



Best Value Procurement Methods for Professional Services —

Overcoming the Limitations
of *Low-Bid* and *QBS*

POSITION PAPER

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Position Statement:

NIGP: The Institute for Public Procurement affirms that publicly advertised price and cost competition is a key principle for achieving taxpayer value in government procurement of services from private sector providers, and that public procurement professionals must be empowered to determine the most relevant application of that principle and the most appropriate selection method to achieve best value when procuring services, including professional services. NIGP does not support mandates that require public entities to apply the Qualifications-Based Selection (QBS) method for selecting providers of certain professional services.

Crucial Principles for Procurement.

The public deserves good procurement, meaning right *quality* results at the right *price*. This commonsense goal is realized through several principles, including the following two primary principles:

Price Competition: Price competition (including a break out listing of costs) is fundamental in a system of checks and balances for determining a fair contract price.

Competition of Ideas: For most procurements, there are several alternative approaches to solving the need, each with their set of pros and cons. Wise decisions result only when public procurement can employ procurement methods that expose and assess the pros and cons of those alternatives.

These principles, along with all factors important to achieving the public interest, must be carefully balanced to match every unique procurement situation. Achieving that balance is not possible when procurement law includes mandates dictating that proposals from providers must be evaluated based on only one or a few narrow criteria, or that prevent a comparative assessment of all proposals. Achieving that balance is only possible when the public entity is allowed to match its selection criteria to its needs and to what the marketplace can provide.

Challenges to Good Quality and Good Price.

A frequent challenge to obtaining good outcomes (the right quality) is misplaced reliance on “low bid.” A traditional form of competition is the process that awards a contract to the lowest bidder, commonly called an “Invitation for Bids” selection method, or similar term. In an earlier,

less sophisticated age, executive decision makers and purchasers in the private and public sectors relied heavily on this selection method. During that history we learned that the low-bid method can lead to negative results around the quality of services provided to the government. For instance, applying the low-bid method to procurements for professional services could lead to problems if there were no consideration of qualifications. That is, a bidding race based solely on the lowest dollar can result either in selection of an inexperienced provider, or can create an incentive for the service provider to take financial short cuts and compromise needed quality. Also, the low-bid method is built around a predetermined single solution to the need, based on the assumption that alternative approaches are not available or are not needed. This can be short-sighted, and often leads to acquiring less than the best solution.

Obtaining a good price in public procurement becomes a challenge when exceptions to full and open competition are necessary or allowed. For instance, because of the exigencies of war time during World Wars I and II and the Korean Conflict, the U.S. Department of Defense sometimes was hampered by the procedures required for publicly-advertised open competition and began using noncompetitive selection methods. Since there was no low-bid competition involved in those contracts, the government would directly select a service provider and attempt to negotiate a reasonable price. Some of those negotiated contracts led to concerns about whether fair prices were being paid, and, in turn, that led to passage of the “Truth in Negotiations Act” (Public Law 87-653) in 1962. The Act helped to ensure that when price competition was not applied, the government could get access to truthful and complete data on costs from the service provider to determine whether overall prices were fair and reasonable.

Modern Public Procurement Solutions.

In response to these challenges, public procurement developed “Best Value” selection methods to create a more balanced basis for competition, enabling the public entity to pre-qualify providers as needed, and base selection on qualifications, project approach, and various types of price and cost information, along with other criteria the public entity deems important to a successful selection.

The public entity advertises all these relevant criteria in its solicitations, along with the relative weights for those criteria. Typically, once all the qualified proposers have been ranked against those criteria, the top ranked provider and the entity discuss options and risks, negotiate a more precise description of the services or goods, and negotiate price and the basis for making payments. Some modern methods allow contact with several proposers to ask for “best and final offers” or to conduct concurrent negotiations - even for services like construction that

have traditionally been low-bid.¹ These types of selection methods take more effort but generally lead to a smoother and more successful project, avoiding the time and expense of dealing with a misguided project approach or preventing the cutting of corners on quality that can arise from the low-bid method. These Best Value methods leverage price or cost competition to collect comparative information, which is one of the essential factors for determining overall value. The public always deserves both to get good results from its contracts and to pay a good price.²

During their emergence, these best value selection methods were not widespread or always well understood among entities that relied primarily on the low-bid method. However, a significant development in modernizing procurement methods came when the Best Value concept was recognized and endorsed by the American Bar Association, in 1979, with its publication of the ABA Model Procurement Code.

