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PUBLIC BUILDINGS—SELECTION OF ARCHITECTS AND ENGINEERS

P.L. 92-582, see page 1486

House Report (Government Operations Committee) No. 92-1188, June 28, 1972 [To accompany H.R. 12807]

Senate Report (Government Operations Committee) No. 92-1219, Sept. 25, 1972 [To accompany H.R. 12807]

Cong. Record Vol. 118 (1972)

DATES OF CONSIDERATION AND PASSAGE

House July 26, 1972

Senate October 14, 1972

The Senate Report is set out.

SENATE REPORT NO. 92-1219

THE Committee on Government Operations, to which was referred the bill (H.R. 12807) to amend the Federal Property and Administrative Services Act of 1949, in order to establish Federal policy concerning the selection of firms and individuals to perform architectural, engineering, and related services for the Federal Government, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

Purpose

The purpose of H.R. 12807 is to cast in statutory form the traditional system Government agencies have used for more than 30 years in the procurement of architect-engineer services. The bill would amend the Federal Property and Administrative Services Act of 1949 to establish a Federal policy for the selection of qualified architects and engineers to design and provide consultant services in carrying out Federal construction and related programs. The bill expressly declares it to be the policy of the Federal Government to negotiate contracts for such professional services on the basis of demonstrated competence and qualifications for the type of professional service required at fair and reasonable prices.

Background

On April 20, 1967, the Comptroller General of the United States requested Congress to clarify by legislation the procedure used in selecting architect and engineering services under Federal procurement statues. The Comptroller General subsequently recomendmed that the selection process for these services follow a competitive pricing procedure under which the amount of the fee to be paid would be considered a factor in the selection process. The Comptroller General has recom-

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mended that the 6-percent limitation on architect-engineer fees should be repealed.

Legislation similar to H.R. 12807 was passed by the House during the 91st Congress and reported by this committee. However, Congress adjourned before the Senate could act on the measure.

A bill, S. 3156, was introduced in the 92d Congress by Senator McClellan and Senator Percy which is substantially similar to H.R. 12807.

There are several differences between H.R. 12807 and the measure reported by the committee in the 91st Congress. First, language was added to require public announcement of all requests for A/E services. This will assure that all interested A/E's have the opportunity to learn about the Government's requirements for design services. Such mandatory public announcement is designed to enhance further competition among A/E's for Government contracts.

H.R. 12807 also was modified to reflect the suggestion that discussions of anticipated concepts and the relative utility of alternative methods for furnishing required services should be taken into account in evaluating the relative competence and qualifications of A/E's and not wait until negotiations are already underway with the selected A/E.

Finally, at the suggestion of the General Services Administration, language was added to improve the selection procedure, should none of the originally selected firms agree to a satisfactory contract.

Explanation of the Bill

H.R. 12807 responds to the Comptroller General's request that Congress clarify the procedure for selecting architects and engineers. The bill retains the present practice of selecting the best qualified design professional, subject to the negotiation of compensation that is fair and reasonable to the Government.

The bill does not affect existing statutes which limit architect-engineer fees to 6 percent of the estimated construction cost. The 6-percent limitation, when applied to the preparation of designs, plans, drawings, and specifications as Congress intended, is a valuable safeguard to the public. While the limitation may pose some difficulty in negotiating fair compensation for small projects, renovation work and projects requiring exceptional design effort, the 6-percent fee limitation is deemed to be an equitable ceiling.

H.R. 12807 restates the selection procedure generally applied in the procurement of architectural and engineering services—a procedure which Federal, State, and local governments have been using for more than 30 years, and which is also followed to a large degree by the private sector. Under this selection procedure, architects and engineers compete on the basis of their respective capabilities, qualifications, and experience as they relate to a proposed project. A/E's are ranked by the procuring agency on the basis of their ability to perform the project. Negotiations are then conducted with the top ranking firm to arrive at the compensation for the project. Under H.R. 12807, the compensation paid must be "fair and reasonable to the Government." Furthermore, the architect-engineer fee for the preparation of designs, plans, drawings, and specifications can be no more than 6 percent of the estimated construction cost of the project. The 6-percent limitation has been in existence since 1939 and is not changed by H.R. 12807.

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As provided in the bill, architectural and engineering firms engaged in the lawful practice of their profession, are encouraged to submit annually a statement of qualifications and performance data to the agencies concerned with the procurement of such professional services. The agency head, for each proposed project after public announcement, must evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms and then select in order of preference, no less than three of the firms deemed to be the most highly qualified to provide the services required, based upon criteria which he has established and published.

