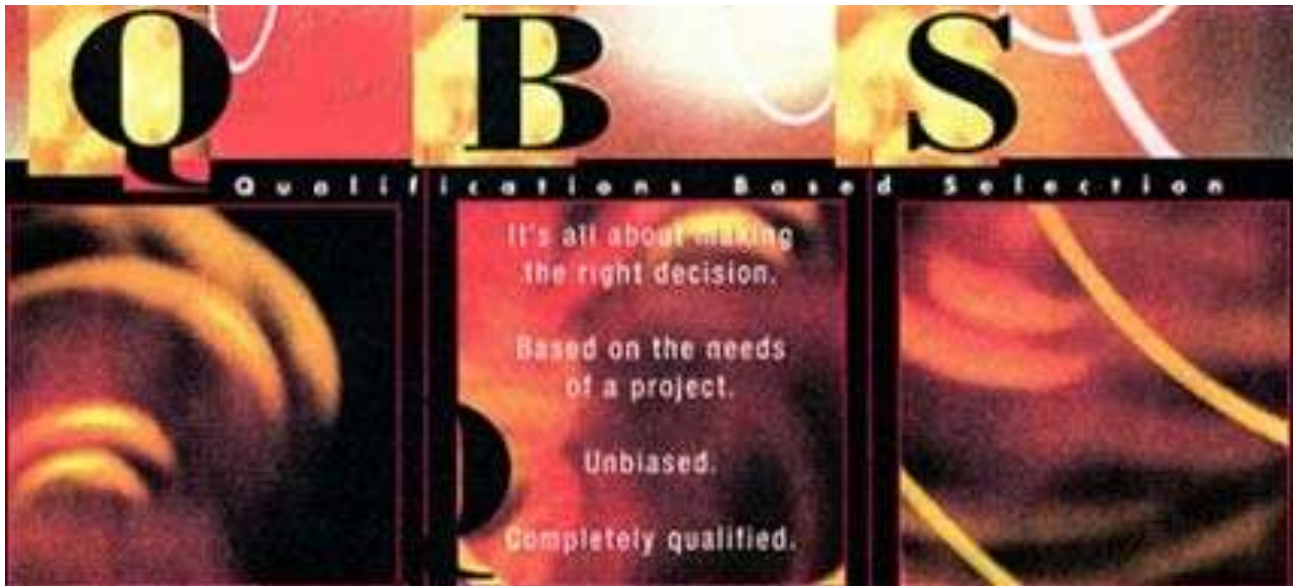


Guidelines

Guidelines for Contracting for Architectural, Engineering, Land Surveying & Landscape Architect Services in Washington State



Government Agency Requirements of RCW 39.80

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GUIDELINES TO CONTRACTING FOR
ARCHITECTURAL, ENGINEERING,
LAND SURVEYING,
& LANDSCAPE ARCHITECT SERVICES

REVISED 1990

GOVERNMENT AGENCY REQUIREMENTS
OF RCW 39.80

FORWARD

RCW 39.80, relating to contracts for architectural and engineering services, was adopted by the legislature in 1981. The legislation established a state policy for procurement of architectural, engineering, and land surveying services in the State of Washington and enacted into law requirements for an open and competitive procurement process that meets the needs of state and local agencies. The act was modeled after the federal Brooks Act (Public Law 95-582) and the American Bar Association Model Procurement Code.

These guidelines describe the purposes of the legislation, analyze the statute, and suggest methods by which agencies may benefit and comply with the process. While the policy should be viewed in its entirety, the primary subject of these guidelines is the procurement process itself, and focuses on how it can be implemented in terms of:

1. Public announcement
2. Selection
3. Negotiation of work-scope at fair and reasonable price.

These guidelines are published as a public service to assist governmental agencies of the State of Washington in understanding and implementing provisions of the state policy for procurement of professional services.

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APPENDICES

1. RCW 39.80

ATTORNEY GENERAL'S OPINIONS:

2. AGO 1981 No. 19 November 20, 1981

3. AGO 1988 No. 4 February 18, 1988

4. AGO 1988 No. 14 June 24, 1988

CHOOSING THE RIGHT DESIGN PROFESSIONAL

CHOOSING THE RIGHT PROFESSIONAL	Choosing the right design professional is vitally important to your project. In order for the public to obtain maximum value for its construction dollars, the best obtainable design must be procured. The most qualified designers must be found and employed. The method for selection described here is prescribed by law and is intended to ensure that your project is designed by the right people.
REQUESTS FOR QUALIFICATIONS	In order for you to have the opportunity to consider the qualifications of all the firms that would be interested in designing your project, a public announcement is established as a means to solicit submittals.
SUBMITTAL	Firms that are qualified to perform services for you submit information about themselves. The submittals should be required to conform to a uniform format, so that you can easily compare the various characteristics of the interested firms.
INTERVIEWS	Your Selection Committee* determines which of the many firms are qualified to be on the "short list," if one is used, and schedules, an interview with each in order to better acquaint your committee with the firms personnel, background, and qualifications.
EVALUATION & SELECTION	Your committee is now in a position to exercise its judgement. References are checked. You may decide to visit the firms' offices or tour some projects they have designed. You will establish your own method and criteria for determining the firm "most highly qualified" to design your project. Usually, you will rank three firms, first, second, and third.
NEGOTIATION	You now sit down with the most highly qualified firm for your particular project and work out a scope of work and compensation contract which is mutually beneficial. In order for the firm to provide you with the best design to your project, it is necessary to discuss the scope of the construction project, the budget, and your time schedule. From this you can establish the scope of the effort and a reasonable fee. This is also an opportunity to discuss alternative or innovative approaches to the project design which could help control costs and improve the quality of the project construction.

***NOTE:** The statute does not specifically require a Selection Committee.

THE PROCEDURE

The State of Washington has established a uniform policy for procurement of architectural, engineering, and land surveying services by all state and local government agencies. This policy is based on a qualification based selection process commonly known as QBS. It is designed to provide the public with maximum value for its expenditure, it entails a fair and equitable step-by-step process that will facilitate the agency's selection of a consulting firm based on qualifications and competence in relation to the type and scope of the project.

Procurement officials seeking A&E services for the first time may ask, "Why not obtain price quotations from a number of firms and select the low bidder?" If we were discussing the construction phase of a project, the procedure would be simple. Detailed plans and specifications would be advertised, with a solicitation for the lowest bid. The process effectively compares the cost of like, known, and specifiable commodities and services. But there is no known way of writing specifications for a design. After all, design is not a commodity. It is a creative function developed in concert with client input. It depends upon the designers experience, imagination, and study of alternative approaches which most effectively address the requirements of each project.

