

# THE SENSITIVE ISSUE OF FEES

Over a decade ago, the Chicago AIA crossed the line. As a group, they began a discussion about fees. The precise details of their discussion is not readily available to us today, but we do know that it involved some form of agreement between professionals acting as a group on when or how to charge clients. As a result of their discussions, the Federal Government stepped in and handed down what is referred to as the “Consent Decree”. This document is a legal document establishing the limits and responsibilities Architects as a group must follow in order to comply with Antitrust Laws. The meaning of the “Consent Decree” is of utmost importance to us as members of the AIA, and the implications of it are far-reaching for us as business owners and partners. One of the many responsibilities established by this document is for the AIA to continue to educate their membership on the subject. As for me, I have never been educated on the subject and only discovered the meaning of the document after researching it myself. This issue of the Leagueline is dedicated to the understanding of that document.

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*Following is a re-print of the pre-ambule to the “Consent Decree” as found in the Component Resource Manual at the National AIA website library.*

## Antitrust Concerns

Compliance with the antitrust laws should be a priority concern of component officers, directors, and staff. Component activities are more likely to be scrutinized by antitrust enforcement authorities than actions of individual members because component activities are the coordinated actions of members who are, in most cases, competitors. Actions by competitors as a group, if they unreasonably restrain competition, are the basis of a number of federal and state antitrust violations. Chapters and state organizations are responsible for seeking the advice of the ALA General Counsel on any matter that may involve antitrust compliance.

The U.S. Department of Justice, the Federal Trade Commission, state attorneys general, and private parties regularly look at trade and professional associations, their leaders, and their members for signs of anti-competitive activity, intentional or otherwise. Antitrust investigations and lawsuits are notoriously long, complicated affairs. And, typically the large expenses incurred for attorneys, economists, and litigation support cannot be recouped, even if no liability is found. Litigation also distracts staff and leaders from serving other member needs.

The penalties for antitrust violations can be severe. A private party can win actual damages multiplied times three. Prosecutors can seek felony convictions with sentences up to three years in jail and fines up to \$350,000 for individuals and \$10 million for corporations. The government can also obtain injunctions that are enforceable through summary contempt procedures. In sum, it is definitely in the interest of members and

staff at all levels of the Institute to identify and resolve antitrust questions before they become problems.

Component leadership and staff should know basic antitrust concepts and how they relate to the usual activities of the component. Expertise is not expected, but rather sensitivity sufficient to recognize when an antitrust question might be present. Advice on particular matters is always available from the Institute's General Counsel. If you have any doubt, ask for an opinion. It is better for counsel to be involved early in a project, before any irrevocable decisions are made, because there is almost always a legally proper and effective means to achieve a desired result.

## Basic Antitrust Principles

The fundamental principle of the antitrust laws is that an agreement between two or more competitors that unreasonably restrains trade is illegal. The first element, an agreement between competitors, is usually present for components by reason of their very existence, because component activities are the combined activities of members who generally are competitors. Therefore, components must ensure that their activities do not cause an unreasonable restraint of trade, which is the second element of the illegal equation.

In general, component activities risk being held unlawful if either the purpose or the effect of such activities is to:

1. **Fix or maintain prices.** "Price-fixing" broadly includes agreements that raise, lower, or stabilize maximum or minimum prices or fix other price-related terms and conditions of sale such as discounts, allowances, or credit terms. It doesn't matter if the prices set are reasonable or if there are socially worthy reasons that particular prices or terms should be fixed. Because unified prices are so central to a free market economy, even price agreements that are quite informal, amounting to little more than an unstated understanding may be illegal.
2. **Boycott a competitor or customer.** An agreement among members that they will not work with another architect or a particular client or category of clients is unlawful if the purpose or effect of such conduct is to lessen competition by limiting the choices that consumers of architectural services would otherwise have. A component that denies a new membership or terminates an existing membership because of the manner in which the architect competes may be engaging in a boycott. Similarly, any effort to organize members to refuse to do business with a particular client, public or private, or in a particular manner risks being challenged as an unreasonable restraint of trade.
3. **Allocate business or customers.** Members acting alone may decide to focus on a particular practice area or go after any commission they choose, but any agreement between members to divide or allocate customers or markets is unlawful. Components should not foster or facilitate such arrangements. Even informal

unwritten understandings that members will refrain from doing business with one another's clients violates the law.

## **The 1990 Consent Decree**

The Institute and all components are required to comply with a federal court order (the "Consent Decree") that became effective in 1990. **IT IS VITALLY IMPORTANT THAT EVERY COMPONENT OFFICER, DIRECTOR, AND EMPLOYEE READ AND UNDERSTAND THE CONSENT DECREE DOCUMENT** (A copy is included in Appendix 1.)

