

THE
STATE
OF

QBS

BATTLES AT THE
LOCAL AND NATIONAL
LEVEL ARE CHALLENGING
HOW FIRMS DO
BUSINESS.

Thirty years ago, Congress passed the Brooks Act, codifying in federal law the process known as qualifications-based selection (QBS). Over the years, most states have followed suit in passing “mini Brooks” laws. QBS quickly became the cornerstone of the engineering industry, ensuring that clients and taxpayers benefit from the best services available.

Yet despite being the law of the land, QBS continues to face challenges at both the state and federal levels, prompting the industry to remain vigilant in its defense. While the focus at the federal level has primarily been defensive actions to protect the Brooks Act, the fight in the states has been more pronounced. A few states have yet to adopt QBS, while others are working to expand state law to the county and municipal level, ensuring that all local government procurement decisions are made using QBS.

The future of QBS hinges on the success of these ongoing efforts. Low cost, low bid procurement initiatives continue to have political appeal among some elected officials pushing so-called procurement “reforms.” Faced with a lack of balanced information, voters may be prone to respond favorably to a sales pitch that preaches low bid as a means to achieve greater accountability. Of course, in the end, it is the taxpayer that suffers the consequences of shortsighted decisions that put quality secondary to the cheapest price.

If QBS is to survive in this



BY CAMILLE FLEENOR AND STEVE HALL

political environment, the industry must continue to educate policy makers and the general public that procuring engineering services based on qualifications is the surest way to safeguard the

public interest and ensure that tax dollars are well spent.

QBS in the States

In 2001, Alabama successfully amended the state's competitive bid law to require all state agencies to use QBS when contracting A/E services. Despite this victory, the new QBS law may still be in jeopardy, as some in the state are still calling for a selection process based on low-bid. "When a design professional is forced to submit a low bid to win a job, the firm's priority shifts from protecting the client's interest to protecting its financial well-being—in short, everyone loses," says Renee Casillas, executive director of ACEC/Alabama.

This past July, Michigan became the 43rd state to pass a "mini-Brooks" Act. The hard-fought battle of modifying a non-binding state statute that only encouraged the use of QBS was led by ACEC/Michigan.

John Matonich of ACEC

member firm Rowe, Inc., who serves as chairman of the Michigan QBS Coalition, believes that passing a QBS law at the state level will encourage municipalities in Michigan to also adopt

projects receiving more than 35 percent in state funding and with a constructed value greater than \$400,000.

Oregon closely modeled its language on a QBS law currently on

Just as the industry is facing challenges to QBS at the federal level, the states are grappling with the issue as well.

QBS practices: "Currently, some local governments use price as a guiding factor when selecting A/E services. However, most realize that QBS gives them the best value for their dollar."

Ensuring that local governments use the QBS model was a key legislative initiative of ACEC/Oregon in 2001. Seeking to strengthen the state's QBS law, ACEC/Oregon successfully amended the state statute to require that municipal governments employ QBS on all

the books in 21 states, including Washington. Though the Washington law lacks a strong enforcement mechanism, ACEC/Washington has had considerable success in resolving compliance issues. Bill Garrity, executive director of ACEC/Washington, estimates that 90 percent of the cases in which municipalities attempt to skirt QBS are the result of uninformed contracting officers, an issue that is typically remedied with a phone call and letter. The other 10 percent,



QBS: A HISTORY LESSON

Prior to 1939, government employees typically performed architecture and engineering (A/E) work on federal projects. However, a 1939 statute (Public Law No. 76-43) directed federal agencies to contract with private firms. In doing so, government managers recognized that the expertise and innovation brought by the private sector improved the aesthetic, functional, and safety characteristics of structures while minimizing life cycle, operations and maintenance costs.

While quality and on-time delivery quickly became trademarks of the private sector in serving government clients, the role that cost should play in

the procurement of these services remained an open question.

The Brooks Architect-Engineering Act (Public Law 92-582), enacted in 1972, put this question to rest. The new law sought "to clarify the legality of the traditional manner in which federal departments and agencies select architects and engineers to perform services in the federal government." The Brooks Act codified into federal law the selection process known as qualifications-based selection (QBS), in which contracts for design services are negotiated on the basis of demonstrated competence and qualification for the type of professional services required at a fair and

reasonable price.

Unlike solicitations based solely on price, agencies using QBS publicly solicit A/E services, create a short list from qualified candidates, rank them, and begin negotiations with the top-ranked firm to determine the scope of the project, before price is ever discussed. If the parties are unable to agree on the terms of a contract, the agency is free to begin negotiations with the next ranked firm. QBS does not negate price as an eventual factor for contract negotiations with the design professional. Instead, price becomes a factor after the most qualified professional firm has been identified and the scope of work has been agreed to.

according to Garrity, are instances where municipalities are attempting to use price or other non-qualification criteria to intentionally not comply with QBS.

