A number of unique legal issues and risks arise on state and local construction projects performed for public owners in the United States—issues and risks that do not arise on private projects. Familiarity with construction law is useful when it comes to many legal issues related to public works. But advising clients involved with state and local construction projects requires much more than a general understanding of construction law. Public works are subject to laws and regulations that give public construction the hallmarks of a regulated industry requiring knowledge of sometimes arcane and intricate law that differs by jurisdiction. Failure to appreciate differences between legal requirements governing public and private works can have significant adverse consequences for a public project participant, whether owner, contractor, subcontractor, or design professional.

For example, a construction contract between an owner and a contractor on a private project may be entered into based on no more than a long-standing relationship and direct negotiations, with the owner free to pay a higher contract price despite knowing other contractors would perform the same work at a lower price. If the same project were undertaken by a public owner, however, the law would not allow such an approach and may require the owner to publicly advertise an invitation for bid and to award the contract to the lowest responsive and responsible bidder, notwithstanding sound reasons for preferring a bidder who offered a higher price. In some jurisdictions, failure to adhere to such requirements may have draconian consequences unheard of in the private sector, like disgorgement or return by the contractor of all amounts paid by the public owner because the contract was not procured in accordance with “competitive
bidding” requirements, even if the project was completed to the owner’s full satisfaction.¹

The goal of this handbook is to highlight critical differences that frequently exist between the law applicable to state and local public works versus private works so that owners, contractors, subcontractors, and design professionals can avoid the many pitfalls and surprises that can arise due to such differences. Although the law of each state or local jurisdiction may vary in its particulars, there are a number of common differences between the law applicable to public and private projects. Familiarity with such differences enables those providing legal advice to participants on public projects, and the participants themselves, to better understand and discern the particular requirements of their state or local jurisdiction and how they differ from those applicable to private construction projects.

I. Three Types of Construction Projects: Private, Federal, and State and Local Projects

Construction projects can be grouped into three categories based on the nature of the owner, which can be a useful step in identifying laws applicable to a project. There are federal projects where the federal government is the owner, public works projects where a state or local agency is the owner, and private projects where the owner is a private party. As used in this handbook, federal contracts refer to construction contracts between the United States or an agency of the United States and a construction contractor. Federal statutes and regulations (e.g., Federal Acquisition Regulations or FAR) govern federal contracts, and entire books are available on federal contracting. In contrast, this handbook does not focus on federal construction contracts or private projects; instead, it focuses on state and local projects. However, federal funding often supports projects of a state or local agency, in which case a number of requirements may be imposed as a condition of the federal funding, which requirements are discussed throughout this handbook and should not be overlooked.

Throughout this handbook, references are made to “public works,” “public projects,” and “state and local projects” or “state and local construction projects.” These labels are used to refer to construction projects undertaken by state or local public owners and do not extend to those projects undertaken by the federal government as owner. Similarly, as used in this handbook, the phrases “public owner(s),” “public entity(ies)” or “public agency(ies)” refer to state and local entities that may contract for design and construction services but do not encompass the federal government or federal agencies. The phrases “state and local projects” or “state and local contracts” refer to construction projects or contracts for design or construction services undertaken by public owners exclusive of the federal government.

II. Differences between the Law Applicable to Public and Private Works

A. Procurement, Protests, Debarment, and Project Delivery Systems

The significant differences between the law applicable to state and local construction projects and private projects are most pronounced when it comes to the procurement of design and construction services.

As alluded to above, laws in most states dictate the process a public owner must adhere to when procuring construction services. These procurement laws are intended to guard against favoritism and ensure that the public is receiving a competitive price. Many public owners are required to award construction contracts to the lowest responsive and responsible bidder following public advertising of the invitation for bids. Such a process need not be followed in the private sector. Private owners need not publicly advertise for bids, are not required by statute to award contracts to the low bidder, and frequently award construction contracts to the contractor who offers the overall best value and not just the lowest price. Chapter 2 of this handbook examines the process of procuring construction services: the bid process; the award process; and the concepts of bid responsiveness and contractor responsibility. Next, chapter 3 discusses the concept of prequalification and the fact that many public owners now require that contractors prequalify with public owners in order to be eligible to bid on public projects.