Failure to comply with the Consent Decree may result in the court assessing fines against a component or convicting the individuals involved for criminal contempt of court.

The Consent Decree prohibits components and the Institute from adopting any rule, resolution, bylaw, policy, or standard that restrains or prohibits members from engaging in any of the following activities:

- Competitive bidding or the submission of price quotations
- Providing free services
- Providing discounted services.

Similarly, components may not make any statement, oral or written, that says directly or by implication that any of these activities is unprofessional, unethical, or contrary to a policy of the Institute or a component. All component officers, directors, and employees are subject to these restrictions and may be held personally liable if they fail to follow them.

To assist components in complying with the Consent Decree, the Institute's General Counsel will review all written component policy statements, rules, bylaws, guidelines, and manuals that deal with competitive bidding, price quotations, free services, and discounted services. Components are to submit these statements for review before they are published or distributed.

There are important things the Consent Decree does not do. It does not require individual members to engage in competitive bidding or provide free services; members acting on their own and not on behalf of the chapter are free to make their own decisions on these matters and express their own opinions. Moreover, the Consent Decree does not prevent components from lobbying at the state and local level to persuade public officials and agencies to select architects for public projects on the basis of their qualifications. Lobbying for QBS and other governmental policies and actions favorable to architects is specifically exempt from the Consent Decree.

Every component must do a few things annually to meet the education requirements under the Consent Decree. Every year, the president and executive director (if there is

one) must sign a certification that they have received, read, understood, and agree to abide by the Consent Decree. The component must certify, through one of its officers, that copies of the Consent Decree have been given to each of the officers and directors of the component and they have read, understood, and agreed to abide by it. Further, components must present at one general membership meeting an educational program on antitrust. Showing the videotape, "Legal Hardhat Required," meets this requirement.

If a component violates the decree by, for example, issuing a policy statement against competitive bidding, the General Counsel's office can correct it within 45 days. If the violation is not corrected, it will be reported to the Department of Justice. The government can ask the court to impose a fine on the component or, in a serious case of willful violation, prosecute individuals for criminal contempt of court, which is punishable by fine, imprisonment, or both.

The purpose of the Consent Decree is to ensue that members, individually and within their firms, make their own decisions about whether or not to engage in competitive bidding or to provide free or discounted services. Components should not try to tell members what to do or not to do regarding these subjects. Questions about the consent decree should be directed to the Institute's General Counsel.

## **Certain Activities That Require Antitrust Review**

Certain subjects that are of recurring interest to members nearly always have potential antitrust implications. Components should seek the advice of the General Counsel before initiating activities involving these subjects.

**Fees.** Neither the Institute nor any component is permitted to have a mandatory fee schedule or recommended fee guidelines that members are expected to follow. Professional fee schedules have been held to be unlawful price fixing. When asked about fees that architects customarily charge, a component should respond that fees are a matter for negotiation between client and architect. However, it is appropriate for components to distribute information about types of fee arrangements, lump sum, percentage of construction cost, hourly rates, for example, such as is contained in *You and Your Architect*. Discussion of fees at chapter meetings should not be allowed. Members should make their own independent decisions on what to charge for their services.

**Selection methods.** As noted, the consent decree does not prohibit legitimate lobbying activities at the federal, state, or local level, including lobbying to maintain or strengthen the Brooks Act on procurement of architectural services and lobbying in favor of similar statutes or procurement methods by public agencies at state and local levels. Components should take care that all statements endorsing a particular method of architect selection or compensation are carefully phrased so that it is clear the statements are directed to the public sector and are not intended as instructions to members on individual business practices. Efforts to promote qualifications-based selection on private projects must be done with great care and all material should be reviewed by the AIA General Counsel.

**Design competitions.** The Institute has for many years made recommendations on how to conduct good design competitions. It is appropriate for components to bring to the attention of sponsors of competitions, whether formal or informal, the experience and insights of the Institute and its members about design competitions. It is also appropriate for components to educate members on how they can better decide for themselves whether or not to participate in a competition.

However, if a component goes further and encourages or organizes members to refuse to participate in a particular competition or type of competition, it risks being challenged for sponsoring an illegal boycott.

**Surveys.** Many components want to canvass their members to collect facts about their practices. Such surveys can cover wages and salaries, incomes, costs, and other data about particular business practices. Collecting this information is lawful unless it is used to further a restraint of trade.

Surveys of competitively sensitive matters, such as fees and sundries, should be confined to historical, not current or future, data and reported in an aggregated format that does not identify individual contributors. Survey forms and reports should be checked in advance by the AIA General Counsel.

