

The Honorable John Huppenthal

July 30, 1999

Arizona State Senate

N^o. I99-015 (R99-010)

Question Presented

You have asked whether the Arizona Board of Regents may authorize State universities to engage in design-build construction projects. A design-build project is one that combines the architectural design with construction in a single bid proposal.

Summary Answer

The Legislature has required the Arizona Board of Regents ("ABOR") to adopt procurement procedures that are "substantially equivalent" to the policies and procedures prescribed in Arizona's procurement code. Because a design-build project would be a significant departure from the policies and procedures prescribed in the procurement code, the ABOR is without legal authority to authorize it.

Background

In 1984, the Legislature enacted the Arizona procurement code, which is codified in Title 41, Ch. 23, of the Arizona Revised Statutes ("A.R.S."). The Legislature also then adopted a policy statement identifying the purposes of the code. 1984 Ariz. Sess. Laws ch. 251, § 1. The purposes included making the procurement laws among the various State agencies as consistent as possible and fostering competition within the free enterprise system. *Id.* The Legislature exempted the ABOR from the procurement code. However, it required the ABOR to adopt rules that are "substantially equivalent to the policies and procedures prescribed" in the code. A.R.S. § 41-2501(E).

In 1996, and again in 1998, the Legislature authorized a pilot program permitting the Department of Transportation, the Department of Administration, and certain counties and cities to combine architectural design and construction in a single bid proposal for a limited number of projects. 1996 Ariz. Sess. Laws ch. 146 and 1998 Ariz. Sess. Laws ch. 278. ⁽¹⁾ The Legislature referred to this concept as "design-build". *Id.* Neither of these design-build authorizations amended the procurement code. Instead, they were enacted either as session laws or amended specific procurement legislation for the Department of Transportation. In addition to authorizing a limited design-build pilot program, the 1998 legislation established a legislative study committee to examine the use of design-build contracting. Among other things, the committee is to consider "whether the design-build process should be authorized on a continuing basis." 1998 Ariz. Sess. Laws ch. 278. The study committee's final report is to be completed by December 31, 2001, and the legislative authorization for the pilot program will lapse on December 31, 2002. *Id.*

Analysis

A. The Board of Regents' Authorization of the University's Design-Build Renovation Project Is Inconsistent With A.R.S. § 41-2501(E).

The Legislature required the ABOR to adopt procurement rules that are "substantially equivalent to the policies and procedures prescribed in" the procurement code. A.R.S. § 41-2501(E). Generally, the best evidence of a statute's meaning is its language. *Jenkins v. First Baptist Church*, 166 Ariz. 243, 245, 801 P.2d 478, 480 (App. 1990). Because the Legislature has not defined substantially equivalent, reference is made to the common and approved use of the language. A.R.S. § 1-213. ("Words and phrases shall be construed according to the common and approved use of the language."). "Substantially equivalent" means equal "in essential and material requirements." See *State ex rel. Polaroid Corp. v. Denihan*, 517 N.E.2d 1021, 1022 (Ohio App. 1986); *Indiana Bd. of Chiropractic Examiners v. Chamberlain*, 495 N.E.2d 794, 797 (Ind. App. 1986).

The design-build program authorized by the ABOR is not substantially equivalent to the policies and procedures prescribed in the procurement code. The procurement code establishes different methods for awarding construction contracts and contracts for architectural services. See A.R.S. § 41-2533 (construction contracts are normally awarded to the lowest bidder after competitive sealed bidding process) and A.R.S. § 41-2578(D)(1) (architectural services normally awarded to the "highest qualified firm" after competitive process). These distinctly separate processes are not consistent with a design-build contract, which combines design and construction.

Additionally, laws must be read together to give meaning to all provisions. *State ex rel. Church v. Arizona Corp. Comm'n*, 94 Ariz. 107, 110-111, 382 P.2d 222, 224 (1963). If the procurement code already authorized the use of design-build projects, the 1996 and 1998 design-build legislative authorization would not have been necessary. The limited legislative authorization for design-build projects on a pilot basis by specifically designated entities has no effect on ABOR's authority. It neither changed the procurement code, nor authorized ABOR to initiate design-build pilot projects.