The agency head then enters into negotiations with the firm deemed most qualified, and a contract is let if a fee (comprising the architect's or engineer's cost of performing the services, plus his anticipated profit) that is fair and reasonable to the Government can be agreed upon. In making his determination, the agency head must take into account the estimated value of the services to be rendered and their scope, complexity, and professional nature.

In the event the most qualified architect or engineer is unwilling to perform the prospective services for a fee that is determined to be fair and reasonable to the Government, negotiations are terminated and the agency head must then enter into negotiations with the second most qualified firm. Failing accord with that firm, negotiations are commenced with the third most qualified firm.

If a contract with any of the highest qualified firms cannot be negotiated, additional firms must be selected in order of their competence and qualification, and negotiations continued until a contract is consummated.

Under this procedure, negotiations are conducted on the basis of a detailed analysis of the cost to perform the required service, plus a reasonable profit. Architects and engineers know that regardless of high ranking, their failure to agree to a fee that is fair and reasonable to the Government will deprive them of the opportunity to obtain the contract in question and that the Government will initiate negotiations with other firms.

In support of this procedure, the House Committee on Government Operations, which held hearings on the bill, makes the following pertinent observations in its report on H.R. 12807:

> The system favors selection of the most skilled and responsible members of these professions. Competition for Government contracts is based on qualifications and experience—terms of competition that qualified members of any profession or field of endeavor are willing to meet. Under this system, A/E's are under no compunction to compromise the quality of the design or the level of effort they will contribute to it in order to meet the lower "fee" quotations of other A/E's. They are free to suggest optimum design approaches that may cost more to design, but can save in construction costs and otherwise increase the quality of the building or facility to be constructed.
>
> This system protects the interests of the taxpayers. Having won the competition on the basis of capability, the winning A/E must then negotiate his fee. He must demonstrate on the basis of projected costs that his fee is fair and reasonable. He must accept whatever adjustments the Government de-

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mands if he wishes to obtain the contract. He knows that if he holds out for an unfair or unreasonable fee, the Government will terminate the negotiations and award the contract to another A/E at a fair and reasonable price.

The procurement of architectural and engineering services has traditionally been recognized as presenting unique considerations. Like the medical and legal professions, the architectural and engineering professions demand abundant learning, skill, and integrity, requiring a broad spectrum of capabilities that for the best results must be closely matched with the needs and requirements of those who contract for them.

MISCELLANEOUS CONSIDERATIONS

A question has been raised about the effect that H.R. 12807 may have on the antitrust laws of the United States. The question was raised because the Antitrust Division of the Justice Department had filed suits against the American Society of Civil Engineers and the American Institute of Architects aimed at deleting provisions in their codes of ethics prohibiting competitive bidding for professional services.

Realizing that such antitrust issue might be raised incident to this legislation, Mr. Brooks, chairman of the House Government Activities Subcommittee, which held hearings on H.R. 12807, addressed a letter to the Acting Attorney General on March 6, 1972, requesting that either he or a representative of the Department appear at a subcommittee hearing and state the position of the Department on the bill.

On April 18, Mr. Bruce Wilson, Acting Deputy Assistant Attorney General, Antitrust Division, representing the Department of Justice, appeared before the subcommittee.

During his testimony, Congressman Brooks asked:

> My question is, Does the bill as it is written, in its substance, violate the antitrust laws of the United States?

In his response, Mr. Wilson stated:

> No, Mr. Chairman; I don't think it does. Quite clearly, it is not a violation of the antitrust laws. What we are talking about here is not really antitrust laws as such. What we are talking about is competition policy and philosophy.

Another question raised concerning the bill relates to whether Congress should act on architect-engineer procurement before the Commission on Government Procurement reports to the Congress. This question also was considered by the House Government Operations Committee. It observed that:

> More than 5 years have passed from the time the Comptroller General originally requested Congress to clarify the legality of the traditional procedure the Government has used to procure A/E services. Subsequently, Congress established a Commission on Federal Procurement which, at this time, is making a broad evaluation of the Government's procurement policies for the purpose of submitting recommendations to the Congress as to how they might be improved.
>
> Were the procurement procedures reflected in H.R. 12807 an abrupt change or a new approach to the acquisition of A/E services, there might be reasonable justification for postpon-

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ing action on this bill until Congress had the opportunity to study the recommendations of the Procurement Commission. However, H.R. 12807 simply casts traditional A/E service procurement procedures into statutory form. This would clear up the uncertainty caused by the report of the Comptroller General that was submitted to Congress more than 5 years ago and end the confusion that has been caused by his efforts to establish his approach to A/E procurement as a substitute for the traditional time-tested procedures that are recognized in this bill.

