

Oversight of Public Authority Contracts by the State Comptroller

By Kim Fine

Public authorities were created to (i) finance, construct and operate revenue-producing facilities for the public benefit; (ii) assist the public sector with projects intended to spur economic development; (iii) provide financial support for non-profit sector projects that serve public needs; and/or (iv) coordinate the development or management of resources that transcend traditional political boundaries. The benefits of public authorities to New York State include their ability to finance public improvements without increasing taxes, to assess fees on users to cover the costs of construction or operation, to avoid the use of broad-based dedicated revenue streams, to finance the public takeover of private enterprises, to remove entities and associated operations from the direct control of elected officials, and to provide a more flexible management environment than is typical of government.¹



area that would benefit from improved processes and increased scrutiny.

Recent Developments

In July 2009, the State Senate passed legislation that had passed the Assembly a month earlier revising elements of the Public Authorities Accountability Act of 2005 (A2209-C).³

In addition to creating an Independent Authorities Budget Office (ABO), the legislation empowers the State Comptroller to approve public authority contracts. Expanded oversight of public authority contracts by the State Comptroller was first requested by Comptroller Alan G. Hevesi in 2004 when he released a report providing a history of public authorities and citing instances where inadequate supervision resulted in questionable or improper actions.⁴ The legislative proposals were supported at the time by Attorney General Eliot Spitzer, who became the State's Governor in January 2007 and continued his calls for public authority reform in his first State of the State address. In the interim, then Governor George Pataki established the New York State Commission on Public Authority Reform, chaired by corporate governance expert Ira Millstein. Its recommendations informed the Public Authorities Accountability Act of 2005, which made some reforms but was viewed by many to not go far enough. The 2005 Act did not address the issue of review of public authority contracts by the State Comptroller.

Negotiations with the legislature to enhance public authority oversight were not successful during Spitzer's less than 15 months in office. In fact, the issue was not raised by Spitzer in his second State of the State address, delivered approximately 10 weeks before his resignation. When Governor David Paterson took office in March 2008, given the circumstances and the financial challenges facing the State, public authority reform was not a stated priority. However, in June 2008, Governor Paterson did issue an Executive Order establishing a task force comprised of leaders of public authorities that issue State-supported debt to study a procurement practice: the selection of underwriters for negotiated sales of State-supported bonds.⁵

Assemblyman Richard L. Brodsky, whose investigations and hearings as Chairman of the Assembly Committee on Corporations, Authorities and Commissions helped inspire efforts that resulted in passage of the Public Authorities Accountability Act of 2005, continued efforts to negotiate further reforms throughout 2008. Senator John J. Flanagan led his House's effort to promote reform but the

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New Yorkers pay for public authorities in the form of rates, tolls, fees and taxpayer-funded subsidies. Revenues pay the debt service on authority-issued bonds. In most cases, New Yorkers use authority facilities because bridges, roads, subways, water systems and universities are granted monopoly status in the name of the public interest. As a result of the lack of oversight assigned to these entities, some have developed a culture of mismanagement and experienced a history of unethical and, at times, illegal activity.²

While the intended benefits of the independent operation of public authorities described in the 1967 study by the Office of the State Comptroller should not be curtailed by treating these entities exactly like State agencies, it is clear that additional oversight of authority operations is needed. As evidenced by audits conducted by the Office of the State Comptroller and other revelations, the award of contracts by public authorities is an operational

regular 2008 session concluded with no action. Unsuccessful in advancing a stand-alone bill, Assemblyman Brodsky tried to insert broad authority reform in a bill providing financial relief to the Metropolitan Transportation Authority (MTA) in March 2009; again, authority reform failed to advance.

In June 2009, the Assembly passed a bill sponsored by Brodsky with 140 votes and forwarded it to the Senate. Although delayed by uncertainty about leadership in the Senate that stalled all action for several weeks, the bill passed the Senate on July 16, 2009.⁶

The legislation requires public authorities to submit to the State Comptroller proposals for procurements of anticipated value of more than \$1 million. Within 45-days of receipt of a proposal, the Comptroller is to inform the authority whether the procurement will be subject to review and approval. If the Comptroller does so subject procurements to review and approval, the resulting contract will not be valid and enforceable without the Comptroller's express approval, unless the Comptroller fails to act on the contract within 90 days of submission to his or her office. The Comptroller also may initiate the requirement for a contract or category of contracts to be subject to his or her review and approval. Certain types of contracts are excluded from these provisions, such as those arising from an emergency.

