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# **Responsible Bidding on Public Work: Improving New York's Lowest Responsible Bidder Law**

A Report by the  
New York State Senate Standing Committee on Labor  
Senator George Onorato, Chair  
January 2010

# The New York State Senate Standing Committee on Labor

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# Executive Summary

The awarding of public work contracts to irresponsible bidders is a problem that has been around for decades. In New York, state and local public construction contracts above certain dollar amounts must be awarded to the lowest responsible bidder, but the law does not define the term “responsible.” As a result, state and local contracting officials award public work contracts using different standards. Many contracting officials understand that contractors who fail to pay prevailing wages or provide workers’ compensation, fail to pay unemployment and other payroll taxes, or possess a criminal record are not responsible bidders. In the end though, since the law also allows agencies to consider the lowest bid, award decisions are often driven by cost savings.

This gap in the law has serious consequences for workers, law-abiding contractors, and state and local governments. Contractors who successfully underbid other firms often do so by misclassifying their employees as independent contractors. Misclassification enables them to avoid paying unemployment insurance, prevailing wages, workers’ compensation and disability insurance. These unscrupulous contractors place the welfare and safety of workers at risk. Their employees do not receive prevailing wages, or workers’ compensation benefits if injured on the job, and often lack the training needed for the project since their employers do not participate in apprenticeship training programs. Irresponsible bidders also create an unlevel playing field for employers who submit higher bids because they rightly pay prevailing wages and provide apprenticeship training.

Locally, municipalities are hurt when local workers bring home insufficient paychecks to support local businesses and pay taxes. Poorly built projects create new costs in terms of needed repairs, delay and enforcement actions. For the State, millions of dollars in uncollected revenues from unemployment and payroll taxes are siphoned off into New York’s underground economy.

In order to study the problems that exist under the current lowest responsible bidder law and to determine whether the law should be amended, the Senate and Assembly Labor Committees held a joint hearing on April 22, 2009. Testimony was presented by state and local officials, building trade unions, contractor associations, local government organizations and others on the best practices used in New York and elsewhere to award public work contracts.

## Current Systems

State contracting agencies in New York are required to follow uniform guidelines established under Executive Orders to determine the responsibility of bidders on state public work contracts. Bidders must answer questions probing their responsibility including workers' compensation and unemployment insurance coverage; compliance with prevailing wage, other labor, OSHA and environmental laws; any criminal convictions or investigations for business-related activity; public bidding debarments or disqualifications; contract suspensions or terminations; revocation of minority and women-owned or disadvantaged business certifications; financial capacity and bankruptcies; professional license sanction history; and identification of principals, officials and shareholders with 5% or more of the firm's shares. The State Comptroller maintains the information in a database of contractors and subcontractors for use by state contracting officials in determining the responsibility of bidders. Questionnaires are accessible under the Freedom of Information Law.

New York City uses a Vendor Information Exchange System (VENDEX) that requires vendors and their principals to each complete questionnaires which are updated every three years. The Mayor's Office of Contract Services (MOCS) stores the information in a database for use by the City's contracting agencies. In addition to several items of information regarding bidding and contract debarments and disqualifications, criminal activity, judgments and fiscal integrity, similar in part to that required of state bidders, additional information must be provided regarding any failure to file federal, state or local tax returns, non-payment of taxes, and conflicts of interest. The public may view the questionnaires on public access terminals at MOCS.

Other municipalities in the State lack such sophisticated resources and use their own criteria in determining bidder responsibility. The City of Rochester and localities in other states have ordinances that require contractors and subcontractors to meet certain responsibility standards, including the use of approved apprenticeship training programs. Several jurisdictions also require proof of compliance with prevailing wage and workers' compensation laws, and proper classification of workers. Standard questionnaires are commonly used.

Many public contracting systems also utilize a pre-qualified list of contractors and subcontractors to award public work contracts, including the New York City School Construction Authority. Pre-qualification relieves contracting entities of the burden of conducting individual responsibility determinations before bids are opened, and enables contractors to identify qualified subcontractors. Pre-qualification also saves unqualified contractors time and money otherwise spent preparing unsuccessful bids, and can help reduce litigation against contracting agencies.

## Legal Obstacles

Legal obstacles in selecting responsible bidders have resulted from the interpretations by New York courts of the term “lowest responsible bidder.” The courts have interpreted this term to mean furthering the central goals of the State’s competitive bidding laws, which include protecting the public treasury and avoiding favoritism in choosing bidders. The courts have rejected attempts to select bidders based on other factors such as whether they use State-approved apprenticeship training programs. These decisions pre-date the recognition by several jurisdictions in New York and elsewhere that a well-trained workforce reduces costs by limiting workplace injuries and producing a better quality project with less delay. These decisions have also deprived local owners of standards that could help avoid litigation by unsuccessful bidders challenging the objectivity of local public work awards.

# Recommendations

The overwhelming majority of testimony and written statements submitted for the hearing recommended that standards be added to the law for state and local contracting officials to use in selecting responsible bidders for public work. A minority expressed concern that contracting officials would lose the discretion needed to determine bidder responsibility. The hearing clearly showed, however, that the current lack of standards is the main reason why unscrupulous contractors win public work contracts. Uniform standards of responsibility would ensure the best protection and minimize public work costs for employees, law-abiding employers and taxpayers throughout New York. Responsibility standards would also help reduce unforeseen costs from delays, repairs and litigation, and stem the flow of tax revenues into New York's underground economy.

## I. Standards to Determine Responsible Bidders

The state finance law and general municipal law should be amended to establish and require the use of responsibility standards by state and local contracting officials, including public authorities, in selecting bidders on public work contracts. Bidders would be required to complete a uniform questionnaire. Their information would be maintained by the State Comptroller in a central database for use by state and local contracting officials in awarding public work contracts.

## 2. Uniform Questionnaire

Contractors and subcontractors should be required to complete a uniform questionnaire to be reviewed by the contracting agency before a public work contract may be awarded to their firms. The questionnaire would require the following information:

- Names, addresses and telephone numbers of owners, principals, officers and shareholders who own or control at least 5% of the company's stock.
- The type of business entity.
- Prior contract performance, including debarments, suspensions and disqualifications from bidding.
- Any federal or state violations of environmental, prevailing wage, unemployment insurance, workers' compensation, health and safety, employee misclassification or other labor laws.
- Any federal or state convictions or pending investigations of criminal or civil law violations.

- Any failure to file federal, state or local tax returns; tax liabilities or judgments; and bankruptcies.
- Use of approved apprenticeship training programs
- Identification of subcontractors planned for the project, and prior use of minority and women-owned subcontractors.
- Expertise and fiscal resources.
- Proof of surety bonds and insurance for workers' compensation and liability.
- Any professional license sanctions.
- Whether health insurance is provided to employees.