Assurances of the Comptroller General that he will hold off enforcement of his interpretation of the law pending congressional and Procurement Commission review of the issue do not solve the problem. It is questionable, at best, whether Congress has authorized the Comptroller General, in his discretion, to withhold the imposition of such an interpretation of Federal statutes, once he has determined that Federal agencies are expending funds "illegally." Recognition of such discretionary authority could distort the relationship between congressional committees and the Office of the Comptroller General. It logically raises questions as to the circumstances in which the authority would be exercised and in what circumstances it would be withheld.

If the Commission should recommend a better procurement procedure, then Congress could amend the law to reflect the Commission's recommendations. Meanwhile, time continues to pass and the uncertainty as to A/E procurement procedures remains with us. Even assuming that the Procurement Commission were to render its final report within the next several months, a lengthy period of evaluation of the Commission's recommendations by the Congress would be essential. The time has come, therefore, to clarify existing law.

Although the Procurement Commission report will not be available for consideration by this Congress, the committee intends to expedite action on the Commission's recommendations pertaining to A/E services as early as possible next year. The committee also expects that upon its request, the Administrator of General Services, as well as other Federal agencies and departments, will furnish to the committee a full statement and explanation of any contract for A/E services negotiated pursuant to the provisions of this bill.

Differences Between House and Senate Bills

S. 3156 and H.R. 12807 are similar in their intent and substance. The primary difference between the two bills is that the Senate bill has a section applying the architect-engineer procurement requirements to the military services while the House bill has no such provision.

The committee believes the statement of policy contained in the House bill applies to all agencies of the Federal Government. Furthermore, Congress has made it clear on several occasions (e.g., H. Rept. 90-1869) that the traditional method of selecting architects and engineers is to be followed by the military agencies.

Since the military agencies are currently following the architect-engineer selection procedures as set forth in H.R. 12807, and would be

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expected to continue such procedures in accordance with the statement of policy contained in H.R. 12807, further amendment of the military procurement law is not deemed necessary.

CONCLUSION

The enactment of H.R. 12807 would insure the continuation of the Government's basic procurement procedure, with respect to architectural and engineering services, which has been in operation for more than 30 years. It is also the traditional system of procurement for similar services utilized by State and local governments.

It should be noted that architectural and engineering services are generally exempt under State and local statutes requiring public contracts to be awarded only after calling for bids. The practice of both professions is subject to regulation and licensing under the laws of the various States. Under the principles of common law, the relationship between the architect or engineer and his employer requires a higher level of trust and confidence, and good faith and loyalty than is normally imposed between parties to a simple contract.

The costs for architectural and engineering services in the construction of a structure or a facility generally represent a very small part of the total cost of construction, and yet those services are basic and essential to the quality of construction of the building or facility.

The Committee on Government Operations is always concerned with the element of cost in all Federal endeavors. In this instance, the committee feels that the Government's interest, which is the public interest, is best served by placing the emphasis on obtaining the highest qualified architectural and engineering services available. The bill makes ample provision for keeping costs under control by requiring negotiation for a fee that is fair and reasonable to the Government under the circumstances and by retaining the statutory 6-percent limitation on architect-engineer fees. Failure for any reason to provide the highest quality plans and specifications may well result in higher construction costs, a functionally inferior structure, or troublesome maintenance problems.

The bill is supported by the Administrator of General Services and is in keeping with the selection practices of those departments and agencies having construction and engineering responsibilities.

ESTIMATE OF COST OF H.R. 12807

As this proposal casts in statutory form the traditional system Government agencies have used for more than 30 years in the procurement of architect-engineer services, no additional cost can be anticipated as a result of enactment of H.R. 12807.

SECTION-BY-SECTION ANALYSIS

Section 901

This section contains definitions limiting and defining the scope of the bill. In subsection (1) the term "firm" is defined to mean an individual firm, partnership, corporation, association, or other legal entity permitted to practice the profession of architecture or engineering. This definition has a dual effect: first, it limits the scope of the bill to the procurement of services which members of these professions provide; and second, the definition would have the effect of

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requiring members of these professions to be properly licensed under the appropriate registration laws of the States and other jurisdictions governing their practice. Thus, the bill relates to architects and/or engineers who are registered under statutes that require, on the basis of education, experience, and other appropriate criteria, a high level of professional capability.

This definition requires utilization of the method of selection provided in the bill for the procurement of architectural and engineering services, or also when the scope and the nature of the proposal, to a substantial or dominant extent, logically falls within the unique expertise of these professions.

Subsection (2) defines "agency head" as the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government. This definition does not rule out the submission of recommendations by subordinate officials or advisory committees, groups, or commissions of architects and/or engineers established by the agency head for the purpose of providing independent expert judgment in ranking the capability of architectural and engineering firms in relation to any proposed project.

