



January 24, 2022

Senator Mark Maynard, Chair  
Committee on Government Organization  
West Virginia Senate  
State Capitol Complex  
Charleston, West Virginia 25305

Re: Oppose S. 241, Modifies procedure certain public agencies use to procure architectural and engineering services contracts.

Dear Chairman Maynard:

On behalf of the over 3,500 members of the International Institute of Building Enclosure Consultants (IIBEC), and especially our members in West Virginia, I respectfully request that the committee not consider legislation that fundamentally undermine the state's current procurement process for architectural, engineering and design services.

IIBEC members come from a diverse group of design and construction industry companies, including hundreds of engineering firms, architecture companies, consultants, contractors, and product manufacturers. Our members specialize in design, investigation, repair, and management of roofing, exterior wall, and waterproofing systems.

As you are aware, West Virginia currently uses the Qualifications-Based Selection (QBS) process for the selection of architecture, engineering, and design services, a process that has proven effective for taxpayers. Senate Bill 241 undermines this procurement practice despite having been proven effective for decades, and this is bad for the state and taxpayers.

### **QBS Background**

QBS entails 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.<sup>1</sup>

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.

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<sup>1</sup> 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>

The QBS procedure is characterized by three basic steps:

- (1) The agency/officer evaluates and selects the BEC based on demonstrated qualifications and experience in the required types of professional services without considering fee;
- (2) The agency/officer and the BEC confer to determine and/or review the scope of work, including contract scheduling; and
- (3) A fee for professional services is negotiated based upon the mutually developed scope of services. In the event a mutual agreement on scope of services and fee is not achieved, the agency/officer may negotiate with the next most-qualified professional. Thus, cost is addressed at the appropriate time after the scope of services has been fully defined.

Sadly, the siren song of “faster and cheaper” often leads people to think that starting with price will result in a better product. Former U.S. Senate Public Works Committee Chairman, Senator Jennings Randolph of West Virginia, said it best on the floor of the Senate when the federal A/E selection law was passed. He said:

“Ask 10 firms to bid ... 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 on the design fee while adding 5 to 10 percent to the cost of construction, operation or maintenance.”<sup>2</sup>

For example, professional design fees are typically less than 2 percent of a building’s total life-cycle cost, yet they can have a profound effect on the other 98% (construction, ~12% / operations and maintenance, ~86%) of a building’s overall cost. Choosing the most-qualified BEC is a key component in the success of a publicly funded construction project. A well-qualified BEC, selected through the QBS process, is more likely to create independent high-quality, best-value construction project documents that encourage fair and open bidding amongst contractors, subcontractors, suppliers, and manufacturers.

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 when considering total life-cycle costs than the use of price-based selection criteria.

### **SB 241 Undermines Process**

While some opponents of the procurement model are forthright and seek to directly repeal it, SB 241 keeps the appearance of QBS, but stealthily introduces price competition into the back end of the process, undermining the objective of the statute.

Specifically, the bill proposes to eliminate the procurement committee’s expertise and understanding of what is needed to complete the job, along with the factors as noted above they currently use to determine which company should be awarded a contract. In its place, the bill proposes to insert a low-bid process, awarding the contract to the firm with the lowest price bid.

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<sup>2</sup> Does QBS Save Money? page 2. John M. Palatiello, COFPAES Administrator and NSPS Government Affairs Consultant. <https://www.multibriefs.com/briefs/nsps/doesqbssavemoney.pdf>

History has proven that when price is the primary determinant, 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.<sup>3</sup>

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 West Virginia are best served by the qualified professionals - not the lowest bidder.

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. Please support West Virginia's current, widely accepted, QBS method and not consider SB 241.

Sincerely,

A handwritten signature in black ink on a light blue background. The signature is stylized and appears to read 'Brian'.

Brian Pallasch, CAE  
CEO/EVP

cc: Senator Chandler Swope  
Senator Owens Brown  
Senator Mike Caputo  
Senator Glenn Jeffries  
Senator Richard Lindsay  
Senator Mike Maroney  
Senator Patrick S. Martin  
Senator Eric Nelson  
Senator Randy Smith  
Senator David Stover  
Senator Dave Sypolt  
Senator Mike Woelfel  
Senator Jack Woodrum

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<sup>3</sup> Ibid, page 1.