

PUBLIC HEARING
Local Government Procurement
NYS Assembly Standing Committees on Cities and Local Governments

Thursday, December 14, 2023
10:30 AM
Hearing Room C
Albany, NY 12248

Testimony Submitted by:
AIA New York State and the AIA New York Chapter

Introduction

AIA New York State (AIANYS) and the AIA New York (AIANY) chapter are state and local components of the American Institute of Architects (AIA), a storied organization founded by New York architect Richard Upjohn in 1857 with the goal to promote the scientific and practical perfection of its members and elevate the standing of the profession.

Today, our mission here in New York and across the country continues the commitment to advancing excellence in all facets of the architecture profession, to be the voice of the architectural community, and a resource for its members in service to society. We represent more than 9,000 architects and design professionals committed to positively impacting the physical and social qualities of New York.

AIANYS and AIANY urge the New York State Assembly to expand the procurement tools available to New York City with the authorization of alternative delivery methods to allow for increased use of qualifications-based selection and improve fairness and transparency in the project development process.

Qualifications-Based Selection (QBS)

The use of a qualifications-based approach to procuring architectural and engineering services on publicly funded projects was codified into law (P.L. 92-582) by the U.S. Congress in 1972. Also known as the “Brooks Act,” this law requires architects and engineers to be selected for all federal government projects on the basis of qualifications, subject to negotiation of fair and reasonable compensation. Today, over 48 states follow QBS procedures for procuring architectural and engineering services, including the state of New York.

In 1980 the New York State Legislature passed, and the governor signed into law, Chapter 562, requiring all State agencies to use QBS when procuring architectural and engineering services in excess of \$25,000. Since that time, §136-a of the State Finance Law has been expanded to include geological, landscape architecture, and land surveying services. QBS is endorsed by the American Bar Association as part of its “Model Procurement Code for State and Local Governments,” and is a recommended best practice in the New York State Education Department’s “Manual of Planning Standards for School Buildings.”

In sum, the process of procuring professional design services through a QBS process has an extensive history and is widely regarded as a best practice.

The Benefits of QBS

As QBS is predicated on the notion that qualifications, not price, should be the determining factor in selecting an architect, it places fee negotiation at the end of the selection process. While price may have its place within the selection process, it alone should not be the determining factor.

The reason for this is clear: Projects that are contracted solely on price do not take into account the myriad additional factors that go into architectural design. Architectural design is an evolving process and much goes into it after the drawings are signed, sealed

and delivered. In fact, one of an architect's principal duties is to ensure that the construction process goes smoothly.

It is an architect's experience, expertise and ability to resolve unforeseen problems creatively that will keep a construction project moving forward. These intangibles are common throughout the process. As a result, owners who rely only on a submitted bid as the project cost may be placed in a difficult position if the final cost is significantly higher.

QBS helps resolve the projected vs. final cost dilemma by negotiating the project's cost with the most qualified firm among the applicants. QBS also fosters a collaborative environment, so the roles of all stakeholders are known, documented and understood.

Transparency and Accountability to the Taxpayer

QBS recognizes that design professionals play a critical role in the public building process. The quality of design services provided by the architect or engineer is the single most important factor in determining the overall construction and life-cycle costs of a building and it is in the taxpayers' best interest to ensure that the most qualified firms are selected for public projects.

As QBS is a well-documented and defensible process, decisions the owner makes are more likely to stand up to public scrutiny. The selection of a firm is centered around a consistent set of objective criteria established by the public owner and used for evaluating, interviewing, and ranking firms. Within a model QBS process, the public owner's selection team will use its criteria to review RFQs, shortlist no more than three firms, interview the finalists, and score the firms in various areas. Both the successful firm and the unsuccessful firms are provided with their scores. The procuring entity will then enter the negotiation phase with the highest ranked firm to develop a detailed and comprehensive scope of services and compensation. If an agreement between the procuring entity and the highest ranked firm cannot be reached, the owner may terminate negotiations and proceed on to the next highest ranked firm.

