

LEGISLATIVE BILL 715

Approved by the Governor April 20, 1978

Introduced by Savage, 10

AN ACT to adopt the Nebraska Consultants' Competitive Negotiation Act; to define terms; to provide duties; and to provide severability.

Be it enacted by the people of the State of Nebraska,

Section 1. The purpose of this act is to provide managerial control over competitive negotiations by the state for acquisition of professional architectural, engineering, landscape architecture, or land surveying services.

Sec. 2. This act shall be known and may be cited as the Nebraska Consultants' Competitive Negotiation Act.

Sec. 3. For purposes of this act, unless the context otherwise requires, the definitions found in sections 4 to 10 of this act shall be used.

Sec. 4. Professional services shall mean those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered land surveying as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered land surveyor in connection with his professional employment practice.

Sec. 5. Agency shall mean each board, commission, bureau, council, department, officer, division, the University of Nebraska, the Nebraska state colleges, or other administrative office or unit of state government.

Sec. 6. Firm shall mean any individual, partnership, corporation, association, or other legal entity permitted by law to practice architecture, engineering, landscape architecture, or land surveying in the state.

Sec. 7. Compensation shall mean the total amount paid by the agency for professional services.

Sec. 8. Agency official shall mean any elected or appointed officeholder, employee, consultant, person

in the category of other personal service, or any other person receiving compensation from a state agency.

Sec. 9. Project shall mean that fixed capital outlay, study, or planning activity, except renewal work as defined in section 81-173, Revised Statutes Supplement, 1977, described in the public notice of a state agency.

Sec. 10. Continuing contract shall mean a contract for professional services entered into in accordance with the procedures of this act between an agency and a firm whereby the firm provides professional services to the agency for work of a specified nature as outlined in the contract required by the agency with no time limitation. Any such contract shall provide a termination clause.

Sec. 11. The Department of Administrative Services shall, with the advice of each agency, prescribe by administrative rules procedures for the determination of a project under its jurisdiction. The Department of Roads shall prescribe such procedures for highway construction projects. Such procedures may include:

(1) Determination of a project which constitutes a grouping of minor construction, rehabilitation, or renovation activities; and

(2) Determination of a project which constitutes a grouping of substantially similar construction, rehabilitation, or renovation activities.

Sec. 12. (1) Public notice shall be given by each agency, in a uniform and consistent manner, when professional services are required to be contracted for a project whose basic construction cost is estimated by the agency to be more than one hundred thousand dollars and for professional services when the estimated fee for such professional services exceeds ten thousand dollars, except in cases of public emergencies so certified by the agency head. The public notice shall include a general description of the project and shall indicate how interested firms can apply for consideration for such contract.

(2) Each agency shall encourage firms engaged in the lawful practice of their profession who desire to provide professional services to the agency to submit annually a statement of qualifications and performance data. The agency may request a firm to update the file statement before the anniversary date to reflect changed conditions of the firm.

(3) Any firm desiring to provide professional services to an agency must first be certified by the agency as qualified pursuant to law and the regulations of the agency. The agency shall make a finding that the firm to be employed is fully qualified to render the required service. Factors to be considered in making this finding shall include capabilities to perform, adequacy of personnel, past record and performance, and experience.

(4) The Department of Administrative Services shall, with the advice of each agency, adopt administrative procedures for the evaluation of professional services, including capabilities to perform, adequacy of personnel, past record and performance, experience, and such other factors as may be determined by the agency to be applicable to its particular requirements.

(5) The public shall not be excluded from the meetings or proceedings under this section in accordance with Chapter 84, article 14, Reissue Revised Statutes of Nebraska, 1943, and amendments thereto.

Sec. 13. (1) For each proposed project, the agency or a committee designated by the agency shall evaluate current statements of qualifications and performance data of firms as are on file with the agency, together with those that may be submitted by firms regarding the proposed project, and shall conduct discussions with, and may require public presentations by no less than three firms, regarding their qualifications, approach to the project, and ability to furnish the required service.

(2) Any committee designated by the agency shall have among its membership at least one person whose profession represents that particular field of endeavor being considered.