The pre-approval process outlined in this legislation differs from that which applies to contracts of State agencies, and the legislation clearly states that it is not intended to change the Comptroller's existing authority to supervise the accounts of public authorities—generally or as specified in other sections of law.

State Agency Contracts

New York State agencies are subject to a procurement process through which commodities and services are obtained. This procurement process, established in the State Finance Law, generally governs State agencies only.⁷ Local governments must follow procedures outlined in the General Municipal Law, but there are limited rules⁸ governing procurements by public authorities in the Public Authorities Law.⁹ Article 5, section 4 of the New York State Constitution designates the Comptroller as the head of the Department of Audit and Control. In 1925, Article 5, section 1 of the Constitution was amended to specify the Comptroller's functions, and these functions included the duty to "audit all vouchers before payment and all official accounts." This constitutional amendment followed Chapter 342 of the Laws of 1913, which already required the State Comptroller to approve State contracts valued at more than \$1,000.

Before any contract made for or by any state charitable institution, reformatory, house of refuge, industrial school, officer,

department, board or commission, shall be executed or become effective, when such contract exceeds one thousand dollars in amount, it shall first be approved by the comptroller and filed in his office.¹⁰

The State Finance Law has been amended several times since 1913, but the requirement for pre-approval of contracts by the State Comptroller has remained an important part of the system of checks to avoid impropriety in the awarding of State contracts. The seminal case regarding the Comptroller's discretion to approve or disapprove contracts under section 112 of the State Finance Law is *Konski v. Levitt*,¹¹ in which the New York State, Appellate Division, Third Department held that the Comptroller had the independent power to find a vendor non-responsible, and that the Comptroller's refusal to approve a contract was justified in view of his knowledge that the vendor was under Grand Jury investigation for possible involvement with political corruption in the award of public contracts. This decision established two basic principles for future review of State contracts by the Office of the State Comptroller:

- The Comptroller's discretion to approve a contract under section 112 of the State Finance Law is wide-ranging. It is not simply limited to determining whether a contract is fair and reasonable.¹²
- The Comptroller's decision to approve or disapprove a contract will be upheld if the Comptroller has a rational basis for his actions.¹³

Currently, section 112(2) of the State Finance Law generally requires review and approval by the Comptroller of all contracts for or by a state agency, department, board, officer, commission, or institution valued in excess of \$50,000, and contracts for or by the Office of General Services valued at \$85,000 or more.¹⁴ The purposes of this requirement include protecting the public from governmental misconduct and improvidence, and ensuring that contracts are fair and reasonable.¹⁵ The Comptroller's review ensures State agency compliance with a number of statutory procurement requirements, the most comprehensive of which are set forth in section 163 of the State Finance Law, which was added by the "Procurement Stewardship Act" (PSA).¹⁶ The PSA established operating principles "to facilitate each state agency's mission, while protecting the interest of the state and its taxpayers and promoting fairness in contracting with the business community."¹⁷ The Office of the State Comptroller follows the operating principles of the PSA and considers various other factors in its review of State agency contracts.

To ensure that parties to a contract are aware that it cannot be effective until approved by the Comptroller, standard language required for all State contracts stipulates the values at which contracts require approval by the State Comptroller.

Public Authority Contracts

Unlike State agency contracts, prior to legislative action in 2009, with few exceptions, public authority contracts had not been subject to approval by the State Comptroller before they became effective. In general, public authorities are governed by boards of directors that are intended to provide oversight of operations including procurement. In addition, section 2879 of the Public Authorities Law requires public authorities to develop comprehensive procurement guidelines and to submit annual procurement reports to the State Comptroller and other officials.

To supplement its review of these annual summaries of procurement-related activity, the Office of the State Comptroller, pursuant to Article 10, section 5 of the Constitution,¹⁸ conducts audits of public authority contracting procedures and results.

A review of audit reports involving public authorities found that of those examining procurement processes, about 15 percent identified apparent abuses of procurement authority, 40 percent found disregard for procurement rules and the remainder, poor quality procurements resulting in apparent waste or inefficiency. In the first category, audits uncovered improper use of credit cards or use of credit cards to avoid competitive bidding, and adding work to existing contracts to avoid undertaking a new procurement. Disregard for procurement rules were found in cases where competitive bidding requirements or required board approval of an intention to contract were ignored, as well as failure to advance the State's minority and women-owned business enterprise (MWBE) contracting goals. Finally, poor quality procurements were noted in cases where documentation and justification to support purchases were lacking, or written guidelines or procedures did not exist.