The steps in the process, described by ROW 39.80, are as follows:

- **ADVERTISEMENT.** The identification of interested firms and the solicitation of statements of qualifications is the first step. This aids the agency in attracting a firm that will be most qualified to perform the services requested.
- **EVALUATION.** The agency reviews the qualification statements and selects at least three firms that appear to be the most qualified for interview. The purpose of the interviews is for the agency to obtain more in depth information about a firm's experience with similar projects, concepts which it feels may be applicable for the project at hand, and perhaps most important, people who would work on the project. It also allows the consulting firm to become more familiar with the scope of the project.
- **SELECTION.** Following the interviews, the agency ranks at least three firms in preferential order. The top ranked firm is notified that it is considered the most qualified. A schedule for negotiation is established. The statute does not specifically require a ranking of firms, and ranking may not be necessary or desirable for small projects, where firms have already been notified of the availability of work and had the opportunity to express their interest in it.

- **NEGOTIATION.** The agency and the consulting firm further define the work-scope for the project and each party gains a better understanding of the project goals and the approach to be taken. Once the work-scope is well defined, negotiation begins to determine a fair and reasonable price. If, for some reason, an agreement cannot be reached, discussions with the top ranked firm are closed and are opened with the firm considered next best qualified.

WHY NOT FEE BIDDING?

The cheapest design for your project is almost certainly not the best.

Construction projects are, by their nature, definable. The plans and specifications describe exactly what is being bought, so competitive bidding provides you with a known product for the best price. It is like buying pencils or cars or office furniture.

But services, such as are provided by doctors, lawyers, architects, engineers, and land surveyors are not definable. There is no known way of writing specifications for a design or a process. The professional does not sell a product, but a service. The qualifications of the firm's personnel are the key to your selection process, because you are buying their expertise, experience, time, and talent.

By determining which firm is most highly qualified before entering into fee negotiations, you ensure that your project will be undertaken by the right people. The negotiations then ensure that the project requirements and your expectations will be met.

The legislature considered benefits to both agencies and design firms when it provided that price information is submitted after a firm is selected as the most qualified for a particular project:

1. Meaningful and reliable price information is costly and time consuming, for the agency and the firm, to develop. Unless a firm is otherwise qualified and likely to get the work if price and scope of work are agreed, it is a waste of resources to require others to do the same.
2. Competition is increased. Many qualified firms will not go to the expense of responding to price proposals. The cost of preparing a credible proposal is so much in relation to the design fee, that in many cases the total costs of preparation for all firms far exceeds the fee. These costs increase the overhead factor and ultimate cost of services to all agencies.
3. Reliance on price should not be substituted for the exercise of agency judgment on qualifications, or for making the required effort to reach a common understanding of the scope of services and tasks best suited for the project.

A. ANALYSIS OF THE ACT

PUBLIC POLICY

"Section 1. The legislature hereby establishes a state policy, to the extent provided in this chapter, that governmental agencies publicly announce requirements for architectural and engineering services, and negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

The imperatives outlined in the law are: "publicly announce requirements," "Negotiate contracts...on the basis of demonstrated competence and qualification for...services required," "...at fair and reasonable prices."

DEFINITIONS

"Section 2. Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this chapter.

(1) "State agency" means any department, agency, commission, bureau, office, or any other entity or authority of the state government.

(2) "Local agency" means any city and any town, county, special district, municipal corporation, agency, port district or authority, or political subdivision of any type, or any other entity or authority of local government in corporate form or otherwise.

(3) "Special district" means a local unit of government, other than a city, town, or county, authorized by law to perform a single function or a limited number of functions, and including but not limited to, water districts, irrigation districts, fire districts, school districts, community college districts, hospital districts, sewer districts, transportation districts, and metropolitan municipal corporations organized under chapter 35.58 RCW.

(4) "Agency" means both state and local agencies and special districts as defined in subsection (1), (2), and (3) of this section.

(5) "Architectural and engineering services" or "professional services" means professional services rendered by any person, other than as an employee of the agency, contracting to perform activities within the scope of the general definition of professional practice in chapters 18.08, 18.43, or 18.96 RCW.

(6) "Person" means any individual, organization, group, association, partnership, firm, joint venture, corporation, or any combination thereof.

(7) "Consultant" means any person providing professional services who is not an employee of the agency for which the services are provided.

(8) "Application" means a completed statement of qualifications together with a request to be considered for the award of one or more contracts for professional services."

The law applies to all agencies be they "State," "Local," or "Special District."

EMERGENCY

"Section

6. (1) This chapter need not be complied with by any agency when the contracting authority makes a finding in accordance with this or any other applicable law that an emergency requires the immediate execution of the work involved. (2) Nothing in this chapter shall relieve the contracting authority from complying with applicable law limiting emergency expenditures."

The law recognizes that emergency situations do occur which warrant immediate selection and contracting (probably single-source) and thereby precluding adherence to the requirements of the Act.

EXISTING CONTRACTS

"Section 7. Nothing in this chapter shall affect the validity or effect of any contract in existence on the effective date of this 1981 act."

This section recognizes the validity of contracts in force on the effective date of the Act which is January 1, 1982. Such contracts would include amendments to existing contracts whereby consultants may be providing professional services on an ongoing basis in place of agency staff.

PROVISIONS HELD INVALID

"Section 8. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."

EFFECTIVE DATE

"Section 9. This act shall take effect on January 1, 1982."

NEW CHAPTER

"Section 10. Sections 1 through 8 of this act shall constitute a new chapter in Title 39 RCW."

SHB 176 was passed by the House on April 16, 1981, the Senate on April 14, 1982, and was signed by the Governor on April 25, 1981.

B. PUBLIC ANNOUNCEMENT

"Section 3. Each agency shall publish in advance that agency's requirement for professional services. The announcement shall state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the agency who can provide further details. An agency may comply with this section by: (1) Publishing an announcement on each occasion when professional services provided by a consultant are required by the agency; or (2) announcing generally to the public its projected requirements for any category or type of professional services."

1. Purpose of the Public Announcement The public announcement should provide as much information as possible on the scope and nature of the project or work for which services are required. The standard of judgment here should be the extent of information required to generate interest from the professional community and to allow the interested firms to evaluate their qualifications to provide the required services.

Publication in advance provides notice to potentially interested firms that services are required by the agency, and allows them time to respond. The appointment of a "representative" further allows the interested firms to effectively respond to the agency's request by being a source of clarification and additional information.

2. Audience for the Announcement The announcement and its publication should be consistent with the services required and the professional community providing those services. For instance, a small local project would probably not be published to a national market. A project of statewide importance should be published statewide. In short, the publication - its content and where it's published - should be designed to reach those professional who would be qualified and appropriate to the agency and the services required. Neither the agency nor the professional is served by the burden of a procurement process, involving too many firms or firms inappropriate to the task.

3. Format of Announcement Publication can be in the form of a separate announcement for each discrete package of services required, for example, on a per project basis. This works best when the project(s) or works(s) requiring services is large or when the services required are unique. The alternative provided for in the law is an announcement that "generally" announces the agency's need for a "category or type" of service. This form often consists of publication of the agency's capital improvement program on a periodic basis. This alternative works best when the agency has many smaller project(s) requiring relatively standardized services.

The Appendix includes examples of announcements suitable for publication in newspapers or similar publications.

