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COMMITTEE REPORT

HOUSE

6/18/81

FURTHER:

(5)

Date: 6-18-81

Mr. Speaker:

The Committee on LABOR & COMMERCE has had HB 612

"An Act relating to public contracts for architectural and engineering services.

under consideration and reports it back as follows:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for 30787 same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

COMMITTEE TAPE LOG

TAPE NUMBER 1,2

COMMITTEE LABOR AND COMMERCE

HEARING DATE 9/22/81

MEMBERS PRESENT Chairman Terry Martin, Rep Bernie Bylsma

LEGISLATION CONSIDERED House Bills 600 & 612

METER NO. PERSON SPEAKING/ACTION

012 TP1/1 Don Dent, Engineer, President of Bd. of Dir. AK Prof Design Co
cl.

204 TP1/1 Leo McGlothlin, State President, Amer. Institute of Architects

297 TP 1/1 Ken Cannon, President, CCC Architects

669 TP1/1 Ray Shumway, Dep Commissioner, DOT

384 TP1/2 Charles Tryck, Consultant Engineers Commission of AK

679 TP1/2 Ray Shumway (correction to testimony)

1/15/82

TESTIMONY OF MR. CHARLES E. TOPKKO
President, Consulting Engineers Council of Alaska

Mr. Chairman and members of the Committee, my name is Charles E. Torkko. I am the President of the Consulting Engineers Council of Alaska. The Council is an association of active engineering firms dedicated to advancing the quality of engineering in Alaska. I would like to speak today in support of legislation ensuring that the selection of registered professional architects, engineers, and land surveyors for public projects will be made on the basis of professional qualifications and competence and not on premature fee or price bids. To assist the Committee, I have prepared copies of my remarks which I would like to leave with you, Mr. Chairman, at the conclusion of my testimony.

Traditionally, the selection of architects, engineers, and land surveyors--like many other learned professions--has been conducted through an evaluation process based on demonstrated competence and professional qualifications to perform the specific work that is desired. In this regard the selection of an engineer differs from the selection of a vendor for parts or supplies and from selection of construction contractors in that the choice of a vendor or contractor is generally based on detailed specifications and a quoted price, and contracts are generally awarded on a "low-bid" basis. The reason for this difference lies in the fact that the

professional architect or engineer offers a service that calls for applying state-of-the-art techniques to problems which are invariably unique and result in procurement specifications for vendors and construction contractors. I have been a professional engineer for over 20 years, and I can represent to this Committee that in those years I cannot remember solving the same design problem twice. Given these circumstances, the sole consideration in selecting an architect or engineer for a project must be whether the education, skills, and experience represented are best suited to the specific design problems of a proposed project.

No one in this room today--if he or she were ill--would think of asking for bids from physicians and expecting the low bidder to cure a person's illness while restricting the physician's resources. Nor would anyone with a particular complex legal problem--let's say an antitrust matter--ask for bids from the entire legal profession hoping that the most qualified attorney will just happen to submit the cheapest price. Similarly, in the design of a building or other public project, the first and foremost consideration must be the relative skill and experience of persons proposing to do the work. Only after a person or firm has been selected as the best qualified, and after the full requirements of the job have been assessed, should an attempt be made to negotiate a fair and reasonable price for the desired work. I stress the terms "fair" and "reasonable" because I do not mean to suggest that the cost of professional services should be ignored. It must always be the duty of the state or local official responsible for a public project to ensure that fees for professional

architectural or engineering services are amply justified. However, the only time that such a determination can properly be made is after the full scope and complexity of the project are understood, through negotiation. The selected firm must often be given clarifying assistance in the development of the project's objectives.

Many of you might ask what is wrong with requesting preliminary fee bids or estimates of charges for architectural and engineering services. Who loses if a contract is awarded based on, or substantially influenced by, such fee bids?

First and foremost--it is the public who loses--as the ultimate consumer for the proposed project. The public loses in that a few dollars saved at the critical design stage through shortcuts or unimaginative design solutions will result in increased construction costs and--more importantly--in increased operating, maintenance, and other life-cycle costs for the project over the many years of its useful life.

The public loses again in terms of receiving less than maximum value or utility from the project. A "bargain" price is no bargain if the item purchased does not do the job or does it at reduced efficiency.

