLING/ MTA CAPITAL

Governor:

S1508A/A2008A Part BB –This bill authorizes the Triborough Bridge and Tunnel Authority (TBTA) to create a congestion tolling program for vehicles entering Manhattan below and inclusive of 60th Street.

Assembly:

Omitted.

Senate:

S1508-B PART BB -- The Senate supports a congestion mitigation plan that treats drivers fairly, reduces peak-hour congestion, incentivizes efficient commercial vehicle and business travel, dedicates revenues equitably, and is properly and transparently implemented. It is critically important that a congestion mitigation plan ensures fairness in treatment for transportation deserts, suburban residents, and resident who live in the congestion zone. The Senate awaits additional information on the Executive's proposed MTA Reorganization Plan and transit expert panel.

FINAL:

The MTA funding includes a Central Business District tolling program, the first program of its kind in the nation. This will include the installation of electronic tolling devices on the perimeter of the Central Business District, defined as streets south of 60th Street in Manhattan. The program will be established, operated, and maintained by the TBTA, working closely with the New York City Department of Transportation for installation. A six-member Traffic Mobility Review Board will be established by the TBTA to advise on tolls, exemptions, and credits to ultimately be determined by the TBTA based on recommendations from the Board. Tolls will be variable and passenger vehicles will only be charged once per day. The implementation day will not be before December 31, 2020. This tolling program will leverage \$15 billion, which will be dedicated to MTA capital needs.

MTA PROCUREMENT

Governor:

S1508A/ A2008A Part RR In the thirty-day amendments the Governor extends certain procurement provisions of the MTA.

Assembly:

Omitted.

Senate:

S1508-B PART RR -- The Senate modifies the Executive proposal to extend various procurement authorizations for the MTA for four years, and rejects extending the provision which has two years remaining on its authorization.

FINAL:

Certain procurement provisions were extended and the threshold for contracts requiring full Board approval was increased from \$400,000 to \$1million. In addition, the threshold requiring competitive bidding on contracts for supplies, materials and equipment was increased from \$400,000 to \$1 million.

Design-Build is required for all MTA projects in excess of \$25 million unless there is a written waiver by the State Budget Director.

**The budget will also allow the MTA to debar any contractor that exceeds 10% of the contract cost or time on a capital construction project. (Language attached end of page)*

WORKERS COMP PROVIDERS

Governor:S1505/A2005 Part CC –This bill would amend workers' compensation law to extend workers' compensation board (WCB) authority to resolve medical bill disputes, simplify the dispute process, and expand the list of authorized providers for workers' compensation claimants.

Assembly:
Omitted.

Senate:
S1505-B PART CC -- The Senate concurs with the Executive proposal to expand the types of healthcare providers that are authorized to render care to injured workers.

FINAL:

To increase the number and types of medical professionals that care for injured workers, lowering the anticipated cost and duration of care and better serving workers injured on the job, the Budget adds three new types of medical professionals as care providers under the workers compensation system: nurse practitioners, acupuncturists, and licensed clinical social workers. Permitting licensed certified social workers and psychiatric nurse practitioners to treat workers will significantly increase mental health resources, providing desperately needed resources to a vulnerable population. It also removes a barrier to treatment options faced by injured workers suffering with opioid dependency and other mental health conditions.

EMPLOYEE TRAINING INCENTIVE PROGRAM (ETIP)

Governor:
S 1505/A2005 Part B –This bill would amend the Employee Training Investment Program (“ETIP”) in the Economic Development Law to expand the definition of eligible training.

Assembly:
Omitted

Senate:
S1505-B PART B -- The Senate concurs with the Executive proposal to expand the Employee Training Incentive Program

FINAL:

Program was expanded to include software development and clean water internships.

NEW ISSUES NOT IN GOVERNOR'S BUDGET PROPOSAL

Senate:

S1508-B NEW PART GG -- The Senate advances legislation that would extend the exemption of the School Construction Authority from the Wicks Law for an additional five years.

FINAL:

Not included.

S1508-B NEW PART SS -- The Senate advances language to create a new Database of Deals to improve State economic development transparency and accountability

FINAL:

Authorized the Department of Economic Development to create an on-line data base of economic development projects

S1506-B NEW PART FF -- The Senate advances legislation that would restore the definition of public works as embodied in Senate Bill 1947. The Senate believes prevailing wage should be paid on projects supported by public dollars. However, the Senate acknowledges legitimate concerns by various stakeholders and supports all stakeholders coming together to negotiate a mutually agreeable outcome. The final proposal should recognize regional cost differentials among the state, recognize the unique nature of Industrial Development Agency and Local Development Corporation incentives, ensure development in all regions of the state continues, preserving opportunities for MWBEs, and preserve the development of affordable housing.

FINAL:

Not included.

Assembly:

A2006-B NEW PART NN-- Added public work proposal regarding prevailing wage. (Language attached)

FINAL:

Not included.

SA2008-B NEW PART VV--Establishes a Strategic investment in workforce development program to identify and address workforce needs throughout the state.

FINAL:

Not included.

*MTA Debarment provision:

The public authorities law is amended by adding a new section

18 1279-h to read as follows:

19 § 1279-h. Debarment. The authority shall establish, pursuant to regu-
20 lation, a debarment process for contractors of the authority that
21 prohibits such contractors from bidding on future contracts, after a
22 debarment determination by such authority, for a period of five years
23 from such determination. Such regulations must ensure notice and an
24 opportunity to be heard before such debarment determination and provide
25 as a defense acts such as force majeure. Such regulations shall only
26 provide for a debarment in situations involving a contractor's failure
27 to substantially complete the work within the time frame set forth in
28 the contract, or in any subsequent change order, by more than ten
29 percent of the contract term; or where a contractor's disputed work
30 exceeds ten percent or more of the total contract cost where claimed
31 costs are deemed to be invalid pursuant by the contractual dispute
32 resolution process.