Questionnaires must be subscribed as to their truth, accuracy and completeness.

### 3. Centralized Database

The information from the questionnaires should be maintained by the State Comptroller in a centralized database for use by state and local contracting officials in selecting responsible public work bidders. The Comptroller should prepare and post a uniform questionnaire for use by bidders on its website.

### 4. Pre-Qualified Bidder List

Contracting agencies should establish a list of pre-qualified contractors and subcontractors for selecting bidders of public work contracts. The list should be published on the agencies' websites.

### 5. Conformity by Subcontractors

Subcontractors must meet the same responsibility standards as contractors to be eligible to work on public work contracts. Subcontractors who fail to pay prevailing wages or unemployment taxes, who do not provide workers' compensation, or who use poorly trained workers create similar hardships and costs for workers, law-abiding subcontractors and the government.



# Background

In New York, state and local public work contracts above certain dollar amounts are required by law to be awarded to the “lowest responsible bidder.” There are no standards in the law, however, to define a responsible bidder. As a result, the term “lowest responsible bidder” is interpreted and applied differently by project owners across the State. This creates a great deal of inconsistency in the responsibility of contractors and subcontractors who use public funds to build state and local public work projects. Without set standards to determine responsibility, contracts are often awarded without considering a bidder’s compliance with prevailing wage and unemployment insurance laws, use of apprenticeship training, criminal history, prior contract performance and fiscal integrity. Responsible contractors who meet their legal and financial obligations, properly train their workers, and produce quality projects are at a competitive disadvantage from bidders who cut costs dishonestly.

The practice of hiring the lowest bidder without sufficiently determining the company’s labor and fiscal responsibility has repercussions for all parties affected by the contract. State and local project owners face increased costs when repairs are needed for shoddy work or the project is delayed by change orders or litigation. Unscrupulous employers who misclassify their employees as independent contractors deprive workers of prevailing wages and workers’ compensation benefits. Workers are more readily injured on the job when the employer has lax safety practices or provides inadequate training. Contractors who pay required wages and provide apprenticeship training routinely lose bids because they cannot compete with firms that avoid these costs. For the State, millions of dollars are lost annually to New York’s underground economy from employers who fail to pay unemployment and other payroll taxes by hiring workers off the books.

Many bills have been introduced in the Legislature over the past several decades to establish standards to determine bidder responsibility on public work contracts. Each has offered different approaches to the problem. No consensus has ever been reached on how best to identify and select responsible bidders for public work.

On April 22, 2009 the Senate Standing Committee on Labor and the Assembly Standing Committee on Labor held a joint public hearing to study the problems under the current law and whether it should be changed. Representatives from state and local government, building trade unions, contractors’ associations and local government organizations with firsthand knowledge of the economic, social, and brick-and-mortar implications of using irresponsible contractors testified or presented written statements to the Committees. This report presents the findings and recommendations from the hearing.

# Problems with the Lowest Responsible Bidder Law

The questions of whether and how to define a responsible bidder for public work have existed for decades. Numerous bills introduced in the Legislature have tried to define responsible bidding on state and local public work contracts. A representative of the painters union summarized the problem as follows:

“When a contractor is looking to benefit from public money, and by public, I mean taxpayers, it is not unreasonable to ask him to play by the rules. When we simply award contracts to the lowest bidder, without asking him to be responsible, we run the risk of wasting our money ... When a bid is irresponsibly low, the contractor is going to do whatever it takes to turn a profit. He might cheat the workers, cut corners on environmental protections, compromise safety on his jobsite, ignore quality controls, leave the job unfinished, cheat the Workers’ Compensation system, evade taxes, or any combination of the above. Studies show that twenty-five percent of construction workers are paid off the books. If we are looking to take the low road to the bottom, that is easy to do. Why can’t we demand, as taxpayers, that a public project be completed in an efficient manner and with quality?”<sup>1</sup>

## There is no definition of “lowest responsible bidder” in the law

State Finance Law § 135 requires that:

“A contract for one or more buildings in any project shall be awarded to the lowest responsible bidder for all the buildings included in the specifications.”

General Municipal Law § 103 requires that:

“[A]ll contracts for public work involving an expenditure of more than twenty thousand dollars...shall be awarded...to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section.”

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<sup>1</sup> Testimony of Jack Kittle, International Union of Painters and Allied Trades District Council 9, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), pp. III-II2.

The current law does not include any standards to define who is a responsible public work bidder. It is up to state and local project owners to decide how to determine the responsibility of bidders. State contracting agencies are required to follow uniform guidelines contained in Executive Orders for determining the responsibility of public work contractors and subcontractors.<sup>2</sup> The Executive Orders are not law, however, and do not apply to local governments. As a result, courts are not required to enforce these guidelines, which have led to inconsistency in judicial interpretations of the term “lowest responsible bidder.” This has allowed for greater subjectivity and inconsistency in the awarding of local public work contracts. As a representative of the Rockland County Building Trades explained:

“[Y]ou have subjectivity throughout municipalities and even in some of the bigger municipalities. For example, certain contractors that would try to bid throughout different agencies, even in the City of New York, will face different standards of what is a responsible contractor...”<sup>3</sup>

These inconsistencies have also led to litigation, along with a fear of litigation, for local project owners. Several witnesses testified that municipalities are reluctant to adopt responsibility standards not legally required of them at the risk of costly and time-consuming litigation that could delay or derail projects. A representative for the carpenters union explained that:

“There’s been cases where lawsuits have been brought by disqualified contractors who couldn’t possibly have paid the prevailing wages with their bid, but because they were disqualified and there was no definition of what responsible was, they filed lawsuits.”<sup>4</sup>

New York State Labor Commissioner M. Patricia Smith testified that many municipalities want guidance from the law in determining who is a responsible bidder to relieve their litigation concerns:

“[A]t the state level, with the criteria that are there, we have state agencies who are finding contractors not to be responsible. But at the local, municipal level, I find that those agencies are quite reluctant to do so because they fear litigation. They don’t have standards like we have at the state level...and...they’re really asking

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2 New York Executive Orders Nos. 170 and 170.1 (9 NYCRR § 4.170).

3 Testimony of James W. Versocki, Esq. (Representing John Maraia), Rockland County Building Trades, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), pp. 23-24.

4 Testimony of Michael Conroy, Empire State Regional Council of Carpenters, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. 69.

that somehow standards be provided to them so they can rely upon those standards too.”<sup>5</sup>

The Commissioner further explained that providing guidance to municipalities would help the investigations of the Department of Labor as well.

