

**A STATUS REPORT ON ENGINEERING CONTRACT  
AWARD PROCEDURES EMPLOYED BY THE  
OHIO DEPARTMENT OF TRANSPORTATION**

Prepared by the  
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Since 1998, the Ohio Department of Transportation has awarded well in excess of \$500 million in contracts for outside engineering services using a process that is commonly known as "Qualifications-Based Selection." Under this process, competing engineering companies are evaluated on the basis of their professional qualifications for the contract at hand. The company receiving the highest evaluation is offered the opportunity to negotiate with the department to develop a scope of service and a fee for those services, and if those negotiations are successful, the company and the department enter into a formal contract.

For several years in the mid-1990s, however, the Ohio Department of Transportation was required to use a competitive bidding-type system for awarding engineering contracts. For reasons that will

be discussed here, the department quietly abandoned its practice of bidding engineering contracts in 1998 and has not attempted to bid a single engineering contract since.

### **BACKGROUND**

For more than 30 years, Public Law 92-582 has required agencies of the Federal government to use of Qualifications-Based Selection when awarding contracts for engineering and architectural services. A similar law requiring Ohio state agencies to use QBS was enacted in 1988. (More than 40 other states now have similar laws.)

Ohio's QBS law had barely taken effect when, during the 1990 gubernatorial campaign, George Voinovich declared that if he were elected, he would require engineers, architects and others to bid for state contracts. Shortly after taking office, the Governor's Chief of Staff convened a committee of engineers, contractors and state agency officials to search for a "compromise" to somehow inject price competition into the selection process while preserving the concept of Qualifications-Based Selection.

That effort to find a compromise failed, and the Voinovich Administration subsequently proposed administrative rules providing that whenever two or more competing engineering firms were determined to be "equally most qualified" for a project, an agency could take bids from those firms and award a contract to the low bidder. Professional organizations representing engineers and architects opposed adoption of these rules, contending that it is no more possible for two engineers or architects to be "equally most qualified," than it is for two doctors or attorneys to be identically qualified.

The Joint Committee on Agency Rule Review considered the rules and voted to recommend their invalidation, and the Ohio House of Representatives voted in favor of that recommendation. The Senate was poised to do the same, but fearing political damage to a new Republican Governor, the Senate President refused to allow the issue to go to the Senate floor. As a result, the rules took effect by default in late 1991.

Organizations representing engineers and architects filed suit to prohibit implementation of the rules. A Republican Common Pleas Court judge appointed by the Governor upheld the bidding scheme, as did the Franklin County Court of Appeals. The appeals court

decision was split 2-1, however, with one judge declaring, "the rules allow the agency to abdicate its responsibility to rank the firms, instead relegating that duty to the competitive bidding process."

#### **THE OUTCOME: A FAILED EXPERIMENT**

Soon after the conclusion of the litigation, the Ohio Department of Transportation instituted a selection process in which three members of the department's Consultants Committee used a 100-point rating system to evaluate competing firms. On any given project, if the top-rated firms received scores within 5 percent of one another, they were deemed "equally most qualified." The department then solicited competitive bids from all firms and awarded a contract to the low bidder.

ODOT officials openly acknowledged that they manipulated firm evaluations so that two or more firms were found to be "equally most qualified" for many projects.<sup>1</sup> Even the Franklin County Court of Appeals that rejected the industry's legal challenge

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<sup>1</sup> In 1996, ODOT moved to decentralize many department operations, including consultant selection. At a meeting on August 13, 1996, at which ODOT district officials were given training on how to select consultants, an assistant director of the department pointedly warned district officials that consultant evaluation "scores should be in the 70- to 80-point range."

warned that such a practice "would violate the rule as well as the statute."

ODOT awarded 45 final development projects by competitive bidding in the 54-month period from January, 1993 through June, 1997. Contract modifications were approved by ODOT on 10 of the 45 contracts for more than \$1.4 million. During that same period, ODOT negotiated 439 final development projects and approved 103 modifications worth \$9.9 million. In other words, ***contracts that were bid were modified just as often, and in the same percentage, as contracts that were negotiated.***

At the same time, the department incurred far more in administrative costs to competitively bid these engineering contracts than it would have had it awarded those contracts via the traditional Qualifications-Based Selection process.