It should be noted that while price is not the predominant factor in the initial selection of the design firm, the owner still maintains discretion to negotiate a fair price. As mentioned previously, the reliance on price alone when procuring professional design services limits the ability of the owner in their search for the most qualified design firm with the experience and competence to bring a project in on time and within the budget. Experienced and competent design firms, construction managers, and contractors are much more likely to avoid change orders that will cause delay and add costs to the owner and the taxpayer.

Fairness

The use of QBS is both fair to the design firms competing for a contract and the public owner. Questions may arise related to whether the selection of a firm based on experience limits other firms with less experience from participating in public projects. However, the criteria established by the public owner may provide weight and value to certain design specialties, their status as a SBE, SDVOB, or MWBE, and other factors deemed valuable to the public owner.

For the public owner, the ability to select a design firm based on qualifications enables flexibility that permits owners to tailor the procurement of professional design services to meet their specific needs. QBS works for sophisticated owners who consult with architects

often and owners who do not have prior experience working with an architect. QBS provides both groups with a selection process that is not only straightforward and easy to implement, but is objective and fair.

Progressive Design

Progressive design is best suited for owners with the ability to use the QBS process. Under a progressive design framework, the highest ranked design firm may proceed with preliminary design and preconstruction services. Within a project delivery scenario where the design team is selected immediately before or simultaneously with a construction manager and/or general contractor, the parties may maximize collaboration to better define the scope of work, programming, and provision of accurate cost estimates for the proposed work.

When a design has progressed to a point acceptable to the owner, the parties may move to establish a contract price for the second phase which includes a final design and construction services. If the owner and the parties cannot come to an agreement on a contract price, the owner may retain the option to move forward with another contract strategy for phase two.

However, under no circumstance should the design team work for free. Bidding on projects is an expensive endeavor in and of itself. The provision of professional design services must be compensated and owners should not be allowed to compel a design team to provide a design without fair compensation for services rendered. This may be avoided through separate contracts for phase one and phase two of the project, or a single contract for both phases, as some phase two work may be required prior to the establishment of a final contract price. This may take increased upfront effort and time, but the ultimate goal is to progress a project toward construction and completion, and to do so with the most qualified design and construction team.

If the Legislature is serious about authorizing New York City to adopt a progressive design procurement approach, it should start with a legislative proposal to require local governments to procure professional design services using the QBS framework outlined in State Finance Law §136-a.

The Procurement of Professional Design Services

As a matter of public policy, the AIA supports public policies, requirements, and administrative procedures in public procurement processes that mandate the open selection of architects on the basis of qualifications and oppose hiring architects on the basis of fees as the sole determining factor when awarding a contract to provide professional design services. This longstanding public policy works to support design excellence in publicly funded projects, as the AIA believes society is best served by public buildings and places that represent the highest ideas of citizens and their elected government.

Conclusion

AIA New York State and AIA New York strongly encourage the New York State Assembly to expand the procurement tools available to New York City with the authorization of alternative delivery methods to expand the use of quality-based selection instead of lowest bid procurement. With these additional tools, the city will be able to ensure quality project

delivery, provide accountability and transparency at all stages, and embed robust workforce engagement and community participation in the process.

Licensed design professionals are obligated to protect the health, safety, and welfare of the public. This ethical and statutory obligation is fortified through their education, training, experience, and expertise in the design of the built environment and dedication to the improvement of the public realm. The impact of professional design services on the overall health and safety of building occupants is too important to be relegated to a low-bid procurement process meant for the purchase of common commodities. The establishment and expansion of QBS should be the grand strategy and objective in the universe of potential procurement tactics.

The AIA and its state and local components around the country strongly support the continued use and expansion of QBS when procuring professional design services and we look forward to continuing our collaborative efforts to standardize the use of QBS at all levels of government.