

The Public Authorities Reform Act of 2009

By Scott Fein

Efforts to reform public authorities in New York have, until relatively recently, been sporadic. In some measure, this may reflect the conflicting sentiments that legislators and others have about public authorities. Most would consider public authorities relatively effective in the maintenance and delivery of services. However, there is an overarching concern about their transparency, accountability and debt management. Those interested in reform have suggested that three areas of public authority operations merit reform: (i) transparency and governance, (ii) oversight, and (iii) the issuance of debt. The first two of these areas of concern appear well on the way to being addressed.

The enactment of the Public Authority Accountability Act of 2005 (“PAAA”) provided an important step toward increasing public awareness of authority operations. With the establishment of the State Authority Budget Office, an entity was available to obtain and make available on a web site comprehensive data about the fiscal and programmatic operation of hundreds of authorities Statewide. Additionally, the PAAA made comprehensive changes to governance, reporting, and auditing standards and property transactions.

With the operational and budgetary information now available, the legislature and Governor were ready to tackle the next stage of reform, enhancing authority operations and oversight. The Public Authorities Reform Act of 2009 (“PARA”) has recently been developed by the Legislature and Governor’s Office in consultation with the State Comptroller. The Act takes a significant step toward authority reform by enhancing governance, oversight, capacity to enforce reporting requirements, and approval of contracts by the State Comptroller. The PARA has been passed by the Legislature and is likely to be signed by the Governor within the next two weeks. A summary of the provisions of PARA and text of the legislation follow this introduction.

The prospect of a third phase of reform, debt management, has been discussed by commentators over the years. With the enactment of the PARA, the Legislature may now be prepared to consider clarifying important fiscal issues, including the definition of debt, a meaningful debt cap, limitations on conduit and back door borrowing, and coordination of debt issuance.

Public Authorities Reform Act (PARA) of 2009

Definition of Authority

Current Law

Public Authorities include state and local authorities, public benefit corporations and their subsidiaries, and not-for-profits sponsored by or created by a county, city, town, or village government.

PARA of 2009

No changes to existing law.

Authority Budget Office

Current Law:

1. Reviews authority operations, practices, and assesses compliance with law.
2. Maintain a comprehensive inventory of authority documents
3. Improves management practices

PARA 2009 adds the following powers and responsibilities:

1. Verify existence of all authorities in state law
2. Issue recommendations on debt
3. Comply or explain
4. Warn and censure
5. Receive and act upon complaints from the public
6. Formal investigations in response to complaints
7. Power to issue Subpoenas
8. Report criminal activities
9. Develop and issue, after consultation with the Attorney General, a written acknowledgement that board members understand their fiduciary duty.
10. Develop best practices for screening proposed directors
11. Promulgate rules and regulations

12. Develop comprehensive definition of public authorities
13. Review potential consolidation renaming of authorities
14. Standardize content and format of reports
15. Recommend a compensation plan for board members
16. Recommend changes in the terms of office of directors
17. Enter into cooperative agreements
18. Assess individual authorities and set date to make changes pursuant to this article
19. Suspension or removal of directors.

November 2009 Modifications:

1. Slight technical changes regarding the power to issue subpoenas
2. Develop and issue a process for board members to acknowledge understanding of his/her role and fiduciary responsibilities
3. Slight technical change regarding the promulgation of rules and regulations
4. The ABO will recommend a compensation or no compensation plan for board members

Documents Required to be Reported to the ABO

Current Law:

1. Report on debt issuance
2. Compensation schedules for employees
3. Projects undertaken by the authorities in the last year
4. A listing of real property held or disposed of
5. The fair market value of such property
6. The authority's code of ethics
7. An assessment of its internal control structure

PARA 2009 Adds the Following Documents to the Requirements of Public Reporting to the ABO:

1. Financial Reports and mission statement
2. Biographical information for all directors, officers, employees
3. Copy of legislation that creates the authority
4. Description of the authority and board structure
5. Charter (if applicable) By-Laws

6. Names of committees' committee members
7. Listing of operational changes from previous year
8. A minimum 4 year financial plan
9. Capital budget
10. Board performance evaluations
11. Description of assets / services bought and sold
12. Description of litigation an authority is involved in

Board Governance and Fiduciary Duty

Current Law:

1. Audit Committee required
2. Bans board members from serving as CEO, Executive Director, CFO, or Comptroller
3. Authority board members would now be required to (i) execute direct oversight of senior management relating to ethics; (ii) understand and monitor the implementation of financial and operational decisions of the authority; (iii) establish compensation and time and attendance policies; (iv) adopt a code of ethics; (v) establish policies that protect employees who disclose wrongdoing; and (vi) adopt a defense and indemnification policy
4. Requires board members to attend state approved training programs

PARA 2009 Adds the Following Governance Provisions:

1. Board members have an explicit fiduciary duty to the authority and not to the appointing entity
2. Governance committee must: (i) examine ethical and conflict of interest issues; (ii) perform board self-evaluations; (iii) investigate term limits; and (iv) develop by-laws which include rules and procedures for conducting board business
3. Audit Committee members must be familiar with corporate financial and accounting practices
4. Finance Committee created

November 2009 Modifications:

1. Repeals existing law and permits a board member to serve as both the CEO and Chair, and prohibits the Chair of an authority who is also the CEO from participating in determining compensation for the CEO
2. Breach of fiduciary duty would be cause for removal of a board member by the appointing entity

Contracts

Current Law:

Current Law is silent on this issue

PARA 2009 Requires Comptroller Approval of Contracts:

Prior to publication of bids each authority must submit to the Comptroller contracts over \$1 million. Comptroller must notify them that it wants to review contract within 45 days. Contracts must be approved within 90 days. If no action is taken it is automatically approved. All other contracts under \$1 million are subject to review at the Comptroller's request.