C. SELECTION

"Section 4. In the procurement of architectural and engineering services, the agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, based upon criteria established by the agency, the firm deemed to be the most highly qualified to provide the services required for the proposed project. Such agency procedures and guidelines shall include a plan to insure that minority and women-owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The level of participation by minority and women-owned firms shall be consistent with their general availability within the professional communities involved."

While the procurement process will vary in its organization and operation depending on the agency and the project or work for which services are required, the following is an approach designed to implement the law:

1. Statement of Qualifications

The agency maintains a file of "Statement of Qualifications" from firms interested in providing services to the agency. While the agency is mandated to "encourage" firms to annually submit qualifications, the ultimate responsibility for maintaining current qualifications on file rests with the respective interested firms.

2. Request for Qualifications

As the agency periodically has a project or work that requires the procurement of professional services, the agency "requests" qualifications. If the agency has published their need for services on a type or category basis, they will have already received statements of qualifications from which they can identify interested firms.

More often, a notice is published related to a specific project or work. Such notices usually state that the agency is seeking consultants to perform services for a specific project(s). Primary criteria to qualify for the contract

are stated as well as a project schedule and expected budget for construction. The firm of response is indicated, i.e., letter, brochure, agency form, etc., and a deadline for submittal is stated. The notice is in effect a Request for Qualifications (RFQ).

The agency is free to request submittals from specific firms they feel are qualified or appropriate for the services required.

The agency should be particularly concerned that the statements of qualifications are current for the firms under consideration. The capabilities of a particular firm do vary over time as personnel changes occur - employees leave, the firm builds capability, etc.

3. Evaluation of Qualifications

The Statements of Qualifications, either from the agency's files or as a result of the specific RFQ, are then narrowed by the agency. Quite often this is accomplished by appointment of a selection panel of three to five qualified individuals (internal to the agency and/or outside) utilizing stated criteria known to all or the selection process is assigned to agency staff. The panel is charged with producing a "long-short" list of consultants who are the "most qualified" and appropriate for the project from the project or work under consideration. References are probably checked at this stage of evaluation.

The "long-short" list should be screened to a manageable number of interviews. One, two, or three firms may be appropriate on a small project, perhaps more on a large project. The interview list should include only firms any one of which is judged qualified and which the agency would be prepared to retain.

The firms' qualification and capability are further evaluated in the interview process.

4. Interviews

Interviews serve two purposes which are a valuable part of the process to the agency. By conducting "discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach" the agency obtains the advice of the firms interviewed relative to the work contemplated. This process serves as a check on the agency's assumptions and provides input to the ultimate structuring and contracting for the services required. This discussion process can be quite informal.

Formal interviews also serve to facilitate the final selection process. Typically, a selected list of consultants is asked to formally present their qualifications in person to the selection committee. These usually includes answers to specific questions addressed by the agency: more detailed information on staffing, process or

procedures and other information requested during scheduled interviews. It is important that adequate time be given to the consultants to prepare for the interview. Five to ten working days is normal for modest size projects-large, complex projects might require 20 working days.

In procuring services for some projects, the selection process may include visits to each of the firm's offices.

5. Selection

The agency is required to select the firm "deemed to be the most highly qualified" based on criteria established by the agency for the proposed project. Looking forward to the negotiations, the selection panel must rank the most qualified applicants in order of preference. Because competition is usually keen, it is important to retain evaluation sheets, notes, and other documents to support the ranking procedure and selection.

6. Criteria for Selection

Each jurisdictional entity or agency has specific needs related to professional services. Further, the needs change with respect to the project or work to be undertaken. These needs should be translated into a Criteria for Selection which is designed to satisfy the needs of the agency. These criteria, specific to each procurement process, serve as the basis for evaluating the interested firms to determine the "most highly qualified."

Common points of consideration should usually include the following:

- a. Experience of the consultant with similar projects or work together with client references.
- b. Relationship of the firm with support professionals necessary for the ultimate success of the program. These professionals may include bond attorneys, financial consultants, and special design disciplines or testing services.
- c. Reliability and history of consultant and key personnel.
- d. Record of professional and technical activity in societies and institutes necessary to maintain current state of the art expertise and contribute to the betterment of standards of practice.
- e. Specific personnel proposed to be assigned to the project or work,

- f. Workload and size of firm related to the size and timing of the project.
- g. Minority and women-owned firms in the context of the agency's plans in these areas and consistent with the availability of such firms "within the professional communities involved."

The Criteria should be specific to the agency and the project. The Criteria can be organized into rating sheets with criteria weighted as the importance if appropriate.

D. NEGOTIATION

"Section 5. (1) The agency shall negotiate a contract with the most qualified firm for architectural and engineering services at a price which the agency determines is fair and reasonable to the agency. In making its determination, the agency shall take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof.

(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm shall be formally terminated and the agency shall select other firms in accordance with section 4 of this act and continue in accordance with this section until an agreement is reached or the process is terminated."

1. The "Most Qualified Firm"

Selection of the most highly qualified firm sets the scene for detailed contract negotiations. This process is the forum in which the "scope of services" to be provided is examined in detail and modifications negotiated to the satisfaction of both parties.

The highest ranked firm is required to submit pricing information to the agency in advance of the start of negotiations. The pricing information should be supported by a detailed description of the tasks to be completed, the man-hours of effort planned for each task, the categories (i.e., level of experience) of personnel who will be assigned to each task and the time schedule for completion of all elements of the scope of services, as well as the detailed basis for pricing.

The negotiations can then be started with clear understanding by the agency of the architectural or engineering firm's perception and approach to the project. The contract negotiations can then be directed toward developing a mutual understanding of the essential requirements involved in providing the desired services. The agency can satisfy itself that the necessary personnel and facilities will be provided to perform the services within the prescribed time. It may take several meetings to reach agreement on these issues, particularly if the project is unique or complex.

Once there is agreement on work tasks, man-hours loading, personnel requirements and time schedule, the original pricing submission can be revised to reflect these changes. If compensation, contract requirements, and contract documents are agreed upon, the contract is then awarded to that firm.

It is also appropriate on many assignments that there be agreed-upon checkpoints

where the agency and the design professional can examine the results obtained in studies completed to that point, re-evaluate the scope of services needed and negotiate modifications in schedule and/or compensation, as appropriate. This is particularly relevant on complex or unique projects.

The attitude with which both parties approach the negotiations is of critical importance to establishing a proper relationship for the ensuing design process. The architectural or engineering firm will function, in effect, as an extension of the client's organization. The two become partners in the design effort and the negotiations must set the tempo for open communications and understanding between them.

2. The Next "Most Qualified Firm"

It is not always possible to reach agreement with the highest ranked firm. While this inability to conclude a contract may be most easily reflected in the fact that no agreement is reached on equitable compensation, it often relates to a basic disagreement on what constitutes an adequate scope of services and level of effort to complete an acceptable professional product in the eyes of the design professional. It may also be the results of an agency's appetite for a higher level of services than its budgetary capabilities. Rather than continue prolonged and fruitless negotiations after reaching a state of impasse, it is appropriate to terminate negotiations with the top-ranked firm and begin with the firm judged next most qualified. The same detailed discussion of scope, level of effort, schedule and compensation should then be carried out until reasonable contract terms for both parties are agreed upon.

