



Testimony before the
Joint Committees on Transportation

February 15, 2022
Albany, NY

Senators, Members of the Assembly, I appreciate the opportunity to address you today on the proposed Executive Budget for SY 2022-23 as it relates to engineering, particularly transportation, infrastructure, and construction.

My name is John Evers, PhD and I serve as the President/CEO of the American Council of Engineering Companies of New York (ACEC NY). ACEC New York is a proactive coalition of nearly 300 firms representing every discipline of engineering related to the built environment—civil, structural, mechanical, electrical, environmental, geotechnical. We are a diverse group of consulting engineering firms, ranging from sole proprietors to multi-national corporations, from across New York State with a concentrated presence of firms located in New York City. About 25% of our membership is comprised of M/WBE and veteran-owned firms.

Proposed Funding Levels:

The proposed executive budget released this January signals a renewed commitment to New York's custom of enacting multi-year capital plans to support transportation systems. It comes on the heels of the recently passed federal Infrastructure Investment Jobs Act (IIJA) and the scheduled influx of new federal dollars in many areas, particularly roads and bridges. The proposed executive budget recommends a 5-year Capital Plans for both the Department of Transportation, proposed at \$32.8 billion, and the Metropolitan Transportation Authority (MTA), \$52 billion. Additionally, the Executive has outlined numerous large projects around the State that will be funded, including the Gateway project. These projects, and new 5-year plans, signal a first step in a commitment to updating and improving New York State's infrastructure and necessitate a renewed partnership with the consulting engineering community. We urge lawmakers to leverage increased federal aid with new state dollars to ensure a robust and productive multi-year plan.

Engineering Funding Levels:

Of particular interest to ACEC New York in the proposed DOT 5-year capital plan is the funding for engineering and design. Continued strong investment in engineering is critical to the efficient delivery of state and local transportation projects. Design costs are typically around 10% of a project's total cost, but shortfalls in front-end engineering investment result in increased change orders and other construction cost drivers. The importance of the design work necessary in planning, defining scope, analyzing conditions, needs and other pre-design work cannot be overstated in its payoff in long term project success. Put clearly, small investments in engineering deliver enormous payoffs in project delivery. Engineering/administration in the 5-year DOT plan is tentatively budgeted in excess of \$1 billion per year through FY 2026-27. Our major question in this regard pertains to the breakdown between the two categories. The State's consulting engineers not only deliver world-class ingenuity but do it *efficiently*. Repeated independent studies conducted by New York University's school of Engineering have shown that when **all** costs, including overhead, pension, health care and related costs are compared, consulting engineers save the State 15-20%. This increased efficiency allows the State to invest more money and provide more of the benefits that our State's taxpayers rely on, and projects that tie the State together. The capacity and flexibility the State's

consulting engineering firms provide are a force multiplier for the Department to deliver the most infrastructure for its investment. It would further the interest of transparency to know the specific breakout of spending of engineering and administration. I would also stress we need to ensure a balanced economic opportunity for consulting engineering across the entire state.

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.

We note that the proposed budget reauthorizes the use of design/build. We support this extension. However, we urge legislators to also explore the **addition of "progressive design/build"**. This well-known and generally accepted system of design/build selects a design-build team on the basis of qualifications, who then collaborates with the public owner to collaboratively develop a design, and at approximately 60% design negotiate a guaranteed maximum price. This model prioritizes design and construction working with the owner to explore the project's ultimate public deliverables, more fully develop scope, enhance constructability, minimize ownership and maintenance costs, and perhaps most importantly, de-risk the project. This de-risking lessens the likelihood of litigation between design and construction and the design build team and owner that can often be traced to the tension inherent in traditional design build where a price is set when there are still considerable unknowns that can dramatically affect construction cost.

Continued Contractual Certainty:

At a time when the State is creating a new 5-year Capital Plan we want to again remind lawmakers that the State's professional design community has experienced significant upheaval and disruption by having certain existing agreements unilaterally altered. This uncertainty threatens the timely and effective completion of projects. Our professional community prides itself on responsive and productive working relations with public owners. We hope that these contractual modifications are reconsidered.

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; public owners' attempts to entirely insulate themselves

from any liability, regardless of fault is ultimately counterproductive as it disincentivizes reasonable precautions.

QBS:

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 the State’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.

PPP Issue:

Engineering is a vital industry. In the early days of the pandemic-induced lockdowns, confusion about the future was omnipresent. As an industry that was deemed “essential” at the start, ACEC New York member firms realized the importance of continuity; despite the atmosphere of uncertainty, they could continue serving the State and the system’s public owners. The flexibility and nimbleness that characterize the consulting engineering industry was on display as our firms immediately transitioned to remote work, and the essential services they provide were essentially uninterrupted. Partnering with public owners, our firms ensured that projects were safely continued with a minimum of additional disruption.

We did not cease operations during the pandemic, and our firms strove not only to work through it to keep New York State citizens safe on our roads, bridges and in our buildings and mass transit, but also to keep our employees safe, and at their jobs. This led many, particularly our M/WBE firms to accept federal Paycheck Protection Program (PPP) loans to maintain full employment. However, unlike any other industry, engineers are now being forced to payback those PPP loans under the Federal Acquisition Regulation (FAR) thus impacting their operations now – as we begin a massive state building program. While we are working with federal lawmakers to solve this crisis, we are attempting to have state officials work with us to ease the burden of having engineering firms pay back hundreds of millions of dollars in loans meant to preserve jobs during the pandemic prior to a federal fix.

In closing, New York State’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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