Finally, although deference is ordinarily given to the rule-making expertise of State agencies, that deference ends when the rule operates outside of an agency's statutory authority. See *Dioguardi v. Superior Court*, 184 Ariz. 414, 417, 909 P.2d 481, 484 (App. 1995). Here, the legislative standard for ABOR procurement rules is that they must be "substantially equivalent to the policies and procedures prescribed" in the procurement code. A.R.S. § 41-2501(E). The procurement code does not authorize design-build programs or provide for waivers from the code to allow design-build projects. Consequently, the ABOR's waiver of its procurement standards, given the legislative directive in A.R.S. § 41-2501(E), and absent a true emergency, is outside the ABOR's statutory authority. See *Canon School Dist. No. 50 v. W. E. S. Constr. Co.*, 177 Ariz. 526, 528, 869 P.2d 500, 502 (1994) (if rules

conflict with enabling legislation, the rules must yield to the statute); *Fullen v. Industrial Comm'n*, 122 Ariz. 425, 428, 595 P.2d 657, 660 (1979) (an agency has only the power to promulgate rules vested in it by its enabling legislation).

B. The Board of Regents Is Subject to Legislative Restrictions On Procurement Matters

It has been suggested that the Arizona Constitution and the ABOR's enabling legislation allow the ABOR to engage in design-build construction projects absent specific legislative authorization. This is not the case. Neither the constitution nor statutes governing the ABOR nullify the requirements of A.R.S. § 41-2501(E).

The Arizona Constitution grants the ABOR authority over the "general conduct and supervision" of State universities. ARIZ. CONST. ART. XI, § 2. This constitutional provision has been interpreted as preventing the Legislature from displacing the ABOR's supervisory power over university and ABOR employees. *See Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949) (Legislature cannot place non-teaching university employees under supervision of state civil service board); *Arizona Board of Regents v. State Dep't of Admin.*, 151 Ariz. 450, 728 P.2d 669 (App. 1986) (Legislature cannot place ABOR employees within state civil service system). The constitutional powers of the ABOR, however, are not so broad as to allow universities to enter contracts or expend public monies without regard to statutory limits imposed by the Legislature. *See, e.g., Board of Regents v. Frohmiller*, 69 Ariz. 50, 208 P.2d 833 (1949) (rejecting argument that the ABOR's constitutional powers precluded legislation that permitted State Auditor to disapprove claims from payment arising from university contracts). In addition, the Arizona Supreme Court has expressly recognized the Legislature's authority to define the ABOR's power with regard to construction projects. *Board of Regents v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960). When resolving a dispute between the ABOR and the City of Tempe over a construction project, the Arizona Supreme Court noted:

The problem remains to resolve the conflict presented by the Board's and the City's assertions of apparently overlapping powers over university construction. It is not disputed that the ultimate power to resolve this controversy rests in the Legislature which concededly may assign exclusive jurisdiction to the Board or to the City.

Id. at 305, 356 P.2d at 402. For these reasons, the Legislature acted within its authority by directing in A.R.S. § 41-2501(E) that the ABOR adopt procurement rules that are "substantially equivalent" to the procurement code. The constitutional powers given the ABOR in Article XI, § 2 of the Constitution do not allow the ABOR to disregard this statutory requirement.

Finally, although A.R.S. §§ 15-1625 and -1626 give the ABOR broad

administrative authority, these general provisions do not trump the legislative limitations in A.R.S. § 41-2501(E). The various statutes must, if possible, be interpreted to harmonize and give effect to all their provisions. *See Pima County v. Maya Constr. Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988). Therefore, the general powers described in A.R.S. §§ 15-1625 and -1626 should not be interpreted to render meaningless the requirements of A.R.S. § 41-2501(E).

Conclusion

The Legislature has adopted a procurement code that does not generally authorize the combining of architectural design and construction into a single contract. In A.R.S. § 41-2501(E), the Legislature directed the ABOR to adopt procurement procedures that are substantially equivalent to the policies and procedures of the procurement code. Although the Legislature has authorized limited pilot programs for some State agencies and political subdivisions to engage in design-build contracting, it neither changed the procurement code nor authorized either the ABOR or the universities to initiate design-build pilot projects. Therefore, the ABOR must abide by the legislative restrictions in A.R.S. § 41-2501(E) and may not participate in design-build programs without legislative authority.

¹ In 1999, the Legislature increased the number of cities and counties eligible to combine architectural design and construction in a single bid proposal. 1999 Ariz. Sess. Laws ch. 207.

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