The major public authorities whose contracts have been, either by statute or board resolution, subject to pre-audit by the State Comptroller in order to become effective are the Long Island Power Authority (LIPA) and the New York State Thruway Authority, along with its subsidiary corporation, the New York State Canal Corporation.

Section 1020-cc of the Public Authorities Law provides that all contracts of LIPA shall be subject to the provisions of the State Finance Law relating to contracts made by the State.¹⁹ As a result, LIPA contracts exceeding the threshold found in section 112 of the State Finance Law must be submitted to the Comptroller's Office for review and approval before they can become effective.²⁰

Unlike LIPA, the New York State Thruway Authority was not required by legislation to comply with the contracting provisions of the State Finance Law or to submit its contracts to the Office of the State Comptroller for pre-approval in order for its contracts to become effective. Shortly after the Authority was established in 1950,

however, its governing board adopted Resolution Number 19, requesting that the Comptroller "audit the funds of the Authority in the same manner as funds of a regular State agency are audited."²¹ That resolution, together with Article 10, section 5 of the Constitution, has consistently been interpreted by the Authority, the Office of the State Comptroller and, most recently, the courts,²² as authorizing the Comptroller to perform an approval function with respect to Thruway Authority contracts.

Resolution Number 757, adopted by the Thruway's board in 1965, held Authority procurements to the standards set forth in its own procedures, instead of those prescribed by the State Finance Law.²³ Although this changed the standards by which the Thruway conducted its procurements, the Authority continued to require the Comptroller's approval of its contracts before they became effective. When the New York State Canal Corporation was established as a subsidiary of the Thruway Authority in 1992, its contracts also became subject to review and approval by the Office of the State Comptroller before they become effective.

Contracts of various other smaller public authorities are submitted for the Comptroller's review and approval because of the nature of the entity, the nature of the contracts entered into or in response to scandals uncovered at the entity. The Attorney General opined that the Natural Heritage Trust, for example, possesses attributes of a State agency and, therefore, should be treated as a State agency.²⁴ Rentals and concessions (other than for exhibition purposes) entered into by the New York Convention Center Operating Corporation (Jacob Javits Convention Center) are expressly required by statute to be subject to prior approval by the State Comptroller.²⁵ The Hudson River Black River Regulating District has requested approval of its contracts by the Office of the State Comptroller for some 40 years, apparently in response to a procurement-related scandal.

Effects of New Reform

In State fiscal year (SFY) 2008-09, the Office of the State Comptroller reviewed 13,010 contracts valued at \$24.5 billion. In addition, it reviewed 22,132 contract amendments, for a total of 35,142 transactions valued at \$33.8 billion.

These statistics include 308 public authority contracts valued at \$2.06 billion and 448 public authority contract amendments, for a total of 756 transactions valued at more than \$4 billion. Of the 308 new public authority contracts reviewed, 253 were approved, at a value of \$1.75 billion.

By requiring public authorities to ask the Comptroller whether he or she wants to review a procurement and resulting contracts, and expressly granting the Comptroller the authority to pro-actively request pre-approval of

contracts and/or contract types, the number of authority contracts subject to pre-audit will likely increase significantly. Conditions at the time the proposed procurement is presented to the Comptroller, as well as the size and visibility of the project, may encourage the Comptroller to exercise oversight. For example, the New York Convention Center (a.k.a. Jacob Javits Convention Center) recently received approval from the Public Authorities Control Board to start a renovation project valued at \$463 million that may warrant the Comptroller's attention.²⁶

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The Comptroller also might employ past audit findings to determine which authority procurements could benefit from increased scrutiny. Since the provision empowering the Comptroller to inform an authority that its contracts will be subject to pre-approval does not include a limit in terms of estimated contract value, the Comptroller could elect to pre-audit all proposed credit card purchases of an entity where there has been a history of abuse. Similarly, extensions or material changes to existing contracts that may not have been bid competitively could be subjected to pre-approval.

In either case, the Comptroller's review will serve to improve procurements of the State's public authorities by providing lessons and imposing standard requirements. Contract experts in the Office of the State Comptroller will use their experience with State agencies and select public authorities to educate public authority staff in the conduct of fair and competitive procurements.

