

Overview of New York's Procurement Laws and Framework

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New York's Public Procurement Laws

- **Purpose**

- Prevent favoritism, corruption, and fraud
- Protect the public fisc
- To serve as a shield for taxpayers, not a sword for contractors

GML §103

- **GML §103 – Letting of contracts**
 - Lowest responsible bidder
 - Responsibility and responsiveness are key
 - Challenges can be made, but courts favor low bidder where possible
 - Exception for professional services

GML §103

- Exception to competitive bidding for services requiring specialized or technical skills, expertise or knowledge, exercise of professional judgment or a high degree of creativity
- Exception is not statutory; it's based on case law
- Examples include accountants, architects, attorneys, and engineers
- Contracts to be procured pursuant to local procurement policies and procedures required by GML §104-b
 - Sets forth procedures for procurements for goods and services not subject to Section 103, and for establishing procurement policies and issuing RFPs

GML §101

- **GML §101 – “Wicks Law”**

- Public construction projects must separately prepare bid specifications and contracts for: (i) plumbing; (ii) heating and air conditioning; and (iii) electrical
- Increases competition among specialty contractors by cutting out the general contractor (“middle man”)
- Project dollar amounts
- Only applies to public authorities if specifically included in their enabling legislation
- Project Labor Agreement exception

Project Labor Agreements

- Section 222 of the Labor Law
- A PLA is a pre-hire collective bargaining agreement establishing a collective bargaining representative for all persons who will perform work
- Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 222 (1993) (commonly referred to as “Boston Harbor”)
 - U.S. Supreme Court set forth constitutionality of utilizing PLAs
 - Government’s proprietary function, not regulatory function
- Matter of New York State Ch., Inc., Associated Gen. Contrs. v. New York State Thruway Auth., 88 N.Y.2d 56 (1996) (commonly referred to as the “Thruway case”)
 - Authorized use of PLAs in New York under certain conditions

Project Labor Agreements

- PLA may be utilized on a given project under certain conditions:
 - Reliance on a consultant's pre-bid feasibility or due diligence report project manager favoring a uniform agreement
 - A finding that a PLA has a proper business purpose, that it will provide direct and indirect economic benefits to the public, and that it will promote the particular project's timely completion
 - A showing of "more than a rational basis" for the necessity of the PLA
 - Consideration for the potential for labor unrest
 - A showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes
- Case law indicates that if these guidelines are followed, pursuant to more than cursory review and consideration, a PLA likely will be considered valid

Covid-19 Updates

- Public bid openings
 - Executive Order (“EO”) 202.11. EO 202.11 permits the non-public opening of bids
- Public participation
 - Where practical, public entities must record or live stream bid openings so that the public has the opportunity to view such bid openings
 - Bidders may participate remotely as well
- Electronic bids
 - Bids may be accepted in electronic format
- Site visits
 - Pre-bid conferences or site visits are discouraged, unless essential
 - Virtual or remote site visits are recommended

Public-Private Partnerships

- **Forms of public-private partnerships/alternative project delivery**
 - Contract operations
 - Design/build
 - Design/build/operate
 - Lease
 - Design-build/operate/transfer
 - Contraction Manager at Risk

Public-Private Partnerships

- Request for Proposals process
- Best value, not lowest price procurement
- Evaluate proposals based on:
 - Qualifications
 - Technical specifications
 - Business deal
 - Price
- Negotiated transaction
- Aggregation of services: design, construction, operation, and maintenance

Traditional Approach: Design-Bid-Build (DBB)

- Description
 - Public entity contracts separately with engineer to design project and contractor to construct project (decision on construction based on lowest cost bid from responsive, responsible bidder)
 - Public entity or private company operates and maintains facility
 - Performance and business risk transferred

Public-Private Partnership

- A single entity is responsible for designing, building an improvement or new facility and is accountable for results through acceptance
- Single source guarantor
- Government does not separately retain or manage design engineer, general contractor for construction
- Performance and business risk transferred

