

**ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE**

March 29, 2012

8:08 a.m.

MEMBERS PRESENT

Representative Bob Lynn, Chair
Representative Wes Keller, Vice Chair
Representative Paul Seaton
Representative Peggy Wilson
Representative Max Gruenberg
Representative Pete Petersen
Representative Kyle Johansen

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 239

"An Act relating to the procurement of architectural, engineering, or land surveying contracts funded by money from the state."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 239

SHORT TITLE: PROF. SERVICES IN STATE-FUNDED CONTRACTS

SPONSOR(S): REPRESENTATIVE(S) HOLMES

| | | |
|----------|-----|---------------------------------|
| 04/16/11 | (H) | READ THE FIRST TIME - REFERRALS |
| 04/16/11 | (H) | STA, L&C |
| 03/13/12 | (H) | STA AT 8:00 AM CAPITOL 106 |
| 03/13/12 | (H) | Heard & Held |
| 03/13/12 | (H) | MINUTE(STA) |
| 03/29/12 | (H) | STA AT 8:00 AM CAPITOL 106 |

WITNESS REGISTER

MIKE COUMBE, Staff
Representative Lindsey Holmes
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 239 on behalf of Representative Holmes, sponsor.

TERRY SCHOENTHAL
USKH

Anchorage, Alaska

POSITION STATEMENT: Testified on behalf of USKH Engineers during the hearing on HB 239.

CHRIS HLADICK, City Manager
City of Unalaska
Unalaska, Alaska

POSITION STATEMENT: Testified during the hearing on HB 239 to explain why the proposed legislation is not necessary.

CHRIS KOWALCZEWSKI, Program Manager
Pre-Development (Pre-D) Program
The Foraker Group
Anchorage, Alaska

POSITION STATEMENT: Testified during the hearing on HB 239.

COLIN MAYNARD, Member
Alaska Professional Design Council (APDC);
Chair
Qualifications-Based Selection (QBS) Committee
Anchorage, Alaska

POSITION STATEMENT: Testified during the hearing on HB 239.

TERRY NEIMEYER, Chair
American Council of Engineering Company (ACEC)
Washington, D.C.

POSITION STATEMENT: Testified during the hearing on HB 239.

MARK O'BRIEN, Chief Contracts Officer
Contracting and Appeals
Office of the Commissioner
Department of Transportation & Public Facilities
Juneau, Alaska

POSITION STATEMENT: Answered questions during the hearing on HB 239.

SAM KITO III, Architect
School Finance and Facilities Section
Department of Education & Early Development
Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on HB 239.

KATHIE WASSERMAN, Executive Director
Alaska Municipal League
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to HB 239.

ACTION NARRATIVE

[8:08:49 AM](#)

CHAIR BOB LYNN called the House State Affairs Standing Committee meeting to order at 8:08 a.m. Representatives Keller, Seaton, Johansen, Petersen, Gruenberg, and Lynn were present at the call to order. Representative P. Wilson arrived as the meeting was in progress.

HB 239-PROF. SERVICES IN STATE-FUNDED CONTRACTS

[8:09:05 AM](#)

CHAIR LYNN announced that the only order of business was HOUSE BILL NO. 239, "An Act relating to the procurement of architectural, engineering, or land surveying contracts funded by money from the state."

[8:09:25 AM](#)

MIKE COUMBE, Staff, Representative Lindsey Holmes, Alaska State Legislature, presented HB 239 on behalf of Representative Holmes, sponsor. He stated that the proposed legislation would apply the standards currently used to select those who plan public works projects to all state-funded projects, including projects run by nonprofit organizations and local governments. He said the standards are already in place for projects using federal funds. He relayed that HB 239 would require the contractor to choose the most qualified, most experienced person to do the design work, to help ensure that projects are designed correctly the first time. Mr. Coumbe said this system is currently used by the federal government, 41 other states, and many other local governments around the state, including Fairbanks, Anchorage, and Juneau. He noted those available to testify.