A Competing Solution - Qualifications-Based Selection.

Shortly before the ABA Model Procurement Code was developed and released, another approach began to be used for choosing architects and engineers for design of public works, arising from anecdotal but important concerns for failed designs and fallen buildings; the consequence, it was said, from over-reliance on the low-bid process for hiring architects and engineers, with the explicit implication that those firms were either inexperienced or succumbed to economic pressure to cut corners on quality and due diligence in design or construction oversight.³

The architectural and engineering (A&E) industry, now usually including land surveying and sometimes other related services, started promoting a special procurement method called Qualifications-Based Selection (QBS). QBS includes, appropriately, relevant qualifications and

¹ State of California, Senate Bill No. 762 (2015), at: http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0751-0800/sb_762_bill_20151008_chaptered.pdf.

² NIGP Position Paper on *Best Value in Government Procurement* (2013), at: http://www.nigp.org/docs/default-source/New-Site/position-papers/150105_best-value_position-paper-complete_updated.pdf?sfvrsn=4.

³ U.S. House of Representatives Report 98-621, *Structural Failures in Public Facilities*, March 15, 1984, pgs. 18-19.

Also, testimony by Sen. Jennings Randolph during debate on the 1972 Brooks Act: [Under low-bidding.] “we may end up with a technically capable architect or engineer, but one who, for lack of experience or because of a desire to stay within his bid reduces the time spent on field surveys or in the preparation of detailed drawings, or in providing inspection services.”

experience (which, when explained and justified well, are the most significant factors), but crucially deletes, and in fact prohibits, any comparative price information. Depending on the exact wording passed by lawmakers, public entities are not allowed to request, let alone compare, costs or price information of any kind among the competing providers. The intent of this method is that, no matter the need or circumstances, and regardless of price, the “most highly qualified” individual or firm must be selected.

When federal agencies of the United States government experimented with QBS, the authority for doing so was not clear. In 1967, the General Accounting Office advised Congress that there was no statutory basis for ignoring costs and that the requirements of the “Truth in Negotiations Act” for examination of cost and pricing data applied to architectural and engineering services. Within a few years, however, the proponents of QBS were successful in persuading Congress, in 1972, to pass the “Brooks Act,” not only allowing, but requiring federal agencies to use QBS for the procurement of A&E services. With that major foothold, these industries broadened their lobbying efforts to compel state legislatures to also adopt some version of QBS. Today, approximately 46 states have done so, although several continue to explore whether to change course.⁴

Is the QBS method a problem?

Yes, we have learned several things:

QBS hamstring a public entity by taking away price competition, which is a primary check and balance for paying a fair price. Without the effect of price competition in the evaluation and selection process, the winning firm, standing alone in price negotiation with the public entity, has free rein to start negotiating at the highest possible price. Knowledge is power and without comparative price or cost information from several firms, the government entity and the public are missing crucial knowledge about what is reasonable value within the marketplace. This transfers excessive bargaining power to the selected firm about the price the government will pay, which is not good public policy. For example, in the health care and financial services sectors, it has been difficult to gather accurate, complete, and comparative information about costs. That makes it very difficult to understand exactly how costs relate to outcomes, although we have concluded that we are paying far too much for mediocre social outcomes. In much the same way, QBS interferes in determining the value of professional services provided by the

⁴ A few examples of Recent Developments on Qualifications-Based Selection of Engineering Services, particularly Kansas and Florida, at: <https://www.nspe.org/resources/issues-and-advocacy/action-issues/qualifications-based-selection-engineering-services>, accessed Sept 2017.

architectural and engineering and related occupations. We need more scrutiny of the value for all professional services, not less.

The history of government procurement in the U.S. is replete with established confirmation of the principles of fair, open, and full competition, including price or costs as one factor.⁵ Unfortunately, QBS laws were written to prohibit the ability to collect comparative pricing or costs breakdowns from proposing firms. This particular QBS feature has been and remains very contentious within government procurement, but has never received sufficient or unbiased, objective examination of its impact. QBS marketing is strongly opposed to the low-bid method, which is fine, but goes further to include assumptions and negative insinuations about any cost competition by relying on distracting emotional appeals to public safety, which is not fine or accurate. The tactics of this marketing campaign beg for examination of relevant questions that have gone unaddressed, such as: If price competition is a minor factor during a competitive selection, are proposers invariably going to cut corners on quality oversight later on, or is that a red herring? Does a competitive selection process really drive providers to designing so quickly that important details will be left out? When price competition is a minor factor, do we really believe that the lowest price automatically means that firm is not well qualified? While acknowledging that quality design and construction oversight can save money on an overall construction project, does high quality work only come by paying high prices?

