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Nonessential Budget Proposals—Including These 5—Should Be Left Out of Enacted Budget

Nonessential Executive Budget Proposals Obscure Transparency and Increase Costs of Development Projects

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New York State's bleak fiscal outlook requires lawmakers pass a "bare bones" fiscal year 2021 budget that is focused on funding critical services and the response to the COVID-19 pandemic. Deferring nonessential policy issues will allow for greater focus on the fiscal task at hand and a more robust public debate of these policies' merits at a later time. Among those that should be deferred are five proposals that would expand executive power, reduce oversight, and have significant impacts on the cost of publicly subsidized development projects and public procurement. These proposals would:

- Allow the State Budget Director to transfer certain appropriations to another department, agency, or public authority;
- Allow the State Division of Budget, rather than the Office of the Comptroller, to determine whether a reimbursement or refund to the State is considered revenue or a reduction of expenses;
- Expand prevailing wage requirements to publicly subsidized construction projects;
- Extend design-build authority to additional State agencies with provisions that offset many of the benefits of design-build; and
- Eliminate competitive bidding for certain Metropolitan Transportation Authority (MTA) procurement activities.

Transfer Authority

The Executive Budget for Fiscal Year 2021 contains a provision that would allow the State Budget Director to transfer funds from any one of more than 100 appropriations to another department, agency, or public authority without legislative approval. This reduction of funds from a legislatively approved use and commensurate increase for an alternative use could be done without review or prior legislative notification. For example, an appropriation for veterans' housing could later be diverted to a completely unrelated project or purpose, such as economic development grants to businesses.

Currently, funds can be transferred among agencies only with legislative authority to create a new program or shift responsibility for programs or services from one department to another. The current pandemic response presents a case where there may be strong reason to utilize greater funds than those appropriated for health care expenses; however, new Executive authority is not needed to do this. The Legislature can amend the budget—and in times like these it should be able to act quickly—or the Executive branch can tap the $1 billion appropriation that is available "for transfer by the governor to the general, special revenue, capital projects, proprietary or fiduciary funds to meet unanticipated emergencies."[1]

Accounting Classifications

The Executive Budget contains provisions that would allow the State Division of Budget (DOB) to determine whether a reimbursement or refund to the State is considered a revenue or a reduction of expenses. For example, when a locality reimburses the State for the State's cost of plowing the locality's roads, the reimbursement is recorded on the State's books as a revenue. Under the proposed provision, DOB could require the Comptroller to account for the reimbursement as a expense reduction; thus, it could appear that the State had spent less money than it actually had.

Prevailing Wage

The Executive Budget also includes important expansions of and modifications to prevailing wage requirements by requiring private developers to pay prevailing wages to construction workers on construction projects whose development costs are at least 30 percent publicly funded. This expands the State Constitutional requirement to pay workers a prevailing wage on public projects to private projects that receive public funds or tax breaks, with limited exceptions for some projects like affordable housing or non-profit development.

Prior research shows prevailing wage mandates increase construction costs on public projects by 13 to 25 percent, depending on the region and type of work.[2] Expanding the prevailing wage requirement to publicly-subsidized private projects will increase project costs, making some projects financially infeasible without additional subsidy to cover the cost of the wage increases.[3]

While the current prevailing wage requirement applies to a clear set of projects and uses a uniform local wage schedule, it is not clear to which projects the proposed mandate expansion would apply. The provisions no guidance to developers or State and local officials about how to calculate the value of subsidies provided to a project or its total cost; the onus is on the developer to determine whether a project would trigger the wage requirement. A new, gubernatorially controlled Public Subsidy Board would have authority to specify guidelines for which projects are subject to the law, as well as to deem specific projects eligible, creating uncertainty among developers and contractors. The proposal also gives the Department of

Labor Commissioner the authority to order work to stop on any project found out of compliance with reporting requirements.

Design-Build

The Executive Budget would extend the existing design-build authorization to additional state agencies and authorities, and make permanent the authorization for agencies that already have it. CBC has long supported design-build authority as a method to reduce capital construction costs and accelerate project delivery; however, two provisions would offset potential savings and efficiencies, and a third would reduce oversight.

The first provision would require that agencies using design-build comply with the Wicks Law requirement to bid certain construction work individually as opposed to as an entire scope of work for projects greater than $3 million in New York City and $1.5 million elsewhere. Making design-build projects subject to Wicks Law undermines the some of the key benefits: Combining project designers and contractors onto a single team improves coordination and communication among project partners, which shortens timelines and reduces the risk of change orders and other costly delays. Making design-build projects subject to Wicks Law would add steps to all phases of construction, hinder coordination and accountability, and make it more difficult to realize the savings offered by design-build.

The second provision would allow design-build agencies to bypass the standard two-step design-build bidding process. The two-step bidding process allows design-build teams to be shortlisted based on their qualifications before a smaller subset of bidders are invited to develop detailed proposals. This encourages smaller firms to participate, as they would not incur the cost of preparing a proposal only to have it rejected because the agency determined they were not qualified to handle the project. Eliminating the pre-qualification step requires all bidders to incur expenses to develop design proposals and project budgets upfront without a sense of their odds of winning a project. These are costly and time-consuming efforts. The lack of a pre-qualification step limits the competitive pool to large, well-capitalized firms that can afford to incur considerable expenses to craft proposals.

The design-bid proposal would also exempt public authority design-build contracts from oversight by the State Comptroller's office, even when such contracts are awarded through a competitive process. This will diminish the Comptroller's longstanding oversight powers and reduce already limited transparency into procurement and capital project management at state authorities.

MTA Procurement

The Executive Budget also includes proposals to allow the MTA to award contracts after a five-day bid solicitation period, down from 15 business days, and to limit bid advertisements to its website. Both measures will decrease competition. Other provisions permitting the award of

contracts of up $5 million for “innovative” technology projects pursuant to a process to be determined by the MTA board also deserve further scrutiny. The MTA’s considerable financial pressure is not a reason to reduce procurement transparency.

Conclusion

The need to focus on preparing New York State for an uncertain future should take precedence over policy proposals that can be revisited in the coming months. In this time of fiscal and economic upheaval, transparency and public engagement on controversial policy changes remains critical.

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Footnotes

1. State Operations Appropriation Bill, A9500-a/S7500-a (New York State, February 22, 2020), p. 795, https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A09500&term=2019&Summary=Y&Text=Y .
2. EJ McMahon and Kent Gardner, “Prevailing Waste: New York’s Costly Public Pay Mandate” *Empire Center for Public Policy* (April 24, 2017), https://www.empirecenter.org/publications/prevailing-waste/.
3. Leaders of the Statewide Coalition for Smart Growth, “Prevailing wage will kill downtown redevelopment renaissance across New York: Opinion“ *The Journal News* (March 20, 2020), https://www.lohud.com/story/opinion/2020/03/20/prevailing-wage-kill-downtown-redevelopment/2885196001/.