[8:11:47 AM](#)

REPRESENTATIVE SEATON directed attention to [subsection (b)], beginning on page 2, line 3, of HB 239, which read as follows:

(b) If negotiations with the most qualified and suitable professional person under (a) of this section are not successful, the contracting person shall negotiate a contract with other qualified professional persons of demonstrated competence, in order of the ranking of the proposals by the contracting person.

REPRESENTATIVE SEATON asked if there has been much litigation related to the choice of most qualified bidder. He then noted that the State of Alaska has a small procurement process for those procurements under \$100. He related that several of the municipalities in his district already use this process. He said [the state] gives a lot of small grants to nonprofit organizations that may need to do some minor surveying or engineering. He stated, "I would like to find out whether the people who are testifying on this bill have a problem with inserting the same level of procurement ... in this bill, so that small procurement processes for nonprofits and municipalities -- that the small capital grants that we give could be under the small procurement process instead of this process."

[8:14:43 AM](#)

REPRESENTATIVE SEATON drew attention to a proposed amendment in the committee packet, labeled 27-LS0596\M.2, Bannister, 3/28/12, which read as follows [original punctuation provided]:

Page 2, line 22, following "that":
Insert "(1)"

Page 2, line 23, following "construction":
Insert "; or
(2) would not exceed the amount for small procurements under AS 36.30.320(a) if the contract were subject to AS 36.30 (State Procurement Code)"

REPRESENTATIVE SEATON clarified, "In other words, if the amount of the grant that we're giving is less than the amount that the state uses for small procurement process, then it would be exempt from the procedure."

[8:15:52 AM](#)

MR. COUMBE, in response to Chair Lynn, said the definition of "best qualified" is set by [the person doing the contracting] -

the person who is the receiver of the state funds - and it will differ depending upon the needs of the localities.

[8:16:57 AM](#)

REPRESENTATIVE P. WILSON said she knows of contractors who repeatedly get bids by under-bidding, but end up charging more when the cost of the project rises above the bid price. She said there has even been a law suit, which takes considerable time, during which one of the contractors that was sued successfully got another project started by under bidding yet again. She questioned what affect HB 239 would have on such a practice.

[8:18:13 AM](#)

MR. COUMBE said HB 239 is designed to help solve that problem, because instead of going to the lowest bid for design work there would be a ranking of the people as to qualification. The proposed legislation takes the lowest bid choice out of the equation. He said, "You have to choose the most qualified first [and] negotiate. If you're not satisfied with that negotiation, you can go to the next most qualified next, but you're always going through the list as you have determined where the ranking of qualifications are." In response to a follow-up question, he said this pertains to the design of the project, not for the construction of the project.

REPRESENTATIVE P. WILSON concluded that under HB 239, those who are not experienced would not be given a chance.

MR. COUMBE responded that the intent is to pick the most experienced first for the design phase, because the design of the project will determine how the rest of the project will go.

REPRESENTATIVE P. WILSON reiterated that this would never give a chance for someone new to come in and do something.

MR. COUMBE ventured there is probably some other way for a brand new person to work with someone with more experience first.

REPRESENTATIVE P. WILSON opined that the proposed legislation would set things up well for those already established and that is not fair.

CHAIR LYNN concurred. He offered his understanding that a person who gained experience by working with someone who is

experienced, then started his/her own company, would again be considered inexperienced.

[8:21:25 AM](#)

MR. COUMBE deferred to those in the practice.

[8:21:45 AM](#)

REPRESENTATIVE KELLER asked how the state monitors what municipalities do on their state contracts.

MR. COUMBE answered that currently state agencies deal with the people who are running the state funds projects - municipalities or nonprofit organizations - and those agencies are currently responsible for monitoring the contracts and enforcing the law, and they will continue to do so under HB 239. In response to a follow-up question, he said the agency involved is whichever agency is doing the contract work.

[8:23:26 AM](#)

REPRESENTATIVE P. WILSON offered another example of those with experience keeping those without experience from having a good chance at working. She said the result was increasing costs around the state. She opined that someone with more experience may not necessarily be the better choice over someone just out of school. She posited that [HB 239] will raise the cost of doing business in Alaska.

[8:24:46 AM](#)

MR. COMBE reminded the committee that the state currently uses this qualification-based selection, and the intent of HB 239 is to expand that practice to municipalities when state funds are involved.

