

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

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INTRODUCED BY LINTON, McVERRY, CAPPABIANCA AND GEIST,
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REFERRED TO COMMITTEE ON STATE GOVERNMENT, FEBRUARY 24, 1988

AN ACT

1 Providing for the selection of registered architects,
2 professional engineers, landscape architects and land
3 surveyors to provide professional services to Commonwealth
4 agencies.

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5 The General Assembly of the Commonwealth of Pennsylvania
6 hereby enacts as follows:

7 Section 1. Short title.

8 This act shall be known and may be cited as the Professional
9 Design Service Procurement Law.

10 Section 2. Legislative findings and declaration of policy.

11 The General Assembly finds and declares as follows:

12 (1) In order to protect the public health, safety and
13 welfare and to avoid unnecessary construction, maintenance
14 and public facility replacement costs, it is essential to
15 obtain the highest possible level of competent design
16 professional services at a fair and reasonable price.

17 (2) Selecting the most competent design professionals
18 requires an open competitive selection process based upon the
19 professional qualifications, experience and capability of
20 firms to provide the services needed by Commonwealth
21 agencies.

22 (3) Establishing a fair and reasonable price for design
23 professional services requires a process of negotiation with
24 the firms previously determined to be most highly qualified
25 and suitable to provide services needed by Commonwealth
26 agencies.

27 (4) The evaluation of the technical competence and
28 suitability of design professionals should occur prior to and
29 independent of the determination of fair and reasonable
30 levels of compensation because any system of direct or

1 indirect competitive price bidding severely restricts the
2 potential scope of professional advice and services offered
3 to Commonwealth agencies and requires inflexible decisions
4 regarding the scope and nature of professional services to be
5 acquired by such agencies.

6 (5) It is the purpose of this act to ensure that design
7 professionals are selected by Commonwealth agencies based
8 upon a public and competitive process which evaluates the
9 professional competence, experience and suitability of firms
10 and then provides for the negotiation of fair and reasonable
11 compensation for their services. It is the further intent of
12 this act to prohibit the selection of design professionals
13 using price-based competitive bidding or any equivalent
14 selection process.

15 Section 3. Definitions.

16 The following words and phrases when used in this act shall
17 have the meanings given to them in this section unless the
18 context clearly indicates otherwise:

19 "Commonwealth agency." Any executive or independent agency.

20 "Design professional." Any registered architect,
21 professional engineer, landscape architect or land surveyor
22 licensed to provide professional services pursuant to the laws
23 of this Commonwealth or any professional association,
24 corporation or partnership or other legal entity authorized by
25 the laws of this Commonwealth to provide such professional
26 services.

27 "Design professional services." Those professional services
28 within the scope of the practice of architecture, engineering,
29 landscape architecture or land surveying, including studies,
30 investigations, surveying, mapping, tests, evaluations,

1 consultations, comprehensive planning, program management,
2 conceptual design, plans and specifications, value engineering,
3 construction phase services, soils engineering, drawing reviews,
4 preparation of operating and maintenance manuals, and other
5 related services associated with research, planning,
6 development, design, construction, alteration or repair of real
7 property.

8 "Executive agency." The Governor and the departments,
9 boards, commissions, authorities and other officers and agencies
10 of the Commonwealth. The term does not include any court or
11 other officer or agency of the unified judicial system or the
12 General Assembly and its officers and agencies.

13 "Independent agency." The Office of Attorney General, the
14 Department of the Auditor General, the Treasury Department, the
15 Pennsylvania Fish Commission, the Pennsylvania Game Commission,
16 the Historical and Museum Commission, the State Civil Service
17 Commission, the Pennsylvania Turnpike Commission, the Milk
18 Marketing Board, the Pennsylvania Liquor Control Board, the
19 Pennsylvania Human Relations Commission, the Pennsylvania Labor
20 Relations Board, the Pennsylvania Securities Commission, the
21 State Tax Equalization Board, the Pennsylvania Higher Education
22 Assistance Agency, the Pennsylvania Crime Commission, the State
23 Ethics Commission, the Board of Claims and the Public Utility
24 Commission.

25 "Price-based competitive bidding." Any system for the
26 selection of design professionals based upon the formal or
27 informal submission of verbal or written estimates of total
28 costs or proposals in terms of total dollars, man-days of work,
29 percentage of construction costs or any other measure of
30 compensation whereby the Commonwealth agency may compare design

1 services on a price basis prior to the time that one design
2 professional has been selected.

