

The Public Ought to Know: Sears' bill deserves more attention in City Council

By Corey Bearak

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In June 1997, my friend and civic colleague Jim Trent complained about practices waged by the Mayor's Office of Contract, with the appropriate acronym, MOC. A landscape architect in the procurement office at the city's Department of Design and Construction, Jim was concerned that the MOC sought to renegotiate bids for such professional services as the design of construction projects.

He argued that competitive negotiations where price is the sole or dominant factor for "judgment or intellectual services" is not in the best interest of the public nor the agencies that procure professional services. Jim said that the MOC would nickel and dime professional design consultants, with a result that could lead to poor design and cost-overruns in city projects.

Jim said New York City needed a law modeled on the Brooks law, Federal Public Law No. 92-582, which provides for the selection of firms and individuals to perform professional services for the federal government on a best-qualified basis and competitive negotiation. Makes sense to me.

Qualified Based Selection, or QBS, benefits include quality plans and specifications that result in quality contract documents with more accurate estimates and reliable bids. This would mean better designs and more accurate and reliable bids that lower construction, operating and ownership costs.

Section 136A of the State Finance Law also adopted QBS, making it "the policy of New York state to negotiate contracts for architectural and/or engineering services and/or surveying services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable fees."

Jim said the MOC misused its authority and overrode the Procurement Policy Board to approve contracts; it would pressure professional engineering and architecture firms bidding for design projects to lower their submitted bids. This occurs because contracts for architectural and engineering work with city agencies get awarded by competitive bidding with cost as the primary, if not sole, factor.

When it comes to professional design work, it makes sense to allow agencies to determine the reasonableness of price against the quality of the proposed scope of work. The federal government and the state recognize that selections for professional design services should be made based on who is best qualified. Getting the bill drafted seemed a no-brainer to me, but 20 months passed before a proposed local law (Int. No. 523) got introduced in February 1999.

Part of the reason involved the need to find a smoking gun while Jim still was employed with a city agency. No one in a city agency was jumping to come forward and say this was a problem.

Though federal and 43 state laws existed and the American Bar Association supported Quality Based Selection legislation as part of its Model Procurement Code, no one involved in the process was stepping forward, particularly at a time when the folks running City Hall had a reputation for playing hard ball if you challenged them.

We worked with the Independent Budget Office; interestingly the then-IBO attorney now works for City Hall including on contracting issues. We looked at the Mayor's Management Report for any indicators to justify drafting the bill. There was some informal outreach to the Procurement Policy Board. Finally, I reached out to Bernie Haber, then still chair of Community Board 11 and a principal in a major engineering firm. Bernie's recommendation to draft the bill carried weight.

The ABA code commentary explains that "the architect-engineer is engaged to represent the (agency's) interests and is therefore in a different relationship with the (agency) from normally existing in a buyer-seller situation. For these reasons, the qualifications, competence and availability of the three most qualified architect-engineer firms is considered initially and price negotiated later."

Sounds logical. So why does our city still not have such a sound good-government measure? It was suggested to the Charter Revision Commission created by current and previous mayors. At least one candidate for mayor supported it, and the Queens Civic Congress included it in its platform.

The Giuliani administration opposed Int. No. 523 at its only hearing in December 1999 and it died when that council session ended in 2001. Bob Benfatto, an attorney in my council office who is now chief aide to Councilwoman Helen Sears (D-Jackson Heights), got her to sponsor the legislation, Int. No. 45, in the session that ended last month. The Committee on Contracts held one hearing in November 2002.

The City Council ought to make it a priority to pass this legislation in the session that began this month. Only eight members sponsored or co-sponsored Sears' bill. It merits the sponsorship of all of her colleagues upon its reintroduction, perhaps as early as next month. The Contracts Committee ought to schedule a hearing soon to get the legislation before the entire Council.

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