

Celebrating the 50th Anniversary of the Brooks Act

by John Palatiello

On this day, October 27, in 1972, President Nixon signed into law legislation providing for qualifications based selection (QBS) of architecture, engineering, (A&E) and related services, including surveying and mapping. It was 50 years ago today the Brooks Act became law.

At the time of its enactment, the Brooks Act was a radical departure from the norm of lowest bid in Federal procurement. It set a precedent that enabled qualitative factors to become commonplace in various contemporary acquisition procedures. In other words, A&E was for past performance and best value before it was cool.

Enacted by Public Law 92-582, the Brooks Act was named for its author, then-Representative Jack Brooks (D-TX). Although agencies had used qualifications as an evaluation and selection factor, followed by negotiation of a fee that is “fair and reasonable to the government” for A&E services for more than a century, the legislation was necessary to codify the practice.

“Ask 10 A&E firms to bid on the design of a particular facility and many agencies will take the easy way out and select the low bidder. Under such circumstances, we may end up with a technically capable architect or engineer, but one who, for lack of experience or because of a desire to stay within his bid reduces the time spent on field surveys or in the preparation of detailed drawings, or in providing inspection services. As a result, the government may have saved itself a half of one percent to the cost of construction, operation or maintenance,” said Senator Jennings Randolph (D-WV) on the Senate floor during the 1972 debate on the legislation that became the Brooks Act.

The “qualifications based selection” or “QBS” process is codified for Federal agencies in title 40 of the United States Code, section 1101 and implemented in the Federal Acquisition Regulation (FAR) at 48 CFR 36.6. Passed on a bipartisan basis and supported by lawmakers in both parties over the ensuing 50 years, the process is also recommended by the American Bar Association in its Model Procurement Code for State and Local Government, and has subsequently been adopted by almost every state in a “mini-Brooks Act”.

The law emphasizes an investment in quality and competence in A&E services, so the integrity of buildings, facilities and other government activities dependent on designs, drawings, surveys, and other related services could be relied upon during construction, operation, and maintenance over the life of such structures and program activities.

The law requires an agency’s public announcement of its requirements for professional A/E-related services, interested firms compete by submitting their qualifications, usually on a standard government form, SF 330, the agency evaluates the firms’ submittals and selects a short list of most qualified firms for an interview. Based on evaluations of the firms’ qualifications, experience, past performance and other factors, the agency determines which firm is the most qualified to meet the government’s requirements. The government prepares an independent estimate of the anticipated cost, and a negotiation is held between the government and the selected firm to arrive at a price that is fair and reasonable to the government. In the process, the government holds the cards. If a fair price cannot be negotiated, the government is free to terminate the negotiation and begin discussions with the second ranked firm.

It is rare that the United States suffers from faulty buildings. When such failures do occur, such as the 1978 implosion of the roof of the Hartford Civic Center or the 1981 collapse of the Hyatt Regency Kansas City skywalk, Congress investigated these incidents and issued a report on “Structural Failures in Public Facilities” in 1984. It found, “procurement practices that lead to or promote the selection of architects and engineers on a low bid basis should be changed to require prequalification of bidders with greater consideration given to prior related experience and past performance.” The chairman of the subcommittee conducting the study and publishing the report was then Rep. Al Gore, Jr. (D-TN). As President, Ronald Reagan said at a ceremony recognizing design excellence in Federal buildings said, “Good design doesn’t cost money. Good design saves money, and you know how that warms my heart.”

When earthquakes, hurricanes, and other calamities impact foreign countries, the destruction to buildings too often results in tragic loss of life. In America, such instances are rare, due to strong building codes and excellence in A/E services employed through the QBS process. Non-construction related services also benefit from the emphasis on quality. A recent drowning in Loudoun County, Virginia was attributed to inaccurate and incomplete mapping use by the local 911 emergency response system. The Commonwealth of Virginia does not use its state QBS law for this mapping program.

The Brooks Act, licensing of design professionals, and strong building codes contribute to the fact that hurricanes and other natural disasters, while tragic, do not result in the property damage and loss of life in the United States that is experienced in most other countries.

When the landmark Competition in Contracting Act was enacted in 1984 in response to the scandals related to over-priced coffee pots and toilet seats bought by the Pentagon, Congress defined the QBS process as a competitive procedure in Federal law. During consideration of the original Brooks Act in 1972, Senator Edward Gurney (R-FL) explained “any Federal procurement officer ... will tell you that competition based on professional-technical qualifications is every bit as hot and demanding as competition based on price, perhaps more so.”

The famous showman, P.T. Barnum, is well known for saying, “There’s a sucker born every minute.” What is less known is that Barnum also observed, “The smartest way of deriving the greatest profit in the long run is to give people as much as possible for their money.” To the nineteenth century British author John Ruskin is attributed the observation, “It’s unwise to pay too much, but it’s worse to pay too little. When you pay too much, you lose a little money — that is all. When you pay too little, you sometimes lose everything, because the thing you bought was incapable of doing the thing it was bought to do. The common law of business balance prohibits paying a little and getting a lot — it can’t be done. If you deal with the lowest bidder, it is well to add something for the risk you run, and if you do that you will have enough to pay for something better.”

The Brooks Act saves money. There is no evidence that selecting architects, engineers, surveyors, or mapping professionals on the basis of qualifications, competence, experience, and past performance results in higher costs. Indeed, given that such services amount to less than 1/10th of 1 percent of the total life cycle cost of a structure or facility, but affect the operation and maintenance costs over the life of the facility, the research and data shows the investment in quality in design-related services saves money and human lives. A study conducted jointly by the University of Colorado and Georgia Institute of Technology drew from a database of approximately 200 public and private construction projects in 23 states, including transportation, water, commercial and industrial projects, ranging in size from relatively small projects to those costing hundreds of millions dollars. Its authors compared various

procurement methods, including QBS, best value, and low-bid, with such factors as total project cost, projected life-cycle cost, construction schedule, and project quality outcome. Results showed that using QBS to procure the design component of a construction project “consistently meant lower overall construction costs, reduced change orders, better project results and more highly satisfied owners than in other procurement methods”.

The Brooks Act is a law that has worked for 50 years. It contributes to the public health, safety, and welfare, as well as is part of what makes the United States the envy of the world.

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