“[W]hat we find is that no matter how successful we are in our investigations, we’re back, we are basically catching the bad guys after the fact. And what the lowest responsible bidder strengthening those standards would do, would weed out the ‘bad guys’ before they get the public jobs. That would obviously lessen the...workload at the Labor Department. But I think more importantly, what it would do, by weeding out the bad guys beforehand, is make sure that not only do we get responsible bidders, but I think that we’re going to get better work on our state public construction contracts.”<sup>6</sup>

Local government organizations such as the Association of Towns of the State of New York and New York State Conference of Mayors and Municipal Officials recommended against changing the law to define the lowest responsible bidder. They were concerned that a definition would rob localities of the necessary flexibility to secure the best contract on a case-by-case basis.

The Association of Towns stated:

“These judicial interpretations guide local government decision-making and create an equitable and efficient process for determining bidder responsibility, obviating the need for a statutory definition of responsibility. The framework so established operates to both preserve the interest of local officials in conducting their business in an efficient and effective manner while also protecting the public fisc and the rights of the potential bidders.”<sup>7</sup>

Most witnesses, however, testified that the law’s failure to define who is a responsible bidder has created inconsistency and unpredictability in how public work contracts are awarded throughout the State. They urged adding responsibility standards for bidders to the current law to resolve these problems.

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5 Testimony of Commissioner M. Patricia Smith, New York State Department of Labor, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), pp. 15-16.

6 Testimony of Commissioner M. Patricia Smith, New York State Department of Labor, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), at pp.16-17.

7 Written testimony of The Association of Towns of the State of New York, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p.1.

## Case Law Restricts the Definition of “Lowest Responsible Bidder”

Restrictive guidelines for determining the responsibility of public work bidders were established by the New York State Court of Appeals more than a decade ago. These restrictions are still used by many contracting officials today. In 1996, the Court ruled that the selection of public work bidders may not violate the two central purposes of New York’s competitive bidding statutes which include: (1) protecting the public treasury by obtaining the best work at the lowest possible price and (2) preventing favoritism, improvidence, fraud and corruption in awarding public contracts.<sup>8</sup> The Court rejected efforts by the New York State Dormitory Authority to award a contract to modernize the Roswell Park Cancer Institute in Buffalo to a contractor that promised to use a project labor agreement to improve employment and contract opportunities for minorities and women.<sup>9</sup> The Court found that these purposes were unrelated to the purposes of the competitive bidding laws. Ten years earlier, the Court struck down efforts by the City of Rochester to require contractors to use an apprenticeship training program in order to be eligible to bid on public work contracts. The pre-condition of an apprenticeship training program, ruled the Court, was not linked to the interests of the State’s competitive bidding laws.

These decisions pre-date a 2001 amendment to the labor law that allows state and local contracting officials to require contractors and subcontractors to use registered apprenticeship agreements prior to entering into a public work contract.<sup>10</sup> Since these decisions, many jurisdictions in New York and elsewhere now require contractors to participate in a registered apprenticeship training program to be eligible for a public work contract. There is a growing recognition that apprenticeship training saves costs by improving the quality of the construction, avoiding delay and repairs, and reducing on-the-job injuries. In 2003, the Rochester City Council passed an ordinance requiring its contractors to have registered and approved apprenticeship agreements prior to entering into a public work contract.<sup>11</sup> In 2009, the Council extended this requirement to subcontractors performing public work.<sup>12</sup> The responsibility guidelines in the Governor’s Executive Orders also consider whether the contractor and proposed subcontractors provide apprenticeship opportunities through registered apprenticeship training programs.<sup>13</sup>

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8 In the Matter of New York State Chapter, Inc., *Associated General Contractors v. New York State Thruway Authority*, 88 N.Y.2d 56 (1996).

9 *Associated Builders and Contractors, Inc. v. City of Rochester*, 67 NY2d 854 (1986).

10 New York Labor Law § 816-b (Chapter 571 of the Laws of 2001).

11 City of Rochester Ordinance No. 2003-347.

12 City of Rochester Ordinance No. 2009-76.

13 New York Executive Order No. 170.1(9) (9 NYCRR § 4.170).

## Good Contractors are at a Disadvantage

Without standards for determining responsibility, contracting officials are able to award public work projects to the low bidder even if that contractor or its subcontractors have prevailing wage violations, fail to pay unemployment insurance taxes, misclassify their workers, fail to use an apprenticeship training program, have health and safety violations, or criminal records related to business activity. Contractors who follow responsible business practices are at an unfair disadvantage. High-road employers who pay prevailing wages, provide workers with health insurance, have not been sanctioned on past contracts, are fiscally responsible, and participate in apprenticeship training programs have higher costs than contractors who do not meet these expectations. Contractors who operate in the underground economy by violating employment and tax laws also shift costs onto law-abiding contractors when increased assessments are needed to protect workers of employers who fail to pay their fair share.

## Detrimental to Workers

Workers suffer when bid price is the main selection factor in awarding public contracts. Contractors who cut corners in order to submit the lowest bid often do so by misclassifying their workers as independent contractors. Independent contractors are not covered by workers' compensation, are ineligible for unemployment benefits, and can lose out on overtime rates and health benefits that employers may otherwise provide to their workers. The extent of employee misclassification in the construction industry in New York State is estimated to be as high as 14.9%,<sup>14</sup> and as much as 25% in New York City.<sup>15</sup>

A representative from the bricklayers union discussed a common scheme that some contractors use to avoid payroll and unemployment taxes:

“[L]et me give one example of a project where the Bricklayers investigated, this was in 2007 in the Bronx, a project where business representatives went to the project on two occasions over several months and videotaped all the workers on the project. On one occasion, there were about 26 workers on the videotape laying brick. The certified payroll for that day only had two people on it. The day several months later, 38 people appeared on the videotape laying brick. There were ten on the certified payrolls. This was a public project, and it was a project where certified payrolls were required, prevailing wage was required. It turns

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14 “The Cost of Worker Misclassification in New York State,” Linda H Donahue, James Ryan Lamare, Fred B. Kotler, J.D. ILR Collection, Research Studies and Reports (February, 2007), p. 2.

