

What Owners Need to Know About QBS

BY KEVIN R. SIDO



QBS stands for *qualifications-based selection* with the emphasis on “qualifications.” QBS is a process by which an owner selects a design professional

where the parameter of price is secondary to the owner’s full satisfaction with the design professional’s qualifications. Under QBS, an owner gets the opportunity to hire the design professional the owner finds most highly qualified.

QBS is mandated by the federal government and many state and local governments. By using QBS, the owner can assure a project receives the proper planning by a design professional whose qualifications and personnel have been analyzed in competition with other design professionals. While QBS is not required for private owners, some may desire its focus on quality over price in selecting design professionals.

In 1972, Congress passed the Brooks Act, which established QBS for projects where the federal government is the owner. According to the Senate Report that accompanied the legislation, the law’s purpose was to codify practices of the previous 30 years of federal, state, and local governments to “retain the present practice of selecting the best qualified design professional, subject to the negotiation of compensation that is fair and reasonable to the government.”

Under the Brooks Act, first the agency head encourages design professionals to annually submit “current statements of qualifications and performance data.” The agency head, when a specific project is contemplated, is then to evaluate the statements on file plus statements submitted by other firms for the proposed project. Before considering fees, the “agency head shall conduct discussions with at least three firms to consider anticipated concepts and compare alternative methods for furnishing services.” The agency head then selects at least three firms, in order of preference, considered to be the “most highly qualified to provide the services required.” The agency head negotiates with the most

highly qualified firm and negotiates with the next firm only if an agreement with the more qualified firm cannot be reached. Qualifications come first. Contract terms and fees are considered only after qualifications have been ranked.

Why not hire the design professional as a “lowest responsible bidder”?

When the project is in its infancy, it would be impossible for a design professional to “bid” on the owner’s barely conceived ideas where “plans” may be little more than back-of-the-envelope jottings or planning meeting minutes. Those “plans” won’t resemble the detailed drawings and specifications that the contractors will ultimately bid on in order to fulfill the statutory mandate of “lowest responsible bidder.” The design professional is the midwife to those owner’s preliminary ideas and concepts.

Contractors, as “lowest responsible bidders,” are selected by competitive bids only after the owner establishes a program or scope for the project that has been transformed into a project manual with drawings. The design professional starts that transformation by consulting with the owner at the schematic phase. At that stage, the project’s feasibility can best be analyzed. Better a bad proposed project be reshaped—even scuttled if need be—than have it sail forward with a fleet of contractors on board. Only after the project can be seen as schematically sound will the design professional’s effort be directed to the preparation of construction documents.

In selecting the best person to assist in the creative process, qualifications should be, and will be, examined. The public—and certainly no less the owner—is best served by retaining the most qualified design professional. That selection process is best handled through the processes set by the Brooks Act and state or local laws that are patterned on it. Those processes ensure that the owner will find a most-qualified design professional for the creative planning yet later receive the lowest responsible bidder for construction.

But is QBS cost-effective?

Yes! Design professionals’ fees are relatively minor—maybe 10% to 15% or less of full construction cost. Yet, the design professional incurs a significant responsibility in shaping the owner’s concept into a workable project and a biddable set of drawings and specifications.

So not only does it make sense to retain and work with the design professional who is fully synchronized to the owner’s original ideas, but there’s also no economic disadvantage in doing so. While QBS emphasizes qualifications, no design professional gets a blank check.

In the second stage of the selection process, the owner’s most preferred design professional is asked to provide a fee proposal. The owner and engineer then enter the negotiation stage; with an RFP seeking bids (prices), meaningful discussions just won’t happen. If the owner and the most preferred design professional cannot reach an agreement during the second phase, then the owner can negotiate with the next most preferred design professional. Just because a design professional is determined to be most highly qualified does not mean the owner must select that design professional regardless of price. Moreover, owners and design professionals are free to negotiate a fixed fee, hourly fee, percentage fee, or other fee arrangements. QBS does not stifle that creativity. For over 60 years, QBS has been the method of choice for public projects to receive the highest quality of professional design services.

Kevin Sido has more than 30 years of experience in litigation and as a transactional counsel for design and construction professionals. He is a partner in the law firm Hinshaw & Culbertson LLP.