

**Written Testimony for the Oregon House of Representatives
Senate Bill 644**

**House Committee on Consumer Protection and Government Efficiency
Chair Paul Holvey**

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**by Bill Kirby
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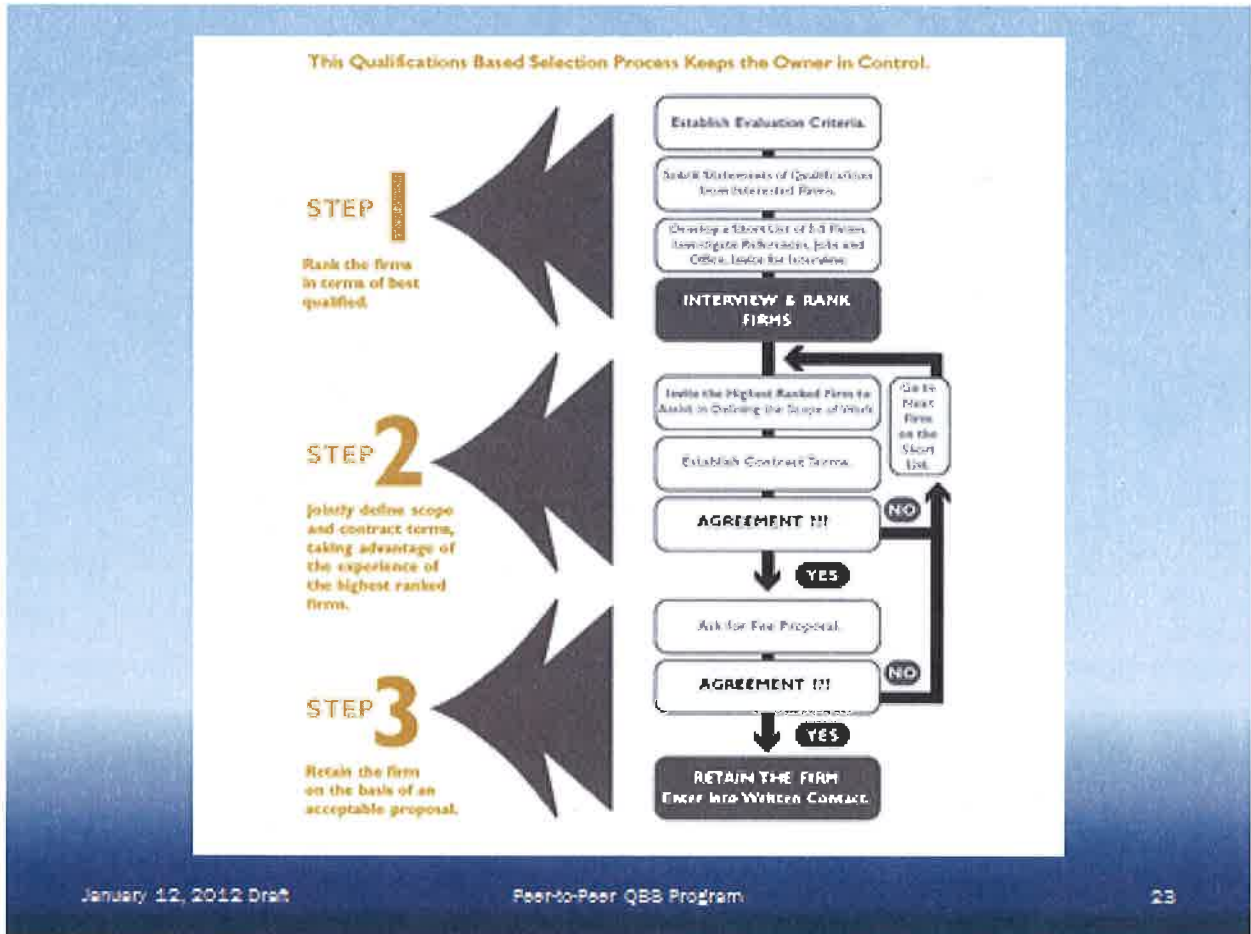
Chair Holvey, members of the committee, my name is Bill Kirby. I am the City Attorney for the City of Beaverton, and I am here today to speak in opposition Senate Bill 644.

Up front, I want to note that the City of Beaverton has used a qualification-based selection process for hiring many of our architects, engineers and related QBS consultants, and we began doing so well before HB 3316 was enacted two years ago, which mandated the use of QBS process for all public agencies on larger contracts.

That said, the City of Beaverton has significant concerns with SB 644.

Our first concern is that SB 644 weakens an important safety valve contracting agencies like the City of Beaverton have in negotiating contracts resulting from of procurements that use a QBS process. At section 1, page 2, line 16, the Bill proposes to strike the text “as determined solely by the contracting agency” from ORS 279C.110(5). We’re opposed to that amendment and I’ll explain why.

The common wisdom of QBS is that the QBS process “Keeps the Owner in Control.” Here’s a flow chart summarizing the QBS process taken from a recent statewide training program I was asked to speak at:



On the right side of the flow chart, the two “No Loops” illustrate the safety valves cities and other contracting agencies have in the QBS selection process. These safety valves are vital for keeping owners in control of the QBS process.