**Membership.** Membership in the ALA is a valuable asset for architects and enhances their ability to perform as professionals. Because of this, the antitrust laws affect how the AIA decides who should or should not be a member. In general, the Institute is required to have objective criteria for denial or expulsion from membership. Those criteria cannot discriminate among architects based on how they compete. The Institute applies those criteria evenhandedly and with procedural safeguards that ensure a full airing of all relevant considerations.

Components have the initial responsibility to review a membership application, verify the registration status of an applicant for regular membership, and assess the applicant's standing in the community. Components do not have authority to make binding decisions on applications. Component recommendations to accept or reject a new member should be promptly forwarded to the Institute for final determination.

Any recommendation to reject an applicant or terminate a member (other than for nonpayment of dues) must be supported by a clear statement of reasons keyed to the Institute Bylaws and Rules. The Institute Secretary has guidelines for the review and appeal of adverse decisions on applications.

**Free sketches.** It is not unethical or unprofessional for members to agree to do work for free. Whether or not to provide free services is a business decision for members to make on their own. Efforts by a component to discourage free services may result in an antitrust proceeding or investigation.

**A note on lobbying.** No law, including the antitrust laws, prohibits the AIA or any member from exercising the First Amendment right to petition government for legislation

or administrative action, even when competition would be restrained by the government action. Lobbying cannot, however, be simply a ruse to disguise an otherwise unlawful restraint of trade by a component or members. As noted earlier, it is legitimate to press government to adopt qualifications-based selection procedures, but a collective agreement not to submit price quotations to a government agency that requested them would be unlawful.

Discussions or negotiations about government fee schedules or the terms of contracts used by government agencies are particularly sensitive. Such discussions with government generally are lawful provided they do not result in agreements among architects that restrain competition for government projects. However, components should not lobby about the fees or contract terms for individual projects. Leave this activity to members acting individually.

Because there is a range of conduct in this area that may or may not be an antitrust problem depending on what is done, you should contact the AIA General Counsel's office at the Institute before proceeding with such discussions.

## **Guidelines for antitrust compliance.**

**Meetings** Most, if not all, of the Meetings subjects indicated above that can result in antitrust problems will come up, *if* they come up at all, in the course of meetings of the component membership, the component board, or a committee. Meetings are less likely to stray into sensitive areas if the following points are kept in mind.

- Prepare a written agenda in advance of the meeting and stick to it.
- Be sure minutes accurately reflect what took place at the meetings.
- Avoid “off the record” or executive session discussions of competitively sensitive subjects. Confidentiality cannot be assured.
- Do not convene “rump session” meetings before or after official meetings to supplement business discussions.
- Stay away from any discussion of fees.
- Do not discuss refusal to work with or to recognize the work of particular architects.
- Do not discuss refusal to conduct business or provide services to particular clients, or providing services on particular terms.
- Do not deny or unreasonably delay the application for membership of any individual who meets the eligibility requirements.
- Seek the advice of the AIA General Counsel before issuing any statement that might be regarded by others as restraining competition.

# WHAT SHOULD BE SAID ABOUT FEES

The restrictions imposed by the Consent Decree include, prohibiting the creation of fee guidelines, and allowing for discounted or free services. We all have the right to help out a friend, family member, community group or even a client-in-need with discounted or free service. In fact, we are lucky to be able to do so when we can. As for fee guidelines it sure would be easy to tell a client “this is what I have to charge” and to show them an industry standard menu of prices, but we can’t.

When thinking about why these guidelines ever existed in the first place, one would assume it would be for the preservation of the profession. Clearly, when fee levels deteriorate so does service quantity and quality.

While we cannot provide guidelines to help you establish the value of your services you can find resources to help you gauge fee levels. Historical data is available through survey data from companies such as PSMJ Resources, inc. ([www.psmj.com](http://www.psmj.com)) and the AIA itself has information to help you prepare quotes.

Establishing a proper fee for the services being offered to your client is helpful to both you as an Architect as well as your client. This in no way implies that you should overcharge a client at the beginning in order to protect yourself from unknown services you might need down the road, but that you enumerate those services before finalizing a fee. Documents such as the AIA-B163 Form can be a valuable tool when preparing a fee quote and details the various services that might be needed during a typical project. These services can be discussed and established at the very beginning of a project, and the appropriate fee can then be assigned.

Without regard to being a sole-practitioner, small office, or a large firm, the appropriate fee for services rendered is essential to the financial health of a business. After all, the more healthy a business, the more pro bono, community service, educational and staff support related services can be afforded and contributed by that very same business.

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