E. THOUGHTS FROM THE PROFESSIONS (An Editorial)

In 1981, the architectural and engineering professional organizations in the state of Washington sponsored SHB 176 as a means of establishing a consistent process for the selection of professional service firms for public work and to provide an alternative to competitive bidding. Sponsoring organizations were the Architects and Engineers Legislative Council; American Council of Engineering Companies of Washington; Structural Engineers Association of Washington; American Society of Civil Engineers; Washington Society of Professional Engineers; Washington Council of Civil Engineers and Land Surveyors; Institute of Electrical and Electronics Engineers; American Society of Mechanical Engineers; Washington Council of the American Institute of Architects; and the Land Surveyors Association of Washington. An organized process was needed to reduce the cost of proposal preparation and interviewing, to emphasize selection based on quality and service in the best interests of the public, and to arrive at a fair and open selection process. In 1981 the bill became law as a new chapter title 39.80 in the Revised Code of Washington (RCW).

ON COMPETITIVE BIDDING OF DESIGN SERVICES

With the adoption of RCW 39.80, the legislature acknowledge competitive bidding for professional design services was not in the public interest of the citizens of Washington State. For a number of reasons competitive bidding was never a good criteria for selecting professional design services although it was frequently used until the passage of RCW 39.80.

The following discussion should clarify the reasoning of the legislature on this matter.

The public agency's first selection criteria should be the qualifications of and the "quality and service" proposed by the design firms under consideration. Selections of consultants based on the lowest professional service costs is typically not in the best interest of the public. The design firm's assignment is to provide the best facility that serves functional, tiesthetic, operational, and economic objectives. The agency, therefore, must select on the basis of quality and level of service appropriate to achieve these objectives. Compromising either quality or level of service for the first cost price does not serve the public.

When price becomes a factor in the basic selection process, it can easily become the dominant factor regardless of the weighing it is allegedly given in the Request for Proposal (RFP). The problem is, that in order to effectively price a project, there must be agreement between the agency and the consultant as to exactly what the scope of services is intended to include. The range of design alternatives, the desire to seek innovative cost- or energy-saving solutions, the type of construction to be used, the balance between construction and operating and maintenance costs to be achieved, all have to be considered in defining the level of effort and expertise of the design professional's staff that will be applied to the project. Until this is done, attempts at pricing have little meaning. To do so as a bid in response to an RFP without detailed negotiation with the agency as to scope has even less meaning.

For instance, if the design professional is asked to bid on furnishing design services, the bidding process, per se, forces unacceptable options.

- Provide a proven, conservative design by adapting past experience to the project. To achieve the lowest bid, he or she could decide not to examine new, perhaps more appropriate, alternatives to achieve lower first cost and lower life cycle cost for the project, considerations that are clearly in the public interest.
- Minimize the participation of senior, well-experienced personnel and rely on less-experienced people, again not necessarily in the public interest.
- Forego all or part of the profit to make greater professional effort to the detriment of success of his or her firm as a business venture.
- Create more risk by making assumptions which may not be valid instead of spending more time to researching and developing the proposal.
- "Low ball" the scope of services and thus the bid, and then attempt to negotiate contract changes with his client to get the project up to a level where both the amount of effort applied and the compensation received are closer to what is appropriate for the particular assignment, again a technique that is not in anyone's best interest.

None of these approaches works to the best interest of either the public or the design professional. Only by open, good faith negotiation after ranking firms on the basis of qualifications and experience can the client receive full, effective value and the design professional deliver the services expected of him.

The agency must still be concerned about price in the public interest, and rightfully so from the professional's viewpoint. The negotiation process in RCW 39.80 allows the agency to negotiate price, and the leverage to insure fair negotiation. The process provides that the agency can always go to the second most qualified firm identified in the selection process.

ON THE COST OF DESIGN SERVICES

The question often arises as to the cost of professional design services and the value received therefrom.

The following example is a funding (budget) summary of a medium-to-large public building project in Washington State:

1.	Building Construction Cost	\$4,500,000
2.	Land Cost	100,000
3.	Equipment (office machines, cleaning, etc.)	400,000
4.	Furniture, Carpet, Drapery, etc.	300,000
5.	Survey, Testing, Art Program	110,000
6.	Contingency	450,000
7.	Architectural and Engineering Fees (assume 6%)	270,000
8.	State Sales Tax (6.5%)	<u>292,500</u>

TOTAL BUDGET

\$6,422,500

The AE fee is based only on Item 1, the building construction cost, which is 70 percent of the total budget. An "average" AE fee of 6 percent has been assumed, which results in a \$270,000 fee (Item 7). Note that varying the fee percentage by 112 of a percentage point up or down (\$22,500) affects the total project cost by only 0.35 percent, but affects the consultant's fee by 8 percent. While the design professional's fee should be negotiated to result in a fair and reasonable fee, the resulting fee must be appropriate to do the job intended. The design professional is the key in controlling the big risks on a project such as the inflation rate, the cost of financing, the fluctuations in the construction industry, the cost and utilization of construction labor, and the impact of weather. For instance, a one-month delay in start of construction could cost 1 percent (\$45,000). Concerns for reducing costs should be directed to those areas where the real costs are.

ON THE COST OF PROPOSAL PREPARATION AND INTERVIEWING

A public agency should control the costs of proposal preparation. By efficiently conducting the selection process, costs will be reduced for the consultant, the agency, and most importantly, the ultimate user or consumer.

Preparation of detailed written proposals with follow-up interview presentations is appropriate for public works selection to insure the opportunity for all qualified consultants to participate. Consultant proposal costs are part of the costs of doing business and are charged to administrative overhead.

However, a public works owner can reduce overhead costs to the agency and consultant by carefully prescreening consultant applicant letters of interest and standard statements of qualifications forms (refer to comments regarding "Standard Statements of Qualifications"). Invitation for too many consultants only makes the process more costly, time-consuming, and burdensome to the agency and the design professionals. Ideally, two or three firms is the maximum number that should be selected for detailed proposals and interviews. To effect good prescreening, an agency first reviews the statements of qualifications information on the firm's history, which will ideally be prepared in a standard form format. The first list of screened applicants will then be further narrowed by evaluation of specific qualifications relative to defined project needs of the agency -- again, ideally on a standard form. In many instances, firms can be selected directly from the standard form submittal information.

This process results in the fewest number of firms incurring the full cost of going through the entire selection process, and it also requires the least time (cost) to the selecting agency. The cost of participating in the selection process represents costs which will vary depending on complexity of the project. For a moderately complex program requiring several professional disciplines, the cost of submitting general qualifications and brief details of similar work related to a client's needs on standard forms may be in the range of \$500 to \$1,000. Costs for detailed proposals and interview presentations for moderate size projects represent substantially higher investment, which may approach \$5,000 to \$10,000, or even \$20,000 for each firm

that is invited to an interview. At each stage of screening the agency should ask the question, "given our criteria, which of these firms would be willing to enter into a contract for professional services, if they are otherwise qualified, in the subsequent more detailed selection phases?"

