



# SECTION V

## QUALITY BASED SELECTION PROCESS

For ARCHITECTS,  
SURVEYORS and ENGINEERS

## **A. ACTS DEFINING QUALIFICATION BASED SELECTION**

Illinois, like many other states, has legislatively imposed public 'Request for Proposal' requirements on the procurement of architectural, engineering and surveying services.

The Illinois Acts are fundamentally modeled after the federal Brooks Act (40 U.S.C. §541), requiring federal agencies procuring architectural, engineering or land surveying services to follow the federal procurement law. The Act essentially requires federal agencies to base their contract decision upon "demonstrated competence and qualifications" instead of the lowest responsible bidder. (40 U.S.C. §541/5)

There are two Acts in Illinois that define the selection process for architects, engineers and surveyors:<sup>1</sup>

### ***1. State Projects***

The state and its subdivisions are subject to the Architectural, Engineering and Land Surveying Qualification Based Selection Act. (30 ILCS 535/5)

### ***2. Local Government Projects***

Units of local government (including most school districts) are subject to the Local Government Professional Service Selection Act. (50 ILCS 150/1)

The purpose of this legislation is to afford design professionals opportunities to participate in the public sector market for services. Strict competitive bidding for professional architectural and engineering services is not required<sup>2</sup> or permitted.

## **B. QUALIFICATION BASED SELECTION PROCESS**

Under the Local Government Professional Service Selection Act (50 ILCS 150/1), qualification based selection must follow a defined process:

### ***1. Determining Exemption from Compliance***

There are two situations that deem a project exempt from the qualification based selection process:

#### ***a) Existence of a Relationship with a Design Professional***

Under Section 4 of the Local Act, whenever a political subdivision proposes to undertake a project requiring architectural, engineering or land surveying services, it shall follow the qualification based selection process "unless it has a satisfactory relationship for services

with one or more firms." If its needs for architectural or engineering service are being met by existing arrangements, the subdivision is not required to re-evaluate and re-engage its design professional.

A "satisfied client" does, however, have to permit architectural and engineering firms with which they are not currently doing business to annually file a statement of qualifications and performance data. In this case, the only duty of the political subdivision is to accept filings or qualifications and performance data.

### **b) Bona Fide Emergencies or Small Projects**

If the political subdivision determines by resolution that an emergency situation exists or the cost of the professional services is expected to be less than \$25,000.00, they may waive the requirements of giving notice, conducting interviews, and selecting one of the three qualified firms. (30 ILCS 535/45, 535/50; 50 ILCS 510/8)

## **2. *Notice to Listed Firms or Publication***

As mentioned above, the public entity must allow firms to submit a statement of their qualifications and retain the listing of interested design firms. Upon a decision to seek a new relationship with a design professional, The Local Government Professional Services Selection Act provides that the political subdivision must:

- a) Mail a notice requesting a statement of interest in the specific project to all firms who have a current statement of qualifications and performance data on file with the political subdivision; or
- b) Place an advertisement in a secular English language daily newspaper of general circulation throughout such political subdivision, requesting a statement of interest in the specific project and further requesting statements of qualifications and performance data from those firms which do not have such a statement on file with the political subdivision. Such advertisement shall state the day, hour and place, the statement of interest and the statements of qualifications and performance data shall be due. (50 ILCS 510/4).

A suggested form of the public notice contemplated by the statute appears below:

## **PUBLIC NOTICE**

The District \_\_\_\_\_ will receive statements of interest from architectural, engineering and land surveying firms interested in performing professional services on (state specific project, e.g., asbestos survey, design and construction of a 750 seat performing arts center, a six-classroom addition to Maple School, etc.) Statements of qualifications and performance data are due on \_\_\_\_\_ (date), on or before \_\_\_\_\_ (time), at the business office located at \_\_\_\_\_ (address), \_\_\_\_\_ (room), \_\_\_\_\_ (zip) \_\_\_\_\_ (phone number).

Assuming that the political subdivision is looking for a new architect or engineer, the Act prescribes a selection procedure. The success of the selection process will be greatly enhanced by some soul searching and preparation of the following steps.

Negotiation of the owner architect agreement must start with a base of performance expectations. It is strongly recommended that the owner's proposed contract accompany the owner's program requiring design services.