15 Fiscal Policy Institute, “Building Up New York, Tearing Down Job Quality” (December 2007), p. 1.

out that the contractor, after we objected to the way the workers performed on the project and the fact that people weren't being reported, ended up on the debarment list for the state. As of October though, the contractor reformulated itself and is back doing brickwork once again in the Bronx, just under a different name. With a different arrangement of ownership.”<sup>16</sup>

Contractors who treat their workers as employees, but disobey prevailing wage and safety requirements present additional problems. A representative for the ironworkers union testified that wage fraud is a “huge issue...[T]here’s a lot of workers out there that are being underpaid, that are afraid to say they’re being underpaid for fear of retribution from their employers.”<sup>17</sup> Workers also face injury on the job if their employers fail to provide adequate safety training, or violate federal Occupational Safety and Health Administration (OSHA) rules. A representative for the International Brotherhood of Electrical Workers (IBEW) gave an example of how irresponsible contractors can place the health and safety of employees at risk:

“He kept getting contracts despite the fact that he had one willful prevailing wage [violation], a dozen non-willful prevailing wages because it was almost impossible to get a second willful in those days, and he had been found guilty of negligent homicide by OSHA. So we asked the OGS Commissioner and his Counsel to come in and explain to us how they kept finding this contractor to be responsible. And the Counsel said, well, responsible is whatever we want it to be...The Judge agreed with them. They said there’s no criteria, they’re responsible, OGS says they’re responsible, they’re responsible. A year later ... the Rochester Laborers brought us a videotape of this contractor working on a SUNY Construction Fund job at SUNY Geneseo, using prison inmates with no protective gear whatsoever, removing asbestos. This person was still considered responsible, and unfortunately under the current state of the law, it would not be impossible for a judge today to still find that person responsible.”<sup>18</sup>

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16 Testimony of William E. Nagel, Esq., Bricklayers and Allied Craftworkers Local 1 New York, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), pp. 116-117.

17 Testimony of Paul Sirianni (Representing Edward Walsh), New York State Ironworkers District Council, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. 73.

18 Testimony of Paul N. D’Onofrio, Esq., International Brotherhood of Electrical Workers, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), pp. 66-67.



## Support for the Underground Economy

Contractors who misclassify their employees as independent contractors, hire workers off the books and pay them in cash, ignore unemployment taxes, fail to provide workers' compensation and disability coverage and fail to withhold workers' personal income taxes fuel an underground economy that costs the State millions of dollars in tax revenues annually. As a former attorney from the State Attorney General's Office testified, "I have personally seen contractors that have tax liens from the State of New York be awarded public work, which is unconscionable. It is an abrogation of our responsibility as taxpayers to allow tax cheats to be awarded public work projects."<sup>19</sup>

The New York State Joint Enforcement Task Force on Employee Misclassification recently reported on the misclassification problem in New York. The Task Force uncovered 12,300 instances of employee misclassification and \$157 million in unreported wages in the State.<sup>20</sup> More than 11% of the businesses investigated were not registered for unemployment insurance.<sup>21</sup> The Task Force has assessed over \$4.8 million in unemployment taxes, over \$1 million in unemployment insurance fraud penalties, over \$12 million in unpaid wages, and over \$1.1 million in workers' compensation fines and penalties.<sup>22</sup> These lost revenues are likely just the tip of the iceberg, since they only represent a limited number of investigations by the Task Force. In New York City, the annual loss from misclassification in the construction industry has been estimated to be \$70 million in unpaid income taxes, and \$272 million in unemployment tax, disability and workers' compensation payments.<sup>23</sup>

## Impact on Localities

When public work employees are underpaid, they have less money to return to the local economy. State Labor Commissioner Smith testified that each dollar of unemployment insurance benefits received by jobless workers returns approximately \$1.64 to their communities through patronage of local businesses and services.<sup>24</sup> On-the-job injuries to employees who have no workers' compensation or proper training can create additional costs. Workers who are not paid their full wages or get injured while working may be forced to rely on public assistance. Turning to government-funded programs such as Medicaid places a financial burden on local governments and communities as well as the State.

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19 Testimony of James W. Versocki, Esq. (Representing John Maraia), Rockland County Building Trades, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, 'Lowest Responsible Bidder' (April 22, 2009), pp. 25-26.

20 The Joint Enforcement Task Force on Employee Misclassification, Annual Report (February 1, 2009), p. 3.

21 Ibid at p.4.

22 The Joint Enforcement Task Force on Employee Misclassification, Annual Report (February 1, 2009), p. 3.

23 Fiscal Policy Institute, "Building Up New York, Tearing Down Job Quality" (December 2007), p. 1.

24 Testimony of M. Patricia Smith, New York State Department of Labor, U.S. Senate Committee on Health, Education, Labor, and Pensions, 'Unemployment in a Volatile Economy: How to Secure Families and Build Opportunity' (March 6, 2008), p.2.



Several witnesses explained how costs can increase and the quality of projects can suffer when contractors fail to use apprenticeship training or employ lax safety practices. A representative for the painters union stated, “When an employer does not offer health insurance to his workers, those workers are going to use public health care systems. And odds are that they will not pay the bill.”<sup>25</sup> A witness for the ironworkers union described problems caused by a subcontractor erecting steel on a new school:

“[The subcontractor] was found guilty...of...failing to provide certified welders as per the job specifications. Subsequently, they had to redo the majority of the welds on the project...We heard earlier in regards to setting a project back. On this particular project...they literally had to rip the roof off of this new school and have the welds inspected, and have the welds removed and rewelded. It was probably a good four-month process in regards to that. And if we had lowest responsible bidder language, obviously that would be something that would have helped that situation.”<sup>26</sup>

### **Irresponsible Subcontractors**

Certain subcontractors engage in many of the same patterns of evasion and non-compliance as irresponsible contractors. In some cases, subcontractors conduct their business in concert with or at the behest of the prime contractor. Testimony was presented concerning the practice of lowballing by certain construction management firms hired by municipalities after presenting attractive proposals. To achieve cost-savings, these firms pressure general contractors who reach agreements with subcontractors to accept lower prices for their work.

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25 Testimony of Jack Kittle, International Union of Painters and Allied Trades District Council 9, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), pp. 112-113.

26 Testimony of Paul Sirianni (Representing Edward Walsh), New York State Ironworkers District Council, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. 74.

A key component of responsible bidding recommended by many witnesses would require contractors to identify their subcontractors at the time they submit their bid. As explained by a representative for the bricklayers union:

“This issue of subcontracting is key to getting any kind of accountability...Because as is pointed out, most of the bidding is done by a small group of general contractors, or even construction managers, and that subcontractor information just isn’t available, [a]t least prior to the award of the bid. So that would be extremely helpful.”<sup>27</sup>

Scrutinizing primary contractors without examining the labor record and fiscal integrity of subcontractors can defeat the purpose of responsibility determinations. As a witness for the ironworkers union stated:

“[T]he people that we deal with that are the unscrupulous players, for the most part, are a lot of the subcontractors...What good would responsible bidder language do if the general contractor was deemed the responsible bidder and chose to subcontract the majority of the jobs to subcontractors that don’t have to abide by the same standards?”<sup>28</sup>

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27 Testimony of William E. Nagel, Esq., Bricklayers and Allied Craftworkers Local I, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. 118.

28 Testimony of Paul Sirianni (Representing Edward Walsh), New York State Ironworkers District Council, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p.75.