November 2009 Modifications:

1. Comptroller to review no bid contracts and those funded with State dollars. Comptroller not to review competitively bid contracts.
2. Comptroller NOT to review contracts of Roswell Park, Nassau, Erie, Westchester, and Clifton-Fine Public Benefit Corporation Hospitals that are:
 - Subject to the DOH Certification of Need process
 - For services, affiliations or joint ventures for the provision or administration of health care services or scientific research;
 - For direct health care services or goods used in the provision of health care services; or
 - For participation in group purchasing arrangements.
3. Comptroller NOT to review contracts for unforeseen emergencies
4. Comptroller NOT to review contracts for the purchase or sale of energy, electricity, or ancillary services on the spot market; contracts for the purchase or sale of energy/power, fuel, costs and ancillary services with a term of less than 5 years; or contracts for the sale of energy/power for economic development purposes

Disposition of Property

Current Law:

Requires a property disposal policy and a contracting officer. Publication of all real property owned. A loophole allows certain property to be sold below fair-market value.

PARA 2009:

Authority property must be sold at fair market value.

November 2009 Modifications:

1. Below fair market value sales permitted if it is within the mission of the Public Authority, as defined by their authorizing statute.
2. Complete disclosure of all below fair-market value transactions
3. Below fair market value transactions subject to denial by the Governor (by certification) and either house of the legislature (by resolution) within 60 days of receiving notification
4. For local authorities, approval by the local government for below fair market value transactions would be sufficient to permit the transfer if such approval is provided for in the authority's governing statute and the transfer is for property originally possessed by the authority

Debt Reform

Current Law:

Current Law is silent on this issue.

PARA 2009 Creates Stronger Debt Oversight Measures:

Authorities must submit debt reform measure to the ABO and statement of intent to guide issuance and overall amount of debt issued.

Limitations on the Creation of Subsidiaries

Current Law:

No limitations on the creation of subsidiaries by public authorities

PARA 2009 Requires Subsidiaries Can Only be Created by State Law Unless:

1. It is for a specific project that the state authority has the power to pursue whose primary purpose is to limit liability, which may not issue debt in excess of \$1 million
2. Subsidiaries must be reported 60 days prior to the formation and must report annually to the ABO

November 2009 Modifications:

Roswell Park, Erie, Westchester, Clinton-Fine, and Nassau public Benefit Corporation Hospitals receive substantially greater leeway with regard to subsidiary creation; such corporations are exempt from limitation on debt issuance, and are not subject to the qualifying criteria for the creation of a subsidiary without legislative approval that requires subsidiary to be for the purpose of limiting liability.

Audits of Authorities

Current Law:

Each authority must undergo an annual independent audit.

PARA 2009:

Audits must be performed as required by Sec. 2 of State Finance law and requires the audit to be sent to the ABO.

MWBE

Current Law:

1. MWBE law currently applies to 35 authorities
2. MWBE law applies to state contracts for “labor, services, supplies, equipment, materials.”

PARA 2009:

1. Requires all state authorities to abide by MWBE standards
2. Clarifies that MWBE law applies to state contracts for services to include, “legal, financial, and other professional services.”

Lobbying Contacts

Current Law:

Current law is silent on this issue

PARA 2009:

Requires every member, officer, or employee to make a record of any lobbyist contract and the adoption of policies implementing these requirements.

November 2009 Modifications:

State authorities required to maintain a record of lobbying contacts made in an attempt to influence any rule, regulation, or ratemaking procedure of such authority.

Whistleblower

Current Law:

The board to establish written policies and procedures that protect employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance or other inappropriate behavior.

PARA 2009 Strengthens Whistleblower Provisions:

1. Requires a Whistleblower Access and Assistance Program in consultation with the Attorney General that (i) establishes toll-free phone lines available to employees, and (ii) offers advice and consultation on state and federal laws

2. An authority may not fire, discharge, demote, suspend, threaten, harass, or discriminate against any employee for their whistleblower actions

CEO Confirmation

Current Law:

Confirmation of MTA CEO

PARA 2009:

Confirmation of all Public Authority CEOs

November 2009 Modifications:

Confirmation of CEO Executive Director of specified Public Authorities

- Dormitory Authority (Executive Director)
- Thruway Authority (Executive Director)
- Power Authority (CEO)
- Long Island Power Authority (CEO)

Labor Agreement

PARA 2009:

Silent on this.

November 2009 Modifications:

1. State authorities prohibited from entering into any contract for the development of a hotel or convention center in which the authority has a substantial proprietary interest unless such contract includes a labor peace agreement with a labor organization that represents hotel employees in the state, for at least 5 years.
2. Contracts may be entered into *without* a labor peace agreement upon a written determination by the authority that a labor peace agreement would prevent the project from going forward, or would substantially increase the cost of the project. Basis for the determination would include prior experience, earlier RFPs for the same project, or detailed evaluation of potential bidders.
3. Provision would expire June 30, 2012.

Effective Date

This act will take effect on March 1, 2010.