Most states are working to advance legislation similar to that in Washington and Oregon in or-

der to filter the process down to the local level. Many procurement officials for municipalities have their own selection methods in place and are hesitant to move the price negotiation further down in the selection process.

Many procurement officials for local municipalities are not aware of state laws requiring QBS.

der to filter the process down to the local level. Many procurement officials for municipalities have their own selection methods in place and are hesitant to move the price negotiation further down in the selection process.

In Colorado, for example, some counties and municipalities have expressed opposition to following codified QBS regulations. "They're very much in favor of local rights without state interference," says Sondra Donnel, execu-

tive director of ACEC/Colorado. This year, she says, her organization will target counties and cities that are favorable to QBS in order to get an ordinance passed: "A lot of the major municipalities are already using QBS anyway. If we can get them to do it formally, we

QBS Defense at the Federal Level

Defense of QBS remains a top priority at the national level for ACEC. Last year, the Council protested a solicitation for an engineering and construction management services contract in Egypt. The contract, let by the Agency for International Development (AID), proposed to use

price as a major criteria in selection. After receiving ACEC's protest letter, AID recalled the solicitation and issued a new RFP that fully complied with the Brooks Act.

In addition to frequently responding to violations from various federal agencies, the Council is currently pursuing several regulatory and legislative changes that would further protect the Brooks Act. At the request of the Bush administration, ACEC is currently drafting regulatory language that would exempt engineering and related services in proposed revisions to the Office of Management and Budget's Circular A-76, a federal policy that governs the way public-private competitions are conducted. The current circular mandates that these competitions be awarded on price, in direct conflict with Federal law on the procurement of A/E services.

This is a very important issue both in terms of protecting QBS and advancing ACEC's outsour-



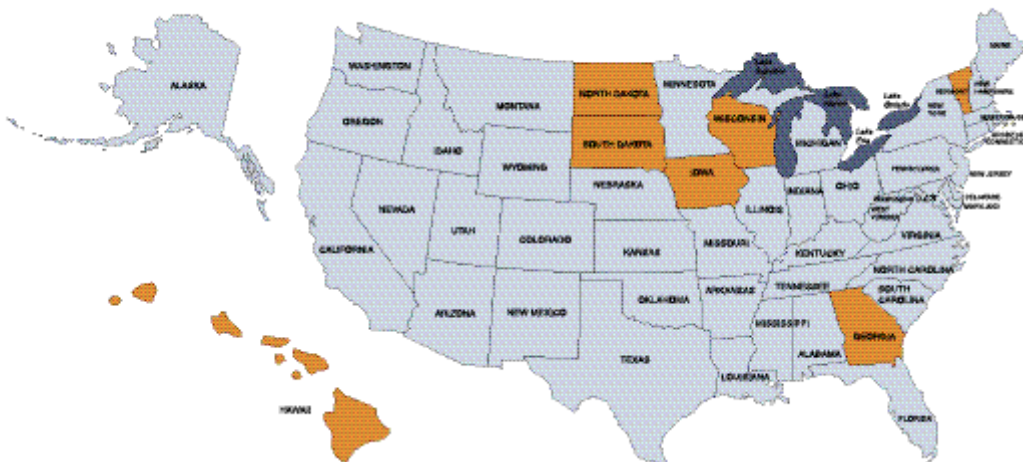
"A lot of the major municipalities are already using QBS anyway. If we can get them to do it formally, we can encourage agencies around the state to use it as well."

—Sondra Donnel, executive director of ACEC/Colorado

ing agenda, says ACEC President Dave Raymond: "As the administration moves forward with its competitive sourcing policy, an exemption is essential to assuring that engineering services aren't low bid. Without it, agencies could refuse to outsource certain engineering functions, arguing that doing so would violate the Brooks Act."

ACEC is also in discussions with senior staff at the Department of Defense to ensure that projects using so-called "non-appropriated funds"—revenues raised through activities at defense facilities that are not provided through the normal congressional appropriations process—follow federal acquisition regulations, including the use of QBS. Current regulations are unclear on whether QBS must apply to construction projects using non-appropriated funds, leaving this decision to the discretion of federal procurement managers. While in some cases QBS is utilized, ACEC member firms have reported instances where engineering services were procured by the lowest bid. ACEC is

Status of QBS Nationwide



States with QBS laws
States without QBS laws

seeking a clarification in the regulations to ensure that all non-appropriated fund procurements adhere to QBS.