Failure to comply with procurement requirements can have severe consequences and can result in administrative and courtroom battles over the propriety of the procurement and the award of a construction contract. On public projects, a disappointed bidder may be entitled to bring a bid protest challenging the procurement at various phases as well as the very award of the contract itself. Additionally, contractors and subcontractors who have failed to adhere to laws applicable to public contracts or have engaged in misconduct or had performance issues on prior contracts may be debarred or suspended from bidding on public projects. The entire concept of bid protests and debarment and suspension proceedings is “otherworldly” to contractors and subcontractors who only perform private work projects as these legal processes only apply to public works contracts. Bid protests and procurement challenges, as well as debarment and suspension, are examined in chapter 4.

Disappointed bidders and others also have sought to maintain actions against public owners, public officials, and third parties assisting public owners in the evaluation of bids (e.g., project managers, construction managers, and design professionals). Chief among these actions are claims under 42 U.S.C. § 1983 asserting that a bidder or contractor has been subjected to de facto debarment resulting in denial of procedural or substantive due process, equal protection of the law, or free speech rights. The prospect of a section 1983 action ordinarily would not arise on a private project, but arises in the context of public works because of the involvement of governmental entities as public
owners. Moreover, disappointed bidders have attempted to assert a variety of state law claims such as defamation or tortious interference with prospective business expectations against other bidders. These types of actions and claims are explored in chapter 16.

A variety of project delivery systems are used on construction projects. In the private works context, owners have great flexibility to choose a project delivery system that best fits the needs of the project. There is far less flexibility on public works. As a general matter, unless otherwise authorized by law, public works typically have been delivered under the traditional design-bid-build approach. Yet, with increasing frequency, states and local entities are permitted by new laws to use alternative project delivery approaches like design-build, construction manager-at-risk, and contract awards based on best value and not simply lowest price. But the use of a form of project delivery not authorized by statute may precipitate a protest or other challenge to the procurement or contract award. To guide public owners and contractors, chapter 5 addresses project delivery options on public projects and the increasing legislative receptivity to alternative forms of project delivery on certain classes of projects. Chapter 6 then dives deeper into the public procurement topic du jure—public-private partnerships (P3s) as a means for public owners to fund and execute projects, some of the key issues concerning authorization of P3 projects, and other legal and contractual issues associated with P3 projects.

B. Contract Terms and Limits on Risk Allocation

Regardless of the project delivery system employed, the way in which the terms of a construction contract on a private versus a public contract are established usually differs dramatically. Construction contracts for public works are not ordinarily negotiated in the conventional way that occurs on private contracts where drafts pass back and forth between private owner and contractor and face-to-face meetings may be held to resolve points of disagreement. Instead, on public contracts, the owner ordinarily attaches a form of contract with the invitation for bids. Under the traditional public competitive bidding process, the bidder who is awarded the contract must execute the contract “as is” subject only to addenda that may have been issued by the public owner prior to contract award. There is no negotiation of contract terms. While this gives public owners substantial control over the terms of the contract and important risk allocation provisions, a number of considerations constrain the ability of public owners to foist entirely one-sided contracts onto contractors. For one, the market may respond negatively to extremely one-sided contracts, and a public owner proposing such a contract may find itself with no bids or few bids with prices greatly inflated to offset unreasonable risk allocation provisions. But this dynamic is far different from the process of arriving at the terms of a construction contract in the private sector.
II. Differences between the Law Applicable to Public and Private Works

Aside from the “invisible hand” of the market influencing the terms of a public contract, laws in various jurisdictions may require a public owner to incorporate certain provisions in a construction contract or may preclude allocating certain risks to a construction contractor. Chapter 7 identifies some of the limits on a public owner’s ability to shift certain risks to a construction contractor, such as the limits some jurisdictions impose on contract clauses that purport to shift to a contractor all risk for unanticipated underground conditions or for errors in design furnished by the public owner.