# Review of Current Systems for Determining Bidder Responsibility For Public Work

## New York State – Council of Contracting Agencies

In 1993, Governor Mario Cuomo issued Executive Orders establishing uniform guidelines for state contracting agencies to follow in determining the responsibility of bidders and subcontractors on public work contracts. The Orders, which are still current, require consideration of the following guidelines:

- **Ability:** Adequate expertise, prior experience with comparable projects and the financial resources to perform the work in a timely and competent manner, including proof of surety bonding, insurance, and professional licenses by directors, officers and shareholders with at least 5% of the company's stock.
- **Criminal Conduct** in connection with government contracts or business activities, including convictions, pending indictments and grants of immunity for racketeering, bribery and comparable crimes involving the bidder, its subcontractors, or their directors, officers and shareholders with at least with 5% of the company's stock
- **Grave Disregard** for the safety of employees, state personnel, or members of the public, including whether the training, equipment and workplace practices show a commitment to safety.
- **Prevailing Wages:** Willful non-compliance with the prevailing wage law, including violations by bidders, subcontractors, or their affiliates.
- **Other Labor Laws:** Violations of other labor laws, including wage, unemployment insurance and child labor.
- **Workers' Compensation:** Violations of the workers' compensation law or failure to provide proof of workers' compensation or disability insurance coverage.
- **Environmental Protection:** Compliance with state and federal environmental protection laws.
- **Apprenticeship Training:** Good faith efforts to use registered apprenticeship training programs.

- **MWBE:** Compliance with laws promoting the use of minority or women-owned (MWBE) or disadvantaged businesses as potential subcontractors.
- **Equal Employment Opportunity:** Compliance with federal and State equal employment opportunity laws for the training and employment of disadvantaged persons.
- **Balanced Bids:** Submission of bids that are mathematically and materially balanced, and in line with agency engineering estimates.
- **Other Causes** to question responsibility such as bids containing false or misleading statements.<sup>29</sup>

The New York State Council of Contracting Agencies (CCA) provides a uniform questionnaire for state bidders to use based on these guidelines. Bidders must answer questions regarding their responsibility, including workers' compensation and unemployment insurance coverage; compliance with prevailing wage, other labor, health and environmental laws; any criminal convictions or investigations for business-related activity; public bidding debarments or disqualifications; contract suspensions or terminations; revocation of minority, women-owned and disadvantaged business certifications; financial capacity and bankruptcies; and identification of principals, officials and shareholders with 5% or more of the firm's shares. There is no requirement, however, to disclose the use of apprenticeship training programs or to identify the subcontractors planned for the project. Also, subcontractors are not required to submit their questionnaires until after the prime contract is awarded.

The Comptroller uses the CCA questionnaire to review bidders chosen by state agencies for public work contracts. The information is maintained by the Comptroller in an electronic database for state contracting agencies to review prior to selecting bidders. The public may review questionnaires by submitting requests to the Comptroller under the Freedom of Information Law.

Witnesses disagreed on the effectiveness of the Executive Orders. A representative for the IBEW stated, "[n]o judge in this state is bound by those Executive Orders. And if you read the case law, the judges are all over the place."<sup>30</sup> A witness for the New York State Building and Construction Trades Council commented that problems with the lowest responsible bidder law have long existed and that if the Orders were enough, a hearing would not have been necessary.<sup>31</sup>

29 New York Executive Orders Nos. 170 and 170.1 (9 NYCRR 4.170).

30 Testimony of Paul N. D'Onofrio, Esq., International Brotherhood of Electrical Workers, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, 'Lowest Responsible Bidder' (April 22, 2009), p. 61.

31 Testimony of Al Catalano (Representing Edward J. Malloy), New York State Building and Construction Trades Council (AFL-CIO), Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, 'Lowest Responsible Bidder' (April 22, 2009), p. 52.

Other witnesses spoke in support of the guidelines in the Executive Orders, but pointed out that Orders do not apply to local governments. Localities may or may not have authority to rely upon the guidelines, and are often reluctant to do so at the risk of litigation from potential bidders. A representative for the Rockland County Building Trades testified that the failure of the Orders to apply to municipalities is of “particular concern. Because municipalities face the concern of getting projects done [in] a timely fashion versus the cost of litigation. And it is an unfair situation that they’re presented with, in our opinion.”<sup>32</sup>

State Labor Commissioner Patricia Smith stated:

“These criteria [guidelines] are even more relevant today as we determine how best to use our scarce public dollars and provide the greatest return on investment.”<sup>33</sup>

However, she noted that:

“[T]he list does have gaps. For example, the list does not expressly include adverse responsibility determinations or debarment from bidding on federal contracts or on public contracts in neighboring states. Nor does the list expressly provide for state and local tax and other liabilities to be considered in determining whether to award public monies to the contractor.”<sup>34</sup>

A list of contractors currently debarred for prevailing wage violations is available on the New York State Department of Labor’s website.

## New York Localities

### New York City – VENDEX System

New York City uses the Vendor Information Exchange System (VENDEX) to collect information concerning potential vendors for public work contracts. VENDEX was created in response to a local law passed by the New York City Council in 1991 that requires the use of a vendor integrity system.<sup>35</sup> Vendors and their principals must submit questionnaires that are maintained by the Mayor’s Office of Contract Services (MOCS) in a database. The questionnaire requires information concerning:

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32 Testimony of James W. Versocki, Esq. (Representing John Maraia), Rockland County Building Trades, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. 25.

33 Testimony of M. Patricia Smith, Esq., New York State Department of Labor, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. II.

34 Ibid.

35 NYC Administrative Code § 6-116.2.

- **Identification** of principal owners, officers and affiliates of the contractor and its subcontractors, including addresses and taxpayer identification numbers, and conflicts of interests with city agencies and other entities.
- **Contract Sanction History** including debarments, suspensions, and determinations of non-responsibility or ineligibility to bid by contractors or affiliates based on their business conduct within the past five years.
- **Judgments and License Sanctions:** Judgments or injunctions against a contractor, and professional license sanctions against the contractor, its principal owners and officers within the past five years.
- **Tax Compliance:** History of filing income tax returns, outstanding tax warrants or unsatisfied liens.
- **Criminal Activity:** criminal convictions and pending proceedings by a federal, state or local agency against the contractor, its owners, officers, or previous owners or officers related to truthfulness or business conduct and other felonies.
- **Bankruptcy Proceedings** in the past seven years against the contractor or its affiliates.<sup>36</sup>

The questionnaire, however, does not require disclosure of the use of any apprenticeship training programs or the identification of the subcontractors to be used for the project.

A representative for MOCS explained how VENDEX works:

“Every potential vendor must complete [VENDEX] questionnaires for the company itself, and its top three principal officers, including parent companies and controlling entities. These questionnaires are valid for three years from the date of signature, and must be updated by the vendor for any new award within that three-year period by either submitting changed questionnaires, if any of the reported information has changed, or by providing certification of no change, if the information remains unchanged. The City treats both false filings and willful non-disclosures of relevant material on [VENDEX] as potential grounds for non-responsibility determinations and for criminal prosecution.”<sup>37</sup>

<sup>36</sup> Ibid.

