

December 7, 2023

NYSSPE Testimony – Assembly Standing Committees Local Government and Cities Regarding Local Governmental Procurement – Thursday December 14, 2023

The New York State Society of Professional Engineers (NYSSPE) wants to thank you for the opportunity to share its concerns respecting the procurement of design services at the municipal level in New York State. NYSSPE is a professional association representing the interests of its members and more generally the interests of all professional engineers (totaling more than 30,000 licensees in New York State) practicing in all disciplines (civil, structural, mechanical, electrical, geological, environmental, etc.) and practicing in all practice settings (private sector consulting, industry, government, and education.)

We are writing to urge that both the Committee on Local Governments and the Committee on Cities focus upon the well-established benefits derived from the use of qualifications base selection in connection with public and quasi-public projects at all levels of government. Qualifications based selection (QBS) is a procedure method whereby design professionals, including professional engineers and architects, are retained on the basis of qualifications, rather than price as a threshold matter. Under the QBS method, the procuring agency reviews the qualifications submitted by interested individuals and firms, ranks respondents, and then negotiates with the most qualified respondent for a mutually agreeable contract inclusive of price. If an agreement cannot be reached the next best qualified firm is selected subject to negotiation, etc. Cost always remains a major factor in the selection process.

Concomitantly, QBS provides for open competition among professional design firms in the areas of competence, experience, prior performance and technical qualifications, followed by negotiated compensation. This procurement methodology was enacted in 1972 on the federal level (PL 92-582) and required federal agencies to utilize QBS procedures when procuring design services. New York, along with the vast majority of other states have enacted QBS laws modeled in varying degrees upon the Federal Law.

Specifically in 1980, New York enacted Section 136-a of the State Finance Law which required the use of QBS for all New York State agencies. Numerous localities have also adopted laws modeled after the federal statute. They require the utilization of QBS procedures when procuring design services.

Incorporation of a QBS design component, in instances where a design build procurement methodology is used on the federal, state or local levels, is essential. If a submittal is received from a team comprised of a contractor and design firm each can be assessed for competence, experience, prior performance and technical qualifications and selection predicated upon a comparison of submittals in toto. It is critical that once the team is selected the project move forward with the named firms and a substitution of firms only be permitted in extraordinary circumstances such as a dissolution of one of the participants.

The NYS Education Department's State Boards for Professional Engineering and Architecture have jointly furnished guidance respecting the use of design build. Further, NYSSPE has endorsed this joint recommendation and in 2018 the Society furnished the NYS Legislature comments respecting a budget proposal authorizing the expanded use of design build. Attached hereto is a copy of our prior submittal which includes a recitation of the Education Department's guidelines. A perusal of this submittal will prove informative as expanded use of design build is again under consideration.

Finally, in an assessment of the potential benefits derived from the adoption of QBS it is critical to consider that QBS ensures that projects are designed in a manner that is safe, innovative, environmentally sound, and cost-effective over the project's life cycle. QBS ensures that these life-cycle costs such as construction, operations, and maintenance are factored into project design. The cost for design services represents a small percentage of the construction and other life cycle costs of a project. A well-designed project pays substantial dividends with respect to both the construction and life cycle costs of the project. In short, it is simply penny wise and pound foolish to employ a low bid methodology for design services when so much is riding on getting the design component of the project right.

The Society would welcome any questions raised by the foregoing and recommends that you contact our Legislative Counsel, Mark C. Kriss, Esq. at mck@fwc-law.com or via phone at (518) 527-1148.

February 5, 2018

(NYSSPE) – Position Statement - Design Build

2018-2019 Budget Bill S 7508 / A 9508 (Part R)

On behalf of the New York State Society of Professional Engineers (NYSSPE) we are writing to urge amendments to the above referenced bill consistent with the recommendations endorsed by the broader design community in New York including the State Education Department Boards for Professional Engineering and Architecture. NYSSPE is a professional trade association representing the interests of its members, and more generally the interests of all professional engineers (totaling more than 25,000 licensees in New York State) practicing in all disciplines (civil, structural, mechanical, electrical, geological, environmental, etc.) and practicing in all practice settings (private sector consulting, industry, government, and education.)

Budget Bill S 7508 / A 9508 (Part R) is based largely upon current law which authorizes a limited number state entities including the State Thruway Authority, the Department of Transportation, the Office of Parks, Recreation and Historic Preservation, the Department of Environmental Conservation and the State Bridge Authority to use a design build procurement methodology. The 2018-19 Budget proposal expands this list of governmental agencies permitted to utilize design build specifically adding the Dormitory Authority, the New York State Urban Development Corporation, the Office of General Services (OGS), the Department of Health, and the New York State Olympic Regional Development Authority. Moreover, and most critically, the proposal expands the use of design build by authorizing its use in vertical construction (building and appurtenant structures).

NYSSPE has previously voice concerns over the potential dangers attendant to the use of design build and recommended a number of quality assurance safeguards. These measures are needed to assure that public health, safety and welfare are not compromised in the design build process. While many of these safeguards have been included in the procurement process at the agency level, the absence of express statutory requirements threatens the potential safety and effectiveness of the design-build process.

Reduction in cost, improved speed in project delivery, and improved quality are touted as the benefits of design build. However, the process is subject to abuses, and safeguards must be employed to insure that projects are designed and constructed in a manner consistent with interests of project owners and the general public. The use of design build in vertical construction only heightens the need for robust quality assurance safeguards. Moreover, the instant proposal would permit the use of design build by the Dormitory Authority, and OGS regardless of the size of the project. (All other projects remain subject to a ten million dollar threshold.) The use of design build for smaller scale projects inherently raises added concerns. Smaller projects are simply more likely to undergo less scrutiny than large scale developments.