Second, the professions of architecture and engineering suffer. Human nature being what it is, if fee bids or price estimates are injected prematurely into a competition process, the temptation to "lowball" the bid

will often be irresistible. A job obtained through a "bare bones" bid will produce one of two results. Either the client, and in this case the public, gets a less than optimal project and pays manyfold for the few dollars saved in design costs, or the design costs are later escalated upward through change orders as the client discovers the true cost of quality, professional work. This is, of course, unfair to others in the competitive process who may have refused to sacrifice professional quality for price.

The concept that I have outlined for you today, and which is represented in the legislation before this Committee, is neither new nor radical. As I mentioned at the beginning of my remarks, the generally accepted method for selecting architects and engineers has been to defer negotiation of fee until after a selection has been made based on qualifications. The federal government recognized the need to ensure that this concept is protected by passage of the Brooks Act in 1972. Many other states have followed this precedent and have enacted similar legislation. I have attached a list of these jurisdictions to my written remarks for the information of the Committee. Also, the American Bar Association, after years of effort, has adopted its Model Procurement Code, which calls for competitions to be based on qualifications and for the best qualified person or firm to be selected before fee or price is negotiated. Finally, the Alaska State Board of Registration for Architects, Engineers and Land Surveyors, established under Title 8 of the Alaska Statutes, has adopted, as a regulation with the force of law, 12 AAC 36.230, which prohibits registered professional architects and engineers from soliciting

or submitting proposals for services based on fee or price bids.

Although the substantial majority of public contracts for architectural and engineering services in Alaska are presently being advertised and awarded in accordance with the concept I have described, there have, unfortunately, been cases in which, either intentionally or inadvertently, registered professionals have been requested to submit fee bids. When a registered architect or engineer is faced with such a request, he or she must either decline to submit a proposal for the public job or be placed in a situation which violates the code of professional conduct established by regulation. The legislation which the Consulting Engineers Council of Alaska supports would specify that for contracts with registered architects or engineers issued by the state or a political subdivision, the initial selection of a person or firm must be made on the basis of professional qualifications and demonstrated competence to perform the desired work. I would, however, like to stress that the state or local official would, under this proposal, be free to establish whatever procedures or criteria they deem best in selecting a qualified person or firm. The only requirement under the proposed bill is that an attempt be made to negotiate a fair and reasonable fee with a person or firm selected as best qualified to perform the needed work. If negotiations with that person or firm are unsuccessful, state or local officials remain free to negotiate with other qualified applicants or to reject all or part of the remaining proposals. The recommended legislation would only apply to contracts with registered professional architects, engineers, and land

surveyors and would not affect bids for construction or other types of services or supplies by the state or its local governments. Also, contracts awarded in response to an emergency condition would be exempt from provisions of the bill.

By adopting the proposed bill, Alaska will join with many other states in ensuring that the public receives the highest possible quality of architectural and engineering services while preserving flexibility for state and local officials. I urge this Committee to act favorably on the proposed bill, and I will be happy to attempt to answer any questions. Thank you for the opportunity of testifying before the Committee today, and I thank you for your consideration of the proposed bill.

Sofa
9/16/81

proposed

Original sponsor: Labor and Commerce
Committee by request

BY THE LABOR AND
COMMERCE COMMITTEE

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 612 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to public contracts for architectural
7 and engineering services."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 35.15 is amended by adding a new section to read:

10 Sec. 35.15.055. CONTRACTS FOR ARCHITECTURAL AND ENGINEERING SER-
11 VICES. (a) The department may award a contract for architectural or
12 engineering services only to a person or firm that the department deter-
13 mines is capable and qualified. Notwithstanding AS-35-15-050, after
14 selecting a capable and qualified contractor for architectural or engi-
15 neering services the department shall establish a reasonable fee for the
16 services through negotiations with the contractor. The fee shall be
17 based on the scope and complexity of the services required.

18 (b) A person or firm that ^(submit) provides architectural or engineering
19 services may annually submit to the department a statement of qualifica-
20 tions and performance data. Before awarding a contract under (a) of
21 this section, the department shall review the statements of qualifica-
22 tions and performance data on file with the department together with
23 statements of qualifications and performance data submitted by others in
24 response to an advertisement or request for bids under AS 35.15.030.

for proposals.

