

## **POLICY MANUAL**

### ***A Summary of Policy Positions of the QBS Facilitator Council regarding Issues Commonly Encountered Adopted March 2022***

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***The following topics represent commonly asked questions of the QBS Facilitators Council and their responses. These policy positions are those of the QBS Facilitators Council and readers should seek their own legal opinions, if needed.***

#### **1. Respondent Participating in the Selection/Interview Process**

To avoid the appearance of favoring one respondent to an RFQ over another, an entity should not allow another respondent to participate in any part of the process in ranking and/or final selection of the successful candidate, including the interview phase. Ethically, interviews with entities which have submitted proposals should not be conducted in an executive session. Interviews should be open to the public but closed to respondents that have been selected for interviews.

In addition, a respondent should refrain from attending or participating in any part of the process in ranking and/or final selection of the successful candidate, including the interview phase. Implementation of this practice will avoid the appearance that respondents and/or organizations issuing the RFQ could be taking an unfair advantage

of the presentation and evaluation process. Moreover, ethics rules for respondents should prohibit them from such participation.

## **2. Engineering Rule**

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During the 2009 legislative session the following ISBPEPLS rule was approved by the Idaho State Legislature:

**05. Selection on the Basis of Qualifications.** *A Licensee or Certificate Holder should seek professional employment or professional service work on the basis of qualifications and competence for proper accomplishment of the work assignment. On selections for professional engineering and land surveying services that are required pursuant to Idaho Code 67-2320, a licensee or certificate holder, in response to solicitations described in Idaho Code 67-2320(2)(a) shall not submit information that constitutes a bid for services requested.*

The rule formally prohibits engineers and land surveyors from responding to "Requests for Proposals" or "Requests for Qualifications" that include requests for fee proposals. RFP's and RFQ's that include such requests are in violation of Idaho Code 67-2320.

In 2016 IBPEPLS issued a further interpretation of their rule stating:

*The Board has determined that providing a bid for services on public projects by a licensee either as the prime consultant or as a sub-consultant is a violation of this rule. The QBS law requires that licensees compete for work only on the basis of qualifications. The intent of the law is to ensure public projects benefit from technical expertise as demonstrated by technical qualifications, not cost.*

## **3. Non-Profit Organizations**

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If the organization making the request is a not a 'political subdivision' of the state, QBS does not apply even if government funds are being used through a grant or other means. Idaho QBS is a process with which governmental agencies that procure design services must comply. The QBS requirements are triggered not by the source of the funds but by the organization procuring the services. However, if federal funding is being utilized, the requirements of the Brooks Act would most likely will apply, regardless of the organization's status.

## **4. Proprietary Information**

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Is it allowable to a Request for Qualification to include requests for detailed proprietary information about the proposing entity's financial solvency and ability to deliver service?

Under the QBS law, the organization issuing the RFQ is not restricted from asking for this information as long as it does not ask for any details or specifics about the fees for the project within the RFQ. If the RFQ includes a request for proprietary information, that information should be exempt from any public records request under the Idaho State statutes. This protects the individual firms or organizations providing that information.

## **5. Design Build and Other Alternative Delivery Methods**

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*DESIGN BUILD:* For ITD projects in their Design-Build program, QBS is specifically excluded from the procurement process. However, the ITD process mandates review and consideration of qualifications in their two-step design-build selection process.

If design build is being used as the delivery system for a project outside of ITD's system, the QBS process as outlined in Idaho Code 67-2320 is not required to be used by law. However, it is the strong position of the QBS Council that qualifications of the designer must be included in the design-build procurement process. If the design build process is utilized, it is in the best interest of the agency/public entity to employ the QBS process. This should be accomplished through the use of a two-phase system in which the qualifications are ranked prior to the consideration of the cost proposals.

