

NEW FEDERAL LAW REQUIRES USE OF QUALIFICATION-BASED SELECTION PROCESS FOR FEDERAL-AID ARCHITECTURE AND ENGINEERING CONTRACTS

A federal law which became effective on November 30, 2005 (Public Law 109-115, section 174,) requires state and local transportation agencies to utilize a “Brooks Act”-compliant Qualification-Based Selection (QBS) procedure when awarding federally-assisted architecture and engineering (A&E) contracts. This law repealed authority for such agencies to use “alternative” state law procedures (such as “Best Value”) or “Brooks-Act-Equivalent” procedures. The FHWA has issued preliminary guidance on the new law (see: <http://www.fhwa.dot.gov/programadmin/121205.cfm>) and is currently reviewing the applicable regulations (23 CFR Part 172) to determine what changes will be necessary to conform to the new law.

The State and Municipal procurement laws have differed significantly regarding selection of A&E consultants. Under the state procurement law, Mn/DOT has generally been required to use a competitive “Best Value” approach, using cost as one factor, in the selection of A&E consultants. This was an FHWA-approved “alternative procedure”. Cities and Counties were not, however, required to use a competitive best value process to select architects and engineers, though many have chosen to do so. The new federal law, however, now mandates that state and local agencies use the Brooks Act procedures for certain contracts paid in whole or in part with federal funds.

In a nutshell, the Brooks Act provides that covered contracts must be:

- 1) Publicly announced; and
- 2) Competitively awarded on qualification-based criteria only, not utilizing cost as a factor in consultant selection.

Following are questions and answers regarding implementation of this new federal requirement.

What types of contracts are covered by this law?

Engineering and design-related services are defined to include program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or architectural-related services.

Are there any exclusions?

Yes. Brooks Act procedures do not need to be used for contracts such as planning studies that are not directly related to or connected to a construction project. In addition, the Brooks Act exempts certain “small purchases” – which is *the smaller of* the federal (currently \$100,000) or state (currently \$5,000) small purchase amounts. There are also provisions for “non-competitive negotiation” (i.e. “single source”) contracts with requirements similar to those found in state law.

Can price be a consideration in a QBS selection?

No. Consultants must be ranked and selected without regard to cost. Cost will be negotiated with the top-ranked consultant.

Must a local agency accept the consultant's cost?

No. Prices negotiated after consultant selection must be fair and reasonable to the local agency. If, after good faith negotiation, the local agency and the selected consultant are unable to agree on price, the local agency may end the negotiations and begin negotiating with the next-ranked consultant. Having a good internal estimate prior to negotiation will help your negotiating position. Mn/DOT recommends that RFP's contain terms that 1) require the consultant to submit a proposed budget and detailed scope of duties promptly after selection, and 2) require negotiations to be finalized in a reasonable time period and provide notice that the local agency has complete discretion to determine when to terminate negotiations and move on to the next-ranked proposer.

How are proposals solicited?

Proposals must be solicited by public announcement, advertisement or any other method that assures qualified in-state and out-of-state consultants are given a fair opportunity to be considered for award of the contract. Publication in the local agency's official newspaper should be legally sufficient, though you may want to use other means to reach a broader audience.

What factors can be used in consultant selection?

Factors to be considered may include demonstrated competence and expertise related to the project requirements, resources available to perform the work within the time constraints, record of past performance, proposed project management techniques, and other non-cost factors demonstrating an ability to handle special project constraints.

May a local or in-state preference be used?

No. A local agency may not give a preference to a local or in-state consultant, however, familiarity with and availability to the project locale may be considered as a factor. In addition, in those cases where state law requires the use of an engineer licensed in Minnesota, such licensure may be used as a factor.

When must a local agency start using the Brooks Act process?

This applies to any covered federally-assisted A&E contract procurement initiated after November 30, 2005.

Who can I contact for more information?

State Aid for Local Transportation ("SALT") (<http://www.dot.state.mn.us/stateaid/>)