

Testimony before the  
Assembly Standing Committee on Transportation

December 6, 2019  
Albany, NY

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Dear Members of the Committee:

I want to thank you for holding this hearing and giving me an opportunity to submit testimony about the State's DOT Capital Plan.

The prior NYSDOT Capital Plan provided a significant, stable and much needed infusion of funding. As the State Department of Transportation is developing its next capital plan, we encourage the State to continue to provide strong and predictable funding to avoid undoing years of solid progress.

**Local programs:**

Pave NY and Bridge NY must be continued. These programs – particularly Bridge NY – have been successful in providing funding for improvement of local roads and bridges. Our members who are directly involved in implementing these programs report that DOT and local components of the program are uniquely valuable in delivering for the State's road users.

**Allocation of resources:**

In developing the future program, we believe it would be worthwhile to analyze whether asset management is better served by a program focused on more rehabilitation and replacement/reconstruction in contrast to the approach of past programs where corrective/preventive maintenance is supplemented by a few transformational projects.

As the next 5-year program is developed, we encourage continued use of design consultants, especially in upstate regions. The Department has traditionally committed to a roughly even split of in-house and consultant design. In the past, the combined (design and construction) allocation was 60% downstate (Westchester County through NYC) and 40% upstate. The newest TIP (Transportation Improvement Program) shows an 81% downstate/19% upstate split. We hope to see greater utilization of the creativity and flexibility your consultant partners bring in the upstate area.

**Continued Contractual Certainty:**

The State's professional design community has experienced significant upheaval and disruption by having certain existing agreements unilaterally altered under the threat of cancellation. This uncertainty threatens the timely and effective completion of projects and sends a clear signal that contracts will not be honored and the professionals behind them not respected. Our professional community prides itself on responsive, cooperative and productive working relations with public owners, and NYSDOT is a critical partner to

ACEC New York and our member firms. We hope that this unilateral contractual modification is reconsidered, but more importantly, that NYSDOT (and other Stage agencies) reject this as an acceptable way of doing business.

Given this hearing's focus on the impact of the budget on the NYS DOT Capital Program and related issues, we must mention that the 2019-2020 budget contained Article VII language requiring the MTA to issue debarment regulations. These debarment regulations require the MTA to debar any contractor, including design consultants, for 10% time or cost overruns. The regulations that were issued in May give the MTA minimal discretion in evaluating the causes for such overruns, provide no meaningful due process opportunity, apply debarment to individuals – including junior employees with minimal managerial authority – and impose draconian and punitive measures far out of step with typical debarment clauses and out of proportion with the conduct sought to be deterred. These debarment regulations work in conjunction with Executive Order 192, issued in February, which can be summarized as creating a “debarred for one agency, debarred for all agencies” regime. Combined, these two acts create an environment where a contractor or engineer can be debarred by the MTA for issues caused *by the MTA* with the consequence of being debarred from working for NYSDOT. This puts firms in an impossible situation and poses a threat to the ongoing existence of firms attempting to do work in this State. As this situation progresses, these regulations will cause difficulties for agencies, like NYSDOT, to find contractors and design consultants willing to pursue public work with the fee and schedule structures to which they are accustomed. We strongly encourage the legislature to revisit and reconsider this misguided section of law.

### **Scope and planning:**

We'd like to bring attention to what we perceive as a lengthening of the amount of work and time between designation and notice to proceed/signed. Member firms report that it can now take 10 months to get even the smallest contract started. In addition, consulting engineers are being asked to submit a scope that is trimmed to meet an assigned budget with a long list of technical assumptions to reduce the scope of specific tasks in the standard NYSDOT SOS.

Another concern is the project deliverable schedules that change with insufficient notice. This is problematic from a staff management point. Design consultants schedule staff to complete a deliverable by a specific date and if that date is suddenly amended, that can leave a hole in the firm's workload that could have been accommodated with greater notice.

While we understand the technical and administrative challenges inherent to beginning and executing a project, we encourage the Department of Transportation to explore methods to both expedite this process and add greater timeline certainty, and we are eager to collaborate to identify efficiencies and solutions.

### **Federal Action:**

The Federal political climate remains challenging, and infrastructure plans have repeatedly been proposed and then abandoned. Despite the uncertainty this brings, we are heartened by the recent removal of the FAST Act's rescission provision and the corresponding funding clarity this brings. We are encouraged that State-level stakeholders have indicated their continued commitment to delivering for the State's needs, despite the uncertainty and challenges flowing from the Federal government's lack of clarity in policy direction and funding.

ACEC New York continues to communicate with Congressional leaders and industry partners about the long-term value of infrastructure investment, and we encourage State legislative and Agency leaders to continue to promote this message. Long-term, stable transportation funding helps New York plan long-term capital programs on the State level. For reference, FHWA has estimated that for every billion dollars spent on infrastructure, 28,000 jobs are created. These jobs will benefit workers across the skill and economic spectrum and bolster minority- and women-owned businesses. More jobs will positively influence spin-off economies and related service and material suppliers throughout the state. This investment will also result in new tax bases that will pay an immediate dividend. Besides improving the economy, investment will provide necessary rehabilitation and improvements to our deteriorating infrastructure, the decline of which negatively impacts public health and impairs our ability to compete nationally and globally. Sound infrastructure will attract businesses to invest in the city, while crumbling roads and bridges will make investment less attractive and could lead to an exodus of businesses and the jobs they create.

## **Alternative Project Delivery and Procurement:**

The use of design-build procurement continues to increase. When done correctly and on appropriate projects, design-build can reward efficiency and innovation, bring about faster and more responsive solutions, and reduce disruption to system users and surrounding communities.

These time savings can, in certain circumstances, lead to cost savings. Still, design-build or other alternative delivery methods bring advantages only when applied to projects of appropriate scope and complexity, managed by sophisticated and experienced owners. Design-build is not appropriate for all jobs and, in many cases, has unintended negative 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 makes up most procurements issued. Responding to design-build procurements involves considerable up-front outlay by design firms. Without clear and fair rules regarding compensation for this work, qualified firms will be less likely to pursue these opportunities. In addition, factors such as liability limits, schedule accelerations, additional insurance policies, quantity estimate responsibilities, multipliers, win bonuses and other items need to be addressed carefully and developed to promote success by design firms and clients alike.

Finally, we encourage this committee to continue supporting the use of Qualifications-Based Selection (QBS) for procurement of professional design services. This method – applied to State Agencies via State Finance Law §136a – leads to increased competition by proposing firms. Utilizing a QBS system to procure the professional services of a design professional provides the client and the public with the most important aspect of that service – namely, the innovative approaches and alternative methods which arise when working together with the design professional on the precise scope of a project. In 2005, New York City adopted QBS via Procurement Policy Board rule, and a subsequent study issued by the City noted that (in comparison to the prior cost-based procurement model) the number of firms proposing on projects increased, many of which were small and had not pursued City work before, and were also highly qualified and competitive for the work being sought. We appreciate NYSDOT's commitment to QBS procurement of professional design services, and we hope that it can inform the procurement practices of other State and municipal transportation-related clients.

# ACEC New York

*American Council of Engineering Companies of New York*

New York State Department of Transportation's various projects 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.

A handwritten signature in black ink, appearing to read "Jay Simson". The signature is fluid and cursive, with a large initial "J" and "S".

Jay Simson, CAE  
President & CEO  
ACEC New York