A host of requirements must be incorporated into state and local construction contracts depending on the jurisdiction—requirements simply not required on private projects. Chapter 8 reviews payment and performance bond requirements on public works often imposed by so-called “mini,” “baby,” or “little” Miller Act statutes (which are based on the federal Miller Act) that vary widely among states and by type of project. Chapter 9 addresses state and local preference programs that may be imposed on public contracts (e.g., small, disadvantaged, woman-/minority-/veteran-owned enterprise programs and “buy local” preferences). Chapter 9 also covers the legal challenges to such programs, the adoption by some states of laws forbidding certain affirmative action programs in public contracting (with exceptions for federally funded projects), and compliance challenges and consequences of noncompliance with such requirements.

Differences also exist in the statutory payment rights and remedies available on public versus private projects for contractors and subcontractors. Chapter 10 emphasizes the major differences in these payment remedies, most notably with respect to mechanics liens. While mechanics liens may be filed on private projects, such liens are not available against public property. However, most states give subcontractors “stop notice” rights enabling them to effectively lien those contract funds that have not yet been disbursed by the public owner as a form of payment security for unpaid labor and materials furnished to the public project. And chapter 18 explains green construction laws and the types of requirements that may be imposed on public works by legislative mandate or contract to bring about environmental goals such as sustainability and energy efficiency.

Several labor and employment related issues unique to public works are detailed in chapter 13. The most significant of these is that state or local law in many jurisdictions dictates payment of prevailing wages to laborers performing work on public works. Prevailing wage requirements on public works often result in pages of contract clauses or contract exhibits dealing with submission of certified payrolls, audit clauses, and penalties for noncompliance. State prevailing wage laws are known as “mini,” “baby,” or “little” Davis-Bacon laws in homage to the federal law that imposes prevailing wage requirements on federal contractors (and that are imposed on many state and local projects receiving federal funds). But state prevailing wage laws can diverge significantly from their federal counterpart and differ state to state. And, apropos
of the sharp political divides within the country, battles are being fought in many states over whether to repeal or adopt prevailing wage laws. Chapter 13 elaborates on the shifting sands in this political battle.

C. Claims, Changes, and Disputes

Public construction projects, like private projects, are not immune to changes, claims, and disputes. But there may be unique requirements or special considerations on public works applicable to such matters and their resolution. Chapter 14 tackles claim issues. One issue of particular note is that a number of jurisdictions strictly apply statutory and contractual claim notice requirements and do not recognize the more forgiving constructive notice and actual prejudice approach that often applies on private contracts and on federal contracts. Contractors need to be aware of the approach in each jurisdiction in which they perform projects and take steps to preserve their claims. Chapter 15 surveys state false claims acts, modeled to varying degrees after the federal False Claims Act, and how those acts have been used by public owners and whistleblowers on public construction projects.

Alternative dispute resolution on public works and some unique settlement issues are addressed in chapter 17. For example, unlike a settlement agreement resolving a dispute on a private construction project that can be treated as confidential, a settlement agreement on a public project is a “public record” and a confidentiality clause may not shield the agreement from access by the media or the public at large. Contractors also need to be sensitive to certain provisions that might be inserted into a settlement agreement that might have collateral adverse repercussions. By way of illustration, the public owner and the contractor may share the view that their disputes have made their relationship particularly acrimonious or toxic and decide to insert a clause providing that the contractor will not bid on any future project of the public agency for a specified period of time. The contractor needs to be concerned whether such a clause constitutes a voluntary debarment or suspension that must be disclosed in response to prequalification questionnaires or questions in solicitations of other public owners whose procurements the contractor intends to pursue. Guidance on these and other issues is provided in chapter 17.