3 Section 4. Scope.

4 Commonwealth agencies shall procure design professional
5 services based upon qualifications-based competition as provided
6 by this act. Each Commonwealth agency shall adopt rules and
7 regulations to implement the procurement procedures set forth by
8 this act or may adopt uniform rules which may be promulgated by
9 the Secretary of the Budget. Commonwealth agencies shall not
10 adopt any rules or regulations or establish any procedures for
11 the procurement of design professional services based directly
12 or indirectly upon price-based competitive bidding. This act
13 does not restrict a Commonwealth agency from requesting, during
14 the process of negotiation, from the design professional with
15 which the Commonwealth agency is negotiating, estimating
16 criteria to be used to determine estimated costs of design
17 services for negotiating purposes. After the effective date of
18 this act, any contract or agreement made in violation of this
19 act is against public policy and shall be void and
20 unenforceable, provided however, that any claim that a contract
21 has been executed in violation of the provisions of this act
22 shall be filed with the Secretary of the Budget within 30 days
23 of the award of the contract.

24 Section 5. Exemptions.

25 Design professional services shall be procured as provided by
26 this act, except that sections 6, 7, 8, 9, 11 and 12(e) and (g)
27 shall not apply to the award of:

28 (1) A sole source contract, with the approval of the
29 Board of Commissioners of Public Grounds and Buildings, when,
30 pursuant to regulations adopted by the Secretary of the

1 Budget the agency head determines there is only one potential
2 source for the required services because of highly
3 specialized agency requirements.

4 (2) An emergency contract if the following conditions
5 apply:

6 (i) The agency head, with the approval of the
7 Secretary of the Budget, determines that there exists a
8 threat to public health, welfare or safety and the
9 urgency of the need does not permit the delay involved in
10 using the competitive selection procedures set forth by
11 this act.

12 (ii) A written explanation of the reasons an
13 emergency exists and the rationale and process of
14 selecting the design professional is filed for public
15 inspection and copying with the agency controller.

16 (iii) If only one proposal is solicited, the
17 emergency procurement is confirmed by the Board of
18 Commissioners of Public Grounds and Buildings.

19 (3) A contract for which the cost of services is less
20 than \$5,000, provided that design professional service
21 requirements shall not be artificially divided so as to
22 constitute exempt small purchases pursuant to this
23 subsection.

24 Section 6. Public announcement.

25 Notice of the need for design professional services shall be
26 published by the Commonwealth agency in the Pennsylvania
27 Bulletin and in any other manner required by law. Such notice
28 shall be published sufficiently in advance of when responses
29 must be received in order that design professionals have an
30 adequate opportunity to submit a letter of interest to be

1 considered to supply professional services to the Commonwealth
2 agency. The notice shall contain a statement of the services
3 required which adequately describes the project and sets forth
4 in reasonable detail the services required by the agency,
5 provides instructions for the submission of a letter of interest
6 to be considered as a design professional, describes the
7 anticipated time schedule for the award and completion of the
8 work contemplated, identifies the evaluation criteria which will
9 be used to select a design professional, and specifies the name,
10 address and telephone number of an agency official who can
11 answer questions about the project and provide assistance in
12 submitting a letter of interest.

13 Section 7. Submission of letters of interest.

14 Design professionals shall submit letters of interest in
15 order to be considered as suppliers of professional services to
16 the Commonwealth agency. The letter of interest shall set forth
17 the qualifications and experience of the design professional
18 and, if appropriate, the design professional's plan for
19 completion of the required services. In addition to any other
20 information required by the agency, the letter of interest shall
21 include:

22 (1) The name of the design professional and the location
23 of all the design professional's offices, specifically
24 indicating the principal place of business.

25 (2) The education, training and qualifications of
26 members of the design professional's firm or business
27 association and key employees to be assigned to the project.

28 (3) The experience of the design professional's firm or
29 business association which reflects technical capabilities
30 and project experience.

1 (4) The names of five clients who may be contacted,
2 including at least two for whom services were rendered in the
3 last year.

4 (5) A listing of contracts for design professional
5 services provided by the design professional to any agency of
6 the Commonwealth within the past five years.

7 (6) A statement made under oath that the information
8 submitted by the design professional is correct to the best
9 of the applicant's knowledge and belief and that the
10 applicant will comply with the requirements of this act,
11 particularly the provisions of section 14.

12 Section 8. Selection committee.

13 (a) Appointment.--The agency head shall appoint a committee
14 consisting of five members to prepare a selection report for
15 consideration by the agency head. Except for the Department of
16 General Services, which shall utilize a selection committee as
17 provided by section 2401.1(19) of the act of April 9, 1929
18 (P.L.177, No.175), known as The Administrative Code of 1929, the
19 selection committee shall consist of well-qualified design
20 professionals or persons with experience in construction or
21 Commonwealth procurement. At least three members of the
22 selection committee must be well-qualified registered
23 architects, professional engineers, landscape architects or land
24 surveyors licensed by the Commonwealth. No member of a selection
25 committee shall hold any elective office or office in any
26 political party or body. The agency head shall appoint a
27 chairman of the committee.