The legislation passed by both Houses represents a reasonable response to problems that have been uncovered, and a balanced approach to improving public authority procurement practices.

Endnotes

1. See Office of the State Comptroller, study No. 4, Public Authorities in New York State: A Financial Study, Comptroller's Studies for the 1967 Constitutional Convention (1967) (citing to the *Report of the Temporary State Commission on Coordination of State Activities* (1956)).
2. See Office of the State Comptroller, Public Authority Reform: Reining in New York's Secret Government 29-38 (2004), available at <http://www.osc.state.ny.us/press/releases/feb04/publicauthorityreform.pdf>.
3. A.2209-C, 232nd Sess. (N.Y. 2009) [*hereinafter* S.1537-C/A.2209-C] (currently awaiting gubernatorial approval).
4. Public Authority Reform, *supra* note 2.
5. N.Y. Exec. Order No. 10 (2008), available at http://www.ny.gov/governor/executive_orders/xeorders/pdf/eo_10.pdf.

6. S.1537-C/A.2209-C (2009).
7. See generally N.Y. State Fin. Law §§ 135-146 (2002 & Supp. 2006); §§160-168; §§ 79-d-179-p; §§ 179-q-179-ee. See also N.Y. High. Law § 38 (2001 & Supp. 2006); N.Y. Pub. Bldgs. Law § 8 (1996 & Supp. 2009) (provisions governing the award of highway construction and other public works contracts).
8. N.Y. Gen. Mun. Law §§ 100-109-b (1999 & Supp. 2006).
9. N.Y. Pub. Auth. Law §§ 2875-2880-a (2002 & Supp.2006).
10. See 1913 N.Y. Laws 637.
11. *Konski Eng'rs, P.C. v. Levitt*, 415 N.Y.S.2d 509 (3d Dep't 1979).
12. *Id.* at 510.
13. *Id.* at 511.
14. N.Y. State Fin. Law § 112 (2002 & Supp. 2009).
15. *City of New York v. State*, 87 N.Y.2d 982, 985 (1996); *Parsa v. New York*, 64 N.Y.2d 143, 147 (1984); *Konski Eng'rs, P.C.* 415 N.Y.S.2d at 509.
16. See 1996 N.Y. Laws 527.
17. N.Y. State Fin. Law § 163(2) (2002 & Supp. 2006).
18. N.Y. Const. art. 10 § 5 (vesting in the Comptroller the power to “supervise” the “accounts” of certain “public corporations,” including most public authorities).
19. N.Y. Pub. Auth. Law § 1020-cc (2009).
20. N.Y. State Fin. Law § 112 (2002 & Supp. 2006). Currently, the State Finance Law approval threshold for the purchase of goods and services is \$50,000.
21. See *Worth Constr. Co., Inc. v. Hevesi*, 819 N.Y.S.2d 812 (3d Dep't 2006), *aff'd*, 8 N.Y.3d 548 (2007).
22. *Id.*
23. See Office of the State Comptroller, Public Authority Contracting Parties: Billions of Dollars of Public Funds Committed Without Adequate Oversight (2006), available at <http://www.osc.state.ny.us/pubauth/publicauthoritycontracting.pdf>.
24. 1974 Op. N.Y. Att'y Gen. 9 (1974).
25. N.Y. Pub. Auth. Law § 2564 (2002).
26. See Press Release, Office of the Governor of N.Y., Governor Paterson Announces Approval of Jacob J. Javits Convention Center Renovation and Expansion (Mar. 24, 2009).

Kim Fine served as Deputy Comptroller for Budget and Policy Analysis, coordinating various reform agendas advanced by the Office of the State Comptroller including public authority reform and procurement reform. During that time, in addition to authoring studies and policy reports, she oversaw the development of the Public Authority Reporting Information System through which authorities submit data to the Office of the State Comptroller and Authority Budget Office (ABO). Representing the Comptroller, she sat on the Advisory Council on Procurement Lobbying and served as co-executive director of the Local Government Assistance Corporation. She also served as Deputy Budget Director for the State, where her responsibilities included supervision of the ABO and involvement in framing and negotiating public authority reform legislation as well as Workers' Compensation reform. Kim continues to closely monitor developments in State government in her current role as Senior Vice President for Policy, Planning and Communications for Albany Medical Center.