<sup>37</sup> Testimony of Elisa Velazquez, New York City Mayor’s Office of Contract Services, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. 32.

The questionnaires are accessible to the Mayor, the City Comptroller, City agencies, elected officials, and the City Council. The public may review the questionnaires on public access terminals at the MOCS office.

Most witnesses testified that VENDEX was an effective system for determining the responsibility of public work bidders. They acknowledged, however, that such a sophisticated system might be too costly for smaller cities to maintain. Most agreed that a similar statewide system maintained by an entity such as the State Comptroller would allow municipalities to determine bidder responsibility without incurring the costs or facing the logistical challenges of maintaining their own systems. A representative of the bricklayers union commented that VENDEX could be improved by requiring contractors to disclose any subcontractors they plan to use for the project.<sup>38</sup>

### New York City School Construction Authority

The New York City School Construction Authority (SCA) was created in 1988 by the Legislature to oversee construction and renovation of school buildings in the five boroughs of the City. The SCA requires its contractors and subcontractors to be pre-qualified as responsible firms before bidding on any projects. The evaluation of bidders is based on:

- Experience
- Quality and timeliness of past performance
- Financial capability
- Reliability and responsibility
- Safety record
- Compliance with equal employment opportunity requirements
- Compliance with labor laws
- Integrity
- Enrollment in an approved apprenticeship training program.

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<sup>38</sup> Testimony of Robert Mantello, Bricklayers and Allied Craftworkers Local 2, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, 'Lowest Responsible Bidder' (April 22, 2009), pp. 57-58.

To qualify, contractors must complete an online application and re-qualify every three years. The SCA website include a list of pre-qualified contractors and subcontractors, along with those who have been disqualified or found ineligible. The list displays contractors by trade with names and addresses, and shows whether they are minority-owned, women-owned, or locally-based businesses.

A representative for the Rockland County Building Trades testified that the SCA's pre-qualification system was effective:

“I also wanted to draw the Panel’s attention to the use of a pre-qualified contractors system by the New York City School Construction Authority...that’s a very important system that the Building Trades would like to highlight to the Panel<sup>39</sup> ...[t]he contractors go through a multi-stage vetting process. They answer a questionnaire, and it’s very similar to what all New York City contractors have to do through the Vendex System. However, the School Construction Authority has a much more in depth vetting process. And we believe that pre-qualification will allow only good contractors to bid on this work.”<sup>40</sup>

### Rochester, New York

In 2003, the Rochester City Council passed an ordinance requiring any contractor, prior to entering into a public work contract in excess of \$250,000, to have an apprenticeship agreement that has been registered and approved by the New York State Commissioner of Labor.<sup>41</sup> In 2009, this requirement was extended to subcontractors performing public work contracts in excess of \$100,000.<sup>42</sup>

## Other States

### New Jersey

New Jersey requires contractors and subcontractors to complete a questionnaire and pre-register with the State Department of Labor and Workforce Development<sup>43</sup> Applicants must identify their principals, partners, officers and others with a business interest; carry workers’ compensation coverage; disclose any federal, state or local debarments, labor law violations, and pending public contract investigations; list the

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39 Testimony of James W. Versocki, Esq. (Representing John Maraia), Rockland County Building Trades, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, ‘Lowest Responsible Bidder’ (April 22, 2009), p. 24.

40 Ibid at pp. 27-28.

41 City of Rochester Ordinance No. 2003-347.

42 City of Rochester Ordinance No. 2009-76.

43 N.J.S.A. 34:11-56.48 et seq.



public works projects performed in the last twelve months; and indicate any loss of contractor registration. Contractors may not use unregistered subcontractors. The Department may deny or revoke registration for inaccurate or incomplete information. When a contract is denied, an informal meeting is held to ensure that complete and accurate information was provided. This process has helped to minimize the reversal of denials if the unsuccessful bidder pursues its case at an administrative hearing.<sup>44</sup> The New Jersey Department of Labor and Workforce Development has a searchable database of registered contractors and subcontractors on its website.<sup>45</sup>

## Illinois

Illinois requires that contractors complete a questionnaire and meet the following standards to be eligible for state public work contracts:

- Compliance with the Illinois Prevailing Wage Act and Federal Equal Employment Opportunity Law.
- The contractor and its subcontractors must participate in a registered federally-approved apprenticeship training program.
- Provide insurance coverage, including workers' compensation, general and professional liability, product liability, automobile, and completed operations.
- Owe no state or unemployment insurance taxes.
- Have adequate financial resources and expertise for the project.
- A satisfactory record of past contract performance.
- Business integrity, without pending civil or criminal investigations.

Bidders that fail to meet these standards will be deemed non-responsible and ineligible for public work contracts.<sup>46</sup> Pre-qualified bidders are listed on the website of the Illinois Capital Development Board.

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44 Written testimony of M. Patricia Smith, New York State Department of Labor, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, 'Lowest Responsible Bidder' (April 22, 2009), pp. 6-7.

45 <http://lwd.dol.state.nj.us/>.

46 Illinois Procurement Code 30 ILCS 500, and Illinois Administrative Code Title 44 Sec. 1.2046.

## Minnesota

Minnesota law allows state and local project owners to select public work bidders by one of two methods: lowest responsible bidder or best value contracting. Minnesota's best value statute allows contracting officials to consider a contractor's past record including: performance on prior projects; level of customer satisfaction; record for performing on-budget and on-time; ability to minimize cost overruns; technical capabilities; and qualifications of key personnel.

The best value system has both supporters and opponents. Ten states in addition to Minnesota allow best value contracting for public work construction projects.<sup>47</sup> The New York City Bar Construction Law Committee submitted a report for the hearing which recommended that contracting agencies in New York be given the option of using best value contracting as an alternative to lowest responsible bidding in awarding public work contracts.

The critics of best value contracting claim that it lacks standardization, allows an unacceptable amount of subjectivity to enter into the contracting process, and creates great potential for favoritism. A representative for the International Brotherhood of Electrical Workers commented, "Best value is the same problem as lowest responsible bidder; it's whatever anybody wants it to be."<sup>48</sup>

## Ohio

Ohio requires certain state and local agencies and localities to award public work contracts to the lowest responsive and responsible bidder. Bidders must complete a questionnaire regarding their prior experience on similar projects; any state, federal or local debarments; any violations of prevailing wage, OSHA, environmental protection or affirmative action laws; and any contract terminations for the contractor or subcontractors.<sup>49</sup> Prior to awarding contracts, agencies must review the questionnaire and also determine that the bid does not materially or mathematically deviate from the contract specifications.

