

BACKGROUND INFORMATION

AIA MISSOURI vs ST. LOUIS COUNTY PETITION FOR DECLARATORY JUDGMENT

November 5, 2012

The Missouri Chapter of AIA (AIAMO) has filed a petition in the Circuit Court of St. Louis County, asking for a Declaratory Judgment regarding the legality of the St. Louis County Ordinance that purports to authorize St. Louis County to enter into design-build procurement for construction projects.

St. Louis County adopted an ordinance in 2006 that provides for a three-phase process to engage design-build entities to design and construct projects. The process includes the review of qualifications of firms that can provide both design and construction services, followed by the selection of a short list of firms that are then required to prepare preliminary architectural designs and provide a stipulated cost for design and construction. The selection process includes a scoring formula to evaluate the submissions, based on a review of the design along with a single price for the further development of the design and construction. The price submission will account for no less than 50% of the decision to select the successful applicant.

In June of 2012, representatives of AIAMO objected to the ordinance through letters to St. Louis County and the County Counselor. Thereafter, representatives of AIAMO met with the St. Louis County Counselor and other County representatives in an attempt to dissuade St. Louis County from using the ordinance for the current St. Louis County Courts Project. Attorneys for AIAMO met with representatives of St. Louis County again, immediately prior to the filing of a petition asking the court to interpret the ordinance that is in dispute. St. Louis County has taken the position that the ordinance is a lawful method for procurement and has refused to withdraw the design-build procurement for the Courts Project. The Courts Project is anticipated to cost approximately 90.5 million dollars and will be financed by a \$100,000,000 bond.

The objection of AIAMO to the ordinance is based, in pertinent part, on the state law governing procurement by state agencies, commonly known as the Qualification Based Selection process or QBS. Under the QBS statutory process, state agencies are required to select the professional services of architects and engineers solely on the basis of qualifications. After a state agency determines the most qualified firm, the agency then must negotiate a fair and reasonable cost for those services with the most qualified firm. If the agency is unable to negotiate a fair and reasonable cost for the services with the most qualified firm, the agency is then required to attempt to negotiate a fair and reasonable cost with the next most qualified firm, and so on,

until the agency is successful at finding the most qualified firm at a cost it finds fair and reasonable.

AIAMO believes that the St. Louis County design-build procurement ordinance circumvents the state law by requiring firms to submit a cost for the design and construction services as part of the evaluation process to find the successful applicant. Because the design services are embedded in the total cost proposal for the project, the ordinance allows St. Louis County to select the successful firm, including the design services, using the information contained in the cost proposal. In other words, the design services will be selected on the basis of cost and not qualifications.

When other agencies of Missouri had the desire to use design-build procurement, specific and specialized state legislation was obtained to authorize that process, such as when the Missouri Department of Transportation obtained approval to use design-build procurement for certain highway projects. St. Louis County has not obtained such authorization under state statutes and instead passed a local ordinance, without such state statutory approval. St. Louis County has taken the position that its design-build ordinance is commensurate with the process dictated by the state statutes, however AIAMO takes the position that the ordinance cannot be reconciled with the process dictated by the statutes and required of all state agencies, therefore St. Louis is violating the law in the use of the ordinance for the St. Louis County Courts project. The action for a Declaratory Judgment asks the court to interpret the state law as it applies to the St. Louis County ordinance.

AIAMO believes that the procurement of professional architectural and engineering services is best obtained under the current statutory procedure. The state statutes are based on what is known as the federal Brooks Act.

This year is the 50th anniversary of the Moynihan report to President Kennedy, which is a treatise on how good design in public buildings advances American values. This report resulted in the Guiding Principles of Federal Architecture. These Guiding Principles provided a vision and rationale for the federal government to deliver legacy-quality architecture, reflecting the appropriate dignity of our public institutions. Among the list of public buildings that must symbolically and functionally connect with its citizens, there is no greater example than our courts facilities.

As a result of the initiative by Patrick Moynihan, Congress passed the Brooks Act in 1972, mandating the two-tier procurement process for the selection of design professionals. It is this Brooks Act that is the foundation for the Missouri statutory policy of a Qualification Based Selection process. The federal government, and many states thereafter, determined that, in order to achieve the goals set out by the Moynihan report, an agency cannot be constrained by a selection process based on price.

AIAMO disagrees that the procedure in the St. Louis County ordinance is commensurate with the procedure outlined in Missouri state law. The legislative purpose of the Qualifications Based Selection policy of the state of Missouri is to remove all price consideration from the selection of the design professional. In order for an agency to have a commensurate policy, the fee for a design professional must be determined and negotiated after that professional is selected and determined to be the most qualified. When the fee is embedded in a total cost proposal for design and construction, the County is not utilizing a qualification-based selection for the design professional and it is not necessary to negotiate a contract with a design professional that is found to be the most qualified for the project, but rather, the agency is bound to accept the design professionals that are selected by the Design-Build Contractor.,

Implicit in the adoption by Missouri of QBS statutes, is recognition that the design professional is the agent of the Owner, bound by the ethical standards of professional licensing, and charged with the responsibility of translating the Owner's concepts into specific plans and specifications. The design-build approach to construction delivery removes the design professional as the agent of the Owner, and relies on a contractual relationship that is profit oriented and therefore adversarial. The construction industry has historically balanced the adversarial nature of the Owner-Contractor agreement with the role of the design professional to produce the detailed drawings and specifications and to provide advice and counsel to the Owner regarding whether the contractor has performed the work pursuant to those plans and specifications. In design-build delivery, the contractor designs and interprets his or her own work.

Licensed professional architects and engineers have an obligation to protect the health, safety and welfare of the communities they serve. States that adopt QBS statutes and reject design-build delivery understand the public interest in avoiding the downward pressure that can be exerted on the independent exercise of professional judgment of the designer when the design professional owes its allegiance to the entity that is at risk for a price on a project. Put simply, design professionals that have a contractual obligation to an entity that is committed to a price will be obligated to conform their design to the quality and function that is determined by that entity's price commitment. Typically this price is determined at a very preliminary stage in the design development. If the committed price of a contractor runs afoul of buy-out expectations, the contractor will be under pressure to reduce the quality of the project to meet the committed price. This process shifts the risks for the contractor's performance onto the citizens of St. Louis County instead of where it belongs, with the contractor.

When looking at the long range importance of the building effort inherent in St. Louis County projects, such a price-driven process that removes the advice and counsel of the design professional from a contract with the Owner, cannot be in the best interest of the County or the community it serves.

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