*OTHER ALTERNATIVE DELIVERY METHODS:* In terms of QBS benefits and compliance, the Council concurs with the May 9, 2019, ACEC of Idaho letter to the City of Nampa, which stated the following:

*To summarize the suite of delivery options in Idaho and consideration for selection, we believe that the typical Design-Bid-Build or Design-Bid-Build (with Contractor Pre-qualifications) methods are preferred for all projects unless complexity, innovation, or need for designer/contractor collaboration necessitates an alternative delivery approach. From our perspective, the best alternative delivery method is Construction Manager / General Contractor (CMGC). For design build options, Progressive Design-Build (PDB) is highly preferable to Design-Build (DB).*

## **6. Projects with Anticipated Fees under \$50,000**

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If projected fees for a specific project are expected to be less than \$50,000 this does not release the governmental entity from the need to use qualifications, not cost (fee amounts) as their initial guide in selecting a design professional. It does release the entity from the more onerous requirements of Idaho Code 67-2320 (2) which requires a very formal procurement process. Section 3 from Idaho Code 67-2320 concerning projects under \$50,000 allows only two options to follow the formal process **OR** establish your own guidelines based upon competence. Nothing in the law allows the

entity/political subdivision to use cost (fee proposals) as the factor upon which to choose a design professional.

*(3) In securing contracts for engineering, architectural, landscape architecture, construction management, or land surveying services on projects for which the professional service fee is anticipated to be less than the total sum of fifty thousand dollars (\$50,000), the public agency or political subdivision may use the guidelines set forth in subsection (2) of this section or establish its own guidelines for selection based on demonstrated competence and qualifications to perform the type of services required, followed by negotiation of the fee at a price determined by the public agency or political subdivision to be fair and reasonable after considering the estimated value, scope, complexity, schedule, and nature of services required.*

The law states that if the total fee is anticipated to be over \$50,000, there are specific steps that must be taken to procure a design professional's services including advertising a request for qualifications. If the total anticipated fee is projected to be less than \$50,000 the entity must "establish its own guidelines for selection based on demonstrated competence and qualifications to perform the type of services required, followed by negotiation of the fee at a price."

At no time can the entity issuing the RFQ request fee amounts/proposals prior to initial selection, but must negotiate with the top ranked firm, based upon qualifications criteria that you have established. If the negotiations are not successful, the next ranked firm/respondent can be selected, and fee negotiations begun with them. Technically, if anticipated fees will be in excess of \$50,000 a Request for Qualifications should be issued and advertised publicly.

At no time may a single project be subdivided into a series of contracts in order to achieve fee amounts below \$50,000 in order to evade the QBS requirement. Under statute a contract can be extended, or a new contract negotiated for an associated or phased project but that does not allow a single project to be artificially divided into multiple projects either through "phasing over time" or through "geographical split."

## **7. Phased or Associated Projects**

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Neither of the terms "Phased" or "Associated" is defined in the law and interpretation of what constitutes an associated project is generally left up to the political entity. However, the QBS Council suggests that a "significant nexus" be evident between the initial project and a subsequent associated or phased project to meet the criteria. If the entity has an existing, current relationship with a firm (meaning a previous contract) that meets the

qualifications for this project and believes the project to be "associated" with the original contract then the entity can proceed to enter into a contract with that firm without going through the QBS process.

What about "phased or associated" project eligibility for design professional who are not primary parties to the original agreement? An associate partner or sub-consultant who has entered into an agreement with the primary party in accordance with Idaho Code 67-2320(4) would generally not be considered the "person or firm to which that the public agency or political subdivision of the state has previously awarded a professional services contract" and therefore not eligible for that privilege.

*(4) When a public agency or political subdivision of the state has previously awarded a professional services contract to a person or firm for an associated or phased project, the public agency or political subdivision may, at its discretion and in accordance with all provisions of section Idaho Code [59-1026](#), negotiate an extended or new professional services contract with that person or firm.*

## **8. Contract-Engineering Service**

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Engineers Engaged by Public Agency/Political Subdivision to Serve as Appointed Engineers (Contract Engineers).

A contract city or county engineer must be hired through the QBS process (based upon qualifications as the foremost consideration). Once a contract engineer is appointed as a City Engineer, for example, he/she or their firm may then provide any and all services and duties that might normally be provided by a City Engineer, including projects for the City (or other political subdivision) that may arise and would require engineering services. As long as the contract engineer is considered the appointed City Engineer his/her services may be provided for any current or future city project. These contract engineering services are not subject to the time limits set for on rosters under the code. However, it is best practice that the RFP specify a time limit for the Agreement (recommended at five years) and clearly spell out what the specific scope of the city engineer assignment will be.