D. Subcontractors and Design Professionals

Separate chapters are devoted to subcontractors and design professionals—both key players on public works. Chapter 11 considers a number of unique issues on public contracts pertaining to subcontractors that are also germane to public owners and contractors. These subcontracting issues include the requirement in many states that subcontractors whose work exceeds a certain dollar threshold be specifically identified and listed in a contractor's bid as a means of preventing “bid shopping.” In states with subcontractor listing laws,
listed subcontractors receive statutory protections against the prime contractor dropping the subcontractor that are over and above the protections provided by common law. Further, noncompliance with listing laws expose a contractor to statutory penalties and remedies and may provide the basis for bid challenges that can disrupt an otherwise orderly procurement.

Chapter 12 spotlights a number of unique considerations applicable to design services on public works. The manner in which design services are procured on public projects is very different from how construction services are procured. But design services ordinarily cannot be procured in a wholly laissez-fair manner. Many states have a “mini-Brooks Act,” a reference to a federal law applicable to procurement of design services on federal projects, which must be followed when procuring design services. These mini-Brooks Acts typically provide for a qualifications-based selection process and do not require award of services based strictly on the “low” bid.

In an age of expanding statutory authorization of design-build as an acceptable project delivery system for large public projects, design professionals must have a heightened sensitivity to organizational conflicts of interest. Indeed, many states, transportation authorities, and other public owners have laws or policies that preclude a design professional from joining a design-build team that is submitting a proposal on a project where the design professional (or an affiliate) was involved in developing the conceptual design, the design criteria or the request for proposal, or previously provided certain other services to the public owner related to the project. Design professionals need to carefully consider such conflict rules or they may find themselves foreclosed from pursuing a lucrative opportunity as a member of a design-build team for having undertaken a far more narrow assignment assisting the public owner or be in violation of conflict of interest laws. In contrast to design-build public works, on a private project there typically is no legal roadblock preventing a design professional’s role from morphing from consultant to the owner to member of a design-build team so long as such shift in role is acceptable to the owner. Chapter 12 considers these and other design-related issues.

E. Public Record Acts and Municipal Bankruptcy

The final two chapters assess two more issues unique to public works. The subject of chapter 19 is state public record acts (i.e., state analogues to the federal Freedom of Information Act) and how those acts have been used in the context of public works. Most procurement and contract administration documents are public records and may be requested by any member of the public. Requests under public record acts have been used in a variety of ways: by disappointed bidders to collect information about a winning bidder’s award or to gather information to support a bid protest; by project participants to obtain “discovery” outside the litigation process to build or support a claim; by firms to gain information about competitors; and by owners, contractors, subcontractors,
public interest groups, and others for a variety of other purposes. Chapter 19 addresses this as well as the enforcement of public records act requests and steps that may be taken to protect proprietary or confidential information from the prying eyes of a public records act request.

Lastly, chapter 20 covers bankruptcy of public owners—what states authorize “municipal” bankruptcies under Chapter 9 of the U.S. Bankruptcy Code, what types of public owners may file for bankruptcy, and what steps should be taken by contractors, subcontractors, and design professionals should municipal bankruptcy be threatened. In the world of private contracts, bankruptcy of an owner can be a risk and most contractors and designers consider the financial condition of the project’s owner, among other factors, in conducting due diligence on whether to pursue a large, private construction project. But contractors and designers have been less discriminating when it comes to contracts with public owners. The scrutiny given to public owners usually focuses more on whether they regularly and timely pay invoices or have a reputation for advancing every technical excuse to delay or avoid paying otherwise valid invoices. With a number of high-profile municipal bankruptcies, including the bankruptcy of the City of Detroit, the largest city in the history of the country to file for bankruptcy, the conventional wisdom of “public contract as annuity” is open for reexamination. Chapter 20 identifies steps that bidders might want to take as they assess the insolvency and bankruptcy risk of their potential public contract counterparty.