[8:25:55 AM](#)

REPRESENTATIVE GRUENBERG directed attention to a legal memorandum, dated 1/24/11, [included in the committee packet], which he said raises a number of issues that he wants addressed at some point.

[8:26:22 AM](#)

REPRESENTATIVE SEATON opined that the question Representative P. Wilson raised is an important one. He suggested that a bidder who underbids and ends up charging more could be lowered on the qualified bidder ranking list.

MR. COUMBE deferred to a future testifier, but said HB 239 would not limit the criteria that the municipalities or nonprofit organizations would use to determine the qualifications.

[8:28:01 AM](#)

MR. COUMBE, in response to Chair Lynn, said under HB 239 the municipalities would still determine the qualification factors to ensure that the design work is done by the most qualified.

[8:30:28 AM](#)

TERRY SCHOENTHAL, USKH, testified on behalf of USKH, which he imparted is a design firm that has architects, engineers, landscape architects, and surveyors. He addressed some of the issues brought up by committee members. He predicted that HB 239 would have significant ramifications in cost to the state, because smaller communities do not hire solely on cost, but also on expertise. He relayed that in cases where cost is factor, there is a high preponderance of cases that go to the low bidder.

MR. SCHOENTHAL said there seems to be a consistent pattern of confusing the construction portion of a project with the design portion. He said they are two completely different animals. A designer is hired not only to do the design, but also to prepare a set of legal documents that allow the community to bid the project and get fair bids. Those documents can be lengthy; every aspect of the project is identified in them. When and request for proposals (RFPs) come out for design, it is about 20 pages long, and there is perhaps only 1 page that describes the design aspect. Frequently, at the start of a project, he said, everything that will be needed is not known.

MR. SCHOENTHAL, in response to Representative Seaton's concern about litigation, relayed that although selection based on qualification occasionally results in protest, it rarely results in litigation. Regarding small procurement, he said it already exists throughout the state. Regarding fairness to those with less experience, he said he has helped people get their start in the business, but does not recommend hiring someone without experience in design work when spending state money, especially

in rural areas. He said, for example, that when people are brought from outside Alaska, they are not familiar with the circumstances that are common to the Alaska environment. He said it takes years of practice to be able to design for Alaska. He said a person who leaves a firm and starts off on his/her own does not start from scratch, but carries a collection of work to the new venture.

8:37:40 AM

MR. SCHOENHAL mentioned fairness, and he said at the start of a project, with the RFP, the actual statement of work for almost all design projects is minimal, which makes it virtually impossible to bid on the work itself. He said many communities already have a qualification-based process in hand.

8:39:00 AM

CHAIR LYNN asked Mr. Schoenthal to explain why municipalities, rather than state, should be able to decide between methods of procurement.

MR. SCHOENTHAL answered that when state money is involved, Alaskans have a vested interest in how that state money will be spent in municipalities, and he opined that the state should have a say in how the municipalities will spend that money. He said at the local level, larger communities often have staff with experience on how to select the best contractors, whereas smaller communities "have a tougher go of it" and go through the bidding process. He indicated that some communities may be accustomed to using the bidding process for small projects and think they might as well use the bidding process for design work, but he said they should not do that. He explained that the design aspect often is not clearly defined and can include a much broader range of services.

CHAIR LYNN interpreted Mr. Schoenthal as saying that "this" is akin to the federal government telling Alaska how to spend the money it gives the state. He asked if that is correct.

MR. SCHOENTHAL answered that it is to a degree. He said currently the federal government requires designers to be selected based on qualifications for virtually all state projects, "and what we're asking is that when state monies pass through to these smaller communities that they ... use a ... similar way of making those selections."

CHAIR LYNN asked, "So, we follow the federal model?"

MR. SCHOENTHAL answered, "Well, I would say we follow the state model."

[8:41:45 AM](#)

REPRESENTATIVE SEATON directed attention to [the first sentence] of subsection (e), on page 2, beginning line 12, which read as follows:

(e) Notwithstanding the other provisions of this section, a contracting person may include price as an added factor in selecting architectural, engineering, or land surveying services when, in the judgment of the contracting person, the services required are repetitious in nature, and the scope, nature, and amount of services required are thoroughly defined by measurable and objective standard to enable professional persons making proposals to compete with a clear understanding and interpretation of the services required.