28 (b) Prohibitions.--No design professional shall be eligible
29 for award of a contract pursuant to this act by the agency
30 during the period in which any of the principals or associates

1 of the design professional's firm or business association are
2 participating as members of the awarding agency's selection
3 committee.

4 Section 9. Selection committee responsibilities.

5 Under the direction of the agency head, the selection
6 committee shall perform the following functions:

7 (1) Review letters of interest submitted pursuant to
8 section 7.

9 (2) Evaluate the competing design professionals in
10 accordance with the criteria set forth in section 10.

11 (3) Hold discussions, if appropriate, with at least
12 three of the most highly qualified design professionals
13 regarding concepts and alternative methods of furnishing the
14 required services.

15 (4) Prepare a written selection report for the agency
16 head recommending, in order of preference, at least three
17 design professionals that are considered to be the most
18 highly qualified to perform the required services. The report
19 shall include a description of the discussions and evaluation
20 conducted by the committee to allow the agency to review the
21 considerations upon which the recommendations are based.

22 Section 10. Selection criteria.

23 Each potential design professional shall be evaluated in
24 terms of its:

25 (1) Professional qualifications necessary for
26 satisfactory performance of the required services.

27 (2) Specialized experience and technical competence in
28 the type of work required.

29 (3) Capacity to accomplish the work in the required
30 time.

1 (4) Past performance on contracts with Commonwealth
2 agencies and private industry in terms of cost control,
3 quality of work, and compliance with performance schedules.

4 (5) Location in the general geographical area of the
5 project and knowledge of the locality of the project;
6 provided, that application of this criterion leaves an
7 appropriate number of qualified firms, given the nature and
8 size of the project.

9 (6) Any other criteria so set forth in the notice
10 prepared pursuant to section 6.

11 Section 11. Selection of design professionals for negotiations.

12 (a) Authority.--Except as otherwise provided by section
13 2401.1 of the act of April 9, 1929 (P.L.177, No.175), known as
14 The Administrative Code of 1929, for the Department of General
15 Services, the agency head shall, after review of the
16 recommendation of the selection committee, make the final
17 decision regarding the design professionals with which to
18 conduct negotiations pursuant to section 12.

19 (b) Procedure.--The agency head shall review the
20 recommendations of the selection committee and shall, with the
21 advice of appropriate technical and staff representatives, make
22 the final selection. This final selection shall be a listing, in
23 order of preference, of the design professionals considered most
24 highly qualified to perform the work. If the design professional
25 listed as the most preferred is not the design professional
26 recommended as the most highly qualified by the selection
27 committee, the agency head shall provide a written explanation
28 of the reason for the preference.

29 (c) Revisions of the evaluation committee recommendations.--
30 The agency head shall not add design professionals to the

1 selection report. If the design professionals recommended in the
2 report are not deemed to be qualified or the report is
3 considered inadequate for any reason, the agency head shall
4 record the reasons and return the report to the selection
5 committee for appropriate revision.

6 Section 12. Negotiation.

7 (a) Negotiating team.--The agency head shall establish a
8 negotiating team and chief negotiator for the purpose of
9 executing a contract in the manner provided by regulations of
10 the agency.

11 (b) Elements of negotiation.--The negotiating team shall
12 negotiate a contract with the most qualified design
13 professionals for the required services at compensation
14 determined in writing to be fair and reasonable. Contract
15 negotiations shall be directed toward:

16 (1) Making certain that the selected design professional
17 and the Commonwealth agency mutually have a clear
18 understanding of the scope of the work, specifically, the
19 essential requirements involved in providing the required
20 services.

21 (2) Determining that the design professional will make
22 available the necessary personnel and facilities to perform
23 the services within the required time.

24 (3) Agreeing upon compensation which is fair and
25 reasonable, taking into account the estimated value, scope,
26 complexity, risk and nature of the required services.

27 (c) Compensation.--The negotiating team shall determine the
28 level of fair and reasonable compensation in the manner provided
29 by section 13.

30 (d) Successful negotiation of contract with most qualified

1 design professional.--If fair and reasonable compensation,
2 contract requirements and contract documents can be agreed upon
3 with the most qualified design professional, the contract shall
4 be awarded to that design professional.