Potential Advantages of Public-Private Partnerships Compared to DBB

- Potential for lower cost
- Ability to select on criteria other than low cost, not issue of quality associated with accepting low bid
- Predictable future costs specified by contract (Fixed Price Guarantee)
- Guaranteed schedule to complete construction, typically shorter
- Guaranteed performance

Potential Advantages of Public-Private Partnerships Compared to DBB

- Assumption of technical/environmental/ business risks
 - Technical: achieve design/performance limits; if it breaks, company fixes it
 - Environmental: if exceed permit limits, company fixes and pays fines
 - Business: company assumes risk of construction costs, schedule delays

Potential Advantages of Public-Private Partnerships Compared to DBB

- Single source provider and guarantor for performance, less potential for claims, litigation
- Reduction in potential for change orders
- Fewer public management requirements – day-to-day management with company
- National and international resource base to tap into – research, planning, trouble-shooting, training, optimization, regulatory review

New York State Design-Build Statutes

- Infrastructure Investment Act (2011)
 - Authorized best value procurement for certain state agencies
 - Tappan Zee Bridge project
- New York Transformational Economic Development Infrastructure and Revitalization Projects Act (2016)
 - Authorized design-build for Javits Convention Center
- New York City Public Works Investment Act (2020)
 - Authorizes some New York City agencies to use the design-build delivery method for certain capital projects

New York State Design-Build

- But most public entities must procure agreements on low-bid basis
 - Requires a completed design, meaning that design services must be procured separately and before construction work is procured
- But some public authorities not subject to low-bid laws, so should be authorized to utilize design-build
- Local development corporations also authorized

New York State Design-Build

- Opposition
 - Department of Education licensing laws for engineers
 - New York State Society of Professional Engineers
- No outright ban on design-build
- Design-build clearly authorized for private entities
 - *Charlebois* case – Court of Appeals

Public Authorities Law

- Article 8 sets forth enabling legislation for specific entities
- Generally more flexible than GML §103
- Procurements can be made pursuant to individual Authority procurement policies, unless otherwise specified in enabling legislation
- Allows for alternative project delivery in some cases

Best Value Case Study

- *AAA v. Stony Point*, 159 A.D.3d 1036 (2018)
 - WGL represented long-standing client, the Rockland County Solid Waste Management Authority (the “Authority”, now D/B/A “Rockland Green”), in a challenge to a contract award on a best value basis
 - The Second Department determined that the Authority was a public benefit corporation, which was subject to the Public Authorities Law, not the General Municipal Law
 - Therefore the Authority properly accepted a bid for recycling services which was not the lowest bid
 - Any limitations placed on a public authority’s power to contract must come from that authority’s enabling statute, not the General Municipal Law

Local Development Corporations

- Local development corporations (LDCs) are private, not-for-profit corporations often created by, or for the benefit of, local governments for economic development or other public purposes
- Governed by §1411 of Not-For-Profit Corporation Law
- LDCs are not subject to public procurement laws that require certain contracts to be bid competitively; they may use P3 procurements
- May acquire property from local government without appraisal or public bidding
- Debt is not subject to the constitutional debt limits established for most municipalities

New York Counties' Use of P3s

- Not common, but has been used
- New York legal authority
 - General Municipal Law (Section 120-w)
 - Specific purpose (energy performance contracts Energy Law, Article 9)
 - Special legislation
 - Professional services exception
 - Home Rule Charter

New York Counties' Use of P3s

- **GML §120-w – Solid waste contracts**

- Authorizes municipalities to enter into contracts for design, construction, and operation of solid waste management facilities, and solid waste collection and disposal
- Broad definition of solid waste, includes:
 - Solid and yard waste, composting, recyclables, sludge
- Permits the design, construction, operation, financing, ownership or maintenance of a solid waste management-resource recovery facility for up to 25 years
- Request for proposal process
 - Draft RFP
 - 60-day review period
 - Final RFP

Section 120-w Case Study

- **Rockland County**

- Co-composting facility

- Utilized Section 120-w provisions to procure and develop a co-composting facility
 - Recycles bio-solids from wastewater treatment plants in Rockland County. The bio-solids are mixed with clean wood waste and then composted. The finished product is used as a soil amendment for use on golf courses, flower gardens and landscaping projects