Written guidelines defining the selection process are essential in an organized selection process and very helpful in controlling costs and time. They help the selection committee perform their work, particularly those members new to the process. Guidelines also help professionals understand their responsibilities in the selection process as they seek an opportunity to provide services. The guidelines avoid miscommunication and help establish rapport with the professionals, thereby assuring the agency of the best environment in which to select the most suitable professionals. The process should be orderly, with all steps described succinctly. Written promulgations of the process will save the agency both time and money.

Once guidelines are established as a consistent process, agency staff will be able to administer the selection process more effectively, and the professional can respond more effectively. The process proceeds according to a preestablished plan, minimizing criticism or manipulation by any party. In short, a well organized and clearly understood selection process minimizes the cost to the agency, while inviting the participation of the greatest number of qualified professionals.

ON FAIR AND OPEN SELECTION

RCW 39.80 was adopted to insure a fair and open selection process in the best interests of all concerned. The requirement of public announcement can be met in several ways. Posting of the annual capital improvement budget for public viewing or providing copies to interested groups or individuals can represent simple compliance.

The public agency interested in the widest dissemination of their need for services may advertise. Advertising will attract the most broadly based interest. Agencies can be assured that design firms will support this process by aggressively responding to public announcements.

Agencies should establish internal procedures that minimize the possibilities of collusion. Selection committees and procedures can be formulated to foster impartiality, and the proceedings should be made available to the public's scrutiny.

ON THE AGENCY'S ROLE IN "QUALITY AND SERVICE"

It's axiomatic to say that the more effective the agency, the more effective will be the design professional's result in terms of quality and service. The professional's goal is to provide the highest quality and the appropriate level of service to the agency. This can best be accomplished in a true working relationship between the design professional and the contracting agency. The agency is the "expert" in defining the results desired. The agency likewise must actively support the design effort by contributing information and decisions on a timely basis.

The way in which the agency manages its participation in the design process might affect the outcome of the services. Providing concise and timely information and making prompt decisions would often eliminate the need for redesign and resulting additional changes. What's more critical, the agency has a leadership role to play in setting direction and defining the public purpose and intent for the project forming the basis of the design professional's product.

ON HELP FROM THE PROFESSION

The design professional community sponsored the legislation that was adopted as RCW 39.80. That same community continues to work for the public interest to achieve quality and service on public work at costs to the public that are fair for the scope of services required. The profession is ready to assist any public agency in developing detailed selection procedures consistent with RCW 39.80.

F. TIPS FOR SMALL AGENCIES

Some small agencies have felt that the architect, engineer, land surveyor, and landscape architect selection requirements of RCW 39.80 are an unnecessary burden because of requirements for advertising, followed by the selection of the most qualified firm for a particular project based on the experience, performance and ability of the personnel to be assigned to the project. Resistance to following the statute usually stems from the agency or its counsel reading additional requirements into the statute which were not intended, and failing to recognize the extent of discretion and judgment reserved for the agency. The minimum criteria are notice, selection of the most qualified firm for a particular project and negotiation of a contract with a selected firm at a price which is determined to be fair and reasonable to the agency. The statute does not include, nor require cumbersome, complex or specific steps for the agency to follow to be in compliance. The agency makes the selection based on its own criteria and judgment, as opposed to price bidding, where the firms themselves make the selection by submitting a low cost proposal which may or may not result in the quality and scope of work expected, or needed, for the designated project. On any construction project, design costs are a very small portion of the total project costs, yet may largely determine whether a project is actually built within budget without change orders and cost overruns. Also, it has been proven that money spent for good design decreases construction cost, emphasizing the need to select the most qualified firm to perform professional design services. The following are guidelines that small agencies may find helpful in meeting the requirements of RCW 39.80.

PUBLIC ANNOUNCEMENT

The notice or public announcement requirement is similar to that under federal law and the ABA Model Procurement Code, except that it has been simplified for the convenience and ease of implementation by smaller agencies. It does not specify how announcements should be made or published. For most small agencies, notice in a local publication is sufficient. These agencies should seriously consider using a general announcement to cover a period of time, thus eliminating the need for specific announcements for small projects. The purpose of the statute is simply to increase competition and provide more choices for the agency by providing an opportunity for firms to submit their qualifications and express interest in doing work for the agency. By following this minimal notice requirement, the agency is free to select firms for projects over a period of time based on whatever qualifications criteria deemed appropriate by the agency. Samples of general announcements are shown in Appendix 5 of this booklet.

STATEMENT OF QUALIFICATIONS

It is strongly recommended that small agencies use the federal standard form 254 and 255 for submittal of qualifications by architects, engineers, land surveyors, and landscape architects. The form has been used for many years by federal agencies and is familiar to design professionals. The form provides adequate information

without the overkill of a multiple page questionnaire.

THE SELECTION COMMITTEE

Another area that concerns small agencies is the formation of a selection committee competent to determine the most qualified firm for a particular project. Although not required by the statute, such a committee is helpful in making technical and construction expertise available to the agency. Small agencies may identify individuals within the community who have relevant experience and ask them to serve on a voluntary basis as the need arises. Many individuals are pleased to contribute valuable expertise in cooperation with staff or elected officials. In addition to private sector design and construction contractors, volunteers may be obtained from those serving in technical positions with other agencies, such as PUD's, water and sewer districts, road districts and local contractors.

Member organizations of design professionals are ready to assist any agency in establishing a proper selection process to meet the requirements of RCW 39.80. Telephone numbers of these organizations may be found on the inside back cover of this booklet.



Public Works/Utilities Department
Post Office Box 90012 • Bellevue, Washington • 98009 9012

ON THE AGENCY'S ROLE IN "QUALITY AND SERVICE"

It's axiomatic to say that the more effective the agency, the more effective will be the design professional's result in terms of quality and service. The professional's goal is to provide the highest quality and the appropriate level of service to the agency. This can best be accomplished in a true working relationship between the design professional and the contracting agency. The agency is the "expert" in defining the results desired. The agency likewise must actively support the design effort by contributing information and decisions on a timely basis.

The way in which the agency manages its participation in the design process might affect the outcome of the services. Providing concise and timely information and making prompt decisions would often eliminate the need for redesign and resulting additional changes. What's more critical, the agency has a leadership role to play in setting direction and defining the public purpose and intent for the project forming the basis of the design professional's product.

qs

City of Bellevue offices are located at Main Street and 116th Avenue S.E.

Appendix 1

CHAPTER 39.80 RCW - CONTRACTS FOR ARCHITECTURAL AND ENGINEERING SERVICES

Sections

- 39.80.010 Legislative declaration.
- 39.80.020 Definitions.
- 39.80.030 Agency's requirement for professional services-- Advance publication.
- 39.80.040 Procurement of architectural and engineering services--Submission of statement of qualifications and performance data—Participation by minority and women-owned firms.
- 39.80.050 Procurement of architectural and engineering services--Contract negotiations.
- 39.80.060 Procurement of architectural and engineering services--Exception for emergency work.
- 39.80.070 Contracts, modifications reported to the office of financial management.
- 39.80.900 Savings.
- 39.80.910.1 Severability--1981 c 61.