5 (e) Failure to negotiate contract with most qualified design
6 professional.--If fair and reasonable compensation, contract
7 requirements and contract documents cannot be agreed upon with
8 the most qualified design professional, the negotiating team
9 shall advise the design professional in writing of the
10 termination of negotiations. Upon failure to negotiate a
11 contract with the most qualified design professional, the
12 negotiating team shall enter into negotiations with the next
13 most qualified design professional. If fair and reasonable
14 compensation, contract requirements and contract documents can
15 be agreed upon, the contract shall be awarded to that design
16 professional. If negotiations again fail, negotiations shall be
17 terminated and commenced with the next most qualified design
18 professional.

19 (f) Notice of award.--Written notice of the award shall be
20 sent to the design professional with whom the contract is
21 successfully negotiated. Each design professional with whom
22 discussions were held shall be notified of the award.

23 (g) Failure to negotiate contract with design professionals
24 initially selected as most qualified.--Should the negotiating
25 team be unable to negotiate a contract with any of the design
26 professionals initially selected as the most highly qualified
27 design professionals, additional design professionals shall be
28 selected by the agency head or his designee upon the advice of
29 the selection committee, based upon their respective
30 qualifications; and negotiations shall continue until an

1 agreement is reached and the contract awarded.

2 Section 13. Fair and reasonable compensation.

3 (a) Cost estimates.--An independent estimate of the cost of
4 design professional services may be prepared and furnished to
5 the agency head or his designee before commencing negotiations
6 for each proposed contract or contract modification expected to
7 exceed \$25,000.

8 (b) Determination of cost.--The negotiating team shall
9 determine fair and reasonable compensation based upon the
10 estimated value, scope, complexity, risk and nature of the
11 professional services. The amount of compensation shall be
12 approved by the selection committee.

13 (c) Confidentiality.--Access to information concerning the
14 agency's cost estimate, any independent cost estimate and cost
15 proposals submitted by design professionals shall be limited to
16 agency personnel whose official duties require knowledge of the
17 estimate. An exception to this rule may be made during contract
18 negotiations to allow the negotiating team to identify a
19 specialized task and disclose the associated cost breakdown
20 figures in the agency's estimate, but only to the extent deemed
21 necessary to arrive at a fair and reasonable price. The overall
22 amount of the agency's estimate shall not be disclosed.

23 Section 14. Code of conduct.

24 (a) Standards.--No employee, officer or agent of any design
25 professional submitting a letter of interest or receiving a
26 contract pursuant to this act shall:

27 (1) Make or offer any political contribution for the
28 purpose of influencing a decision regarding the award of
29 contracts pursuant to this act.

30 (2) Make or offer any gift to any Commonwealth officer,

1 official or employee for the purpose of influencing a
2 decision regarding the award of contracts pursuant to this
3 act.

4 (3) Make or offer any political contribution or gift to
5 any person based upon the award of any contract pursuant to
6 this act.

7 (b) Applicable laws and regulations.--All Commonwealth
8 officials and employees associated in any way with the award of
9 contracts pursuant to this act, including members of selection
10 committees, and all employees, officers and agents of firms
11 submitting proposals and entering into contracts pursuant to
12 this act shall, as appropriate, comply with the provisions of
13 the following:

14 (1) The act of July 19, 1957 (P.L.1017, No.451), known
15 as the State Adverse Interest Act.

16 (2) Contract compliance Executive Orders or Management
17 Directives, including Executive Order 1984-1, 4 Pa. Code Ch.
18 1 Subch. M (relating to affirmative action); and Management
19 Directive 215.7.

20 (3) Any Code of Conduct for Appointed Officials and
21 State Employees adopted by Executive Order, including
22 Executive Order 1980-18, 4 Pa. Code Ch. 7 Subch. K (relating
23 to code of conduct for appointed officials and State
24 employes).

25 (4) Section 215 of the act of April 9, 1929 (P.L.177,
26 No.175), known as The Administrative Code of 1929, relating
27 to extra compensation.

28 (5) Any Management Directives relating to contractor
29 integrity, including Management Directive 215.8.

30 (6) The act of October 4, 1978 (P.L.883, No.170),

1 referred to as the Public Official and Employee Ethics Law,
2 relating to conflicts of interest.

3 (7) Section 1641 of the act of June 3, 1937 (P.L.1333,
4 No.320), known as the Pennsylvania Election Code, relating to
5 reports by business entities; publication by Secretary of
6 Commonwealth, for which purposes contracts awarded pursuant
7 to this act shall be deemed non-bid contracts.

8 Section 15. Rules and regulation.

9 Rules and regulations to implement the provisions of this act
10 may be proposed and adopted prior to the effective date of this
11 act.

12 Section 16. Repeals.

13 All acts and parts of acts are repealed insofar as they are
14 inconsistent with this act.

15 Section 17. Effective date.

16 This act shall take effect in 120 days.