



American Council of Engineering Companies of New York

TESTIMONY

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Introduction:

To the members of the State Senate and Assembly present here today, we appreciate the opportunity to deliver testimony on the proposed Executive Budget for SFY 2025-26 as it relates to engineering, particularly transportation, infrastructure, and construction.

My name is Michael Burrige and I serve as the New York State Director of Government Relations for the American Council of Engineering Companies of New York (ACEC New York). I am joined by Maria Lehman, P.E., who serves as the Chair of our Legislative Committee, and is GHD's Infrastructure Market Leader for the U.S., former Acting Executive Director of the New York State Thruway Authority, and was a member of President Biden's National Infrastructure Advisory Council.

ACEC New York is comprised of a diverse group of almost 300 consulting engineering firms, collectively employing about 33,000 New Yorkers and nearly ten times that worldwide. Our member firms range from sole proprietors to multi-national corporations across New York State, with a concentrated presence of firms located in New York City. About 25 percent of our membership is comprised of M/WBE and veteran-owned firms.

NYS DOT Capital Plan:

The Executive Budget proposal released on January 21st champions a major priority of ACEC New York and its coalition partners in the design and construction industry, and that is the inclusion of an additional \$800 million for 'core' projects as part of the NYS DOT 5-year Capital Plan. This funding is crucial to restore the plan's purchasing power and ensure that projects outlined in the Capital Plan's Memorandum of Understanding remain in the program.

Improving affordability and public safety for all New Yorkers is the major theme for this year's budget season and legislative session, and investing in our transportation infrastructure fits squarely within those values. According to the most recent Annual Highway Pavement and Bridge Conditions Report, nearly 11,400—about 65 percent—of the State's bridges are in fair or poor condition, and 17,000 lane miles—about 40 percent—are in fair or poor condition. As for the economic impact on motorists, the recent National Transportation Research Nonprofit (TRIP) report estimates that the combined costs from road conditions, congestion, and accidents amount to about \$3,500 per motorist in terms of lost time, fuel, and auto maintenance and repair.

As this data shows, it is imperative for the state of New York to immediately address the rapid deterioration of our transportation infrastructure and complete the projects included in the Capital Plan's MOU. Uncertainty related to federal funding for current and future transportation infrastructure projects is a significant concern for the design and construction industry, and we will be working with our federal partners to help secure the unspent Infrastructure Investment and Jobs Act funding and push back against its elimination. As a state, we should focus on what we can control, and that includes an honest assessment of the current condition of our transportation infrastructure, coupled with the will to aggressively invest to turn the tide.

ACEC New York strongly supports the inclusion of the additional \$800 million and recommends its inclusion in the final budget.

MTA Capital Plan 2025-2029:

It is apparent that negotiations need to occur to identify additional funding to ensure the MTA has the necessary resources to fulfill its \$68.4 billion Capital Plan request. Consulting engineers are proponents of a robust MTA Capital Plan and championed the benefits of the MTA Central Business District Tolling Plan, meant to reduce traffic congestion, improve air quality, and create an important revenue stream. New Yorkers and other users of the MTA deserve a safe, reliable, and affordable transit system. These core objectives cannot be met without a dedicated and predictable long-term investment.

In this year's State of the State address, the governor mentioned the need for the MTA to identify cost efficiencies as part of negotiations. We understand that efficiencies must be found at the MTA as part of any plan to increase revenue to fund the Capital Plan. Since 2020, consulting engineering firms have shouldered the burden of cost-efficiency measures in the form of across-the-board rate cuts of 10 percent. Further, engineering firms were required to pay back the Paycheck Protection Program (PPP) loans through credits on their overhead rates under the Federal Acquisition Regulation (FAR)—to the tune of hundreds of millions of dollars. This rule not only applied to federal contracts, but also State contracts that apply FAR cost principles. We hope that all the relevant stakeholders appreciate the adversity engineering firms have weathered over the past several years and reject any cost-cutting measures that target the engineering community.

Workzone Speed Camera Program:

ACEC New York and its members remain extremely concerned for the well-being of the men and women performing work and maintenance on our roads, bridges, and tunnels. These dedicated men and women deserve a safe working environment just like any other trade and profession. We commend the governor's proposal to make the Automated Work Zone Speed Enforcement program permanent and expand it to include MTA bridges and tunnels and the New York State Bridge Authority properties.

ACEC New York strongly urges the Legislature to include this program expansion in the final budget agreement.

New York Opportunity Promise Scholarship for Community College:

Promoting the profession of engineering to the next generation is a priority for ACEC New York and a passion for many of our members. Since 2002, ACEC New York has awarded more than \$1.3 million in scholarships, including second year community college students who intend to continue their education at a four-year school. If New York is going to remain competitive at the national and international levels, it must prioritize college affordability for students considering a career in professional engineering and its specialty disciplines, such as civil engineering, mechanical engineering, electrical engineering, structural engineering, among others.

The governor's inclusion of a new Opportunity Scholarship for SUNY/CUNY community college students pursuing a degree in a high-demand field should be commended and embraced by the Legislature. Further, the State should explore enhancements to the STEM Incentive Program

and the feasibility of loan forgiveness for accredited engineering degree programs, similar to the incentives provided to teachers, farmers, nurses, and other high-demand occupations.

Alternative Project Delivery and Procurement:

ACEC New York believes in the value of project delivery systems that guide the design of public and private facilities, are in the best interest of the owner, utilize a Qualifications-Based Selection (QBS) procedure for the selection of design professionals, provide unbiased protection for existing and future infrastructure, and protect the health, welfare and life safety of the public. ACEC New York recognizes that the traditional design-bid-build project delivery system is utilized for the majority of construction projects. However, ACEC New York also acknowledges design-build as an alternative project delivery system that, while not appropriate for every project, is a useful delivery tool to have in certain circumstances for private and public projects.