III. Federal Funding of State and Local Public Works

Although this handbook is not about federal construction contracts, the federal government nonetheless imposes many requirements on state and local public works that must be considered as part of any comprehensive and responsible treatment of state and local construction projects. This is because many state and local public works receive federal funding, and strings usually accompany federal funds.

Federal funding is especially common on state and local transportation projects such as roadways, subways, light railways, and airports, which may receive grants from federal agencies like the U.S. Federal Transit Administration (FTA), U.S. Federal Highway Administration, and U.S. Federal Aviation Administration. While federal grant money used to augment funding for a state or local project does not make the construction contract a federal construction contract, federal funding may carry with it conditions and requirements that impact the procurement process and may impose requirements that might not otherwise apply to a public project funded exclusively with state and local funds. And the failure to comply with federal requirements imposed by virtue of federal funding may have severe consequences to project participants placing a premium on compliance with these requirements from the outset of a project.
As underscored in chapter 13, federal funding may trigger application of the federal Davis-Bacon Act, which requires payment of prevailing wages to all laborers. In these circumstances, prevailing wages must be paid even in a state that itself has no law requiring payment of prevailing wages. Likewise, as noted in chapter 9, federal funding may require (1) compliance with Buy America requirements (as opposed to Buy American requirements applicable to federal construction contracts) and (2) participation in the FTA’s disadvantaged business enterprise program, despite the fact that state law would preclude such a program on a project in the absence of federal funds.

Furthermore, a public project funded by a federal grant may expose contractors, subcontractors, design professionals, and other project participants to claims for violations of the federal False Claims Act (FCA) for failing to adhere to requirements imposed as a result of federal funding and qui tam or “whistleblower” actions that may try to convert mere breaches of contract into FCA violations seeking treble (i.e., triple) damages. Chapter 15 discusses exposure to federal FCA claims on state and local projects, something that does not exist on private projects or a public works project funded solely with state or local funds (though exposure may exist under a state FCA). Where state or local funds and federal funds are used on a public works project, exposure may exist under both the federal FCA and a state FCA.

A key lesson of this handbook is that participants on state and local projects need to understand funding sources for each project. Due to the ubiquity of federal participation in the funding of major state and local public works, one question that should always be asked is whether federal funds are being used to fund the project. If so, the next question is whether there are any requirements that accompany the federal funds. These questions are important for the public owner, the construction contractor, subcontractors, and design professionals and are touched upon in various chapters of this handbook. For instance, chapter 10 cites federal regulations dictating that an FTA grantee incorporate into its construction contracts provisions pertaining to (1) withholding and release of contractor retention and (2) the prompt payment of subcontractors and release of subcontractor retention—requirements that may preempt inconsistent state laws.

**IV. Public Works: A Substantial Segment of the Construction Market**

By any measure, state and local public works account for a substantial percentage of the annual spend on construction and these projects constitute an important component of the economy at several levels. Figure 1.1 shows the

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2. Of course, any project funded by the federal government, whether a public or private contract (e.g., a project funded by the Federal Emergency Management Administration aka FEMA), potentially exposes a project participant to the federal FCA.
dollar value of total construction put in place in the United States annually between 2002 and 2016, as well as the dollar value of private projects, state and local projects, and federal projects. In some years, total construction value in place exceeded $1 trillion with the value of state and local construction comprising well over a quarter of the overall value in several years. In 2009, the total value of state and local construction amounted to just over $286 billion—the highest it had been since 2002. Aside from the amount spent on them, state and local projects play crucial roles in maintaining the nation’s infrastructure and the efficiency and competitiveness of the economy.

For construction industry participants, spending on state and local projects can be a bright spot even during major economic downturns, as witnessed by the 2008 financial crisis and its aftermath. As Figure 1.1 shows, following the financial crisis, total value of construction decreased by 32 percent between 2008 and 2011, reaching a low of roughly $788 billion. But the private works segment of the industry suffered disproportionately, dropping by 45 percent.

