



**AIA**  
New York State

## **Testimony on the 2018-19 Executive Budget Proposal**

### **Economic Development**

Monday, January 29<sup>th</sup>  
10:30 AM

Legislative Office Building  
Hearing Room B

Presented Before:

New York Senate Finance Committee  
Chair, Hon. Catharine M. Young

&

New York State Assembly Ways & Means Committee  
Chair, Hon. Helene E. Weinstein

Presented by:

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Executive Director

The American Institute of Architects New York State

## **I. Introduction**

On behalf of the American Institute of Architects New York State's (AIANYS) Board of Directors and our membership, I would like to thank Chairs Young, Weinstein, and the members of the Senate Finance and Assembly Ways & Means Committees for allowing me the opportunity to discuss the 2018-19 Executive Budget proposal as it relates to design-build project delivery (Part R of the Transportation, Economic Development and Environmental Conservation Article VII budget bill).

Founded in 1931, AIANYS has a statewide membership of 8,900-plus members in 13 chapters. Its parent organization, The American Institute of Architects (AIA), is a nationwide, member-based organization consisting of 90,000 members. It is the Mission of AIANYS to represent architects and the profession of architecture in government and provide services to the membership. AIANYS is the voice of the architectural community and a resource for its members in service to society.

## **II. Design-Build Expansion**

To date, the level of public design-build authorization in New York State has been limited to a handful of agencies and confined primarily to horizontal infrastructure projects, such as highways, bridges, dams and flood control projects. The Executive Budget proposal seeks to expand design-build authority to the Dormitory Authority of the State of New York (DASNY), the New York State Urban Development Corporation (UDC), the Office of General Services (OGS), the Department of Health (DOH) and the New York State Olympic Regional Development Authority (ORDA). Specifically, this bill would add the phrase, "buildings and appurtenant structures," to the types of capital projects approved for design-build project delivery.

It is important to note that design-build is not just a method to procure design and construction services. Design-build is a project delivery method which significantly alters the contractual relationships between the public client, the licensed design professional, the general contractor, and all consultants and subcontractors. AIANYS stresses, that the architect and other licensed design professions have a unique role in project delivery, and their status as a licensed profession pursuant to Title VIII of the Education Law, under which they are obligated to protect the health, safety, and welfare of the public and the best interests of the client.

As a matter of policy, AIANYS does not oppose design-build as a project delivery method. AIANYS believes public owners should have an array of project delivery methods at their disposal. However, the current law should be improved to include best practice to ensure all parties to a public contract are treated equally and fairly. Further, as is the case in other states' design-build statutes, measures should be adopted to ensure architects and other licensed design professionals are allowed to maintain their arms-length relationship with other unlicensed entities, and limit outside unlicensed influence on design decisions and matters affecting life-safety elements in buildings. AIANYS therefore recommends the inclusion of language to prohibit the licensed design professional, as a participant in the design-build entity, from being an employee of the contractor.

As an alternative project delivery method, design-build eliminates the traditional direct contractual relationship between the client and the architect. The elimination of this direct relationship also removes the architect as the independent advisor to the client, which complicates their obligation to serve the client's best-interests. Anecdotally, AIANYS has been informed by member architects who have been contracted through the design-build method, that they have been prohibited from contact or communication with the client. As the law is currently written, there is nothing to prevent a contractor from prohibiting an architect, engineer, or other licensed design professional from establishing a direct line of communication with the client. AIANYS therefore recommends the inclusion of language which would prohibit the contractor on the design-build team from barring the licensed design professional from communicating with the public client on matters related to the project design.

### **III. State Education Department's Position on Design-Build**

Notwithstanding the current law, the design-build contractual arrangement remains unethical and unlawful according to the State Education Department (SED). As written, current law and the design-build proposal could expose architects and other licensed design professionals to charges of professional misconduct. While case law exists which seems to confirm the legality of design-build in New York State, *Claude Charlebois et al v. J.M. Weller Associates, Inc.*, 136 A.D. 2d 214, 218 (3d Dept, 1988), there is no explicit statutory authority allowing unlicensed business corporations to practice architecture and engineering under Article 15 of the Business Corporation Law, nor is there any indication the Legislature has changed its legislative intent for the regulation of the professions under Title VIII of the Education Law.