In the name of quality, there was a strong move away from the low-bid method for professional services that occurred in the 1970's. Now that we are beyond that evolution and can use best value selection methods, if there is a need to focus on quality issues, the industry itself should take responsibility to address them. If there are problems from mistakes by inexperienced designers, or by firms unethically cutting corners to try to squeeze more profit from a job, those issues are better addressed by improved professional licensing and more detailed ethical standards and continuing education requirements, not by 100% elimination of price competition for government work – that is, the QBS feature of excluding price is a misguided idea that overcompensates for the perceived flaws of the low-bid method, but does not eliminate problems of service provider competence and quality of work. There appears to be no credible research to substantiate QBS proponent claims that lower price firms will cause expensive problems to projects. Nor is there research to show that the most expensive firms will prevent expensive problems. Design problems can occur on projects regardless of the prices paid to architects and engineers.

In fact, one valuable function of comparative price information is to help procurement staff spot poor or mistaken assumptions in a proposal, which then can be properly addressed during

⁵ *ORIGINS AND HISTORY OF COMPETITION REQUIREMENTS IN FEDERAL GOVERNMENT CONTRACTING*, by Patricia H. Wittie. Also see the legislative history for the Truth in Negotiations Act, Public Law 87-653.

the evaluation process. Without comparative price information, mistakes and incorrect assumptions in a proposal may go undetected.

In addition to the misguided assumptions regarding price competition, we have also learned about other QBS shortcomings:

QBS claims to promote hiring the “most qualified” or best provider. But in application, the size and longevity of a competing firm become the most prominent selection criteria, and of course these are no guarantees of quality on any given project. The real effect, seen as a consistent pattern in public procurement, is that a narrow focus on qualifications and experience leads to rewarding the largest and longest existing firms, and erecting barriers to newer and smaller firms that may be equally or even more capable for the particular work. Tilting the selection process to favor the most established players is a distortion of marketplace principles, depriving the government of broadening the pool of providers and hindering the development of new and small firms.

The government entity should be allowed to choose the provider that is the *best fit* for the situation. Occasionally the need is for a top expert, however not every situation has a justified need for the most experienced or longest existing provider. Many times, the need for professional services is so straightforward, and the requested deliverables so clear, that all proposers that meet thoughtfully chosen minimum qualifications could provide an equally acceptable outcome. An ordinary RFP, and rarely perhaps even a low-bid ITB, are well suited methods for such situations.

Other times the primary aim is for fast response, or a high level of customer service, or for operating within a strict project budget. These needs can get pushed aside by a narrow focus on “highest qualified.” Other important aims to consider include: thinking about the best partnering strategy for meeting the long-term needs of the public entity, opportunity and equity for all firms, doing what is possible to continually develop a competitive pool of providers, and others. Any mandate to focus only on the very highest qualifications interferes with the ability to balance the full set of important aims. Value is a combination of all relevant factors and criteria, not one or two.

Another QBS shortcoming is the challenge to achieving good results that comes when a project lacks, sometimes unavoidably, a well-developed scope of work. In such situations, the government entity has an urgent need to collect information from several perspectives to evaluate the wisest project approach. When a QBS statute is so tightly written that selection is based only on a description of qualifications and experience, this not only dodges the issue about costs or prices, but also short circuits any process for getting a good competitive comparison of recommended approaches for a needed project. In contrast, best value options

like design competitions,⁶ multi-stage RFPs, and multiple simultaneous negotiations with a discussion of design alternatives can harness the public benefits that come from a competition of ideas.

How does Best Value selection compare to QBS?

In contrast to QBS, Best Value selection methods are the preferable alternative for dealing with the challenges that public procurement faces, for several reasons.

