

By [John Palatiello](#) • Jan 20th, 2010 • Category: [Regulation](#)

## **A Law that Works**

The American people and its Federal, state and local political leaders, indeed elected officials worldwide should have learned an important lesson from the devastating earthquake that ravaged Haiti on January 12.

Why did Haiti suffer such abject building failures when earthquakes of similar or greater magnitude are less severe in the United States?

The answer is a combination of factors.

“It’s really not the earthquake that’s killing the people, it’s the buildings that fall down on people, that cause most of the casualties,” Thomas Jordan, director of the Southern California Earthquake Center [said January 16 on CBS Evening News](#).

The United States has some of the most comprehensive building codes in the world. Standards for construction of structures are implemented and enforced by both the construction industry and government agencies. Inspections and oversight are important government functions, but compliance and proficiency by the industry is also critical.

But the U.S. is also a leader in another area that has served the Nation well. There is a traditional process which emphasizes the importance of quality over low price in the selection of firms to provide architecture, engineering and related services.

Known as the “Brooks Act”, the Federal law enacted in 1972 codified a process that had traditionally been used by Federal agencies since before the Civil War. It provides for the selection of firms to perform architecture, engineering and related services on the basis of the competence, qualification, background and track record of competing firms, not the lowest bid.

“Ask 10 A/E firms to bid on the design of a particular facility and many agencies will take the easy way out and select the low bidder. Under such circumstances, we may end up with a technically capable architect or engineer, but one who, for lack of experience or because of a desire to stay within his bid reduces the time spent on field surveys or in the preparation of detailed drawings, or in providing inspection services. As a result, the government may have saved itself a half of one percent to the cost of construction, operation or maintenance,” said Senator Jennings Randolph (D-WV) said on the Senate floor during the 1972 debate on the legislation that became the Brooks Act.

The “qualifications based selection” or “QBS” process is codified for Federal agencies in title 40 of the United States Code, section 1101. Named for its author, then-Representatives Jack Brooks (D-TX), the Brooks Act was passed in 1972 on a bipartisan basis and has been supported by lawmakers in both parties over the ensuing 38 years.

Long before “best value” and “past performance” became the tenet of Federal procurement, the Brooks Act was enacted to assure that quality and competence was invested in “A/E” services, so the integrity of buildings, facilities and other government

activities dependent on designs, drawings, surveys, and other related services could be relied upon during construction operation and maintenance over the life of such structures. The QBS process is also endorsed by the American Bar Association in its Model Procurement Code for State and Local Government. More than 40 states, including Virginia, have enacted “mini-Brooks Acts”.

Virginia’s QBS process, Section 2.2-4301 of the Code of Virginia, provides that for the procurement of professional services, particularly architecture, engineering and surveying. Like the Federal law, Virginia publicly announces its requirements for professional A/E-related services, interested firms compete by submitting their qualifications, usually on a standard government form, [SF 330](#), the agency evaluates the firms’ submittals and selects a short list of most qualified firms for an interview. Based on evaluations of the firms’ qualifications, experience, past performance and other factors, the agency determines which firm is the most qualified to meet the government’s requirements. The government prepares an independent estimate of the anticipated cost, and a negotiation is held between the government and the selected firm to arrive at a price that is fair and reasonable to the government. In the process, the government holds the cards. If a fair price cannot be negotiated, the government is free to terminate the negotiation and begin discussions with the second ranked firm.

There is no law anywhere in the United States that requires competitive bidding for A/E services. In 2001, legislation to inject price competition to such procurement in Virginia was introduced in the General Assembly. It never made its way out of committee and the proposal has not been reintroduced since.

There is no doubt that the United States has suffered its share of faulty buildings. After incidents such as the collapse of the Hyatt regency in Kansas City and the implosion of the roof of the Hartford Civic Center, Congress investigated these incidents and issued a report on “Structural Failures in Public Facilities” in 1984. It found, “procurement practices that lead to or promote the selection of architects and engineers on a low bid basis should be changed to require prequalification of bidders with greater consideration given to prior related experience and past performance.” The chairman of the subcommittee conducting the study and publishing the report was then Rep. Al Gore, Jr. (D-TN). As President, Ronald Reagan said at ceremony recognizing design excellence in Federal buildings said, “Good design doesn’t cost money. Good design saves money, and you know how that warms my heart.”

When the landmark Competition in Contracting Act was enacted in 1984 in response to the scandals related to over-priced coffee pots and toilet seats bought by the Pentagon, Congress defined the QBS process as a competitive procedure in Federal law. During consideration of the original Brooks Act in 1972, Senator Edward Gurney (R-FL) explained “any Federal procurement officer ... will tell you that competition based on professional-technical qualifications is every bit as hot and demanding as competition based on price, perhaps more so.”

The famous showman, P.T. Barnum is well known for saying, “There’s a sucker born every minute.” What is less known is that Barnum also observed, “The smartest way of deriving the greatest profit in the long run is to give people as much as possible for their

money.” To the nineteenth century British author John Ruskin is attributed the observation, “It’s unwise to pay too much, but it’s worse to pay too little. When you pay too much, you lose a little money — that is all. When you pay too little, you sometimes lose everything, because the thing you bought was incapable of doing the thing it was bought to do. The common law of business balance prohibits paying a little and getting a lot — it can’t be done. If you deal with the lowest bidder, it is well to add something for the risk you run, and if you do that you will have enough to pay for something better.”

There is no evidence that selecting architects, engineer and related professionals on the basis of price results in higher costs. Indeed, given that such services amount to less than 1/10th of 1 percent of the total life cycle cost of a structure or facility, but affect the operation and maintenance costs over the life of the facility, the research and data shows the investment in quality in design-related services saves money and human lives.

At the same time the earthquake hit Haiti, new research was released showing government agencies in the United States achieve lower construction costs, more efficient use of taxpayers’ money and higher construction satisfaction when procuring design and engineering services for such projects on a qualifications rather than price. The study conducted jointly by the University of Colorado and Georgia Institute of Technology, drew from a database of approximately 200 public and private construction projects in 23 US states, included transportation, water, commercial and industrial projects, ranging in size from relatively small projects to those costing hundreds of millions dollars. Its authors compared various procurement methods, including QBS, Best Value, and Low-Bid, with such factors as total project cost, projected life-cycle cost, construction schedule, and project quality outcome. Results showed that using QBS to procure the design component of a construction project “consistently meant lower overall construction costs, reduced change orders, better project results and more highly satisfied owners than in other procurement methods”.

The Brooks Act is a law that works. It is part of what makes the United States the envy of the world.

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