REPRESENTATIVE SEATON asked Mr. Schoenthal if he thinks those are necessary restrictions. He opined that the language seems so heavily modified that it may make the ability to include price meaningless.

[8:43:16 AM](#)

MR. SCHOENTHAL explained that the language illustrates that when services are going to be put to bid, there needs to be a clearly defined scope. He said he does not have a problem with a municipality or small community bidding design services, as long as there is a clear scope of work. He stated, "The Corps of Engineers frequently ... bids it as part of the design/build project." He pointed out that an RFP for a Corps of Engineers' project is often 1,000 pages long. Using a vehicle purchase as an analogy, he said that when someone says they want a car, then that information does not reveal whether he/she wants a Cadillac or a [Ford] Fiesta. He said it is difficult to get reasonable bids on a project when the description of that project is only two pages long.

[8:45:03 AM](#)

REPRESENTATIVE GRUENBERG ventured that subjective criteria as opposed to objective could cause protest and litigation. He said state procurement code falls under AS 36.30 and HB 239 would create AS 36.90. He said he sees potential for protests involving communities and/or various professional firms across the state. He said the committee has not seen estimates to what additional costs to consumers may be, and he questioned who should adjudicate these issues.

[8:48:37 AM](#)

MR. SCHOENTHAL said in his 25 years of experience he has never worked for a firm that litigated as a result of not having been chosen for a project based on what Representative Gruenberg has identified as subjective criteria. He suggested to the committee that "it's much less subjective than you think it might be." Those who write RFPs must identify exact projects, references, and other objective information. He clarified that his experience has shown far less litigation [resulting from design bidding] compared to litigants from the contracting side that are protesting bids.

REPRESENTATIVE GRUENBERG questioned whether there may be a need for a provision in bill as to how any disputes should be resolved by the state.

MR. SCHOENTHAL responded that currently litigation is handled locally by municipalities.

[8:52:49 AM](#)

REPRESENTATIVE GRUENBERG offered an example wherein a group of his constituents used state money to purchase land on which to build a cultural center, but subsequently realized they could not afford the project and asked for the money back, which they had a right to do. However, the person who had sold the land not only did not give the money back, he/she also tried to file for bankruptcy. Representative Gruenberg said there is no provision to protect the state's money in this type of situation. He observed that under HB 239 there may be a lot of state money given to municipalities, but there is no language in the bill to the state's investments.

[8:55:10 AM](#)

MR. SCHOENTHAL said, "This bill doesn't change that." However, he said in the bidding of contracts, it is the oversight of other contractors that "keeps the system honest."

[8:56:27 AM](#)

REPRESENTATIVE PETERSEN questioned that this bill may perpetuate the "good ol' boys' club," which could result in the hiring of people with connections.

MR. SCHOENTHAL said that happens not only on the municipal level, but also on projects throughout the state, and "we" accept it as part of the process. He noted that that happens almost as often when bids are accepted, because bidders "are privy to information that other contractors might not have when they put that bid together." He said it is possible only to aim for perfection and get as close to it as possible in an imperfect world.

[8:57:56 AM](#)

CHRIS HLADICK, City Manager, City of Unalaska, testified that he has been a city manager in Alaska for 20 years and has been awarded millions of dollars in projects over the years. He said Unalaska has constructed many public works projects, which have been financed in partnership with the State of Alaska, and he said the community appreciates the state's support and has always complied with purchasing and procedural rules. He offered examples of projects done with state money.