On projects where ODOT selected the most qualified firm and negotiated a contract, the selected firm would give the department a great deal of assistance in developing the scope of service for the project. When ODOT elected to put this same contract out for competitive bids, department personnel were required to write the scopes of service on their own, so that

none of the firms selected to bid would have an unfair competitive advantage.

The scopes of service that were developed unilaterally by ODOT, without input from a consulting engineer, were frequently inadequate, for the simple reason that the personnel who develop these scopes are not experienced in the design of complex construction projects. Important work tasks were omitted or critical scheduling and phasing considerations overlooked. In order to make up for those deficiencies in scope, the low-bidding firm receiving additional compensation through contract modifications after the bidding process.

Immediately upon the election of Governor Bob Taft in 1998, the Ohio Department of Transportation halted the practice of awarding engineering contracts by competitive bid. While there has been no public explanation of why the department abandoned competitive bidding, this is perhaps to be expected, since many of the officials who were required to implement that failed policy are still employed by the department.

Ironically, only months before the Voinovich Administration took office and instituted the competitive bidding process, the

Federal Highway Administration reported that, for the decade from 1979 to 1989, the Ohio Department of Transportation ranked 44<sup>th</sup> out of the 50 states in terms of the amount it spent on consulting engineering, expressed as a percentage of total construction value. In other words, only six states got more construction bang for the dollars they spent on engineering than did ODOT.<sup>2</sup>

Ohio's taxpayers historically received excellent value for their investment in quality engineering. The hard, cold reality is that the decision to require competitive bidding of selected engineering contracts was driven by political motives, not by considerations of cost or efficiency.

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<sup>2</sup> *The Effect of Contracting Out on Engineering Costs*, The Professional Services Management Journal, March, 1992.

## WHY BIDDING ENGINEERING CONTRACTS SHOULD BE REJECTED

The American Public Works Association warns that, "Quality of design has a profound influence on both construction price and operation/maintenance cost but is too often seen strictly as a price item, detached from life cycle cost. The principles of QBS are directly aimed at cost, and price of design is therefore not nearly as significant as its quality."<sup>3</sup>

The U.S. General Accounting Office has observed that "design costs represent a very small proportion, probably less than one percent, of the costs that will be incurred over the life of a building. Decisions made during the expenditure of this less-than-one-percent determine and freeze nearly all costs that follow."

In other words, looking at the short-term the client may save a small amount on up-front design costs by bidding the engineering of a project, but the cost of construction and the long-term costs of operation and maintenance will be substantially higher than they would have had a comprehensive design been performed

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<sup>3</sup> *Selection and Use of Engineers, Architects and Professional Consultants*, the American Public Works Association, 1997.

initially. This is classic definition of "penny-wise and pound-foolish."

The American Bar Association advises, "the architect-engineer or land surveyor is engaged to represent the state's interests and is, therefore, in a different relationship with the state from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence and availability of the . . . firms are considered initially, and price negotiated later."<sup>4</sup>

Traditionally, the engineer serves as a trusted advisor to the public agency, analyzing the agency's problem, then developing a technical solution to solve that problem. In addition, the engineer often represents the agency during construction, making sure contractors build the agency's project in compliance with the engineer's plans and specifications. Competitive bidding degrades this professional relationship, making the two parties economic adversaries.

When engineers and architects are told their services will be selected be based on price, they reduce their level of service to the lowest acceptable threshold, in order to be "low bidder."

Design options that could pay for themselves hundreds of times over in reduced construction costs are never considered.

Oftentimes plans are produced that lack sufficient detail, which requires more decision-making by the contractor in the field, which in turn can cause miscommunication and construction change orders.

The failed Ohio experience of the mid-1990s illustrates that competitive bidding denies the public agency full access to the engineer's greatest assets - creativity, analytical ability and technical expertise - all in the name of false economy.

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<sup>4</sup> *The Model Procurement Code for State and Local Governments*, the American Bar Association, 2000.