In furtherance of the foregoing objective it is imperative that the project owner (state entity) employ an "owner's design professional" (a licensed professional engineer or a registered architect) to act as the owner's expert. A statutory requirement respecting the employment of an owner's design professional would mitigate, to a substantial degree, concerns regarding the ability of the contractor to exert undue influence upon a principal design firm (or team of design firms). Additionally, consideration should be given to requiring mandatory inspections and testing (by properly credentialed inspectors and testing firms) during the construction process, and requiring that such contracts be independent from the primary design build contract (i.e. such contracts should be executed directly between the project owner and the inspection and testing firms). Further, an additional quality assurance provision should be included wherein the principal design firm is afforded unrestricted access to the project owner and the owner's design professional.

The foregoing recommendations, in large measure, are reflected in a proposal co-authored by the State Education Department's Board for Engineering and Land Surveying and the Board for Architecture a copy of which is attached hereto.

Finally, the legislation could be improved by incorporating a mandatory indemnification agreement which provides for fair and balanced contractual indemnification between the project owner and the design build firm. Presently, many governmental contracts place an undue burden upon design consulting firms for both damages and costs (including, without limitation, attorneys' fees). Additionally, in the event the design build entity is comprised of a team of separate entities, incorporation of a mandatory indemnification agreement which insured fair and balanced contractual indemnification between the separate entities is essential. For example, a professional design firm should be accountable for design defects insurable under standard professional liability policy and should not be subject to contractual indemnification for wrongful acts and omissions committed by the project owner, the general contractor or third parties retained by either the project owner or the general contractor.

NYSSPE urges your careful consideration of the recommendations set forth herein. It is critical that expansion in the use of design build proceed in manner that assures that the protection of the public health, safety and welfare remains paramount. The Society looks forward to working with the Legislature and the Governor in finalizing this important legislation.

Respectfully submitted,



Mark C. Kriss, Esq.
Legislative Counsel

DRAFT - DESIGN BUILD 04.19.2013

The following draft document is a joint effort of the State Boards representing the design professions in New York. The State Boards' position is that design build, with the proper safeguards, can be a viable project delivery method for publicly funded projects; one that protects the public's health, safety and welfare while helping to control project costs, schedule, and quality. The requirements, roles, and responsibilities of the design professionals and contractors and the requirements of the RFP design build submission outlined below comprise the parameters around which the State Boards believe the design-build method of project delivery may be performed in the State of New York in a manner that will protect the public's health, safety, and welfare. Of important note to improve accountability to the public, the State Boards support a new licensure requirement for contractors, but only for those contractors who want to use the design-build method of project delivery.

Requirements, Roles and Responsibilities

Depending upon the complexity of the project, the Owner has the flexibility to hire or use multiple Design Professionals/firms for different scopes of professional services

DCP – Owner's Design Criteria Professional

The DCP must be a New York licensed and registered design professional and/or firm authorized to provide design professional services in New York

The DCP may be either Owner's qualified in-house staff or the Owner may hire a New York licensed and registered design professional and/or firm authorized to provide design professional services in New York

A DCP must be retained/serve as Owner's representative for duration of the project

The DCP assists in the preparation of the RFP package to allow the DB Team to submit a proposal that meets the requirements of the DB RFP submission identified below

Sets the quality assurance/control requirements for the DB Team and monitors the DB Team during design and construction

Identifies preliminary list of permits required for projects

Assists Owner with selection of DB Team

Provides review for the Owner while the DB Team advances the design, including the construction documents phase, construction phase, and the project closeout phase, to check compliance with RFP requirements and to ensure design intent is met

DB Team - (DP - Design Professional + Contractor)

Depending upon the complexity of the project, the Design Build Team may consist of multiple Design Professionals/firms to provide different scopes of professional services

DP must be a New York licensed and registered design professional and/or firm authorized to provide design professional services in New York

Contractor must be a licensed and registered contractor qualified to do design-build in New York (contractor only needs to be licensed for design-build projects)

DB Team fixes final cost of project and final schedule

DP develops the final design and stamps/signs final Construction Documents for regulatory approvals

DP reviews submittals and does construction site visits during construction

DB Team is responsible for Quality Assurance/Control, Inspection and Oversight requirements as defined in the RFP

DP conducts final inspection and does punch list, verifies project has been constructed in accordance with New York codes/laws/regulations, and obtains certificate of occupancy and/or completion

Requirements of the DB RFP submission provided by the DCP

Design performance criteria and design standards
Quality Assurance/Control, Inspection and Oversight parameters
Concept/schematic documents to establish design intent
Scope of work and Performance specifications
Proposed project schedule for design and construction (in milestones)

Key Additional Requirements

Hiring of the DB Team should be a two step quality-based and best-value selection that includes, but is not limited to, the DB Team's experience, qualifications and financial capability.

DP on the DB Team may not be an employee of contractor

DCP and the DP on DB Team must be employed at an entity authorized to provide professional design services in New York, including a Certificate of Authorization from the State Board for Engineering/Land Surveying if required or a New York licensed and registered design professional acting as a sole practitioner

DCP cannot be the DP

DP must be named in the DB contract and cannot be terminated from the project without the Owner's consent

The DP is the design professional of record for their defined scope of work.

Notes: Nothing in this document is intended to limit grandfathered corporations from providing those professional services that they are authorized to perform