

# QBS

“We thought our QBS laws were sufficient—  
A court decision thought differently”

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Illinois Professional Land Surveyors Association



Since 1987, the Local Government Professional Services Selection Act has governed how design professionals—architects, engineers, and land surveyors—are hired to design public projects for local governments. This process makes the qualifications of a design team the first consideration in the selection process, followed by a price negotiation process. Qualifications Based Selection, (QBS), is the industry standard; it is used in 46 states to ensure that qualified professionals are chosen to design our roads, bridges, schools, and all government facilities.

Design professionals in Illinois felt state laws firmly protected this process, but we were wrong. A November 2006 court ruling effectively gutted the law by allowing price to be weighed up front, before determining the most qualified professionals to do the job. The Illinois Department of Financial & Professional Regulation (IDFPR), along with the Illinois Attorney General, argued in court in favor of the bill’s original intent to rank qualifications first.

In the past, IDFPR has disciplined violators of the law who attempted to win publicly financed projects based on fee submissions rather than qualifications. As a result of the recent court ruling, more than 30,000 Illinois licensees and their businesses are in jeopardy of prosecution or losing untold business opportunities while the true intent of the law is in question. (For a summary of the court case and decisions, see an article written by James M. Morphew, Esq., which can be obtained from [iplsa@springment1.com](mailto:iplsa@springment1.com)).

As a result of the court decision, Illinois Design Professionals believed a legislative remedy was urgently needed to clarify how design professionals are hired by

local governments. We felt there were numerous reasons to back QBS:

- A 1993 Blue Ribbon Auditor General Committee on the State Procurement Code reaffirmed QBS as the preferred method for procuring design services.
- The QBS process is structured so that qualifications are established first. A firm can be rejected if the owner believes its costs are too high.
- The costs of professional services are small compared to construction costs, yet a more qualified professional can save governments more time and money in construction costs through superior design approaches.
- A more qualified professional will better analyze and develop the project’s scope before any work has begun.
- A more qualified design professional is more likely to be abreast of the latest technology and safety techniques, thus better protecting project owners and taxpayers.
- If the local government is unhappy with the price of design services, they are free to select the next most qualified firm.

By the time we realized we needed legislation to correct the problem, the Ninety-Fourth Regular Session of the Illinois General Assembly had adjourned, and our only option was to wait for the Ninety-Fifth Session to convene after January 1, 2007, or try to pass legislation in the Fall Veto Session of the Ninety-Fourth Illinois General Assembly—not an easy feat for many reasons, one being that no new legislation could be introduced during the veto session.

Fortunately, we found an existing bill we could use to carry our proposed legislation, which was added in the form of an amendment (or addition to a bill), Senate Bill 1453 (SB1453). It read: Amend *Senate Bill 1453 on page 1, line 19 by*

*inserting after period the following: In no case shall a political subdivision, prior to selecting a firm under section 7, seek formal or informal submission of verbal or written estimates of cost or proposals in terms of dollars, hours required, percentage of construction cost or any other measure of compensation.*

In order to convince the legislature about the merits of our proposal, we decided to make a list of talking points and questions legislators might ask. Because of the shortness of the veto session (not even two weeks), we divided the list of legislators and assigned members of our design professional’s team to contact them. This one-on-one contact was crucial to the bill’s eventual success.

The following are the questions and answers we developed:

**Q:** What happens to the local QBS law if we don’t pass this legislation?

**A:** Misunderstanding and confusion will spread until the amendment is passed.

**Q:** Why shouldn’t we ask for price?

**A:** A low price may reflect an inexperienced firm and a lack of understanding of the project.

**Q:** Why shouldn’t we ask for price from design professionals when contractors have to bid?

**A:** A detailed scope of work is not available to the design professional. Contractors on the other hand, are provided detailed plans from which prices can be determined for all aspects of the work.

**Q:** What advantage do local governments have by using QBS?

**A:** They are able to “marry” the best firm for that particular project, considering that firms qualifications, as opposed to having to accept a low bid which may result in a least level of effort.

**Q:** If design firms are pre-qualified to do the work, then why shouldn’t we ask for a price from a number of firms?

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**A:** Pre-qualified firms do not reflect the availability of key staff for that project nor the firm’s ability to meet project schedule.

**Q:** Is cost a factor?

**A:** Yes, cost is a factor. It becomes a factor at the negotiation stage when the client determines whether they are receiving a fair and reasonable fee. If the client is not satisfied, they move onto negotiations with the next-ranked firm.