This definition, of course, is subject to the exemptions in the Federal Property and Administrative Services Act set forth in 40 U.S.C. 474. These exemptions include any agencies falling within the jurisdiction of the Armed Services Procurement Act of 1947.

Subsection (3) defines "professional services" as those of an architectural or engineering nature, as well as ancillary services, that members of these professions or those in their employ may logically or justifiably perform. The purpose of this definition is to encompass all of the services which architects and engineers might logically or justifiably perform.

Section 902

This section declares as a policy of Congress that all agencies of the Federal Government shall negotiate contracts for architectural, engineering, and related professional services on the basis of a selection process based upon competence and capability and a price that is fair and reasonable to the Government.

This policy embodies the traditional methods of architect and engineer selection as reflected in this bill. And, further, it shows that Congress considers this selection method as an acceptable application of "competitive negotiation" for the procurement of these services.

This section expressly provides for public announcements of all requirements for architectural and engineering services, thus assuring the broadest publicity concerning Government A/E service procurements at a high level of competition in the award of A/E contracts.

Section 903

This section allows for the annual submission of statements of qualifications and performance data, which would avoid the cumbersome and costly administrative problem of dealing with these statements were they required to be submitted in response to each proposed project. Those architects and engineers who are interested in any proposed project but who had not previously filed such a statement would also be eligible for consideration upon submission of a current statement of qualifications and performance data. Section 903 provides for

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the establishment and publication by the agency head of criteria to be followed by him in the ranking of architects and engineers on the basis of their qualifications and capability to perform the proposed project.

This section does not require the submission of preliminary designs, plans, drawings, specifications, or other material relating to the proposed project. In unique situations involving "prestige" projects such as the design of memorials and structures of unusual national significance, when the additional cost justifies the approach, and when time allows, the agency head can rely upon design competition under the recognized procedures that have been traditionally applied to this type of procurement. Generally, however, it is expected that the agency head, through discussions with an appropriate number of the firms interested in the project, will obtain sufficient knowledge as to the varying architectural and engineering techniques that, together with the information on file with the agency, will make it possible for him to make a meaningful ranking. Under no circumstances should the criteria developed by an agency head relating to the ranking of architects and engineers on the basis of their professional qualifications include or relate to the fee to be paid to the firm, either directly or indirectly.

Section 904

Section 904(a) sets out the primary negotiation stage once the selection process has been completed. This section requires that the determination of the fee be fair and reasonable to the Government, taking into account the estimated value of the services to be rendered and the scope, complexity, and professional nature of the performance required of the architect or the engineer. The phrase "highest qualified" as used in this section relates back to the selection made in section 903. This phrase is not limited merely to the technical acceptability of the firm, but includes other meaningful, pertinent considerations which have been universally applied in determining relative qualifications of architects and engineers to perform a specific project, and which relate to the quality of the work the Government might reasonably expect from members of these professions.

Section 904(b) states the procedure to be followed should the highest ranking firm fail to agree to a fee the agency head determines is fair and reasonable to the Government. This section states that negotiations with the architects or engineers who are ranked first, second, and third, and so on be conducted independently and in a series. If the agency head determines that the highest ranking firm will not agree to a fee that is fair and reasonable to the Government, no further negotiations shall be conducted with that firm on the basis of that proposal. The agency head will then attempt to negotiate a contract with the next most qualified architect or engineer, and so on, until a contract is consummated at a fee that is fair and reasonable to the Government.

Section 904(c) would allow the agency head to select additional firms in order of competence and qualification and continue negotiations in accordance with earlier provisions of the act until an agreement is reached, should he be unable to negotiate a satisfactory contract with the firms originally selected.

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PUBLIC BUILDINGS
P.L. 92-582

ROLLCALL VOTES ON FINAL PASSAGE

September 19, 1972 Final Passage: Ordered reported: 9 yeas—1 nay

Yeas:
McClellan
Ribicoff
Allen
Humphrey
Percy
Gurney
Mathias
Saxbe
Roth

(Recorded for)
Jackson
Brock

Nays:
Ervin

September 20, 1972 Motion to Reconsider: Adopted: 8 yeas—6 nays

Yeas:
McClellan
Jackson
Ribicoff
Allen
Humphrey
Chiles
Javits
Ervin

Nays:
Percy
Mathias
Roth

(Proxy)
Gurney
Saxbe
Brock

September 20, 1972 Final Passage: Ordered reported: 9 yeas—2 nays

Yeas:
McClellan
Jackson
Ribicoff
Allen
Humphrey
Percy
Javits
Mathias
Roth

(Recorded for)
Metcalf
Gurney
Saxbe
Brock

Nays:
Ervin
Chiles

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