### ***3. Evaluation of Best Qualified Firms***

The statutory scheme requires notice or advertisement of the request of a statement of qualifications for the project, the political subdivision is to select no less than three (3) firms<sup>3</sup> which it determines to be best qualified and rank them in order of qualifications for the project. The statutory criteria for evaluation of the firms which have submitted letters of interest include:

*...Qualification, ability of professional personnel, past record and experience, performance data on file, willingness to meet time and budget requirement, location workload of the firm and such other factors as the political subdivision may determine in writing are applicable.*  
(50 ILCS 5 10/5)

The political subdivision may interview and require public presentations by the candidate firms. The political subdivision is then required to select and rank in order of preference the three firms it assesses as most qualified to provide services for the project at hand.<sup>4</sup>

#### **4. Contract Negotiation**

Once it has evaluated candidates, the political subdivision must prepare a written description of the scope of the professional services required, which will serve as the basis for negotiating a contract with the highest qualified firm. 50 ILCS 5 10/7. (The statute does not attempt to grapple with the fact that describing the scope of professional services required on some complex projects is a task which may, itself, require the guidance of an architect or engineer.)

Once having identified the “highest qualified firm,” the public entity may then negotiate compensation. If negotiations with the preferred firm fail, the political subdivision may commence negotiations with the next preferred firm, and so on. If negotiations with all three firms prove unsuccessful, the political entity must compile a second list of three and start over. 50 ILCS 510/7(3)

### **C. IMPORTANT CONSIDERATIONS**

#### **1. The Owner Should Define its Construction Program in the Request for Proposal**

Select a design firm with the expertise to meet your unique and possibly diverse needs. To adequately attract architects and engineers who practice in the areas of your special needs, the owner should define its program in the request for proposal. This is important for another reason. Hiring the design professional is based upon its representation that it is experienced and skilled in the program area. It is generally not recommended (except under very unique circumstances) to impose a standard of care greater than that to which a design professional is ordinarily held.

However, architect selection based upon representations that it is experienced and skilled in the program area may elevate the standard of care to design professionals who practice in that specific area rather than the “average” architect.

#### **2. Design Fees are No Longer a Criteria in the Selection Process**

As of February 2, 2007, Section 5 of the Act was amended by the Illinois General Assembly to include the following language:

*In no case shall a political subdivision, prior to selecting a firm for negotiation under Section 7, seek formal or informal submission of verbal or written estimates of costs or proposals in terms of dollars, hours required, percentage of construction cost, or any other measure of compensation. (50 ILCS 5 10/5)*

As design fees are no longer a factor in selecting the most qualified applicants, it is important to focus on the experience, depth, quality and suitability of the design firm for the particular project you are about to embark upon. Remember the right design of a structure has the capability of transforming an entire community for generations.

<sup>1</sup> Prior to the enactment of the Qualified Based Selections Acts, the courts routinely exempted architects and engineers from the requirement of public bidding. Architectural services as professional services were statutorily exempt from bidding, e.g. "...contracts which by their nature are not adapted to award by competitive bidding, such as contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part..."

<sup>2</sup> Note that many states require design services to be publicly bid. E.g., Florida requires the competitive bidding of architectural services for public works projects which cost in excess of \$100,000. [Florida Stats. §287.055]. In *City of Lynn Haven v. Bay County Council of Registered Architects, Inc.*, 582 So.2d 1244 (Fla. App. 1988) the city decided to build a new building at a cost of \$120,000. It obtained a set of design concept blueprints from a private contractor and, in its request for bids, instructed the successful bidder to obtain drawings for the project. Florida Architects sought to enjoin the solicitation for bids, claiming that it violated the Act by allowing the contractor, rather than the city, to select and hire the architect. The injunction was issued and the city appealed. The court held that it was the intent of the Florida statute to establish competitive negotiations for the procurement of design services.

<sup>3</sup> In the unlikely event that less than 3 firms submit letters of interest and the political subdivision determines that one or both of those forms are so qualified, the political subdivision may simply negotiate a contract with the preferred firm based upon the political subdivision's defined scope of the project.

<sup>4</sup>The Illinois Open Meetings Act (5 ILCS 120/1 et. seq.) requires the discussion of a prospective bidder's qualifications including financial condition to be conducted in an open meeting. 1976 Ill. Op. Atty. Gen. No. S-1116. However, when a professional is being considered by the board and sensitive discussion may be focused on the issues which arguably may be considered defamatory or relating to "liberty" interests, discussion may be considered in executive session where such public discussion may result in imminent litigation. See, 1983 Ill. Op. Atty. Gen. No. 83-026; cf. *Zaret v. Joliet Park District*, 91 Ill. App. 3d 225 (3rd Dist. 1980) (park commissioner's statement that builder's low bid for project was rejected because commissioner believed higher bidder would do a better job and because he was not that familiar with low bidder, held, non-libelous). Nevertheless, care should be taken in these situations to avoid comments which impugn the personal integrity or basic competence of parties under discussion (e.g., "He's a crook.")