**Q:** How do we know we are getting a fair and reasonable cost estimate?

**A:** Clients rely on independent price estimates from staff, design professionals, consultants and fee databases.

**Q:** Doesn’t price bidding increase competition?

**A:** No, price bidding reduces competition, as many firms only compete based on qualifications and will not participate in a price-shopping exercises.

**Q:** Doesn’t price bidding decrease costs?

**A:** No. A low design fee may result in a poor design, causing higher construction bids, excessive change orders, missed schedules, and higher operating costs. Design services costs account for about two percent of construction and maintenance costs, yet they significantly affect those larger cost elements.

To help design professionals lobby their lawmakers by mail, the team developed a sample letter that could be personalized and sent to senators and representatives asking for their support.



*Dear (Senator or Representative)  
The College of DuPage has asked for your urgent attention and to vote on Senate Bill 1453, which deals with Qualifications Based Selection of Architects, Engineers and Land Surveyors, or QBS. As supporters of the bill, we respect their opinion and*

*the right to share it. However, we must take issue with their version of the facts.*

*First, they say the legislation “eliminates the option for a local government to know the price of proposals in terms of dollars, hours required, percentage of construction cost, or any other measure of compensation” and is “the sole consideration in making a decision.” This is incorrect. The bill before you does not eliminate price. The question is not if price may be considered, but when. No local government will be forced to enter into any contract without knowing and agreeing to the price they will pay to the qualified design firm of their choice.*

*Second, the College of DuPage writes they “developed a process in which we ask for the quality and the fees of such work.” Further, “the cost information is used to negotiate reasonable prices with the quality firms selected.” This process amounts to bid-shopping and was developed despite the fact that the Illinois Community College Board instructed all public community college districts that compliance with the law meant asking for quality first and price second. The process the College developed is contrary to existing federal and state law.*

*Third, they ask you to “note that a legal case was brought by the Department of Professional Regulations against College of DuPage regarding its procedure.” There was indeed a legal case, however, the college has it backwards. The court case they reference (#2004 CH 000349) explicitly names the Board of Trustees of the College of DuPage as the Plaintiff and the Illinois Department of Professional Regulation as the Defendant. Who sued whom? It was the College that sued the state agency which was defended by the Illinois Attorney General. A trial court dismissed the case as having no grounds. The College appealed, and an appellate court found a loophole in the law which we are now addressing in the best arena for deciding legislative intent—the Illinois General Assembly. Not to be outdone, the College continues to pursue legal action against the Illinois government, even suing to have their legal fees paid by the state treasury.*

*Fourth, with perhaps the most baseless and egregious statement of all, the College claims the “U.S. Supreme Court considers*

*this kind of conduct price fixing, a violation of the Sherman Anti-Trust Act.” The United States Justice Department testified before Congress on QBS that “quite clearly it is not a violation of the anti-trust laws” (Congressional Record-House Government Activities Subcommittee Hearing on H.R. 12807). The United States Supreme Court stated its opinion that it is not price fixing (NSPE vs. US, f.n. 21). Finally, federal law currently requires local governments to use QBS selection for any project that has U.S. Department of Transportation funds. Raising the cry of price fixing is irresponsible, wrong and simply shows those who make the accusation do not understand the policy of Qualifications Based Selection or the Sherman Act.*

*It seems, the College has not done their homework. Their arguments either tell only part of the story, the opposite of documented events, or are just plain false. We hope you consider them accordingly.*

*SB 1453 clarifies the original intent of the Local Government Professional Services Selection Act, and makes it consistent with the State Architectural, Engineering, and Land Surveying Qualifications Based Selection Act, which is used by the State of Illinois to hire design professionals for state agency and public university projects.*

*The consequences of public buildings and infrastructure designed by the lowest bidder could be disastrous. Qualifications-based selection ensures the best people are selected, the price is negotiated based on the budget and the job is done right. Vote YES on SB 1453.*

Sincerely,  
American Council of Engineering Companies, Illinois American Institute of Architects – Illinois, Associated General Contractors of Illinois, DuPage County Federation of Women Contractors, Hispanic American Construction Industry Association, Illinois Association of Plumbing, Heating and Cooling Contractors, Illinois Association of County Engineers, Illinois Construction Industry Committee, Illinois Capital Development Board, Illinois Department of Transportation, Illinois Department of Financial and Professional Regulation, Illinois Professional Land Surveyors

*Association, Illinois Society of Professional Engineers  
Mechanical and Specialty Contractors Association, Structural Engineers Association of Illinois*



Our legislation was heard by the Executive Committee of the Illinois House of Representatives on November 14, 2006, just days after the negative court ruling. The College of DuPage and the Illinois Municipal League put up a strong vocal fight and managed to garner some opposing votes. The House floor debate lasted over an hour. The bill's sponsor Representative David Miller did a tremendous job fighting off strong opposition, and the misinformation put out that greatly confused the issue. We needed an extra-majority vote of 71 yeas for an immediate effective date (above the usual 60 votes). We won with 86 yeas, 23 nays, and 6 voted present. It was a solid success.