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47 Alaska, Colorado, Delaware, Georgia, Kentucky, New Jersey, Minnesota, New Mexico, Pennsylvania, Texas, and Utah.

48 Testimony of Paul N. D'Onofrio, Esq., International Brotherhood of Electrical Workers, Senate Standing Committee on Labor and Assembly Standing Committee on Labor Hearing, 'Lowest Responsible Bidder' (April 22, 2009), p. 63.

49 Ohio Revised Code § 9.312.

## Local Ordinances

Localities in several states have passed ordinances that establish responsibility standards for bidders of public work contracts.

### Springfield, Illinois

Springfield, Illinois requires public work bidders to participate in a federally-approved apprenticeship training program. They must disclose any violations of federal or state labor laws including the Illinois Prevailing Wage Act, the Federal Fair Labor Standards Act, the National Labor Relations Act, and OSHA. Failure to accurately present this information results in disqualification and rejection of the bid. Bidders must also show they have adequate financial resources and the ability to perform the work, and disclose their contract performance history, including any failure to pay workers.<sup>50</sup>

### Bloom, Illinois

The township of Bloom requires that public work bidders participate in an approved apprenticeship and training program. They must also provide insurance coverage, including workers' compensation, general and professional liability, product liability, automobile, and completed operations. Bidders must also comply with the Illinois Prevailing Wage Act and the Federal Equal Employment Opportunity Act.<sup>51</sup>

### Santa Cruz, California

The Santa Cruz Municipal Code requires that contractors and subcontractors on public work contracts in excess of \$250,000 use approved apprenticeship training programs. Bidders must also show compliance with prevailing wage and other labor standards laws. Contractors and subcontractors that fail to meet any of these requirements may be declared irresponsible and ineligible to bid on a public work contract for five years.<sup>52</sup>

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50 City of Springfield Code of Ordinances §38.23, 38.35.

51 Township of Bloom, Illinois Ordinance No. 01-02.

52 Santa Cruz Municipal Code Chapters 3.9, 3.10.

## Massachusetts

At least eleven municipalities in Massachusetts have passed responsible bidder ordinances that require public work contractors and subcontractors to meet the following standards:

- Use of an approved bona fide apprenticeship training program.
- Compliance with the state prevailing wage law.
- Workers' compensation coverage.
- Hospital and medical benefits.
- Proper classification of workers as employees or independent contractors.

These municipalities include Amherst, Boston, Brockton, Cambridge, Fall River, New Bedford, Springfield, Waltham, Weymouth, Worcester, and Woburn.<sup>53</sup>

## Oregon, Ohio

The City of Oregon pre-qualifies its public work contractors and subcontractors. Bidders must complete a questionnaire stating their use of a registered and approved apprenticeship training program; the names and addresses of the subcontractors for the project; any debarments or findings of non-responsibility; any federal, state or local violations of prevailing wage laws or OSHA; any pending litigation and judgments for violations of any state or federal wage laws; and their contract performance history. Subcontractors must submit similar questionnaires to establish their responsibility for public work.<sup>54</sup>

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53 Town of Amherst General Bylaws Article I, Responsible Employer Bylaw; City of Boston Municipal Code Chapter 8-9; City of Brockton Revised Ordinances Chapter I3; City of Cambridge Municipal Code Chapter 2.66.080; City of Fall River Revised Ordinances Chapter 2, Division 4, Section 2-294; City of New Bedford Code of Ordinances Chapter 10, Article 2, Section 10-77; City of Springfield Ordinances Title 4 Chapter 4.14.020; City of Waltham General Ordinances Chapter 2, Article 26, Section 2-373A; Town of Weymouth Code of Ordinances Chapter 8, Section 8-500; City of Worcester Revised Ordinances, Regulatory Ordinances Chapter 2, Section 35; City of Woburn Municipal Code Title 17.

54 City of Oregon, Ohio Administrative Code 180.01.

# Recommendations

The testimony and written statements presented for the hearing showed a compelling need to amend the current law to establish responsibility standards for bidders on state and local public work contracts. Responsibility standards would provide greater clarity and reduce litigation concerns for contracting agencies in determining who is a responsible bidder. Contractors who are unable to submit the lowest bid because they pay prevailing wages and provide apprenticeship training would have a fairer chance of winning contracts. New York's skilled construction workers -- currently experiencing record levels of unemployment -- would have new job opportunities. Responsible bidding would also help the State and local governments by reducing unforeseen costs due to delay, repairs or litigation, and curb the flow of tax revenues into New York's underground economy.

The Committee makes the following recommendations:

## A. Amend the Lowest Responsible Bidder Law to Add Standards for Determining Responsibility

The law should be amended to require the use of responsibility standards by state and local contracting officials, including public authorities, in selecting bidders for public work construction contracts. Bidders would be required to complete a uniform questionnaire. Their information would be maintained by the State Comptroller in a database for use by state and local contracting officials in awarding public work contracts. The responsibility standards would determine the bidder's fiscal integrity, compliance with prevailing wage and other laws, use of apprenticeship training and other best practice standards used by jurisdictions in New York and elsewhere.

## B. Uniform Questionnaire

Before a public work contract may be awarded, contracting officials should determine the responsibility of potential contractors and subcontractors by reviewing uniform questionnaires submitted by each contractor and subcontractor for the project. The companies would be required to provide the following information:

1. The names, addresses and telephone numbers of the owners, principals, officers and shareholders who own or control at least 5% of the company's stock.
2. The taxpayer identification number or employer identification number, and the Dun and Bradstreet number.

3. The type of business entity, including but not limited to corporation, partnership, limited liability corporation, limited partnership, joint venture or sole proprietor.
4. The names and addresses of the subcontractors planned for the project.
5. The use of registered and approved apprenticeship training programs for the past five years.
6. Violations of the prevailing wage law under Article 8 of the labor law or under the federal Davis-Bacon Act.
7. State or federal violations of laws relating to unemployment compensation, workers' compensation, occupational health and safety, employee misclassification, employment disability, employment discrimination, or other labor laws.
8. State or federal violations of environmental protection laws.
9. Any failure to file federal, state or local tax returns; any tax liabilities, judgments or liens; and any violations of federal, state or local laws or agreements under which a tax subsidy, loan or grant was provided.
10. Any criminal conviction, indictment, grant of immunity or civil violation for business-related activity, including but not limited to bribery, extortion, fraud, racketeering, contract bidding or restraint of trade.
11. Contract sanction history including federal or state debarments, suspensions, findings of ineligibility, or disqualifications for non-compliance with minority or women-owned or disadvantaged business requirements.
12. Pending investigations for state or federal criminal or civil laws related to business activity.
13. Professional license sanction history against the owners, principals, or officers.
14. Expertise and prior experience performing the type of work required under the contract.