*This passed
as CS.*

*Mitch Graves submitted
this for consideration &
discussion by committee*

CS HB 612

DISCUSSION DRAFT
(Second Draft)

1/12/82

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE - SECOND SESSION
A BILL

For an Act entitled: "An Act relating to contracts for architectural, engineering and land surveying services, and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. AS Title 36 is amended by adding a Chapter to read:

Chapter 30. Professional Service Contracts

Section 36.30.010. Contracts for Architectural, Engineering and Land Surveying Services. (a) It shall be the policy of the state and all political subdivisions, including any agencies thereof, to select persons or firms for the performance of architectural, engineering or land surveying services and to award contracts for such services only on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

(b) In issuing any request for services of an architect, engineer, or land surveyor registered under AS 08.48 and in awarding contracts to such registered professionals, the state and all political subdivisions shall select a person or firm deemed best qualified to perform the desired work on the basis of demonstrated competence and professional qualifications, and an attempt shall be made to negotiate a contract with such person or firm at a price which is fair and reasonable. Prior to such selection and negotiation, the state or a political subdivision shall not request or consider any statement, bid or estimate of fees or charges for architectural, engineering or surveying services for the proposed project or request any other submission or action which would constitute a violation of any provision of AS 08.48 or any regulation adopted thereunder.

(c) This section shall not be construed to require any particular procedure for the selection of architects, engineers or surveyors or for the award of contracts except as provided in subsection (b) above. Nothing in this section shall prevent the state or a political subdivision from publicly ranking proposals or offers received in response to a request for services or from attempting to negotiate a fair and reasonable price with the proponent deemed best qualified to perform the desired work or from attempting to negotiate such a price with other proponents, in order of ranking, if negotiations with the first ranked proponent are not successful or from rejecting all or part of any proposals. This section shall not apply to contracts awarded on an emergency basis when the person responsible for execution of the contract on behalf of the state or a political subdivision has certified in writing that an emergency exists.

Section 2. AS 36.95.010 is amended by adding subsections to read:

Section 36.95.010 Definitions. In AS 36.95.010 - [36.25.025] 36.30.010 unless the context requires otherwise:

() "emergency" means a condition which results in imminent danger of harm to the public health, safety or welfare or which requires immediate action to prevent harm to any person or property.

Section 3. AS 19.10.170(a) is amended to read:

(a) Except as provided in AS 36.30.010 and AS 44.33.300, it shall be the general policy of the department to require the construction of all highways under bid contract. However, subject to the provisions of (b) of this section, when the estimated cost of a construction project is less than \$100,000 or when it appears to be in the best interests of the state, the department may perform the work notwithstanding any other provisions of law.

Section 4. AS 35.15.010(a) is amended to read:

(a) Except as provided in AS 36.30.010 and AS 44.33.300, it shall be the general policy of the department to require the construction of all public works under bid contract. However, when the estimated cost of a construction project is less than \$100,000, or when it appears to be in the best interests of the state, the department may perform the work, notwithstanding any other provisions of law. A complete record shall be kept by the commissioner or his designee of all transactions entered into under this section including names of employees involved in the transactions.

Section 5. AS 37.05.230 is amended by adding a new subsection (9) to read:

(9) Requests and acceptance of bids, or other proposals for professional services of an architect, engineer or land surveyor registered under AS 08.48 shall comply with AS 36.30.010.

Section 6. AS 37.05.240 is amended by adding a new subsection to read:

(6) Requests and acceptance of bids, requests or other proposals for professional services of an architect, engineer or land surveyor registered under AS 08.48 shall comply with AS 36.30.010.

Section 7. This Act shall apply to all requests or advertisements for bids or proposals or other requests for professional services issued after the effective date hereof.

Section 8. This Act takes effect immediately in accordance with AS 01.10.070(c).

Note: States may appear in more than one category. Prohibition of or exemption from competitive bidding requirements for procurement in general may be provided in general statutes for A/E services. A specific procedure for selection of A/E services may be spelled out in another law.

States which prohibit competitive bidding for A/E services in Law:

Tennessee

Texas

States which exempt A/E services from general bidding requirements:

California
 District of Columbia
 Hawaii
 Illinois
 Kentucky
 Mississippi-by attorney
 general's ruling

New Jersey
 New York-by state
 comptroller's opinion
 Ohio
 Oklahoma
 Pennsylvania
 Wyoming

States calling for selection based on qualification: (with procedure requiring ranking of firms, negotiation on scope of project and fee with the top firm. If no contract can be reached, negotiations are terminated and taken up with the second ranked firm. Same procedure required for third ranked firm (and lower ranked firms if required by law) if no agreement can be reached with the second.