RCW 39.80.010 Legislative declaration. The legislature hereby establishes a state policy, to the extent provided in this chapter, that governmental agencies publicly announce requirements for architectural and engineering services, and negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices. [1981 c 61 § 1.]

NOTES: Effective date--1981 c 61: "This act shall take effect on January 1, 1982." [1981 c 61 § 9.]

RCW 39.80.020 Definitions. Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this chapter.

(1) "State agency" means any department, agency, commission, bureau, office, or any other entity or authority of the state government.

(2) "Local agency" means any city and any town, county, special district, municipal corporation, agency, port district or authority, or political subdivision of any type, or any other entity or authority of local government in corporate form or otherwise.

(3) "Special district" means a local unit of government, other than a city, town, or county, authorized by law to perform a single function or a limited number of functions, and including but not limited to, water districts, irrigation districts, fire districts, school districts, community college districts, hospital districts, sewer districts, transportation districts, and metropolitan municipal corporations organized under chapter 35.58 RCW.

(4) "Agency" means both state and local agencies and special districts as defined in subsection[s] (1), (2), and (3) of this section.

(5) "Architectural and engineering services" or "professional services" means professional services rendered by any person, other than as an employee of the agency, contracting to perform activities within the scope of the general definition of professional practice in chapters 18.08, 18.43, or 18.96 RCW.

(6) "Person" means any individual, organization, group, association, partnership, firm, joint venture, corporation, or any combination thereof.

(7) "Consultant" means any person providing professional services who is not an employee of the agency for which the services are provided.

(8) "Application" means a completed statement of qualifications together with a request to be considered for the award of one or more contracts for professional services. [1981 c 61 § 2.]

RCW 39.80.030 Agency's requirement for professional services--Advance publication. Each agency shall publish in advance that agency's requirement for professional services. The announcement shall

state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the agency who can provide further details. An agency may comply with this section by: (1) Publishing an announcement on each occasion when professional services provided by a consultant are required by the agency; or (2) announcing generally to the public its projected requirements for any category or type of professional services. [1981 c 61 § 3.]

RCW 39.80.040 Procurement of architectural and engineering services--Submission of statement of qualifications and performance data--Participation by minority and women-owned firms. In the procurement of architectural and engineering services, the agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, based upon criteria established by the agency, the firm deemed to be the most highly qualified to provide the services required for the proposed project. Such agency procedures and guidelines shall include a plan to insure that minority and women-owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The level of participation by minority and women-owned firms shall be consistent with their general availability within the professional communities involved. [1981 c 61 § 4.]

RCW 39.80.050 Procurement of architectural and engineering services--Contract negotiations.

(1) The agency shall negotiate a contract with the most qualified firm for architectural and engineering services at a price which the agency determines is fair and reasonable to the agency. In making its determination, the agency shall take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof.

(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm shall be formally terminated and the agency shall select other firms in accordance with RCW 39.80.040 and continue in accordance with this section until an agreement is reached or the process is terminated. [1981 c 61 § 5.]

RCW 39.80.060 Procurement of architectural and engineering services--Exception for emergency work.

(1) This chapter need not be complied with by any agency when the contracting authority makes a finding in accordance with this or any other applicable law that an emergency requires the immediate execution of the work involved.

(2) Nothing in this chapter shall relieve the contracting authority from complying with applicable law limiting emergency expenditures. [1981 c 61 § 6.]

RCW 39.80.070 Contracts, modifications reported to the office of financial management. Contracts entered into by any state agency for architectural and engineering services, and modifications thereto, shall be reported to the office of financial management on a quarterly basis, in such form as the office of financial management prescribes. [1993 c 433 § 9.]

RCW 39.80.900 Savings. Nothing in this chapter shall affect the validity or effect of any contract in existence on January 1, 1982 [1981 c 61 § 7.]

RCW 39.80.910 Severability--1981 c 61. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1981 c 61 § 8.]

OFFICE OF THE ATTORNEY GENERAL

OFFICES AND OFFICERS--STATE--CONTRACTS--ARCHITECTURAL AND ENGINEERING SERVICES

State agencies which contract for architectural and engineering services pursuant to chapter 61, Laws of 1981 are not thereby exempt from filing such contracts with the Office of Financial Management under the provisions of chapter 39.29 RCW.

- - - - -

November 20, 1981

Honorable Joe Taller
Director
Office of Financial Management
101 House Office Building
Olympia, Washington 98504

Cite as:
AGO 1981 No. 19

Dear Sir:

By recent letter you requested our opinion on the following question:

Are agencies who acquire architectural and engineering services through Substitute House Bill 176 procedures exempt from filing such contracts with OFM under the provisions of RCW 39.29.040(2)?

We answer this question in the negative; i.e., such agency contracts are not exempt from filing.

ANALYSIS

As you have noted in your letter, chapter 39.29 RCW relates to personal service contracts entered into by state agencies. The underlying legislative intent, as expressed in RCW 39.29.003, is as follows:

KenEikenberry Attorney General
Temple of Justice, Olympia, Washington 98504

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"It is the intent of this chapter to provide for a comprehensive legislative review of all personal service contracts negotiated within state government, unless specifically exempted under this chapter, and to centralize executive supervision of these expenditures by the office of financial management." (Emphasis supplied)

A "personal service contract" is defined in RCW 39.29-.006(1) to mean,

". . . an agreement, or any amendment or renewal thereto, with an independent contractor for the rendering of personal services to the state."

The term "personal service," in turn, is defined by subsection (2) of this same section of the law to mean.

". . . performing a specific study, project, or task which requires professional or technical expertise."

The basic substantive requirement of the law is set forth in RCW 39.29.010 as follows:

"All personal service contracts, including renewals and amendments of existing contracts, entered into by any state officer or activity of the executive and judicial branches of state government, including state agencies, departments, offices, divisions, boards, commissions, and educational, correctional and other types of institutions, shall be filed with the office of financial management and the legislative budget committee at least ten days prior to the date any work commences under such contracts regardless of the source of funds.
. . ."

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There are, however, three avenues to exemption from this filing requirement. First, after stating the requirement, RCW 39.29.010, supra, itself then goes on to provide that:

". . . The director of financial management may exempt on a limited basis specific classes of personal service contracts involving activities of the executive and judicial branches after preparation of documented justification and consultation with the legislative budget committee: PROVIDED, That approval of the exemption is granted prior to commencement of the contract work."1/

Next, RCW 39.29.030 states that:

"This chapter shall not apply to the Washington state apple advertising commission, the Washington state fruit commission, the Washington state dairy products commission, or any agricultural commodity commission created under the provisions of chapter 15.66 RCW and exempted from the budget and accounting system by chapter 43.88 RCW except for special provisions concerning budget submissions and audits."