AIANYs strongly urges the Legislature and the Executive to consult SED regarding its position on design-build and recommends making changes to the Infrastructure and Investment Act to align with the State Design Boards' position paper.

#### **IV. Procurement of the Architect**

Current law exempts design-build projects from Section 136-a of the State Finance Law, which requires State agencies to procure professional design services using a qualifications-based selection process (QBS). AIANYs recommends an amendment to the law requiring the design-build entity to utilize the QBS process, and to expand the definition of "Best Value" to include the qualifications of the licensed design professionals selected as part of the design-build entity.

The QBS procurement process is used in forty-eight states and the federal government. QBS helps foster a collaborative environment, so the roles of all stakeholders are known, documented and understood. Further, because the selection process is well-documented, decisions the owner makes are more likely to stand up to public scrutiny. Professional design services are not like any commodity or service to be procured, as these services are required to be furnished by licensed individuals who are obligated to protect the client and end-users of their service. Therefore, qualifications—not price, is paramount to the selection of a licensed architect or other licensed design professional. The qualifications over price dynamic is even more important in alternative project delivery methods, such as design-build, because of the enhanced risk the design-build entity assumes to deliver the project on time and on budget.

#### **V. Thinking Beyond Design-Build**

AIANYs urges the state to authorize public entities to pursue additional alternative project delivery methods beyond design-build. The best way to ensure the delivery of quality facilities in an expeditious and cost-effective manner is to provide public owners with project delivery flexibility. Project delivery flexibility allows a public owner to conduct a thoughtful, proactive and objective assessment of the unique characteristics of its program/project and the ability to align the procurement plan with the appropriate delivery method. There are several viable alternative project delivery models outside of design-build which promote early collaboration, and provide the state with the efficiency it desires, while eliminating conflicts with the Education Law.

A common misnomer, yet frequently cited point for design-build proponents, is that design-build is efficient and cost-effective due to the establishment of a single contract for both

design and construction services. In reality, the benefit of design-build is found in its ability to bring the design and construction team together during the design phase of a project. However, design-build is not the only alternative delivery method which can facilitate this arrangement.

## **VI. Construction Manager as Constructor Project Delivery**

AIANYs recommends the inclusion of Construction Manager as Constructor (CMc), also known as Construction Manager at-Risk (CM at-Risk). CMc is better suited for vertical construction (buildings), eliminates conflicts with current law, and allows the contractor to collaborate with the licensed design professional during the design phase. Design phase collaboration between the architect and the construction manager is crucial to ensuring constructability and has the potential to reduce change orders, expedite construction services, and reduce barriers to M/WBE participation by providing a review of trade contract packaging early in the process.

Within the CMc method, the public owner contracts with an architect or engineer to provide design services for a public project. Simultaneously or directly thereafter, a construction manager is hired by the public owner to provide constructability consultation and other services during the design phase. In most cases, the construction manager will serve as the general contractor during the construction phase. The separation of contracts between the owner-architect and owner-construction manager is standard practice in the traditional design-bid-build method and is compliant with the Education Law governing the licensed design professions. After preconstruction services are furnished, the construction manager may assume financial obligation for construction using a Guaranteed Maximum Price (GMP), which is also used in design-build to enhance accountability.

AIANYs supports CMc as a highly collaborative and cost-effective project delivery method that meaningfully integrates the design process with essential constructability expertise early in a public project. AIANYs urges the governor and the State Legislature to support the inclusion of CMc into the Infrastructure and Investment Act.

## **VII. Conclusion**

Thank you for providing me time to outline our position regarding design-build enhancements in the Executive Budget. I would be glad to answer any questions you may have as the budget process unfolds.