These two safety valves are what allow an owner to “Go to Next Firm on the Short List” if agreement cannot be reached on contract terms or price. Who makes the determination if contract terms or pricing are unacceptable? The Owner. It’s a fundamental tenant of the QBS process.

As a lawyer, I want it to be perfectly clear to a contract review board or circuit court judge who is in control of the QBS Selection Process. It’s the owner. ORS 279C.110(5) reinforces this fundamental QBS policy by its text stating that a fair and reasonable price for QBS consulting services is determined “solely by the contracting agency.”

Striking that text from ORS 279C.110(5) would open the door to the possibility that a court or contract review board would no longer give deference to the city's judgment of what's a fair and reasonable price for QBS consulting services, and instead would substitute its own judgment for that of the city.

State and local governments cannot abuse the authority granted to them by the "sole determination" language of ORS 279C.110(5). If governments act arbitrarily or capriciously in making a determination, the determination can be ignored as a violation of due process. Moreover, I know of no QBS procurement cases in Oregon where this abuse of authority has been an issue.

Please -- don't amend ORS 279C.110(5) by removing the "sole determination" language. Keep that text as is, so it is clearly understood that the contracting agency controls the safety valve of determining what a fair and reasonable price is for QBS consulting services.

Our second concern with SB 644 is that the bill needlessly complicates the negotiation process relating to direct appointment of QBS consultants. At section 1, page 2, lines 38-41 of the Bill, and then again starting at line 45 of page 2 and ending a line 3 of page 3, the bill provides that in direct appointments, pricing information cannot be used as the basis for a direct appointment.¹

The problem with this proposed amendments is that it takes a common QBS restriction imposed on the consideration of pricing during the initial phase of the QBS process and applies that restriction instead to the entire QBS contracting process in situations involving the direct appointment of a QBS consultant. We're opposed to this amendment and I'll explain why.

Direct appointment reflects the reality that it's expensive to conduct a formal solicitation. That's true regardless of whether the solicitation uses

¹ In both instances, the proposed additional text reads: (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.

a QBS process or not. At some point, it makes sense to forego the formal solicitation process, which can take considerable resources to prepare, publish, respond to and evaluate. Direct appointment instead simply allows a contracting agency to choose (“directly appoint”) a qualified vendor to do the desired work.

In Beaverton, for example, a significant portion of our professional service contracts are related to surveying property lines and the replacement of old water, sanitary sewer and storm drains, often in the same location as the original line. These types of QBS consulting services ought not require a formal solicitation process. The dollar amount involved rarely exceeds \$50,000 and often is in the \$10,000 and under range. These aren’t complex projects. Direct appointment is a sensible means to hire QBS-related services for these sorts of projects.

With that understanding of what direct appointment is, I want to refer you back to the flow chart we discussed earlier. As shown on the left side of the chart, step one in the QBS process is ranking firms in terms of best qualified. That’s the consultant evaluation process. In the direct appointment process, that step is abridged. A consultant is allowed to be summarily selected.

When you pick up the phone or send an email in the direct appointment process, you are starting in the QBS process at Step 2: You are working with the consultant to jointly define scope and contract terms and asking for a fee proposal. The entire negotiation process can often be accomplished in one or two telephone calls or emails.

If the proposed contract terms or price proposal are unfair or unreasonable, you want to remain in control of the QBS process and be able to go to another firm for QBS consulting services.

The proposed change to ORS 297.110(8) and (9) don’t reflect this understanding of how the QBS process works. The proposed change says that “A contracting agency may not ... use... pricing information as the basis for a direct appointment...”

That's bad policy and would deservedly give QBS a bad reputation if adopted. Many of my colleagues distrust the QBS process because pricing isn't put out on the table early on. To not put pricing on the table at all in situations involving direct appointments would be a disaster.

In every procurement -- QBS procurements included -- pricing matters. The QBS process does not negate price as an eventual factor for contract negotiation with design professionals. The QBS process simply delays consideration of pricing; it doesn't make pricing immaterial and irrelevant. The proposed change to ORS 297.110(8) and (9) doesn't reflect this understanding of the role pricing plays in the direct appointment process because the proposed amendment says "A contracting agency may not ... use... pricing information as the basis for a direct appointment..."

Pricing always needs to be considered – at the appropriate time; even in a QBS process involving a direct appointment. If a fee proposal received in negotiation of a direct appointment is unfair or unreasonable, the contracting agency – in its *sole* discretion – needs to be able to reject the offer and call or email someone else.

SB 644 would undermine the established QBS process that allows an agency, at the appropriate time, to consider pricing information when negotiating a contract for QBS services.

In conclusion, the City of Beaverton sees SB 644 as undoing the legislative work done just in 2011, which established the QBS process as the contracting method to be used for hiring design professionals and allowed smaller, direct appointment contracts to consider price, along with qualifications, during contract negotiations, which is the norm in the QBS process.

Passage of SB 644 will weaken the bargaining position of all public agencies when hiring design professionals, and for that reason the City of Beaverton opposes the bill.

Thank you for the opportunity to testify before you today. I would be happy to answer any questions.