If an entity hires a firm to serve as city/county engineer through the QBS process and their contract references this type of design work as part of its responsibilities, that entity may engage that particular firm to provide engineering services without utilizing the QBS process for procuring those services.

## 9. Hiring Rosters

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*Idaho Code 67-2320(i) In fulfilling the requirements of paragraphs (a) through (h) of this subsection, a public agency or political subdivision may establish and select from a list of two (2) or more persons or firms selected and preapproved for consideration by the public agency or political subdivision. In establishing a preapproved list, a public agency or political subdivision shall publish notice as set forth in paragraph (h) of this subsection. When selecting from such list, no notice shall be required; and (i) Any list established under paragraph (j) of this subsection shall remain valid for a maximum of five (5) years and may be canceled by the public agency or political subdivision prior to the list's expiration if the public agency or political subdivision determines that cancellation would be in the public's interest.*

### How Many Firms on The Roster?

Although the code specifies, "two (2) or more persons for firms", generally a roster of between three and five is typical depending on the number of potential assignments and volume of work. Any roster of more than five firms (or "wide open") is NOT advantageous to either the agency or consulting community. The exception is a statewide agency (like ITD) who may develop a roster of qualified firms using "minimum acceptance criteria". In that case, the roster may have many firms listed.

### Developing a Hiring Roster:

QBS operates so firms may be selected and pre-approved for project assignments if a list of two or more design professionals or design/engineering firms is established through the publication process set forth in section 2. Common practice is to:

1. determine what service categories, if any, are needed (a separate roster will be selected for each service category),
2. establish basic criteria for the required service category(s),
3. determine the number of firms desired to be on the roster for each service category (unless it's a "minimum acceptance criteria" roster),
4. publish the notice,
5. receive the responses,
6. evaluate the responses for the various service categories using a quantitative scoring system, and then:
7. select the roster(s):
  - a. for each service category, select the highest ranked firms to place on the roster based on the number of firms desired to be on the roster, or
  - b. select the firms for each service category that meet the "minimum acceptance criteria".

Once this determination has been made the firms are placed on the roster for consideration of future projects (in each service category).

After the roster is determined, it is recommended that firms on the roster NOT be ranked but simply be listed as "approved for work". This allows the agency or political subdivision to select who they believe is the best firm for each specific assignment off the roster based on that firm's strengths and weaknesses relative to the assignment. (If a roster were ranked, the agency or political subdivision will be obligated to always begin negotiations with the highest ranked firm, rather than giving the entity the ability to begin negotiations with the firm that might be best suited for that particular project).

**Assigning a Project Off the Roster if Work Includes Multiple Service Categories:**

If an upcoming project spans several service categories what are the options for picking out of multiple roster categories for the upcoming project?

Based on our experience, we find no problems with choosing from several categories to identify a top firm or top firms to complete the project. Typically, the entity will: 1) pick a firm off the roster or 2) shortlist off the roster that is aligned with the majority of the project work type and then ask for supplementary qualification information from the shortlisted roster participants (see below). However, note that once the entity goes through the initial QBS process in setting up the hiring roster, obligations under the QBS law are considered fulfilled.

**Short Listing from the Roster for Larger or More Complex Projects:**

For a specific large or more complex project where more information regarding qualifications is desired from multiple firms on the hiring roster, it is common practice to send out a "mini" RFQ to several or even all of the firms on hiring roster asking for their response to the particular project. The firms/respondents can then be ranked further based on their specific responses, then negotiations may begin with the highest ranked firm regarding scope and fees as long as all the firms on the roster were originally selected through the formal QBS process

**Term Limits on Roster Selections:**

**The 2021 change to the QBS law included a five-year term limit on Agreements for persons or firms selected onto rosters. The starting time for these limits begins on July 1, 2021, or when any roster Agreements are signed (if after July 1, 2021). Again, "city engineer" or like assignments that do not include a roster are not subject to these Agreement term limits.**

**In summary:**

- 1) don't "rank" your roster(s), and
- 2) select two or more firms for each category of roster you want to fill,
- 3) once your rosters are in place select or "short list" from the roster aligned with the preponderance of the project work at hand, and
- 4) place a five-year time limit in Agreements with roster persons or firms.

