



April 1, 2024

The Honorable Shailen Bhatt
Administrator
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, DC 20590

**Re: Procurement, Management, and Administration of Engineering and Design Related Services;
Docket No. FHWA-2023-0046-0001.**

Dear Administrator Bhatt:

On behalf of the American Road & Transportation Builders Association (ARTBA) and our more than 8,000 members in the transportation construction industry, we urge you to rescind the Federal Highway Administration (FHWA)'s proposed rule titled, "Procurement, Management, and Administration of Engineering and Design Related Services."¹ This proposal would exempt non-state transportation agencies ("non-STAs") from the federal regulatory requirement to utilize qualifications-based selection (QBS) procedures. The exemption would apply if the non-STA were awarded a discretionary grant directly from FHWA.² While FHWA argues this will reduce regulatory burdens for non-STAs, ARTBA contends that this change would actually exacerbate their liability and risk. Instead of dismantling long-standing procurement procedures, FHWA should offer support and resources to assist these discretionary grant recipients in effectively implementing QBS. This approach ensures the integrity of the selection process while giving non-STAs the resources they need to comply.

ARTBA's members plan, design, build, and maintain this nation's transportation infrastructure assets across all modes. We represent a diverse array of entities, including planning and design firms, construction contractors, state and local transportation agencies, materials suppliers, equipment manufacturers, and research and educational institutions. ARTBA staunchly supports the free enterprise system and advocates for open competitive bidding for highway projects.³

Our membership and association are committed to successful deployment of the record federal funding provided in the Infrastructure Investment and Jobs Act (IIJA).⁴ With safety, environmental stewardship,

¹ Procurement, Management, and Administration of Engineering and Design Related Services, 89 Fed. Reg. 5,819, (January 30, 2024).

² *Id.*

³ See ARTBA Highway Policy, available at, <https://www.artba.org/advocacy/policy-positions/highway-policy/>.

⁴ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

and on-time project delivery as priorities, our members facilitate critical infrastructure repairs and necessary improvements to our nation's transportation systems. ARTBA is concerned that the modifications suggested in this proposal would undermine the safety and integrity of transportation projects. Below please find additional comments on the rule.

Background

Under the 1972 Brooks Act, contracts for architecture and engineering services that are directly related to a construction project and utilize federal funding must foster open competition. This is achieved by advertising, ranking, selecting, and negotiating contracts based on demonstrated competence and qualifications for the specific engineering and design services being procured, all while ensuring a fair and reasonable price.⁵

Current FHWA procurement regulations outline a process known as QBS for acquiring professional engineering services.⁶ This well-established method prioritizes the qualifications and competence of the firm over the cost during the initial selection phase. QBS looks to a firm's track record, expertise, specialized abilities, creativity, and demonstrated project delivery success specifically and uniquely relevant to the project for which these services will be provided. FHWA's proposed rule would eliminate the requirement to use the QBS method for projects awarded directly to a non-STA (e.g., local or municipal agency).⁷ QBS would only apply to an STA or its subrecipient.

Comments on the Proposed Rule

I. Eliminating QBS compromises quality and amplifies risk.

a. QBS reduces risk by increasing the safety and reliability of project designs.

By selecting the most qualified professionals, non-STAs can mitigate the risk of project defects, unintended delays, and unplanned costs. Some design failures may not be detected up front. Quality concerns may not be noticed until many years after construction, or when a failure (structural or otherwise) occurs. Qualified professionals can anticipate and correct potential project challenges proactively. Without QBS, non-STAs' limited staff may need to engage in more thorough review of project designs, creating a strain on already limited resources. Overall, these agencies would be required to assume more risk and responsibility to ensure project design, which can result in monetary costs, and legal liability exposure.

b. By emphasizing the quality of the bid, non-STAs can mitigate unexpected project expenses.

⁵ 40 U.S.C. § 1101 *et. seq.*

⁶ 23 U.S.C. § 172.

⁷ *Supra* note 1.