After passage in the House, the bill was sent to the Senate. At first, there were problems because the Senate Rules Committee didn't release our bill. But, with the help of key design professionals who again lobbied lawmakers, the Rules Committee granted emergency status to our bill, allowing it to proceed. Three hours later, we were in a Senate Hearing.

This time, the Community College Trustees Association and the School Board Association joined the Illinois Municipal League in strongly opposing our bill. Despite attempts to delay the bill until January and force a "compromise" with opponents, the bill passed out of committee with no votes to spare. The bill's Senate sponsor, Senator Jeff Schoenburg, understands procurement issues better than most legislators, and he spoke expertly on the pitfalls of price-bidding design services, both in

Committee and on the Senate floor. The bill passed the Senate on a 45-5-2 roll call, which was a tremendous victory in the face of strong opposition.

This experience provides members and lobbyists several lessons, as David E. Kennedy, Executive Director, American Council of Engineering Companies of Illinois (ACEC-IL) points out:

- Do not underestimate your influence with legislators as their constituents.
- Develop a relationship with your legislators before having to contact them on an issue—just as you would with a prospective client.
- Stand-up for your profession and oppose those like the College of DuPage who would circumvent or challenge QBS.
- Appreciate and nurture your friendships and allies, as coalitions are the way to legislative success.
- Trust your association, its leadership, and trust your members; we make a great team!

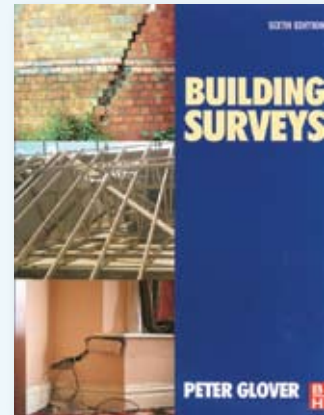
Thanks to all who wrote, e-mailed, or telephoned their legislators in support of Senate Bill 1453. It was truly a team effort.

As a part-time lobbyist for IPLSA, I want to thank the other members of the Design Professions, who, because of their contacts and full-time lobby efforts, made this a success.

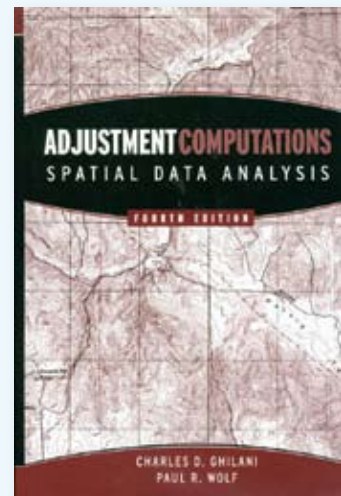
*David E. Kennedy, Executive Director, American Council of Engineering Companies of Illinois  
Bill Enlow, Lobbyist, ACEC of IL  
Jim Morphew, Lobbyist ACEC of IL  
Robert D. Wire, PE, ACEC of IL  
Kim Robinson, Executive Director, Illinois Society of Professional Engineers  
Linda Renee Baker, Lobbyist, Illinois Society of Professional Engineers  
Mike Waldinger, Executive Director, Executive Vice President, AIA Illinois  
Shirley Anderson, Lobbyist, AIA Illinois  
Alice Phillips, Lobbyist, Structural Engineers of Illinois  
Loretta Durbin, Lobbyist, Structural Engineers of Illinois  
Robert E. Church, Executive Director and Lobbyist, IPLSA*

# Reviewers needed

Review any of these books within two months, and you can keep the copy. Contact: [ilse.genovese@acsm.net](mailto:ilse.genovese@acsm.net).



*Building Surveys*, 6th ed., by Peter Glover. Elsevier, 2006.



*Adjustment Computations: Spatial Data Analysis*, 4th ed., by Charles D. Ghilani & Paul R. Wolf. Wiley, 2006.