And finally, RCW 39.29.040 sets forth the following additional, statutory exemptions:

"This chapter does not apply to:

"(1) Contracts specifying a fee of less than two thousand five hundred dollars if the total of such contracts from that agency with the contractor within a twelve-month

1/ It is our understanding that while OFM could grant such exemptions on a limited basis for these classes of contracts, it has thus far not chosen to do so.

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period does not exceed two thousand five hundred dollars;

"(2) Contracts awarded through competitive bids if the bidding follows a formal, documented bid procedure and if the request for bids is advertised through the media normally used by the particular service being sought: PROVIDED, That for management purposes, the office of financial management may require the filing of certain contracts exempted under this subsection;

"(3) Contracts where the contracting agency recognizes that an employee-employer relationship exists;

"(4) Contracts awarded to companies that furnish a service where the tariff is established by the utilities and transportation commission or other public entity;

"(5) Intergovernmental agreements awarded to any public corporation, whether federal, state, or local and any department, division, or subdivision thereof; and

"(6) Contracts awarded for services to be performed for a standard fee, when the standard fee is established by the contracting agency or any other public corporation and a like contract is available to all qualified applicants."

It is subsection (2) of this last quoted statute which pertains to your question. As you have pointed out, there is in chapter 43.19 RCW a prescribed procedure for competitive bidding in relation to those purchases, on behalf of state agencies, which are subject to a competitive bidding requirement. See, RCW 43.19.1908--.1913. And clearly, you are correct in viewing any personal service contracts entered into in accordance with those procedures to be exempt from filing,

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under chapter 39.29 RCW, by reason of RCW 39.29.040(2), supra. As we understand it, however, the specific legal question which you have asked us to review and answer is keyed, instead, to a different legislative enactment.

What you have identified in your letter as Substitute House Bill 176 was passed by the legislature during its most recent, 1981 regular session as chapter 61, Laws of 1981. This enactment relates, particularly, to architectural and engineering service contracts entered into by both state and local governmental agencies on or after the effective date of the act, January 1, 1982.^{2/} In terms of the kinds of contracts to which the act applies, the following definitions, in § 2(5), are specially to be noted:

"(5) 'Architectural and engineering services' or 'professional services' means professional services rendered by any person, other than as an employee of the agency, contracting to perform activities within the scope of the general definition of professional practice in chapters 18.08, 18.43, or 18.96 RCW."

Next, we will quote in full, for immediate reference, §§ 3 through 5 of chapter 61, supra, which contain the general requirements of the law. First, § 3 provides that each "agency,"^{3/}

". . . shall publish in advance that agency's requirement for professional services. The announcement shall state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the agency who can provide further details. An agency may comply with this section by: (1) Publishing an announcement on each occasion when

^{2/} See, § 9, chapter 61, supra.

^{3/} Defined by § 2(4) to mean ". . . both state and local agencies and special districts . . ."

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professional services provided by a consultant are required by the agency; or (2) announcing generally to the public its projected requirements for any category or type of professional services."

Next, § 4 reads as follows:

"In the procurement of architectural and engineering services, the agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, based upon criteria established by the agency, the firm deemed to be the most highly qualified to provide the services required for the proposed project. Such agency procedures and guidelines shall include a plan to insure that minority and women-owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The level of participation by minority and women-owned firms shall be consistent with their general availability within the professional communities involved."

And thirdly, § 5 provides that:

"(1) The agency shall negotiate a contract with the most qualified firm for architectural and engineering services at a price which the agency determines is fair and reasonable to the agency. In making its determination, the agency shall take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof.

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"(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm shall be formally terminated and the agency shall select other firms in accordance with section 4 of this act and continue in accordance with this section until an agreement is reached or the process is terminated." (Emphasis supplied)

Quaere:

Does compliance, by a state agency, with the requirements of this 1981 act, in lieu of competitive bidding under RCW 43.19.1908-.1913, supra, result in an exemption from the filing requirements of chapter 39.29 RCW on the basis of RCW 39.29.040(2), supra?

In our opinion, it does not. We therefore must answer your question, as set forth at the beginning of this opinion, in the negative.

Simply stated, chapter 61, Laws of 1981, supra, does not establish a competitive bidding procedure for the letting of architectural and engineering service contracts by governmental agencies. Rather, it provides for negotiated contracts (as evidenced, particularly, by the above-under-scored language of § 5) after a preliminary determination as to the "most qualified" firm. While there most certainly is a competitive aspect to the law in terms of how a particular architectural or engineering firm is determined to be "most qualified," the competition is at that preliminary level and not, as under competitive bidding, at the critical level of "offer" and "acceptance" in the context of formation of a particular contract.

This is not to say that some further legislative action, in the form of an additional exemption provision in RCW 39.29.040, supra--relating to architectural and engineering service contracts--might not be thought by some in order

OFFICE OF THE ATTORNEY GENERAL

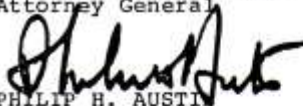
Honorable Joe Taller
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as a matter of policy. But that is for the legislature, rather than either your office or ours, to decide. What we are saying, at this time, is simply that the existing provisions of RCW 39.29.040(2), as the law now reads, cannot be interpreted to provide such an exemption.

We trust that the foregoing will be of assistance to you.

Very truly yours,

KENNETH O. EIKENBERRY
Attorney General


PHILIP H. AUSTIN
Deputy Attorney General



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Ken Eikenberry

ATTORNEY GENERAL OF WASHINGTON

7th FLOOR, HIGHWAYS-LICENSES BUILDING • OLYMPIA, WASHINGTON 98504-8071

STATE AGENCIES--MUNICIPAL CORPORATIONS--CONTRACTS FOR ARCHITECTURAL AND ENGINEERING SERVICES

1. A public agency may not, in procuring architectural or engineering services, consider proposed price or cost in determining which firm is most highly qualified to provide services.

2. When a public agency selects a firm to perform architectural or engineering services, price and cost may be considered only after the most qualified firm has been selected, at which time the law provides for negotiation of a "fair and reasonable" price.

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February 18, 1988

Honorable Gary Nelson
Honorable Lorraine Hine
Legislative Building
Olympia, Washington 98504

Cite as:
AGO 1988 No. 4

Dear Senator Nelson and Representative Hine:

By letter previously acknowledged you requested our opinion concerning public agency procurement of architectural and engineering services under RCW 39.80. We paraphrase your questions as follows:

1. In procuring architectural and engineering services, may a public agency consider proposed price or cost of the services in determining which firm is most highly qualified to provide those services under RCW 39.80.040?

2. At what point in the selection process may price or cost be considered by a public agency in procuring architectural and engineering services under RCW 39.80?

We answer question 1 in the negative and question 2 as set forth in our analysis.

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ANALYSIS

Though it may seem odd at first impression, the State Legislature has adopted a statutory scheme by which public agencies are precluded from considering price when selecting architects and engineers, except for a final price negotiation after the most qualified architect or engineer has been selected.

Chapter 39.80 RCW originated with the passage of Substitute House Bill 176 in 1981, enacted as Laws of 1981, ch. 61. The Legislature's purpose was to establish a state policy that:

governmental agencies publicly announce requirements for architectural and engineering services, and negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

RCW 39.80.010.

