



April 30, 2013

Chair – Rep. Paul Holvey	Rep. Alissa Keny-Guyer
Vice Chair – Rep. John Lively	Rep. Greg Smith
Vice Chair – Rep Dennis Richardson	Rep. Kim Thatcher
Rep. Margaret Doherty	Rep. Jessica Vega Pederson
Rep. Mark Johnson	

**Re: Opposition to Senate Bill 644**

Dear Chair Holvey and Committee Members:

My name is Jeff Nelson and I am General Manager of Springfield Utility Board (SUB). SUB is a municipal electric and water utility formed under the City of Springfield charter that has its own five-member Board of Directors that are elected from registered Springfield voters. Because our customer-owners, through the Board, set utility policies, we are directly accountable to those we serve.

SUB is also a member of the Oregon Municipal Electric Utility Association (OMEU). I am an executive officer of OMEU and, while the details of my comments may be representative of SUB, these comments as a whole represent the interests of OMEU. OMEU members serve the communities of Ashland, Bandon, Canby, Cascade Locks, Drain, Forest Grove, Hermiston, McMinnville, Milton-Freewater, Monmouth, and Springfield. OMEU is formed to perform several activities including the following.

- Secure cooperation among Oregon municipal electric utilities in resolving issues
- Provide means for member utilities to exchange ideas, experiences and obtain expert advice
- Collect, compile and distribute information about administration and operation of publicly owned electric utilities
- Promote legislation that is beneficial to municipal electric utility customers and oppose legislation that would be detrimental to such customers
- Promote harmony of action among municipally owned electric utilities in matters that affect the rights and liabilities of such utilities

Senate Bill 644 – Prohibits contracting agency from using a consultant’s pricing policies and proposals for direct appointment and also permits contracting agency to directly

appoint consultant for certain services such as architectural and engineering. Oregon Municipal Electric Utilities (OMEU) staff continues to coordinate with League of Oregon City staff and others to oppose this bill.

<https://olis.leg.state.or.us/liz/2013R1/Measures/Overview/SB644>

## **QBS Overview**

Federally, the Brooks Act (Public Law 92-582), also known as Qualifications Based Selection (QBS), was enacted on October 18, 1972. Under QBS procurement procedures, price quotations are not a consideration in the first phase of the selection process. Instead, after public solicitation for architect and engineer (A/E) services and submission of proposals, evaluations are made based on selection committee criteria, and a short-list is developed of those to be interviewed. After interviews with the firms, the selection committee ranks the most qualified firms and then begins negotiations on price with the top ranked firm.

The aim is to avoid reliance on low-bid choices that had proven in past projects to often be of lower quality. Choosing design services based on cost leads to confinement of ideas, costly changes and delays along the way and higher priced, less sustainable projects in the long run. Hiring the most qualified professional design services provider at a reasonable price is the best way of ensuring public dollars lead to final constructed projects that are completed on time and on budget.<sup>1</sup>

## **Oregon Legislative History**

In 1997, the state of Oregon followed the lead of the federal government and began using qualifications-based selection to procure the services of design professionals. In 2001, the American Institute of Architects and the American Council of Engineering Companies worked to expand the use of QBS to certain local government projects (based on size and state funding), but the policy had a sunset date<sup>2</sup>. In 2005, the sunset date was removed, requiring the process to become a permanent public policy. Also, in 2005 Oregon HB 2259 allowed “any procurement of goods or services not exceeding \$5,000 may be awarded in any manner deemed practical or convenient by the contracting agency, including by direct selection or award”. In 2011 (with House Bill 3316), QBS law was amended to apply to all local and special government projects, including schools, within certain price parameters. 48 states follow QBS procedures for procuring A/E services.<sup>3</sup>

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<sup>1</sup> <http://www.aia-oregon.org/2011/05/qbs-update-hb-3316.html>

<sup>2</sup> House Bill 3804 (2001)

<sup>3</sup> <http://www.aia-oregon.org/wp-content/uploads/2012/08/Background.pdf>

The American Institute of Architects stated that HB 3316:

**“...Allows small, emerging and minority businesses more opportunities to work with public contracting agencies and build their portfolio...”**

- HB 3316 raises the size of contracts required to use QBS. Previously \$50,000, now projects where estimated design costs are less than \$100,000 (at 10% estimate commonly used, that is a \$1 million project) can use other forms of procurement allowed in Oregon’s public purchasing law.

- This change will allow small and emerging firms to make proposals to public contracting agencies on smaller projects statewide.

- HB 3316 also allows for an “informal QBS process” to be used when design fees will be less than \$250,000 (\$2.5 million project). This process still put qualifications first, but does not require as extensive of a process as regular QBS does for larger projects.”

<http://www.aia-oregon.org/2011/05/qbs-update-hb-3316.html>

## Summary of Concerns

OMEU’s assessment is that SB 644 is a solution looking for a problem. OMEU appreciates the intent to allow for permissive language in legislation to allow purchasing agencies flexibility but the bill’s “may not” language is not the correct vehicle. SB 644 requires entities that use direct assignment to not base projects that are estimated to exceed \$100,000 on price.

1) As written it increases costs for purchasing agencies because of the increased likelihood of having to deal with smaller projects with step by step discussions with multiple potential vendors. SUB’s costs and ratepayer costs will increase with this legislation. I was surprised that a cost impact analysis was not conducted for the bill. A simple \$7,000 survey project now is going to cost upwards of 20% to 30% more because of internal administrative costs.

2) Small businesses have a challenging time breaking into markets. Bright people with a “can do” attitude are ready to do good work. This legislation requires entities to not base projects on price so it will naturally cause entities to go to the same entity over and over rather than create opportunity to a start-up company to enter the market with a competitive price for the same quality of work. **According to the American Institute of Architects position, SB 644 would harm small, emerging and minority businesses.**

If passed, this legislation sends a message that small business “may not” succeed in Oregon, minority businesses “may not” have the same opportunity as established firms, and purchasing agencies “may not” do what is in the best interest of communities to provide quality service with competitive prices. Those that “can do”, “may not”.

OMEU is not suggesting that direct appointment is inappropriate in every instance. However, it is appropriate to give flexibility to purchasing agencies and the opportunity for pursuing either direct appointment which includes pricing or a quote process for projects less than \$100,000.

### Proposed Fix

Fortunately the fix is easy.

- #1 don't pass SB 644, or;
- #2 Rather than the "may not" language, **SB 644 needs to be changed to be permissive "may" language.** That meets the intent providing flexibility to purchasing agencies.

### Existing language:

ORS 279C.110(1) (Section 1) has broad language stating that contracting agencies must comply with Section 2. Right now, Section 8 says, notwithstanding Section 1 ("in spite of" Section 1), **ORS 279C.110 states that a contracting agency may directly appoint a consultant for projects that are estimated to not exceed \$100,000.** It is *permissive* language and requires some level of determination by the contracting agency using price (to estimate the cost). Section 9 is a broader version of Section 8 and gives more latitude in an emergency.

### The proposed new language in SB 644 which OMEU opposes states:

"8(b) A contracting agency **may not** solicit or use a consultant's pricing policies and proposals or other pricing information, including the number of hours the consultant proposes for the service required, expenses, hourly rates and overhead as the basis for a direct appointment under paragraph (a) of this subsection." [emphasis added]

(Section 9 has similar language for emergencies.)

**OMEU suggests not passing SB 644 or having the proposed language in section 8 and 9 be changed to read:**

"A contracting agency **may** solicit or use a consultant's pricing policies...."

Respectfully submitted,



Jeff Nelson  
General Manager  
Springfield Utility Board