**10. ITD Term Agreement**

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Some public entities, such as the Idaho Transportation Department, may use a Term Agreement list. This is addressed under section 2(i) allowing for pre-approved lists. This section states that firms may be selected and pre-approved as long as the list is established through the full QBS process stated in section 2 (setting criteria, publication and ranking by that criteria). ITD's Term Agreement, for example, was found to qualify as a pre-approved list under this section. Cities and counties working with ITD or utilizing state or federal transportation funding can utilize the ITD list as long as the criteria for selection established by the city/county is the same as that used by ITD to establish the list.

**11. Agent**

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The meaning of the term "Agent" is important, particularly as it applies to a situation when a design professional, as defined under the law, engages a secondary design professional on behalf of the public entity to work on the project. This would involve a situation when a public agency hires a consultant through the QBS process to complete a project, and during the course of that project they need to hire a sub-consultant to complete their work.

*What is the correct process for selecting that sub-consultant?*

The QBS Council engaged Jeremy Chou of Givens Pursley LLP, to issue a written opinion. In his written opinion, Jeremy indicated that the QBS law was amended in 1994 to add the word "agent" to the law, but that the definition was not defined. Because of that, we should use the interpretation in a manner that gives the statute's words their plain, usual, and ordinary meaning. Thus, where a private party acts as an agent of a public agency, meaning it has the legal authority to act for or represent that entity in a legal sense (a rare assignment), it is bound to follow the QBS procedure. However, if the private party is not an agent or is acting as a consultant without authority to act legally on behalf of the entity, compliance with the QBS process is not necessary.

The application of QBS on the sub-consultant is dependent on what the original contract identified what the consultant was authorized to do, what was said in their

scope of work and to what extent they were allowed to act on behalf of the public entity to complete the project. If the contract provides that the consultant may legally act as an “agent” of the entity, the consultant must use the formal statutory QBS process in the selection of sub-consultants.

***Idaho Code 67-2320. PROFESSIONAL SERVICE CONTRACTS WITH DESIGN PROFESSIONALS, CONSTRUCTION MANAGERS, AND PROFESSIONAL LAND SURVEYORS.*** (1) *Notwithstanding any other provision of law to the contrary, it shall be the policy of this state that all public agencies and political subdivisions of the state of Idaho and **their agents** shall make selections for professional engineering, architectural, landscape architecture, construction management, and professional land surveying services, including services by persons licensed pursuant to chapters 3, 12, 30, and 45, [title 54](#), Idaho Code, on the basis of qualifications and demonstrated competence and shall negotiate contracts or agreements for such services.*

This follows previous interpretations have indicated that the QBS requirement does not apply to relationships between two private parties, only between a political subdivision and a private party (unless one party is acting as an “agent” of a public entity).

## **12. Sub-Consultants:**

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### *Policy for Design Firms:*

The QBS law only requires use of QBS in the selection of the primary design professional. When the subsequent portions of the required services (sub-consulting services) are awarded to design professionals based on the lowest fee proposal the benefits for QBS are weakened. It also becomes difficult to convince governmental agencies that choosing firms based upon their qualifications is in their best interest and can result in a better-defined scope of work and project outcome if the design firms who champion the QBS process do not approach the engagement of their sub-consultants in the same manner. The QBS Council understands that relationships between a design firm and its partners/sub-consultants is a private issue and outside the scope of QBS law. However, as part of our education process we encourage design firms to follow the same general process that QBS requires of governmental entities, which is that the best qualified firm can best fulfill the determined scope of work for the best negotiated fee, providing the best value to the agency.