MR. HLADICK offered his understanding that the intent of the bill is to prevent municipalities from coming back to the state to ask for more money as a result of design errors. He said the City of Unalaska has never done this. He said the most significant design problems he has dealt with as a city manager have been on projects where the designer was selected by the state. He said the City of Unalaska thinks the current system of grant agreements and regulations as a source of purchasing procedures for design services adequately protects the state from cities using incompetent design professionals. He opined that his community does not need another state mandate. He said the City of Unalaska is not aware of any information suggesting projects built by municipalities have more design problems than projects built by the state or the Corps of Engineers. In fact, he said, 1,200 pages of documents would result in higher costs overall. He mentioned an upcoming presentation by the City of Unalaska that explains the process the city uses in selecting

design consultants. Mr. Hladick stated that HB 239 is not needed, because design professionals are already selected based on qualifications, and any requirements regarding the method of selection the state desires can be contained in grant agreements or regulations, which are much more easily adaptable to changing circumstances than a state statute.

[9:01:09 AM](#)

REPRESENTATIVE GRUENBERG suggested that if the committee is going to hear testimony from design professionals who support HB 239 and individual cities that oppose HB 239, then it should also hear from state agencies to address whether the legislation should focus on providing a mechanism for the state to be able to monitor the situation to see if any problems arise as a result of HB 239.

[9:03:14 AM](#)

REPRESENTATIVE SEATON asked Mr. Hladick if he would support HB 239 if it included an exclusion for small procurements of, for example, \$100,000 or \$200,000.

[9:03:54 AM](#)

MR. HLADICK replied that he would have to consider the question and return with an answer. In response to Representative Gruenberg's previous suggestion, he said an issue for the state has always been how to get the most for the money and assure quality control. He said, "I think we all can't disagree with that comment."

[9:05:28 AM](#)

CHRIS KOWALCZEWSKI, Program Manager, Pre-Development (Pre-D) Program, The Foraker Group, stated that one purpose of the Pre-D Program is to prevent situations such as Representative Gruenberg described from occurring in his district. She said the Pre-D Program assists with the procurement of design services about 12 times a year.

MS. KOWALCZEWSKI said she would focus on whether or not the proposed legislation is needed, from the standpoint of the recipients of state grants. She said most of the organizations the Pre-D Program works with are small non-profits and communities with little experience with capital project [grants]. Many of them assume that professional services are

bid to just like construction services. Some municipalities have procurement codes that require this approach, she said, but in most organizations it is usually a case of not understanding the options; some think that the same process is used to apply for design bids as is used to apply for construction bids. When an inexperienced organization attempts to bid design services, it is usually not in a position to clearly define the scope of work. She offered an example wherein the bids varied greatly because the bidders had to make assumptions as to the level of public involvement, how many public meetings there would be, and when specialists should be utilized. The main concern of the municipality had been to get a firm price within its budget.

9:09:26 AM

MS. KOWALCZEWSKI said an organization must negotiate with the most qualified firm to obtain the services desired within budget. If a negotiation does not result in agreement, then the organization can then negotiate with the next most qualified firm. She said most projects go through the qualification-based selection process, and most experienced developers know they are better off using a competitive qualification-based selection process or they have the expertise to develop the detailed bid specifications that are needed to bid it. She stated that communities and non-profit organizations are told about the advantages of the qualification-based system and are "quite willing to ... go down that road"; it is only the municipalities and organizations with procurement policies requiring that services be bid and inexperienced organizations that don't know about qualification-based elections that run the risk of getting less than they need in terms of services, with no option for negotiations.

MS. KOWALCZEWSKI indicated that although this issue is not a big problem in the state, there is no reason not to support the proposed legislation. She said HB 239 would remove some of the uncertainty about the process of obtaining professional services and ensure that the most vulnerable of the state's small non-profit organizations and communities do not waste their limited resources on less than adequate lowest bidders' designs.

9:12:29 AM

MS. KOWALCZEWSKI talked about the criteria to decide who is most qualified. She said it usually has to do with experience with a specific type of design and locale of a project, considers the history of a design firm in staying within budget and on

schedule, and looks at the specific way a firm delivers services. All of that information helps an organization or municipality to decide who is in the best position to deliver the service.

[9:13:53 AM](#)

MS. KOWALCZEWSKI, in response to Chair Lynn, clarified that local communities know best the qualifications that need to be met to design a project for their area. Once a selection is made based on qualification, she said, it is up to the community to include costs, if it wishes to do so. She said, "This does not take away that control from the community; it just gives them more options for getting a better choice."