In addition, ACEC is working with members of Congress to promote QBS in federal water infrastructure programs. The Council and its industry allies have been successful in recent years in putting QBS language into TEA-21 and AIR-21, and this agenda continues as the House and Senate consider legislation to reauthorize the Clean Water Act State Revolving Fund (SRF) and Safe Drinking Water SRF programs. ACEC lobbyists are working to insert language into this legislation to reaffirm the application of QBS when using federal funds for water projects.

At the end of the day, ACEC and its members believe that using QBS is the only way to go on every level. "Design professionals believe that their services should be selected on the basis of qualifications and competence," says Tim Psomas, chairman of the board of Psomas and chairman of ACEC's Procurement Advocacy Committee. "Using this method assures the acquisition of the most capable professional, while at the same time offering the client a 'fair and reasonable' price. It really is the best solution for everyone."

QBS Resources Web Page

ACEC has created a QBS Resource Web Page that includes:

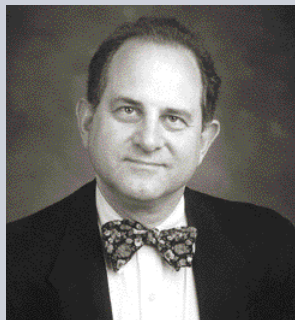
- Brooks Act text
- Information on how to use QBS
- Talking points
- Sample testimony
- A list of relevant ACEC publications
- A state-by-state QBS matrix
- A summary of state procurement statutes
- Links to state QBS Web sites

www.acec.org

ON THE INTERNATIONAL FRONT

Internationally, engineers face a formidable struggle as they try to promote QBS over the quality- and cost-based selection (QCBS) model of procurement now being used by the World Bank and other multilateral development banks.

The World Bank's QCBS



guidelines state that an A/E firm should be chosen from a short list by adding weighted quality and cost scores, where cost is not to exceed 30 points out of a total score of 100. According to Fred Berger, vice president of New Jersey-based Louis Berger Group, however, this formula often ends up excluding the best-qualified firms. Last January, Berger says, when the World Bank tried to get Japanese A/E firms to bid on some work, they refused, pointing out that their

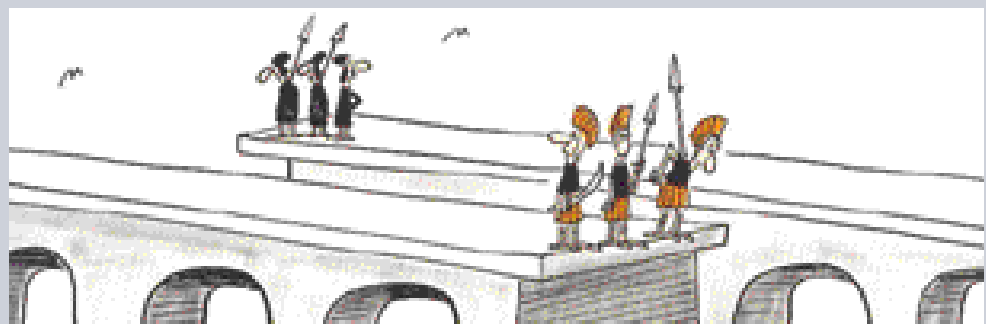
Fred Berger, vice president of the Louis Berger Group, is vice chairman of the ACEC International Committee.

higher costs would automatically give them lower scores and exclude them from consideration.

Berger, who also serves as vice chairman of the ACEC International Committee, urges all engineers to participate in international QBS issues. He says whether QBS laws are strengthened or weakened at home or abroad can carry worldwide repercussions: "There's a lot more of a feedback loop between international and domestic markets than we'd originally estimated. We don't want to start hearing the U.S. congress saying that America is the only place left in the world that doesn't use price competition."

WHY USE QBS?

1. **Promotes Technological Innovation**—While a low bid system of procurement will produce the least expensive services that meet minimum standards, QBS helps the client receive the highest level of professional services based upon demonstrated technical expertise and innovation.
2. **Provides Life-Cycle Savings**—Procurement through QBS promotes life-cycle savings through designs that minimize long-term maintenance costs.
3. **Safeguards Public Interest**—QBS allows owners to protect the public's health and safety by focusing on qualifications to achieve the owner's requirements rather than lowest cost.
4. **Encourages Competition Based on Merit**—QBS is a highly competitive form of procurement for clients interested in technological innovation, creativity, and high design standards.
5. **Promotes Communication**—Using QBS, the owner has the opportunity to fully define the project scope throughout the selection process.



"I told you to use QBS to build this bridge."