The chapter establishes a three-step process for procuring such services: (1) publication of the agency's requirement for professional services, RCW 39.80.030; (2) selection of the firm deemed to be the most highly qualified to provide the required services based upon criteria established by the agency, RCW 39.80.040; and (3) negotiation of a contract with the most qualified firm at a price which the agency determines is fair and reasonable to the agency, RCW 39.80.050(1). If negotiations with that firm fail, the agency determines the next most qualified firm and similarly negotiates, RCW 39.80.050(2).

The term "qualified" is not defined in RCW 39.80; thus, we must give it its ordinary meaning. Webster's Third New International Dictionary 1858 (1981) defines "qualified" as "fitted (as by endowments or accomplishments) for a given purpose: COMPETENT, FIT"

Your first question is whether under RCW 39.80.040 price or cost may be one of the requirements or criteria that the agency may consider in determining the most highly qualified firm. A thorough reading of the statute and an examination of its legislative history indicate that price is not a permissible criterion for choosing the most highly qualified firm.

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The three-step process set forth by the statute provides for negotiation of price only after the agency has selected the most qualified firm. If price were one of the criteria for selecting the most qualified firm, the language of RCW 39.80.050 regarding negotiation of price would be surplusage.

This interpretation is consistent with the legislative history of the statute. Extrinsic aids may be used to construe a statute even in the absence of ambiguous statutory language. Garrison v. State Nursing Bd., 87 Wn.2d 195, 550 P.2d 7 (1976). Documents from state legislative archives may be examined to glean evidence of legislative intent. See, e.g., Seattle Times Co. v. County of Benton, 99 Wn.2d 251, 661 P.2d 964 (1983); State v. Turner, 98 Wn.2d 731, 658 P.2d 658 (1983).

Files from both the House and Senate State Government Committees contain documents reflecting that under Substitute House Bill 176 price would not be a factor in the initial selection of a qualified firm to provide architectural and engineering services. Eq., Memorandum from D. Karras, Staff Analyst, Office of Program Research, to Members, House State Government Committee, February 18, 1981; Memorandum from B. Lynch, Legal Intern, Office of Program Research, to Members, House State Government Committee, February 18, 1981; Senate Committee on State Government, 47th Legislature, Committee Analysis of SHB 176 as Enacted (1981). The bill passed out of the House Committee without amendment in that regard. When the bill was considered in the Senate Committee, an amendment was proposed which would have reworded what was to become RCW 39.80.040, directing the agency to choose

the most qualified firm for the project based on criteria established by the agency which may include: professional competence for the type of services to be performed; technical merits of the offered services; financial capability of the applicant to perform the specified work; the cost, price, compensation, or consideration to be paid by the agency for such services; and the affirmative action/equal employment opportunity record of the consultant.

Proposed Committee Amendment to SHB 176 by Senate Committee on State Government, 47th Legislature (1981) (emphasis added). The committee rejected the amendment. Thus, the legislative history indicates consideration and rejection of price as an initial consideration in selecting a firm to provide architectural and engineering services.

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RCW 39.80 was modeled, in part, after 40 U.S.C. § § 541-544, the Brooks Act. The Brooks Act also contains the three-step process of publication, selection of the "most highly qualified firm," and negotiation of the contract at a price deemed to be "fair and reasonable" to the agency. No case involving the Brooks Act has specifically decided whether price or cost may be a factor considered by the agency in choosing the most qualified firm.¹ However, in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978), the Supreme Court compared the Brooks Act to the Engineers' Society Code of Ethics, which forbade competitive bidding among engineers. The Society's traditional recommended method of engineer selection began with initial competition based on competence and experience. Price negotiations were to take place only after selection of the most qualified firm. The Court stated: "Congress has decided not to require competitive bidding for Government purchases of engineering services. The Brooks Act requires the Government to use a method of selecting engineers similar to the Society's 'traditional method.'" 435 U.S. at 694 n. 21 (citation omitted).

A previous opinion issued by this office reached the same conclusion. It described the newly enacted RCW 39.80 as follows:

Simply stated, chapter 61, Laws of 1981 . . . does not establish a competitive bidding procedure for the letting of architectural and engineering service contracts by governmental agencies. Rather, it provides for negotiated contracts . . . after a preliminary determination as to the "most qualified" firm. While there most certainly is a competitive aspect to the law in terms of how a particular architectural or engineering firm is determined to be "most qualified," the competition is at that preliminary level and not, as under competitive bidding, at the critical level of "offer" and "acceptance" in the context of formation of a particular contract.

AGO 1981 No. 19, at 7.

¹ A Comptroller General published opinion issued in August 1985 concludes that, under the Brooks Act, cost may be considered only after the final ranking of firms. Mounts Engineering, 64 Comp. Gen. 772 (1985).

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Thus, in answer to your second question, the point in the selection process at which price or cost may be considered by the public agency is after the selection of the most highly qualified firm, during the negotiations with that firm. The agency may then contract for the services at a price which the agency determines is fair and reasonable to the agency.

We trust the foregoing will be of assistance to you.

Very truly yours,

KENNETH O. EIKENBERRY
Attorney General



NANCY THYGESEN DAY
Assistant Attorney General



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ARCHITECTS AND ENGINEERS--LAND SURVEYORS--STATE CONTRACTS--
MUNICIPAL CORPORATION CONTRACTS

The procedures outlined in ch. 39.80 RCW convey contracts with
land surveyors.

June 24, 1988

Honorable Busse Nutley
State Representative
49th District
409 W. 37th St.
Vancouver, WA 98660

Cite as:
AGO 1988 No. 14

Dear Representative Nutley:

By letter previously acknowledged you requested our opinion
of whether the reasoning of AGO 1988 No. 4 applies to land
surveyors to the same extent it applies to architects and
professional engineers. We paraphrase your question as follows:

Do land surveyors provide "architectural and
engineering services" as that term is defined in RCW
39.80?

We answer your question in the affirmative.

ANALYSIS

RCW 39.80 provides the process by which governmental
agencies procure architectural and engineering services. See AGO
1988 No. 4. RCW 39.80.020(5) defines "architectural and
engineering services" as

professional services rendered by any person, other
than as an employee of the agency, contracting to
perform activities within the scope of the general
definition of professional practice in chapters 18.08,
18.43, or 18.96 RCW.

RCW 18.08 defines the professional practice of architecture.
RCW 18.43 defines the professional practice of engineering and
land surveying. RCW 18.96 defines the professional practice of
landscape architecture. Land surveying, therefore, is included

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Honorable Busse Nutley

2

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by reference in the definition of "architectural and engineering services". It is an activity within the scope of the definition of professional practice in RCW 18.43. Thus, governmental agencies must follow the process mandated by RCW 39.80 when procuring professional land surveying services.

We trust the foregoing is of assistance to you.

Very truly yours,

KENNETH O. EIKENBERRY
Attorney General



NANCY THYGESEN DAY
Assistant Attorney General



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