15. Financial capability and reliability including fiscal resources to perform the contract, and any audits or bankruptcies within the past seven years.
16. Proof of surety bonding and coverage for worker's compensation and general and professional liability insurance.
17. Whether health insurance is provided to employees.

The questionnaire should be subscribed as to its truth, accuracy and completeness.

### C. Centralized Database

The information from the questionnaires should be maintained by the State Comptroller in a centralized database for use by state and local contracting officials in selecting responsible bidders for public work contracts. The Comptroller should prepare and post a uniform questionnaire for use by bidders on its website.

### D. Pre-Qualified Bidder List

Contracting agencies should establish a list of pre-qualified contractors and subcontractors to use in selecting bidders for public work. The list should be published on the websites of these agencies.

Pre-qualification relieves contracting entities of the burden of conducting responsibility determinations before opening bids. Pre-qualification allows review in a more thorough manner and may lessen the frequency of litigation brought by unqualified bidders. Unqualified contractors could avoid spending time and money preparing bids, and qualified subcontractors may receive more contracting opportunities.

### E. Conformity by Subcontractors

Subcontractors should be required to complete the uniform questionnaire and meet the same responsibility standards as contractors to be eligible to work on public work contracts. Subcontractors who fail to pay prevailing wages or unemployment taxes, who do not provide workers' compensation, or who use poorly trained workers create similar hardships and costs for workers, law-abiding subcontractors and the government.

# Appendix A

## New York State Senate Standing Committee on Labor and New York State Assembly Standing Committee on Labor **Joint Public Hearing on Lowest Responsible Bidder** April 22, 2009

### ORAL TESTIMONY

Associated General Contractors of New York State  
Jeffrey Zogg, Chief Executive Officer

Bricklayers and Allied Craftworkers Local 1  
William E. Nagel, Esq.

Bricklayers and Allied Craftworkers Local 2  
Robert Mantello, President

Empire State Regional Council of Carpenters  
Michael Conroy, Organizing and Political Director

General Contractors Association of New York  
Casey Morgan, Representing Managing Director Denise Richardson

International Brotherhood of Electrical Workers  
Paul N. D'Onofrio, Esq., Legislative Counsel

International Union of Painters and Allied Trades District Council 9  
Jack Kittle, Political Director

New York City Mayor's Office of Contract Services  
Elisa Velazquez, General Counsel



New York State Building and Construction Trades Council  
Al Catalano, Representing President Edward J. Malloy

New York State Department of Labor  
M. Patricia Smith, Commissioner

New York State Ironworkers District Council  
Paul Sirianni, Representing President Edward Walsh

Rockland County Building Trades  
James W. Versocki, Esq., Representing President John Maraia

### **SUBMITTED TESTIMONY**

Association of Towns of the State of New York, The  
G. Jeffrey Haber, Executive Director

Bancker Construction Corp.  
Phillip M. Beyer, Vice President

Empire State Chapter of Associated Builders and Contractors, Inc.  
Rebecca A. Meinking, President

National Electrical Contractors Association (NECA)  
Bruce DeShay, Secretary-Treasurer  
NYS Council of NECA Chapters

National Electrical Contractors Association (NECA)  
Charles Gardner, Director of Government Affairs  
Long Island Chapter, NECA

New York State Conference of Mayors and Municipal Officials  
Peter A. Baynes, Executive Director

New York State Laborers  
George Truicko, Jr.

# Appendix B



## New York State Senate Standing Committee on Labor and New York State Assembly Standing Committee on Labor

### Notice of Public Hearing

**SUBJECT:** Lowest Responsible Bidder

**April 22, 2009 - 10:00 a.m.**

**PURPOSE:** To solicit input on how to define the lowest responsible bidder on public work contracts

**Hamilton Hearing Room B, 2nd Floor  
Legislative Office Building  
Albany, NY 12247**

Although public work contracts in New York are required to be awarded to the lowest responsible bidder, state law does not define the term “responsible.” As a result, the determination of who is a responsible bidder varies throughout the state among owners of public work projects. Contractors that submit the lowest bid and win, but who fail to pay unemployment taxes, provide worker’s compensation, or have a record of poor performance or violations of law, place contractors that comply with the law at an unfair bidding advantage. Workers can be directly impacted if they are injured on the job or misclassified by employers as independent contractors to avoid unemployment taxes. It is important that the large amount of public funds spent on public work contracts is awarded fairly and in compliance with state labor laws.

The Committees will receive testimony on how to define a responsible bidder on public work contracts. Public input is requested concerning:

1. The standards currently used in New York and other states to determine who is a responsible bidder;
2. The effectiveness of these standards in awarding contracts to responsible bidders;
3. How the low bid and responsible bidder requirements should be applied in awarding a public work contract; and
4. Recommendations on how to define a responsible bidder.

Persons wishing to present testimony at the hearing should complete and return the enclosed reply form as soon as possible. It is important that the reply form be fully completed and returned so that persons may be notified in the event of postponement or cancellation of the hearing.

Witnesses are asked to keep oral testimony to no more than ten minutes in length. Written testimony will also be accepted and may be sent to the contact person listed on the reply form. In preparing the order of witnesses, the Committees will attempt to accommodate individual requests to speak at particular times in view of special circumstances. If you are testifying, please submit ten copies of any prepared testimony at the hearing registration desk. In order to further publicize the hearing, please inform interested parties of the Committees' interest in receiving written testimony from all sources.

In order to meet the needs of those who may have a disability, the New York State Senate and Assembly have made their facilities and services available to all individuals with disabilities. Accommodation will be provided for individuals with disabilities, upon reasonable request, to afford such individuals access and admission to Senate and Assembly facilities and activities.

**George Onorato, Chair**  
New York Senate Standing  
Committee on Labor

**Susan John, Chair**  
New York Assembly Standing  
Committee on Labor

# Public Hearing Reply Form

Persons wishing to present testimony at the public hearing on Lowest Responsible Bidder on April 22, 2009 are requested to complete this reply form as soon as possible and mail, e-mail or fax it to:

**Sarah Coligan**

Legislative Office Building, Room 310

Albany, NY 12247

(518) 455-3486 (phone)

(518) 426-6929 (fax)

[coligan@senate.state.ny.us](mailto:coligan@senate.state.ny.us)

- I would like to testify at the hearing on April 22, 2009.
- I plan to attend, but do not wish to testify at the hearing on April 22, 2009.
- I will require assistance and/or handicapped accessibility information.  
Please specify the type of assistance required:

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**NAME:** \_\_\_\_\_

**TITLE:** \_\_\_\_\_ **ORGANIZATION:** \_\_\_\_\_

**ADDRESS:** \_\_\_\_\_

\_\_\_\_\_

**TELEPHONE:** \_\_\_\_\_ **FAX:** \_\_\_\_\_

**EMAIL:** \_\_\_\_\_