- Materials recovery facility

- Utilized Section 120-w provisions to procure and develop a materials recovery facility
 - Processes commingled papers and commingled containers

- Alternative waste disposal projects

- Currently utilizing Section 120-w to solicit expressions of interest and a subsequent RFP for alternative waste disposal options, which may include potential waste to energy projects

Professional Services

- *Fawcett v. Buffalo*, 275 A.D.2d 954 (2000)
 - Company contractually assumed management for the City's municipal water system, including employees
- Comptroller Opinion No. 82-290 (1982)
 - Contract with private corporation to operate public sewer system, without competitive bidding, may be made under the provisions governing professional services contracts

Professional Services Case Study

- **Nassau County Wastewater Facility Operation & Maintenance Agreement**

- Private operation, maintenance and management of the County's sewer system
 - Serves 1.2 million people
 - 3 treatment plants, 53 pumping stations, 3,000 miles of pipe
- 20-year, \$1.2b concession
- Savings of \$230m over contract term
- Procurement pursuant to professional services exception
- Largest water-related P3 to date in the US.
- Operator performs construction management of upfront capital improvements that are public works projects subject to GML §103

Energy Performance Contracts

- EPC is a financing technique that uses cost savings from reduced energy consumption to repay the cost of installing energy conservation measures
- The costs of the energy improvements are borne by an Energy Service Company and are paid back out of the energy savings
- Authorization for state agencies, authorities, school boards, and municipalities to procure through competitive bid or RFP– exemption from low bidding requirements – Energy Law §9-103
- EPCs have been compared to design-build contracts
- Wicks Law does not apply – Energy Law §9-103

EPC Case Study

- **NYC Housing Authority**

- Largest EPC for any U.S. housing authority
- Retrofit 300 NYCHA developments across 1,000s of buildings and 10,000s of apartments
- Water, electricity, heat costs increased 64% over the last 10 years to \$576m annually
- PLA negotiated with Building Construction Trades Council (BCTC) of Greater New York
- NYC has goal of retrofitting every public building for efficient energy use by 2025

County Special Legislation

- **Special Legislation**

- Onondaga County (2014 N.Y. Laws Ch. 35) (Amphitheater)
- Orange County (1997 N.Y. Laws Ch. 504) (Sewer)
- Rockland County (2002 N.Y. Laws Ch. 665) (Wastewater treatment plant, sewer collection system)
- Suffolk County (County Law §§265, 268, 277) (Sewer)

County Special Legislation Case Study

- **Rockland County Sewer District No. 1**

- Failing septic systems were contaminating the Ramapo River Watershed
- Required construction of new wastewater treatment plant and sanitary sewer system
- Special legislation necessary to allow for efficient completion of project
- First wastewater treatment plant DBO project in New York State

Home Rule Charter/Lease Authority

- **Constitutional, State, and Local Authorization**

- Article IX of the State Constitution
 - Grants home rule to counties, cities, towns and villages
- NYS Municipal Home Rule Law
- Local Laws
 - Same status as an act of the State Legislature because it is granted from the State Constitution
 - 19 charter counties have broad authority to enact laws that supersede otherwise applicable state laws
 - Sale or lease of property
 - County Law § 215

Home Rule Charter/Lease Authority Case Study

- **Nassau County/Nassau Veterans Memorial Coliseum**
 - Procurement under Nassau County Charter §2206-a
 - Coliseum specific provisions
 - Lease of real property
 - Exemption of public work for event management and building maintenance
 - \$180 million 100% private investment
 - \$194.5 million minimum guaranteed revenue to County

Conclusion

- Public-private partnerships are becoming more popular with municipal governments
- Have been used in New York
- Counties may use P3s under certain circumstances

About WGL

- Boutique infrastructure law firm that provides responsive legal solutions with cost-effective results
- Advise infrastructure owners in financing, operating and maintaining vital infrastructure in the social, water, energy and transportation sectors
- Experienced in conducting alternative project delivery procurements including design-build and public-private partnerships
- Team members have spent their careers serving the public interest in private practice or government