California (1973)
 Connecticut (1979)
 Colorado (1979)
 Delaware (1976)
 Florida (1973)
 Kansas As and Es (1977)
 Kentucky (1978)
 Louisiana (1975)
 Maine (1979)
 Massachusetts (1975)

Minnesota (1975)
 Nebraska (1978)
 New Hampshire (1973)
 New York State (1980)
 Oklahoma (1974)
 Pennsylvania-building (1975)
 construction offices
 South Carolina (1981)
 Texas (1971)
 Utah (1980)
 Virginia (1980)
 Washington (1981)

States prohibiting competitive bidding under registration law rules, regulations, standards of conduct: (Source: NCARB study revised June 13, 1975. Whether rules are promulgated for architectural board alone, joint board or occupational board is noted).

Arkansas - A
 Connecticut - A
 Florida - A
 Hawaii - A/PE/S
 Idaho - Occup. Licensing
 Kentucky - A
 Louisiana - Occup. Standards
 Montana - A
 North Carolina - A

North Dakota - A
 Oklahoma - A
 South Carolina - A
 South Dakota - A/E
 Tennessee - A/E
 Vermont - A
 Wisconsin - A/E
 Pennsylvania - A/E/LS

ABA

Part E—Architect-Engineer Services

§5-501 Architect-Engineer Services.

(1) *Applicability.* Architect-engineer services shall be procured as provided in this Section except as authorized by Section 3-204 (Small Purchases), Section 3-205 (Sole Source Procurement), and Section 3-206 (Emergency Procurements).

(2) *Policy.* It is the policy of this [State] to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

(3) *Architect-Engineer Selection Committee.* In the procurement of architectural and engineering services, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. [The Chief Procurement Officer or the head of a Purchasing Agency, the Procurement Officer, and [the State Architect]] shall comprise the Architect-Engineer Selection Committee for each architect-engineer services contract over [S_____]. The Selection Committee for architect-engineer services contracts under this amount shall be established in accordance with regulations promulgated by the Policy Office. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the [State], together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(4) *Negotiation.* The Procurement Officer shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the [State], negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached.

COMMENTARY:

(1) This Section applies to procurement of all services within the scope of architecture, professional engineering, or registered land surveying as defined by the laws of the State whether or not construction is involved.

(2) The principal reason for the lack of a definitive policy on the importance of selecting a firm to represent the [State's] interests is the fact that no firm is normally existing in a business which is available for the availability of the third party negotiated later.

(3) It is considered that the price because both estimates of man-hours (to be considered in depth). Once an engineer proposes a fee for his own evaluation and judgment.

(4) If the fee is fair, it is considered that of other competing firms with other qualifications of the architect-engineer recommended procedure for competitive source selection.

(5) If an enacting jurisdiction the following language:

"The Procurement Officer shall negotiate a contract for architectural and engineering services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the [State], negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached."

(2) The principal reasons supporting this selection procedure for architect-engineer services are the lack of a definitive scope of work for such services at the time the selection is made and the importance of selecting the best qualified firm. In general, the architect-engineer is engaged to represent the [State's] interests and is, therefore, in a different relationship with the [State] from that 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.

(3) It is considered more desirable to make the qualification selection first and then to discuss the price because both parties need to review in detail what is involved in the work (for example, estimates of man-hours, personnel costs, and alternatives that the architect-engineer should consider in depth). Once parameters have been fully discussed and understood and the architect-engineer proposes a fee for the work, the recommended procedure requires the [State] to make its own evaluation and judgment as to the reasonableness of the fee.

(4) If the fee is fair and reasonable, award is made without consideration of proposals and fees of other competing firms. If the fee cannot be negotiated to the satisfaction of the [State], negotiations with other qualified firms are initiated. Thus price clearly is an important factor in the award of the architect-engineer contract under this procedure. The principal difference between the recommended procedure for architect-engineer selection and the procedures used in most other competitive source selections is the point at which price is considered.

