AIA New York State

Testimony on the 2017-18 Executive Budget Proposal

Economic Development

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

&

New York State Assembly Ways & Means Committee
Chair, Hon. Herman D. Farrell, Jr.

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I. Introduction

On behalf of the AIA New York State Board of Directors and our membership, I would like to thank Chairwoman Young, Vice Chair Savino, and Chairman Farrell for allowing me the opportunity to discuss the 2017-18 Executive Budget proposal. Founded in 1931, AIA New York State (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-plus members.

AIANYS is the second largest AIA state component in the country, with California being the largest. The comparative strength and impact of New York State architects and architecture firms on the design industry is profound, and the State's regulation of the business and practice of the profession should be viewed in that context.

II. Design-Build

According to the Design-Build Institute of America (DBIA), forty-two states and the District of Columbia allow Design-Build for public project delivery. The level of authorization, scope and structure of other states' statutes varies. Our fellow AIA state components have reported a broad range of views about Design-Build in their respective states and how it has impacted the design and construction industry. Their sentiments range from indicating that it has been highly successful to very harmful. This range of views highlights the importance of ensuring that Design-Build in New York State is implemented in a way which is transparent and protects the health, safety and welfare of the public.

To date, the level of 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 make Design-Build authorization permanent and to expand it to all State agencies, authorities, SUNY, CUNY, their subsidiaries, and counties outside the City of New York. AIANYS recommends that certain steps be taken before the scope of the Infrastructure and Investment Act is expanded and made permanent.

II(a). State Education Department's Position on Design-Build

First, notwithstanding the current law and authorization, the Design-Build contractual arrangement remains unethical and unlawful in the eyes of the State Board of Regents and 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 8 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' positon paper on Design-Build. Absent a comprehensive and thorough understanding of how Design-Build impacts the licensed design professions, the dramatic expansion of its use may not be prudent. Specifically, the current law does not go far enough in providing assurances to licensed design professionals that their participation in a Design-Build contract will not jeopardize their license to practice.

II(b). Independence of the Architect

It is important to note that architects and other licensed design professionals are the only party to a construction contract who are legally obligated as a function of their State-issued license to protect the interests of the client (usually the owner) and the health, safety, and welfare of the public. This client-architect relationship and public protection obligations must be preserved—regardless of the project delivery method. AIANYS recommends the inclusion of a provision in the law which prohibits the licensed design professional, as a participant in the design-build entity, from being an employee of the contractor.

II(c). 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 during the procurement of federal projects. 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.

II(d). Design-Build Reporting Requirement

The 2015 reauthorization of the Infrastructure and Investment Act included a provision requiring Empire State Development to submit a report to the governor and the State Legislature containing information on each authorized State entity that has entered into a Design-Build contract and an explanation of the savings achieved through the method's use. The deadline for the release of this report was June 30, 2016. At this time, we are unsure as to whether or not this report was submitted to the governor and the Legislature. This report could prove to be useful in weighing the benefits of Design-Build against Design-Bid-Build and other project delivery methods.

II(e). Thinking Beyond Design-Build

In order to truly bring New York State into the realm of 21st century public project delivery, 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.

II(f). Construction Manager as Constructor Project Delivery

Specifically, AIANYS recommends Construction Manager as Constructor (CMc), also known as Construction Manager at-Risk (CM at-Risk). CMc is better suited for vertical construction, 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 Design-Bid-Build and is in compliance with the Education Law governing the licensed design professions. After preconstruction services are furnished, the construction manager assumes 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.

III. SUNY/CUNY Multi-Year Capital Plan

AIANYS, along with a multitude of other organizations representing the design and construction industry, strongly support SUNY and CUNY's multi-year capital plans. Capital projects and critical maintenance undertaken by the State and City's public university system is a major driver of economic development and job creation across New York State. Over the past decade, SUNY and CUNY capital construction has contributed to the creation of tens-of-thousands of high-paying design and construction jobs, and continues to build upon the system's reputation and commitment to future generations of students.

IV. Federal and State Historic Tax Credits

Since its creation in 1976, the federal Historic Tax Credit has created 2.3 million jobs, leveraged $117 billion in community investment, and facilitated the rehabilitation of more than 41,250 buildings across the country. Combined with the New York State Historic Tax Credit, these

programs have proved extremely successful in spurring private investment in the rehabilitation of historic buildings which contribute to the richness of our communities.

We have witnessed a rebirth in many of our cities and neighborhoods through the rehabilitation of previously neglected historic buildings or the repurposing of former industrial and manufacturing buildings. These investments would not have happened absent both the federal and State Historic Tax Credit programs. Historic tax credits allow projects of all sizes and scales to be completed in partnership with the private sector. The diversity of projects is only possible because of the commitment of individual entrepreneurs on a project-by-project basis with the assistance of these credits.

As the 115th Congress convenes to discuss wholesale changes to the federal tax code it is important for New York State lawmakers to know that the continuance of historic building projects will only remain viable if both credits are left intact. AIANYS has written the New York State Congressional delegation in support of keeping the federal Historic Tax Credit, as its benefits far outweigh its costs. With one of the oldest building stocks in the United States, the state of New York is a major beneficiary of these credits. We urge the governor and the State Legislature to advocate for the federal tax credit with the New York State Congressional delegation.

V. Conclusion

I would like to thank Chairwoman Young, Chairman Farrell, and members of the Senate and Assembly who provided us with time to discuss our 2017-18 Executive Budget priorities. If you have any questions I would be glad to answer them now or at some other point during the budget process. Thank you.