When done correctly and on appropriate projects, design-build can reward efficiency and innovation, bring about faster and more responsive solutions, reduce costs, and reduce disruption to system users and surrounding communities. Still, design-build or other alternative delivery methods bring advantages only when applied to projects of appropriate scope and complexity, and managed by experienced owners. Design-build is not appropriate for all jobs, and in many cases, has unintended consequences for the professionals tasked with designing and constructing the project. It is not in the State's interest to move to an environment where design-build is mandated or comprises the majority of procurements issued.

Providing sophisticated public owners with the flexibility to include additional alternative delivery tools in their procurement toolbox should be a priority for the State, as it aids in the modernization of public procurement and allows agencies and authorities to respond to specific needs on a project-by-project basis. However, it is essential that the statutory authorization outlines the process in unambiguous terms to ensure best practices are standard and being utilized from one public entity to the next. Design-build projects and contracts vary broadly, and not all of them utilize best practices meant to facilitate an equitable and predictable process conducive to a successful public project. Additionally, some design-build contracts fail to distribute risk in an equitable manner.

We support the expansion of different alternative delivery methods, such as construction manager as constructor, construction manager build, and authorization for the use of "progressive design-build." Progressive design-build (PDB) allows for an accelerated procurement to select and award a contract to the most qualified PDB team. Once selected based on qualifications, the Owner and PDB team enter what is commonly referred to as Phase One or Preliminary Preconstruction Services, and advances concept design development to 60 to 80 percent complete. The culmination of Preliminary Preconstruction Services results in an agreed upon concept and expectations that then become the basis by which the PDB team prepares a formal commercial project delivery proposal that includes the overall contract price.

We applaud Governor Hochul for including progressive design-build in the Executive Budget proposal for State agencies and authorities currently covered under the Infrastructure Investment Act. However, as the bill language reads, the term "progressive design-build" is not defined. If the term and process are not defined and outlined in the law, it may lead to its

disparate use, making it difficult, if not impossible, to correct deficiencies on an agency-by-agency basis. ACEC New York encourages the governor and the legislature to consult with our subject matter experts and other A/E/C industry stakeholders possessing the experience and expertise necessary to ensure the language maximizes the potential for PDB delivery.

Fair and Reasonable Contract Terms:

As the State continues to seek ways to efficiently execute projects, public owners' relationships with and reliance on their consulting engineering partners is of increased importance. The fair and commercially reasonable apportionment of risk is critical to allowing engineering firms to participate in public works projects. The fair and manageable transfer of risk is achieved through negligence-based defense and indemnification clauses in public works contracts. The prevalence of broad-form indemnity and duty to defend clauses in contracts for public work continues to be a major problem for firms providing professional design services in New York and exposes firms to liabilities which are outside their control and are uninsurable.

Broad-form indemnity and defense contract clauses are uninsurable, because unlike contractors, licensed design professionals do not take over or exercise constructive control over a jobsite and therefore should not be required to indemnify the client for liabilities that are due to anything other than the consultant's professional negligence. Professional liability insurance covers consultants against injuries and damages resulting from their negligent professional acts, errors or omissions. To prove negligence, a claimant must establish a professional standard of care, establish the consultants' duty to adhere to that standard of care, and establish their failure to do so—and then prove that this failure proximately resulted in injury or damage to the claimant.

Unreasonable and uninsurable indemnity and defense clauses in contracts are harmful to every party involved. It not only puts businesses at risk of failing, it may also prevent individuals who are harmed from just compensation. ACEC New York urges the governor and the legislature to pass legislation this year to advance public contract reform and remove these broad-form indemnification and defense clauses from contracts for public work. The State Legislature passed similar legislation in 2018 (A.8293-A/S.6622-A) by a near unanimous margin. Unfortunately, this bill was vetoed based upon a misinterpretation of its intent and scope. ACEC New York is working with legislative sponsors to introduce an amended version of the bill this Session.

Expand Qualifications-Based Selection (QBS):

The use of a qualifications-based approach for the procurement of architectural and engineering services on publicly funded projects was codified into law (P.L. 92-582) by the U.S. Congress in 1972. Also known as the "Brooks Act," this law requires engineers and architects to be selected for all federal government projects on the basis of qualifications, subject to negotiation of fair and reasonable compensation. Today, most states follow QBS procedures for procuring architectural and engineering services, including the state of New York.

In 1980 the New York State Legislature passed, and the governor signed into law, Chapter 562, requiring all State agencies to use QBS when procuring architectural and engineering services in excess of \$25,000. Since that time, §136-a of the State Finance Law has been expanded to



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include geological, landscape architecture, and land surveying services. QBS is endorsed by the American Bar Association as part of its “Model Procurement Code for State and Local Governments,” and is a recommended best practice in the New York State Education Department’s “Manual of Planning Standards for School Buildings.”

Unlike State agencies, municipal entities and public authorities are not required to use QBS when procuring professional design services—an anomaly among federal and state procurement procedures. In 2017, the State Legislature passed bill (A.5750/S.5600), which would extend the QBS requirement to public authorities and public benefit corporations. Unfortunately, the governor vetoed the bill. Once again, we are asking the Legislature to pass this legislation and bring public authorities in-line with procurement practices used by federal and State agencies for the past fifty years.

Closing:

New York’s efforts to maintain and repair our transportation infrastructure are critical to the State’s interest in driving broad-based and inclusive economic prosperity. ACEC New York is committed to working with our public counterparts to maximize the benefit of every taxpayer dollar spent on the State’s transportation and infrastructure programs.

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