(3) The agency or committee designated by the agency shall select, in order of preference, no less than three firms deemed to be most highly qualified to perform the required services after considering such factors as the ability of professional personnel, past performance, willingness to meet time and budget requirements, location, recent, current and projected workloads of the firms, and the volume of work previously awarded to the firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, as long as such distribution does not violate the principle of selection of the most highly qualified firms.

(4) This section shall not apply to professional service contracts for (a) a project whose basic construction cost is estimated by the agency to be one hundred thousand dollars or less, or (b) a planning or study activity when the estimated fee for professional services is ten thousand dollars or less.

Sec. 14. Nothing in this act shall be construed to prohibit continuing contracts between firm and agency.

Sec. 15. (1) The agency or the committee designated by the agency shall negotiate a contract with the most qualified firm for professional services at compensation which the agency determines is fair and reasonable. In making such determination, the agency or committee designated by the agency shall conduct a detailed analysis of the cost of the professional services required in addition to considering their scope and complexity. For all lump-sum or cost-plus-a-fixed-fee professional service contracts, the agency or committee designated by the agency shall require the firm receiving the award to execute a certificate stating that wage rates and other factual unit costs supporting the compensation are accurate, complete, and current at the time of contracting. Any professional service contract under which such a certificate is required shall contain a provision that the original contract price and any additions thereto shall be adjusted to exclude any significant sums by which the agency or committee designated by the agency determines the contract price had been increased due to inaccurate, incomplete, or noncurrent wage rates and other factual unit costs. All such contract adjustments shall be made within one year following the end of the contract.

(2) Should the agency or committee designated by the agency be unable to negotiate a satisfactory contract with the firm considered to be the most qualified at a price the agency or committee designated by the agency determines to be fair and reasonable, negotiations with that firm shall be formally terminated. The agency or committee designated by the agency shall then undertake negotiations with the second most qualified firm. Failing to reach an agreement with the second most qualified firm, the agency or committee designated by the agency shall terminate negotiations with such firm. The agency or committee designated by the agency shall then undertake negotiations with the third most qualified firm.

(3) Should the agency or committee designated by the agency be unable to negotiate a satisfactory contract

with any of the selected firms, the agency or committee designated by the agency shall either select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached or review the agreement under negotiation to determine the possible cause for failure to achieve a negotiated agreement.

Sec. 16. (1) Each contract for professional services entered into by the agency shall contain a prohibition against contingent fees as follows: The architect, or registered land surveyor, professional engineer, or landscape architect, as applicable, warrants that he has not employed or retained any company or person, other than a bona fide employee working solely for him, to solicit or secure this agreement and that he has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for him, any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award or the making of this agreement.

(2) Upon violation of this section, the agency shall have the right to terminate the agreement without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, or consideration.

Sec. 17. Any firm, other than a bona fide employee working solely for an architect, professional engineer, registered land surveyor, or landscape architect, who offers, agrees, or contracts to solicit or secure agency contracts for professional services for any other company or firm for or who is paid any fee, commission, percentage, gift, or any other consideration contingent upon, or resulting from, the award or the making of a contract for professional services shall, upon conviction, be guilty of a Class I misdemeanor.

Sec. 18. Any architect, professional engineer, registered land surveyor, or landscape architect, or any group, company, or firm who shall offer to pay, or pay, any fee, commission, percentage, gift, or other consideration contingent upon, or resulting from, the award or making of any agency contract for professional services shall, upon conviction, be guilty of a Class I misdemeanor.

Sec. 19. Any agency official who offers to solicit or secure, or solicits or secures, a contract for professional services and to be paid, or is paid, any fee, commission, percentage, gift, or any other

consideration contingent upon the award or making of such a contract for professional services between the agency and any company or firm shall, upon conviction, be guilty of a Class I misdemeanor.

Sec. 20. Notwithstanding any other provision of this act, there shall be no public notice requirement or utilization of the selection process as provided in this act for projects in which the agency is able to reuse existing drawings, specifications, and other documents from a prior project.

Sec. 21. Nothing in this act shall affect the validity of any contracts in existence on the effective date of this act.

Sec. 22. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.