The QBS procurement method focuses on the qualifications, experience, and record of the professionals designing the project, seeking to maximize high-quality project outcomes. The emphasis on expertise specific to the project, as opposed to the lowest bid, seeks to lessen the risk of project costs and delays. The QBS selection process also rewards design creativity, which lends itself to the best value solution. ARTBA acknowledges the budget constraints often faced by non-STAs. However, the long-term benefits and efficiencies gained from high-quality, well-executed projects ultimately amount to reduced project costs overall.

II. The rationale for and effect of QBS exemptions are questionable.

- a. *FHWA has not provided a clear explanation for abandoning QBS, a process aimed at ensuring the quality of design work.*

In its proposal, FHWA states that compliance with QBS requirements by non-STA grant recipients creates undue regulatory burdens. While ARTBA champions efforts to reduce any such barriers impeding IJIA implementation, FHWA does not provide an explanation as to how QBS ultimately contributes to these issues. The proposal lacks examples of non-STA recipients burdened by the QBS requirement. Had FHWA specifically identified project recipients or scenarios burdened by QBS, commenters could have suggested feasible alternatives to address these challenges. In its discussions, FHWA has not adequately weighed the potential trade-off between short-term expediency and the benefits of a robust selection process. QBS is designed to safeguard against unfairness and abuse, while focusing on transparency and merit. Instead, the rule would broadly remove protections governing the quality of transportation construction designs, for recipient agencies least able to withstand project cost overruns or delays. FHWA should clearly identify the types of projects most challenged by these requirements and suggest ways to assist those non-STAs with implementation of QBS. FHWA can offer additional guidance and training for non-STAs, or support from regional FHWA offices during the contracting process, including the use of industry procurement advisory services.

- b. *Proposed QBS exemptions would achieve limited effect.*

Currently most STAs, and many non-STAs, require the use of QBS in acquiring engineering design services because of statutes sometimes known as “Little Brooks Acts” or “Mini-Brooks Acts.”⁸ Thus, even if FHWA were to exempt non-STAs from these regulatory requirements, there would be no demonstrable effect on agencies functioning under these statutes. Furthermore, ARTBA’s non-STA members indicated they often run their design selection process through their STA due to the demands of handling procurement on their own.

QBS is a widely accepted and recognized practice. Many leading authorities on government contracting including the American Bar Association’s State Model Procurement Code, and Model Procurement

⁸ According to the National Society of Professional Engineers (NSPE) forty-six states have implemented some form of QBS law. See “Explore Recent Developments on Qualifications-Based Selection of Engineering Services,” available at, <https://www.nspe.org/resources/issues-and-advocacy/action-issues/qualifications-based-selection-engineering-services>.

Ordinance for Local Governments and the National Institute of Governmental Purchasing, heartily endorse QBS for engineering and architectural services.⁹ Given the strong support for use of QBS, it is unclear why FHWA would recommend diverging from current state and municipal law and widely recognized legal practices.

Finally, prospective bidders see QBS as indicating an agency's commitment to a transparent and objective procurement process. Similarly, not using QBS will disincentivize some bidders from participating, resulting in less competition.

Conclusion

For the foregoing reasons, ARTBA opposes FHWA's broad-sweeping proposal to eliminate QBS from all grants awarded directly to non-STAs. FHWA has not demonstrated a need for this rule. Instead, the rule may undermine quality design services in construction projects, potentially resulting in increased costs and delays. ARTBA therefore recommends FHWA rescind this rule and instead focus on offering additional resources to non-STAs to implement reliable contracting methods including QBS. Our association would gladly assist in this effort.

Should you require additional information or have any questions, please contact Prianka Sharma, vice president and counsel for regulatory affairs at psharma@artba.org.

Sincerely,



Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs
American Road & Transportation Builders Association

⁹ See State Model Procurement Code and Model Procurement Ordinance for Local Governments, American Bar Association, available at, https://www.americanbar.org/groups/public_contract_law/committees/state-procure/. See also Public Procurement Practice: Qualifications-Based Selection for Architectural & Engineering Services, National Institute of Governmental Purchasing, available at, <https://www.nigp.org/resource/global-best-practices/Qualifications-Based%20Selection%20for%20Architectural%20and%20Engineering%20Services%20Best%20Practice.pdf?dl=true>.