**Figure 1.1**
Annual Construction Value in Place: Total, Private, Federal, and State/Local Expenditures 2002–2016

from its 2006 peak to a low of $502 billion in 2011. In contrast, the value of state and local projects peaked in 2009. Although the value of state and local construction eroded from its 2009 peak by about 14 percent between 2009 and 2013, a fraction of the reduction in the value of private works, it has been increasing since 2013. The spending on state and local projects was spurred by the American Recovery and Reinvestment Act of 2009, which pumped federal money into state and local projects that were supposedly “shovel ready.”

In light of the size of the state and local construction market on an aggregate basis, it is no surprise that many construction and design firms target the opportunities that exist in this market segment. But as the fortunes of the construction market change with the overall economy, design and construction firms sometimes make business decisions to pursue public projects that they might not have pursued in better economic times, as occurred during the economic downturn spurred by the 2008 financial crisis. Firms that limit themselves to private works may decide to pursue public works absent any prior experience with these types of projects as part of a strategy for meeting the challenges of a bad economy. Similarly, firms that ordinarily limit themselves to public works in a limited number of jurisdictions or with a small number of public owners may respond by pursuing projects in unfamiliar states or with new public owners with whom they have no experience. In either case, prudent contractors and designers and their counsel should familiarize themselves with the requirements of the state or local agency to which services are offered to minimize risks associated with even inadvertent violations of procurement laws and other laws applicable to the new arena. Adoption of a “leap before you look” strategy seldom yields positive results on public projects.

The public works segment of the construction market is likely to provide significant opportunities for industry participants for the foreseeable future. The 2016 presidential election had some good news for state and local public works. The Trump administration seems to recognize the importance of investing in infrastructure, though it is unclear where the massive amounts of funds needed for investment will be found or how federal funds will be geographically distributed given political divisions. Regardless of the flow of federal funds, a number of public agencies in various parts of the country saw voters on election day approve ballot measures increasing local taxes to fund a variety of infrastructure projects.

Emblematic of this trend was passage by Los Angeles County voters of Measure M, which increases the local sales tax. The more than $120 billion in anticipated tax revenue generated over the next 40 years as a result of Measure M is dedicated to implementing a county-wide transportation capital plan.

that will fund major rail, subway, and road projects throughout Los Angeles
County.\footnote{Laura J. Nelson, \textit{A Tax Hike to Fund a Major Expansion of the Metro System Is Leading in Early Returns}, \textit{L. A. Times}, Nov. 9, 2016, at 2–3, http://www.latimes.com/local/lanow/la-me-ln-metro-sales-tax-20161108-story.html. Editor and author Daniel D. McMillan successfully defended Los Angeles County Metropolitan Transportation Authority, the agency for which editor and author Charles M. Safer serves as general counsel, in a trial challenging Measure M and defeated an emergency writ filed with the appellate court shortly before the ballots were to be sent out for printing. Laura J. Nelson, \textit{Judge Backs Ballot Language for Metro's Sales Tax Increase Proposal}, \textit{L. A. Times}, Sept. 6, 2016, at 2, http://www.latimes.com/local/lanow/la-me-ln-metro-sales-tax-lawsuit-20160830-snap-story.html.} Thus, public works, both small and large, will continue to be funded and built, as they must, and industry participants and their counsel need to continue to stay abreast of public procurement laws and other legal requirements pertaining to public projects to increase successful outcomes on public projects for all involved.

This handbook contains a number of lessons for those engaged on state and local construction projects, whether public owners, contractors, subcontractors, or design professionals. Foremost among those lessons is that the law applicable to public works differs dramatically from that applicable to private works. Failure to comply with the requirements of public construction law can expose participants to significant legal risks and consequences that may impact their ability to pursue public works in the future. And compliance with the requirements of public projects begins with understanding the laws that apply to each individual project, as those requirements can materially vary among jurisdictions and even among public owners within a particular state. Armed with the information in this handbook, participants on public projects and attorneys that advise them can facilitate the successful realization of the opportunities afforded by the public works segment of the construction industry.