



March 15, 2011

President

Louise Carosi Doyle, PE, FNSPE

President-Elect

Donald P. Nims, PE

Vice Presidents

Laura M. Pellizzi, PE
Long Island Region

Alfred A. Brand, PE
New York City Region

Susan Fasnacht, PE
Mid-Hudson Region

James J. Kuhn, PE
Northeast Region

Michael R. Hayes, PE
Central New York Region

Robert K. Winans, PE
Western Region

Rudi O. Sherbansky, PE
PE's In Construction

Gregory W. Gallagher, PE
PE's In Government

Frank P. Roma, PE
PE's In Industry

Thomas J. Petracca, PE
PE's In Private Practice

Treasurer

Lawrence J. O'Connor, PE, LS

Assistant Treasurer

Keith F. Lashway, PE

Immediate Past President

James J. Yarmus, PE,
PhD, F.NSPE

Executive Director

Kelly K. Norris, CAE

Legal & Legislative Counsel

Mark C. Kriss, Esq.

Budget Bill A.4008/S.2808

Authorizes the use of design build, and other project delivery methodologies, by the State University Construction Fund, the City University Construction Fund, and the Dormitory Authority of the State of New York

The Governor's Budget Bill A4008/S2808, in relevant part, would, for the first time, vest a number of state governmental entities with the authority to utilize design build, and other alternative project design and construction methodologies, without legislative oversight and contrary to current State Education Law for the design professions. Specifically the bill authorizes the use of design build, and other project delivery methodologies, by the State University Construction Fund, the City University Construction Fund, and the Dormitory Authority of the State of New York.

Pursuant to current law, construction in both the public and private sectors must utilize a design-bid-build construction methodology, although design build project delivery can be utilized if there are separate contracts between the owner/design professional and owner/contractor. In New York, design build, where the contractor has contractual responsibility for both design and construction, has only been utilized when expressly authorized by virtue of project specific enabling legislation. In the absence of additional safeguards as detailed below, NYSSPE opposes A4008/S2808 which authorizes the unfettered use of design build and alternative project delivery systems.

Design-build, as typically performed, is a project delivery system whereby a single entity is contractually responsible for both the design and construction of the project. It differs from the design-bid-build, which entails the production of a set of plans and specifications, which are offered for bid. Proponents of traditional design-bid-build argue that the interests of the owner are better protected using the design-bid-build model which emphasizes the role of the design professional as the owner's expert with contractual responsibility to the owner. Supporters of design-build cite savings attributable to a faster construction timetable and the ability to provide one-stop shopping.

In New York, the State Education Law, by its express terms, prohibits the practice of professional engineering by persons who are not licensed or authorized under New York law to offer to provide or provide professional engineering services. In short, a strict reading of the statute bars general business corporations, limited liability companies and other entities (contractors) from providing professional engineering services. The principal public policy rationale of the law is to help insure that public health, safety and welfare are not compromised by the undue influence of corporate enterprise. Our concern is the potential that corporate financial goals will trump professional considerations.

Further, with design-build projects, the full contract price is typically established at the beginning stages of the project. This presents a greater potential for unanticipated design and construction costs arising after the fixed contract price has been established. This, in turn, can lead to eroded contractor profits or, worse,

(Continued)

the temptation to cut corners in design and construction, which creates an increased chance for errors, omissions, claims and lawsuits. Moreover, design build can be abused by project proponents in the initial phases of site development. Since complete plans are not required, essential components of the design can be omitted or obscured, and the true cost of the project not accurately presented to the public and governmental bodies.

Another concern raised by the instant legislation is that it will permit the selection of design services based on a low bid selection process without regard to qualifications based selection (QBS) procedures. The use of QBS insures that the qualifications of the design team are given sufficient weight in the design team selection process. QBS employs a request for proposals which leads to the identification of qualified firms which are scrutinized to determine the firm best suited for the project. Price negotiations then ensue, and if the parties cannot agree, the next most qualified firm would be approached until a contract is consummated by the best qualified firm, subject to meaningful cost considerations. The employment of QBS, which has been widely praised in New York and throughout the country, should not be impeded.

The legislation should be amended to insure the broadest possible use of the QBS process and that contractual relationships between parties are in conformance with current State Education Law.

In short, NYSSPE has long advocated for retention of a project delivery system which insures that design services are procured independently from contracting services and in compliance with Articles 145 and 147 of State Education Law. Additionally, NYSSPE supports the expanded utilization of QBS procedures. Accordingly, in the event that the proposed amendments are not adopted NYSSPE remains opposed to this bill.

Respectfully submitted,



Kelly K. Norris, CAE
Executive Director



Mark C. Kriss, Esq.
Legislative Counsel