The core objective of a Best Value method is to contract with providers of high quality and suitability to achieve the desired outcomes, and by the time that method results in a “short list,” all the providers are capable of delivering high quality results. Public entities have the flexibility to pre-qualify potential proposers before asking for project specific proposals, and can focus on requiring additional qualifications and experience in the project proposals to match the government need.

Instruction on Best Value methods includes analysis of costs of an entire project over its complete lifecycle, including the impact of good design and good oversight of construction, and solutions and approach of value among several proposals (value for money). QBS does not call for such examinations.

Entities need professional services for a countless variety of situations and all degrees of complexity, and procurement professionals must be empowered to determine when and how to evaluate cost or price in the competitive selection process to fit the situation. Procurement professionals are qualified to recognize the situations when comparative price competition or cost information makes sense; and when it does not, they avoid “low-ball” price quotes that could affect quality. Even when a hard price quote for the whole project would be inappropriate, such as when the desired outcomes are only generally understood or the situation calls for the competing providers to propose alternative solutions, it is still valuable to compare standard cost information. Knowledge of billing rates or travel costs or overhead and profit margins could be used for scoring purposes or as non-scored information to be used during negotiations.

Both public and private procurement are rapidly becoming more sophisticated, and the need for exercise of professional judgment in Best Value selection methods is widely accepted. Best Value is a best practice in public procurement with consistently successful results, and the trend to expand this practice continues to accelerate. Governments and their professional

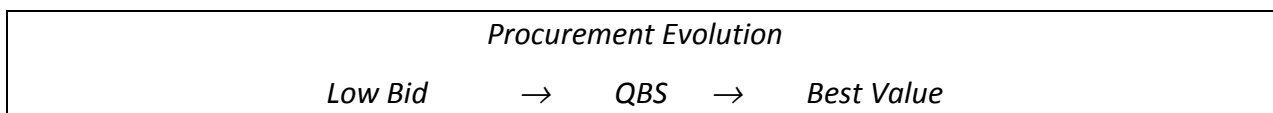
⁶ *The Handbook of Architectural Design Competitions*, the American Institute of Architects. Also see https://en.wikipedia.org/wiki/Architectural_design_competition.

procurement staff hold members of skilled professions in high esteem and take great care to avoid the drawbacks of the low-bid method, properly tailoring Best Value selection procedures to focus on qualifications—procurement professionals have been applying Best Value for all types of professional services for over 40 years.

Other professions are thriving without QBS. In fact, some A&E related professions actively resist the spread of QBS. Only those occupations covered by the QBS mandate have negated the expertise and professional judgment about the fair and appropriate use of costs or prices. Those that have made the QBS selection method their cause have not explained why they are any different from all the other high-level professions. There are no characteristics unique to the A&E professions to justify a unique prohibition of cost or price competition in the public procurement process. There is no principled basis for allowing one industry segment to prohibit the evaluation of price and cost information when selecting a provider. We reiterate that properly tailored price competition is a fundamental, unwavering right of government procurement, and there should be no categorical exclusions.

Public interests have objected to the QBS drawbacks since its inception, but because executive branch agencies of government are by their nature highly divided and do not lobby for or against particular legislative policies, organized special interest lobbying has suppressed efforts to stop or reform QBS in public procurement. It is also telling that there are no calls to make QBS mandatory within the private sector. No one is justifying QBS as a principle that should apply to everyone, which begs the question why it should apply to anyone.

Best Value methods are better at addressing the drawbacks of low-bid procurements and they avoid the drawbacks of QBS. Best Value methods are even more flexible around how to properly assess qualifications and experience. There is a logical evolution from low-bid to QBS to Best Value.



What is the best legislative approach to procurement of professional services?

Procurement legislation most effectively positions government entities for success when it empowers procurement professionals with the flexibility to apply the best practices most suitable to achieving the breadth of agency goals. Discretion and good judgment are fundamental, value-adding capacities provided by practitioners of all professions. Just as A&E providers should be required to demonstrate proficiency against professional standards, be licensed, and held accountable by their professional societies, government procurement

professionals should be held to standards of the public procurement profession. The legislative environment should allow them to contribute their expertise for the maximum benefit of their agencies and the public.

This professional judgment is a far more effective approach to the complexity of modern procurement than mandating any particular method. The drawbacks of the low-bid method for selecting professional services are clear and there should be no mandate to use it. The drawbacks of the QBS method for selecting professional services are clear and there should be no mandate to use it.

