

**NYC's FLAGRANT DISREGARD FOR COMPETITIVE BIDDING LAWS
- "CM-BUILD" PROCUREMENT**

Like democracy itself, competitive bidding laws are not convenient to implement. Such laws often frustrate the procurement efficiencies typically found in private sector construction. But the rules imposed in public bidding reflect the collective wisdom of generations of public works administration. They are designed to avoid the repetition of the notorious public works scandals of the past. While each generation of bureaucrats and politicians think they have a better idea, they forget that fraud, corruption and cronyism always eventually seep back into the system when shortcuts or expediciencies are implemented by new administrations claiming to have a better way.

So it was with the hard-headed Giuliani administration, and so it is now with the Bloomberg administration. The illegal "privatization" of NYC procurement started during the former administration and has exploded during the latter. Today, a significant percentage of NYC public works building construction (not so heavy highway, as yet) is conducted in a manner that clearly circumvents, in numerous ways, both the General Municipal Law and the State Finance Law.

The questionable procurement operates as follows: The City publicly issues an RFP for a "CM-Build" services contract. Once awarded the contract, the CM is required to provide a "turn key" project to the particular City agency, often, but not exclusively,

the Department of Design and Construction. The CM completely administers the project. It “selects” the Wicks contractors (general construction, HVAC, electrical and plumbing) and all of the other subs and suppliers typically without any publication of the bidding opportunity in the NYC Record and without a sealed, competitive bid opening. The CMs select the subs from a “pre-qualified”, limited list of contractors and subcontractors with whom it is “comfortable”, so there is no true open competition. The Wicks primes are treated as subcontractors of the CM in direct violation of the Wicks Law. No payment bond is required of the CM to protect contractors, subcontractors and suppliers.

The competitive bidding laws mandate that there can be no “gatekeeper at the bid room.” Anyone must be able to bid. Open competition is strictly required. Any “qualifying” must be part of the post-bid process, when all bidder responsibility and bid responsiveness issues are to be resolved. Prequalification, often a favorite of the public agencies, prevents open and competitive procurement and is (except in the case of a clear emergency) never permitted to be conducted by NYC mayoral agencies.

NYC’s CM-Build procurement also violates the Wick’s Law. While giving lip service to the concept of procurement via four separate sets of specifications, this is not all that the Wick’s Law contemplates or requires. The statute was designed to assure that the four separate primes are just that, in direct privity with the owner. Further, the law requires that all money flows directly from the owner to each of the four (trade) primes. All disputes, change orders and claims are to be resolved directly between the respective (trade) primes and the owner without financial involvement by a CM or a GC. None of this occurs under the illegal NYC CM-Build paradigm.

The NYC CM-Build contract also directly violates the States Finance Law with regard to required bonding. Since subcontractors and materialmen are not protected by either a GC or a CM payment bond, the purposes of §137 of the State Finance Law are completely frustrated. Contractual “promises” in the CM’s contract with the City that it (or the City) will pay the trades in a timely fashion can hardly be a substitute for strict compliance with the will of the New York legislature which, by definition, is the public policy of this state.

Yes, CM-Build is easier for New York City. Yes, more work can probably be put out more quickly. And, yes, the City will be able to enjoy the efficiency of CM’s literally hand-picking their subs (as in the private sector) from a “pre-qualified” group of subcontractors based on successful prior dealings. Yes, the controversial Wick’s Law has been completely circumvented. It is a public owner’s “dream world” – it just happens to be illegal for far too many reasons to ever be seriously defended.

The opportunity for favoritism and cronyism is so rife that it is almost inevitable. Subcontractors complain they don’t see published in either the City Record or in Dodge Reports many of the jobs now constructed by NYC. Many who have bid to NYC-DDC (or its predecessor DGS) for years, sometimes decades, have been completely shut out. True competition, and competitive pricing, are defeated.

This is public contracting at its worst. It is not just that NYC mayoral agencies have come to rely on this illegal process, the New York City Housing Authority (NYCHA) has just illegally “privatized” its entire \$2 billion capital program through a

mere handful of CM's. Its entire procurement process has been handed over to private parties charged with administrating a simple, but legally indefensible, "turn key" operation.

This is not to say that the very reputable CM firms that are involved in this process have done anything wrong. Much to the contrary, the complete responsibility lies with the public owners who have set up this expedient procurement process outside the law. The CM firms are simply doing what they are designed to do, bidding as construction managers to NYC agencies and professionally carrying out their contractual responsibilities. The indifference to the law by the City, and now other authorities such as NYCHA, is a spreading cancer undermining the competitive bidding laws.

This has been going on for some time, but it is only recently that it has truly gathered a "head of steam." In fact, when these issues are raised with City agency's the reaction is one of puzzlement and denial. The response often is that it can't be illegal, it's so prevalent. (Can you imagine if contractors offered that defense to an owner or, worse still, a prosecutor?) Some City agencies have feebly claimed that this practice is reserved to alleged "emergency" situations. Not only is this not true, it is a tacit acknowledgment that it is illegal to be doing it as pervasively and routinely as it is now being done. While this alleged limited use might have been the case during the early days of the Giuliani administration almost a decade ago, it is certainly not the case today. Hundreds of millions of dollars (or more) of NYC procurement is proceeding in this illegal manner.

As stated, the competitive bidding law's are cumbersome, but they exist for good reason and they are the law of this State. New York City agencies have forgotten both of

these factors. As they rely increasingly on this questionable practice, they become more and more dependent upon this addictive habit. Their cadre of trained procurement professionals diminishes as they rely more and more on the CMs. NYC's ability to effectively execute major public work projects pursuant to New York State law is compromised.

In addition, there can be little doubt, that the lack of true competition is costing the City incalculably. Without true competitive bidding, it is impossible for cronyism not to seep into the system with subcontractors on countless NYC public works projects being virtually hand picked. With only a limited handful of pre-selected companies allowed to bid, pricing can never be driven by the marketplace.

All public contractors should be intolerant of this practice. True competition must be vigorously protected if public contracting as we know it (and as the law requires) it is to be preserved. Even those contractors and CM's who are currently involved should realize that the excessive cost to the system are not in anyone's interest and put the City's capital program at risk. Some participating CM's and contractors have acknowledged to us "off the record" that they themselves have serious doubts about the legalities of this system. They should also realize that for every project within which they are an "insider", there are a multitude of projects for which they are simply shut out. The industry should mobilize to confront the serious threat to public contracting that NYC's current CM-Build contracting represents.