(5) If an enacting jurisdiction desires to use a different selection process, then it may consider the following language:

"The Procurement Officer shall negotiate with the highest qualified firms for a contract for architectural and engineering services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making such determination, the Procurement Officer shall take into account, in the following order of importance, the professional competence of offerors, the technical merits of offers, and the price for which the services are to be rendered."

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CS HB 612

DISCUSSION DRAFT
(Second Draft)

1/12/82

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TWELFTH LEGISLATURE - SECOND SESSION
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(c) This section shall not be construed to require any particular procedure for the selection of architects, engineers or surveyors or for the award of contracts except as provided in subsection (b) above. Nothing in this section shall prevent the state or a political subdivision from publicly ranking proposals or offers received in response to a request for services or from attempting to negotiate a fair and reasonable price with the proponent deemed best qualified to perform the desired work or from attempting to negotiate such a price with other proponents, in order of ranking, if negotiations with the first ranked proponent are not successful or from rejecting all or part of any proposals. This section shall not apply to contracts awarded on an emergency basis when the person responsible for execution of the contract on behalf of the state or a political subdivision has certified in writing that an emergency exists.

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Charles Torsha -

pool of applicants to contract with qualifications
+ low bidding -
demonstration of confidence of performance.

Let record show Rep. Terry Davidson is present.

Speak on HB 600 - dropped because
from hearing schedule
liabilities of airt, eng. & land surveys

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

January 18, 1982

SUBJECT: Analysis of CSHB 612 (L&C)

TO: Representative Terry Martin, Chairman
House Labor and Commerce Committee

FROM: Thomas A. Sofo *TAS*
Legislative Counsel

You have asked for a review and comparison of CSHB 612 with drafts of legislation prepared by attorney, Ted Berns. CSHB 612 and the two drafts provided by Mr. Berns all share in common the objective of taking architectural engineering and land surveying service contracts out from under the requirement that they be let to the lowest responsible bidder. CSHB 612 provides that such contracts should be awarded only to persons or firms that are "capable and qualified". After selecting a capable and qualified contractor, CSHB 612 provides that the fee for the services should be reached through negotiations with the contractor. CSHB 612 also allows for various contractors to have on file with the state material showing their qualifications and performance data. Both drafts provided by Mr. Berns require that contracts for architectural, engineering and land surveying services be awarded "only on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices". The drafts provided by Mr. Berns similarly require that only after the qualified contractor has been selected shall negotiations for the contract price be entered into. The discussion drafts both require that the contract be awarded to the contractor "best qualified to perform the desired work on the basis of demonstrated competence and professional qualifications". It may be argued that the use of that phrase results in limiting the number of potentially qualified contractors depending on how the phrase "demonstrated competence" is interpreted. One may argue that "demonstrated competence" can only apply to those persons or firms who

Representative Terry Martin

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January 18, 1982

have been in field for a certain amount of time or who have worked for the state before. On the other hand, "demonstrated competence" does not necessarily demand such a restrictive interpretation.

Although the second discussion draft includes one or two items not included in the first discussion draft, such as an exception for emergency situations and an affirmative statement that no particular procedure is mandated in the awarding and selection of contractors, the distinguishing characteristic between the two discussion drafts and CS HB 612 is the distinction to be made, if any, between the criteria of "capable and qualified" contained in CS HB 612, and "best qualified to perform the desired work on the basis of demonstrated competence and professional qualifications" contained in both discussion drafts. The possible different interpretations of these two phrases is the distinguishing factor between the bulk of the material contained in CS HB 612 and the two discussion drafts. Second to that point would be the exception allowed for emergency situations noted at the bottom of subsection (3) on page 2, of the second discussion draft. CS HB 612 and both discussion drafts would apparently apply both to the state and municipalities. This office has no objection to using Title 36 as a vehicle for the inclusion of the new material which the committee is considering (as done in the discussion drafts). The mechanics of making the required amendments do not present a problem.

The most important factor for the committee's review seems to be the criteria used in selecting a contractor. It may be that there is no contractor who would qualify under CS HB 612 who would not otherwise qualify under the criteria used in the discussion drafts. The converse may not be true. However, I would look forward to hearing comments from proponents of the discussion drafts as to their preference for the "demonstrated competence" language in the discussion drafts as opposed to the "capable and qualified" language in the most recent version of the committee substitute.

TAS:ljb