In 2016 IBPEPLS issued a further interpretation of their rule stating:

*The Board has determined that providing a bid for services on public projects by a licensee either as the prime consultant or as a sub-consultant is a violation of this rule. The QBS law requires that licensees compete for work only on the basis of qualifications. The intent of the law is to ensure public projects benefit from technical expertise as demonstrated by technical qualifications, not cost.*

**Policy for Agencies:**

We recommend that public agencies be educated to foresee this situation and address the hiring of sub-consultants at the time of the Request for Proposal stage of selection of the prime consultant. When the prime consultant to be selected will not be acting as an Agent, the following statements should be added to the Request for Proposals:

1. "All known design-professional sub-consultants needed to complete the project (individual or firm) must be identified in the consultant's proposal. (This should include all professions listed in Idaho Code 67-2320)."
2. "If unforeseen conditions require the need for addition of a sub-consultant, those identified in Idaho Code 67-2320 should be hired based on qualifications and not price."

**13. Definition of Services**

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***Idaho Code 67-2320. PROFESSIONAL SERVICE CONTRACTS WITH DESIGN PROFESSIONALS, CONSTRUCTION MANAGERS, AND PROFESSIONAL LAND SURVEYORS.*** (1) *Notwithstanding any other provision of law to the contrary, it shall be the policy of this state that all public agencies and political subdivisions of the state of Idaho and their agents shall make selections for professional engineering, architectural, landscape architecture, construction management, and professional land surveying services, including services by persons licensed pursuant to chapters 3, 12, 30, and 45, [title 54](#), Idaho Code, on the basis of qualifications and demonstrated competence and shall negotiate contracts or agreements for such services.*

The QBS section of the law applies to all proposed projects when one of the following conditions apply:

- A) The project or solicitation calls for the services to be performed by a person licensed in engineering, architectural, landscape architecture, construction management and/or professional land surveying services, and/or;

- B) The project or solicitation calls for any level of services for engineering, architectural, landscape architecture, construction management and professional land surveying as defined by the applicable state law, even if the project or solicitation does not specifically call for the person providing the services to be licensed or if the level of services is considered to be minimal.

When this is the case, only an RFQ solicitation may be used to acquire the required services.

Any call for these services must be procured through the processes defined in Idaho Code 67-2320.

The use of unlicensed individuals or firms for the design services defined would be in violation of Idaho Code 67-2320.

#### **14. Selection Criteria and Measurable Scoring**

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The 2021 update to the QBS code lists some selection criteria in subsection c and specifies that scoring should be based on "measurable" scoring in Subsection b.

*Idaho Code 67-2320 (2)...to implement this policy, the public agency and political subdivisions shall:*

- (a) Provide a general description of the services being solicited and encourage persons or firms engaged in the services being solicited to submit statements of qualifications and past performance data;*
- (b) Establish and make available to the public a request for qualifications that includes the criteria and the procedures to be used for **measurable scoring**, ranking, and selection of qualified persons or firms to perform such services;*
- (c) After receiving responses to a request for qualifications, score and rank the responding persons or firms based on their qualifications and demonstrated competence pursuant to the public agency's or political subdivision's established criteria and procedures. The list of ranked respondents, including the scoring used to develop the ranking, shall be made available to the public. **Some examples of selection criteria for consideration may include but are not limited to: a description of the firm, including location and longevity; past performance; project manager and key staff experience, education, and training; experience with similar projects; specific approach to project or assignment; proposed schedule, if applicable; and quality control procedures;***

The selection criteria listed are cited as “examples” in the code and therefore are not required to be followed. They are typical criteria that the QBS Council has seen frequently on past RFPs. You are completely free to use none, some, or all of these examples or to come up with your own selection criteria based on your project or program.

The code does require you to list your scoring criteria in the RFP or RFQ. List those that are most relevant to your process for determining the most qualified person or firm. An RFP or RFQ without scoring criteria listed is not valid under QBS.

“Measurable” simply means that you establish a scoring system for each criteria that can be implemented by your selection committee to determine the most qualified person(s) or firm(s). Scoring on subjective criteria like “project approach” or “qualifications of the Project Manager” are completely valid so long as a numerical scoring system is established in the RFP or RFA, i.e., “measurable”.

#### **15. Pricing, Overhead Rates, or Rate Tables**

The 2021 update to the code eliminated the option to submit overhead rates, rate tables, or other pricing information UNTIL the initial ranking has been performed. Any RFP or RFQ that asks for that information prior to initial ranking is now a violation of QBS.