Supporters of market competition, all good-government advocates, and small- and mid-size firms or newly-established firms wishing to win contracts as prime contractors should advocate rationally and steadfastly for the repeal of the singular QBS mandate for the procurement of A&E and related services at the federal (the Brooks Act) and state levels. An intermediate legislative solution would make QBS use permissive but not mandatory, thus allowing a thoughtful, case-by-case exercise of good judgment by the government entity owner and its procurement professionals.

Until the QBS mandate is repealed, what should be done?

Efforts to spread QBS any further across the land should be resisted. That means preventing attempts to spread QBS to local governments. It also means preventing attempts to spread this method to other professional services.

“Straw man”⁷ arguments about the drawbacks of the low-bid method as a supposed justification for QBS should be rejected. The relevant comparison is between Best Value methods and QBS. States and the federal government and academia should conduct more independent research on the effectiveness of Best Value selection methods as compared to QBS - only a few credible attempts have been made.⁸ We anticipate that credible research will show that both alternatives can result in the same work quality, but that only Best Value methods are designed to actually achieve the greatest overall value, while QBS clearly interferes with achieving it.

Until QBS is repealed, government entities must continue their extra efforts to counter the drawbacks of QBS. One effort is to closely examine the scope of an existing QBS statute - under some statutes, just because an architect or engineer can do the work in addition to other

⁷ <http://www.quickanddirtytips.com/education/grammar/what-is-a-straw-man-argument?page=1>

⁸ An Evaluation of the Efficacy of Qualification-based Selection (QBS) Procedures for Architectural and Engineering Services, by Simon Revere Mouer III, doctoral dissertation at California Coast University, 2001. Accessed at: <http://www.transcend7.com/qbs.pdf>

qualified persons, that does not automatically make the nature of the work become A&E subject to QBS.

Also, government entities need *some* kind of reference point for costs. They should take strong administrative steps to record cost information about levels of quality and necessary effort actually spent on comparable, discrete tasks or projects^{9 10} for use as an historical reference during the negotiation of similar projects in the future. While laborious, this can be an important remedial tool even though it cannot substitute for the value of cost competition. In addition, while all QBS laws interfere with selection decisions, a few may permit the government to collect comparative cost information during the solicitation phase to be used later after initial selection is made; information like billing rates, components of overhead expenses, profit margins, standard non-labor and travel expenses, and history of salary raises, which of course are extremely valuable for use during negotiations.

Government entities should be as sophisticated and collaborative as possible about negotiating with A&E providers on the extent of the work effort, which is the biggest factor in containing the cost. Although there is no substitute for overall price competition, firms in the A&E industry should feel a heightened level of obligation to be completely transparent partners during negotiations, describing all possible options and costs consequences, revealing all their internal information that affects prices, and going out of their way to help the government entity to achieve the greatest value for the public. If that does not occur, government entities should more assertively terminate unproductive negotiations.

Conclusion.

QBS can be seen as a 1970's over-reaction to the drawbacks of the low-bid selection method; as a pendulum swing from one extreme to another, and one that missed the mark. Both before and after this swing, public procurement has successfully achieved quality and value in the selection of professional services other than A&E by using methods superior to low-bid and QBS.

Public procurement has suffered because of the drawbacks of QBS during the selection of architects, engineers, and land surveyors. Now is the time to abandon a one-size-fits-all mandate in favor of Best Value methods that match selection criteria to the factors most important in each project. In the modern era of Best Value selections, mandates like QBS deprive the public entity of the application of good judgment by procurement professionals

9. Texas Department of Transportation Report: Independent Audit Services - Consideration of Cost in the Consultant Selection Process Evaluation, April 15, 2008

10. Oregon Department of Transportation Report, SPR 738, Delivering Better Value For Money: Determining Outsourcing Feasibility And Standard Pricing Methods, July 2013

about the effective use of prices and costs within public procurement. They also deprive the public entity of successful selection methods that have evolved since the low-bid and QBS approaches were put into place. The public deserves information over secrecy, and professional judgment in the public interest over prescriptions from special interests. As a public policy choice, Best Value methods are the only ones robust and flexible enough to balance price, quality, and other important values. Allowing, not preventing, the exercise of this balance is essential for transparent, effective procurement in the best interests of public entities and the taxpayers they serve.