CHAIR LYNN offered his understanding that under HB 239, "they" don't have that many options.

MS. KOWALCZEWSKI offered her understanding that under HB 239, the selection would be made on the basis of qualification first and then, following that, negotiations on costs could be made. She added, "In practice, it becomes part of the selection process."

[9:17:12 AM](#)

REPRESENTATIVE SEATON referred back to the first sentence of subsection (e), on page 2, lines 12-18 [text provided previously], and he noted that there are many restrictions placed on the ability of contracting persons to include price as an added factor in selecting services. He asked Ms. K if The Foraker Group would have any objection to the removal of those restrictions.

MS. KOWALCZEWSKI responded that she is against the removal of that language, because it is necessary to ensure a clearly defined level of work.

[9:19:12 AM](#)

REPRESENTATIVE GRUENBERG offered his understanding that The Foraker Group assists smaller non-profit organizations rather than municipalities.

MS. KOWALCZEWSKI said that is correct; however, she relayed that recently The Foraker Group has worked with municipalities on library projects.

REPRESENTATIVE GRUENBERG offered his understanding that Ms. K is the only one who has testified on behalf of nongovernmental grantees. He said he is wondering whether HB 239 will provide an opportunity for "us" to assist grantees in successfully negotiating the process. He said he may be looking more to Ms. Kowalczewski's clientele, rather than municipalities, because municipalities already have a set of laws.

MS. KOWALCZEWSKI responded, "That is exactly my direction here." She reiterated that the smaller non-profit organizations are confused by the process. She posited that the benefit of [HB 239] to the non-profit sector would be to clarify expectations. She added, "And I think they would be happy to comply with those."

REPRESENTATIVE GRUENBERG said he would like Ms. Kowalczewski's advice as to helping "these people" to prevent the type of situation as he previously described in his district from reoccurring.

[9:25:49 AM](#)

COLIN MAYNARD, Member, Alaska Professional Design Council (APDC); Chair, Qualifications-Based Selection (QBS) Committee, said qualifications-based selection is already used across the state, and HB 239 would remove only the fee as one of the criterion. He said unfortunately the fees can run a wide gamut, because the scope of work is not clearly defined. He offered an example. He said most organizations do not have the sophistication to well-define the scope of work, which leaves those submitting bids to doing a lot of guesswork. He said negotiating a fee and scope of work with the most qualified team will result in a meeting of the minds between the two parties and a much better project, with a design team that will "get you a better set of construction documents that are going to save you a lot of money on 99 percent of the total project costs."

MR. MAYNARD addressed previous questions. He said he has only heard of one instance in his 32 years of experience where the most qualified was not able to negotiate a scope and fee, and he said he has not heard of any litigation regarding selection of design (indisc. - coughing) and qualifications-based selection. Regarding the small procurement process, he said APDC does not have a problem with that. In response to Representative Seaton's question about the language on page 2, [subsection (e)], he said he would not advise eliminating the [restrictive]

language because it would gut the bill. He offered an analogy of buying a car without specifying its features. He said when fee is used as part of the selection criteria, many times what the owner thinks is included and what the designer thinks is included differ.

[9:30:42 AM](#)

REPRESENTATIVE SEATON asked Mr. Maynard if he thinks there has to be a qualification that price can only be included when [the services required] are "repetitious in nature", even when the scope of the work has been fully defined.

MR. MAYNARD recommended leaving "repetitious in nature" in the language, because it would leave another option. He said repetition in services could aid in determining price or scope.

REPRESENTATIVE SEATON pointed out that the way the language is in subsection (e), "repetitious in nature" is connected to "the scope, nature, and amount of services required" by "and"; therefore, it cannot be considered individually. He asked Mr. Maynard, "Do you think that it needs to be that you can only use price if the service is repetitious in nature?"

MR. MAYNARD answered yes, because every construction project is different.

