



February 8, 2023

Testimony regarding SB 2370 cooperative purchasing - Brian Pallasch for the International Institute of Building Enclosure Consultants (IIBEC)

Dear Chair Roers, and members of the committee:

On behalf of the over 3,500 members of the International Institute of Building Enclosure Consultants (IIBEC), and especially our members located across the great state of North Dakota, we thank you for working diligently to ensure that public monies are wisely allocated. Nevertheless, *I respectfully request that the committee consider amending SB 2370 to protect taxpayers and ensure compliance with state requirements regarding the procurement of architecture, engineering, and land surveying services, as outlined by N.D.C.C. Chapter 54-44.7, by inserting a provision prohibiting the purchase of such services via a cooperative purchasing program.*

IIBEC members come from a diverse group of architecture, engineering and design and specialize in design, investigation, repair, and management of roofing, exterior wall, and waterproofing systems.

SB 2370 undermines state code

As you are aware, North Dakota uses the Qualifications-Based Selection (QBS) process for the selection of architecture, engineering, and design services (commonly referred to as 'construction services') for public construction projects, a process that has proven beneficial for government and the taxpayers. However, as written, SB 2370 will allow cities and counties to sidestep the QBS process if construction services are offered as a product through the cooperative purchasing program.

Section 2 of the legislation states, "A county also may participate in cooperative purchasing programs established by any organization that offers its goods or services as a result of competitive solicitation processes. Approval from the office of management and budget under section 54 - 44.4 - 13 is not required for a cooperative purchasing agreement executed under this section." Similar language allows cities to engage in the same practice in Section 4.

Specifically, it is our experience that cooperative procurement plans allow plan participants that are offering manufactured goods to also offer "services" as an add on to the purchase. If, for example, the service is an installation fee that can be selected when purchasing new communication equipment for county vehicles, then that would likely be a good deal for the taxpayers. However, if a manufacturer offers 'construction services' as an add on to the purchase of a roof products, for example, then that offering would be including the purchase of architectural, engineering or design services, which normally would be selected for through the QBS process. Precisely because the legislation does not prohibit such practices, city and county procurement staff may be able to sidestep the QBS process while purchasing materials for a construction project. This mixing of product sales and design services undermines the independence of the design professional and focuses on price in contradiction of the QBS process.

IIBEC supports Cooperative Purchasing for most products

Cooperative purchasing has become increasingly popular due to the potential for saving state governments significant time and money. Often referred to as the Amazon.com for public entities, the service allows participants to easily differentiate between products whose price is widely available allowing them to purchase

the one that meets their needs the best at a price that meets their budget. IIBEC fully supports this wise use of taxpayer funds.

However, there is a vast difference between choosing a product based on price that you can easily determine is a deal for the taxpayers and a service, which is much more subjective. History has proven that when price is the primary determinant for construction services, corners may be cut, and public safety is put at risk. The downsides have been recognized for over a century. As a matter of fact, as far back as 1862, the Attorney General, when ruling on a case observed:

Although this policy (price competition) is certainly desirable in all cases, there are yet some to which it cannot well be applied. Such are contracts for services which require special skill and experience... In all contracts for services which presuppose trained skill and experience, the public officer who employs the service must be allowed to exercise a judicious discrimination, and to select such as, in his judgment, possesses the required qualifications.¹

For decades QBS has proven that contract negotiations that start with qualifications and experience have resulted in better more cost-effective construction projects. When it comes to the design of buildings, roads, bridges, or water systems, the citizens of North Dakota are best served by the qualified professionals - not the lowest bidder.

For the record, the U.S. Federal Government has used QBS since 1972 (Brooks Act – Public Law 92-582) as incorporated into Federal Acquisition Regulation (FAR) Subpart 36.6 - Architect-Engineer Services. This process has been so successful at the federal level that it is recommended by the American Bar Association in its model procurement code for state and local government. Since then, 46 states and many more local governments have incorporated the principles of QBS into their own state procurement processes. QBS has proven to be more efficient and less costly than the use of price-based selection criteria. Note: the ABA also supports cooperative purchasing for commodities.

QBS Background

QBS is a proven step-by-step process that facilitates the owner's selection of a design professional firm on the basis of qualifications and competence in relation to the scope of the project and facilitates the development of an appropriate scope of work for a specific project. The process is straightforward and easy to implement. It is objective and fair. It can be well documented, and it is open to public scrutiny.²

QBS allows procurement officials to exercise greater latitude in selecting design professionals like building enclosure consultants (BEC), by recognizing both objective and subjective criteria such as innovation, unique design approaches, sustainable design, and in identifying the best match for a project's size, scope, location, and regulatory requirements.

More recently, last March the ACEC Research Institute released the findings of a comprehensive study that found "federal and state policies that selected engineering services based on the design team's qualifications and experience had lower project costs and better on-time delivery verses selecting firms based on the cheapest bid."³ Key findings of the report include:

¹ Ibid, page 1.

² Qualifications-Based Selection: A Guide Including Model Local Government Policy and Procedures for Selecting Architects, Engineers and Land Surveyors, July 2000. <http://docs.acec.org/pub/9E675727-0EEE-1DC9-3B51-2A94F3CFDF3B>

³ <https://program.acec.org/qbs-resources-portal>

- QBS saves money – projects where QBS was used to procure engineering services experienced less cost growth (3 percent) versus the national average (6 percent).
- QBS saves time – QBS projects perform better in terms of project delivery time, experiencing less schedule growth versus the national average (7 percent with QBS versus 10 percent without).
- QBS produces higher levels of client satisfaction – (89% of QBS projects receiving “high” or “very high” satisfaction ratings from project owners).
- QBS promotes innovation -- Projects incorporating QBS have a greater likelihood of producing innovative solutions.

Solution

As previously mentioned, we respectfully request the committee include a provision in section 3 and section 4 that prohibits the procurement of construction services outlined by N.D.C.C. Chapter 54-44.7 via a cooperative purchasing program.

We urge you to support a procurement process that has served the state and its taxpayers well. The QBS process is fair, transparent, and promotes open competition by qualified companies.

Thank you for the opportunity to share our concerns on this important topic.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brian', with a stylized flourish at the end.

Brian Pallasch, CAE
CEO/EVP

cc: Senator Jeff Barta
Senator Ryan Braunberger
Senator Sean Cleary
Senator Judy Estenson
Senator Judy Lee