[9:32:31 AM](#)

TERRY NEIMEYER, Chair, American Council of Engineering Company (ACEC), relayed that ACEC is an advocacy organization comprised of 5,000 members and over 500,000 employees throughout the U.S. He further relayed that ACEC of Alaska is comprised of 33 member firms, with 1,264 employees, and is a member of APDC. Mr. Neimeyer said he would give a perspective on what is happening in relation to qualifications-based selection across the country. He said from ACEC's perspective, qualifications-based selection is the preferred method of selection for four reasons. The first reason is because it is unique. He echoed Mr. Maynard's comment that scope needs to be defined in order to find the proper engineer. The second reason is that there are long-term savings on projects. He said the following costs are considered: the cost of engineering, the cost of construction, and the cost of change orders associated with the construction. He said engineers are in the business of securing the public interest, and low bidding is not a good technique to do so. He said many of Alaska's problems are unique to the state. He

mentioned studies in which ACEC participated in the late '80s, in Florida and Maryland, which proved conclusively that low-bid engineer services cost total projects more than final costs. Including Alaska, there are 46 states that require qualifications-based selection, and of those 46, 25 have statutes that require local entities using state funds to use qualifications-based selection. He said Washington, Oregon, and Montana "have it on their books."

MR. NEIMEYER said at the last hearing he attended people [asked], "Is it broken?" He said his answer is: "Yes, it's broken but it's not visible, because it's buried in the total project cost" He relayed that QBS is endorsed by the American Bar Association, the American General Contractors Council, and the American Public Works Association. He said the reason QBS is chosen is because it results in the overall lowest cost. Mr. Neimeyer stated that he has never heard of an instance where there has been litigation over this issue. He posited that QBS actually reduces litigation by reducing the number of change orders.

MR. NEIMEYER said it is not impossible to hire someone new, but in terms of public safety, he used a heart surgeon analogy: "Even though you don't want to use the guy that's having his first major heart surgery, you wouldn't mind if somebody is looking over your doctor's shoulder, who's the most qualified, who is watching him do the surgery before they would operate on you." Regarding whether it is possible to use a percentage of change order on a contract as a selection criterion, Mr. Neimeyer said yes. He explained that a person could answer "not as qualified" under the question, "What is your change order experience?"

[9:37:57 AM](#)

REPRESENTATIVE GRUENBERG asked Mr. Neimeyer if he thinks it would be helpful to have some way to assist communities in having this new requirement given to them.

MR. NEIMEYER responded that there are two states in union, Wyoming and Montana, which are similar to Alaska in that much of the land area is sparsely populated. Both those states have QBS statute. He relayed there are two resources for small communities. The first, he said, is a section regarding QBS on ACEC's web site, which shows the whole process. The second is that American Public Works Association has a group of officials that can help during a typical highway project, for example, by

providing a list of qualifications to use to set up criteria. Both resources are complimentary.

[9:42:06 AM](#)

MARK O'BRIEN, Chief Contracts Officer, Contracting and Appeals, Office of the Commissioner, Department of Transportation & Public Facilities, offered to answer questions from the committee. In response to Representative Seaton, he said currently the provision for QBS is found in the competitive sealed proposal statute and "triggers at [an] amount above the small procurement threshold." He said "in this case" the QBS procedure does not apply to the small procurement statute. He said a QBS is conducted for most small procurements done by architects, engineers, and land surveyors, because it is the right thing to do.

REPRESENTATIVE SEATON asked Mr. O'Brien to explain how integral land surveying is to the architectural and engineering sections of HB 239.

MR. O'BRIEN said he is not sure it is an issue of integration, but rather is a question of history. He said the Brooks Act, which mirrors the QBS on the federal side, started with those three categories. As states, municipalities, and other owners adopted similar provisions, they did so based on the same structure that was in that Act. He said AS 36.30.270 is often called "the mini Brooks Act," because it closely resembles the original Act.

[9:45:22 AM](#)

REPRESENTATIVE SEATON asked Mr. O'Brien if he sees the same savings and problems occurring in engineering and architectural [services] as in land surveying services or if he sees them at the level of fairly small grants, as being a "different animal."

MR. O'BRIEN answered that he does not have experience in that area. Notwithstanding that, he ventured, "In general since they're similar in their licensure and similar in the way they're treated as professionals, I think that's why they're included in the same category."

[9:46:43 AM](#)

REPRESENTATIVE GRUENBERG observed there are governmental and non-governmental grantees. He said he would like to see an

encouragement on policy basis and assistance from the state to help grantees see the benefit and make the transition.

[9:47:41 AM](#)

MR. O'BRIEN said he agrees that providing assistance makes sense; however, he said he does not know what resources are available to do that. He said there are grant administrators in the state.

REPRESENTATIVE GRUENBERG asked Mr. O'Brien to think on this.

[9:48:55 AM](#)

REPRESENTATIVE P. WILSON asked if currently a rebid can take place if negotiations are not successful.

MR. O'BRIEN answered yes, under certain circumstances.

REPRESENTATIVE P. WILSON offered her understanding that "this bill takes that away."

MR. O'BRIEN said he is not aware that that would occur under HB 239.

REPRESENTATIVE P. WILSON said a memorandum from the city manager of Unalaska is where she read that comment.

MR. O'BRIEN said he has seen a rebuttal to that from APDC, and he offered his understanding that APDC does not believe that that language is in the proposed legislation. In response to Chair Lynn, he said the department does not have position on the bill. He added, "It doesn't really affect us."

[9:50:58 AM](#)

SAM KITO III, Architect, School Finance and Facilities Section, Department of Education & Early Development, stated that the department passes funding through to the school districts, which then implement the projects. He said the department has a regulation that requires that school facility projects be selected with a most qualified offer; it is regulation 4 AAC 31 06 5. One component of the regulation is the most qualified offer and the other is ensuring competition. He said the regulation requires that the process be followed for those projects that have a design fee that exceeds \$50,000, which is significantly higher than the small procurement level for the

Department of Transportation. He offered his understanding that there are two reasons for that: to ensure that the process is competitive and qualifications based.

9:53:05 AM

KATHIE WASSERMAN, Executive Director, Alaska Municipal League, testified in opposition to HB 239. She remarked that so much time has been devoted by the legislature in discussing this issue, when there is really no need for it. Furthermore, she stated that the majority of municipalities that do not use this method also do not see a need for it. She questioned a statement made by a previous testifier that a majority of municipalities in the state use this method, but said even if that is true, she does not see what the problem is. She said she also does not see a problem with those municipalities that choose not to use it.

MS. WASSERMAN stated that when she was the city manager and mayor of Pelican and received money from the state, usually the agency that gave the money - the Department of Transportation - helped with the RFP process. She said help is already there for the asking. She opined that HB 239 is "terribly intrusive legislation."

REPRESENTATIVE GRUENBERG said he has heard a dichotomy in the testimony: the design professionals opined it would be beneficial and Ms. Wasserman says it should not be mandatory. He said he does not see those two views as mutually exclusive. He suggested the needs of nongovernmental and governmental entities may differ. He asked Ms. Wasserman how AML would feel about having legislation that would assist those communities that would like to learn about the process and, if so, how that should be done.

MS. WASSERMAN said the state could help those communities through the RFP process without any new legislation. She stated that remote municipalities have found numerous times that the state steps in to do something and then leaves the municipalities on their own to figure out the process.

REPRESENTATIVE GRUENBERG suggested that HB 239 could be a vehicle to assist those communities.

MS. WASSERMAN said while she appreciates that thought process, she thinks "that is another problem outside of the scope of this."

[9:59:19 AM](#)

REPRESENTATIVE SEATON moved to adopt Conceptual Amendment 1, to change [the first] "and" on page 2, line 15, to "or". There being no objection, Conceptual Amendment 1 was adopted.

[10:00:13 AM](#)

REPRESENTATIVE SEATON moved to adopt Conceptual Amendment 2, to remove "land surveying" from the bill title and from the body of the bill. There being no objection, Conceptual Amendment 2 was adopted.

[10:00:47 AM](#)

CHAIR LYNN said HB 239 is a complicated piece of legislation. He talked about trying to be fair to everyone, while protecting local governments and the state's money - which is really the people's money.

[10:01:11 AM](#)

CHAIR LYNN closed public testimony.

CHAIR LYNN announced that HB 239 was held over.

[10:01:45 AM](#)

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 10:02 a.m.