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MO. DEPT OF INSURANCE,
FINANCIAL INSTITUTIONS &
PROFESSIONAL REGISTRATION

Mr. John M. Huff, Director
Department of Insurance, Financial Institutions,
and Professional Registrations
301 West High Street, Room 530
P.O. Box 690
Jefferson City, Missouri 65102-0690

Dear Mr. Huff,

Attorney General Koster has asked me to respond to your inquiry regarding whether it is appropriate for an architect, professional engineer, professional land surveyor or landscape architect¹ who submits a proposal to a public governmental body pursuant to the provisions of §§ 8.285 to 8.291, RSMo., to provide a sealed envelope that contains its proposed costs to provide those professional services to the governmental body at the same time the professional submits its proposal. In providing this response, we do not mean to suggest that we are giving you legal advice or otherwise treating you as a client of the Attorney General or any of his assistants. We merely wish to assist you in performing your official duties as the Director of the Department of Insurance, Financial Institutions, and Professional Registrations.

As stated in § 8.285, RSMo., "it shall be the policy of the state of Missouri and political subdivisions of the state of Missouri to negotiate contracts for architectural, engineering and land surveying services on the basis of demonstrated competence and qualifications for the type of services required and at fair and reasonable prices."

Section 8.289, RSMo., states:

Present provisions of law notwithstanding, in the procurement of architectural, engineering or land surveying services, each agency which utilizes

¹ These titles are referred to collectively as "professional service firms" in the analysis of this question.

architectural, engineering or land surveying services shall encourage firms engaged in the lawful practice of their professions to annually submit a statement of qualifications and performance data to the agency. Whenever a project requiring architectural, engineering or land surveying services is proposed for an agency of the state or political subdivision thereof, the agency shall evaluate current statements of qualifications and performance data of firms on file together with those that may be submitted by other firms regarding the proposed project. In evaluating the qualifications of each firm the agency shall use the following criteria:

- (1) The specialized experience and technical competence of the firm with respect to the type of services required;
- (2) The capacity and capability of the firm to perform the work in question, including specialized services, within the time limitations fixed for the completion of the project;
- (3) The past record of performance of the firm with respect to such factors as control of costs, quality of work, and ability to meet schedules;
- (4) The firm's proximity to and familiarity with the area in which the project is located.

Section 8.291, RSMo., provides that:

1. The agency shall list three highly qualified firms. The agency shall then select the firm considered best qualified and capable of performing the desired work and negotiate a contract for the project with the firm selected.
2. For a basis for negotiations the agency shall prepare a written description of the scope of the proposed services.
3. If the agency is unable to negotiate a satisfactory contract with the firm selected, negotiations with that firm shall be terminated. The agency shall then undertake negotiations with another of the qualified firms selected. If there is a failing of accord with the second firm, negotiations with such firm shall be terminated. The agency shall then undertake negotiations with the third qualified firm.
4. If the agency is unable to negotiate a contract with any of the selected firms, the agency shall reevaluate the necessary architectural, engineering or land surveying services, including the scope and reasonable fee requirements, again compile a list of qualified firms and proceed in accordance with the provisions of sections 8.285 to 8.291.

5. The provisions of sections 8.285 to 8.291 shall not apply to any political subdivision which adopts a qualification-based selection procedure commensurate with state policy for the procurement of architectural, engineering and land surveying services.

As stated in § 8.285, RSMo., the competence and qualifications of professional service firms are the key considerations when it comes to employment on government projects. Missouri's law on this point is largely based on the federal "Brooks Act," (1972), codified at 40 U.S.C.A. §§ 541-544, the legislative history of which states:

"Under no circumstances should the criteria developed by an agency head relating to the ranking of architects and engineers on the basis of their professional qualifications include or relate to the fee to be paid to the firm... The system favors selection of the most skilled and responsible members of these professions... This system protects the interests of the taxpayers. Having won the competition on the basis of capability, the winning architect/engineer must then negotiate his fee..."²

When Missouri adopts a federal statute, the intent of Congress has a bearing on the intent of Missouri's legislature. *American National Insurance Co. v. Keitel*, 186 S.W.2d 447, 448 (Mo. 1945.) It must be presumed that the Missouri General Assembly knew of Congress' interpretation of the Brooks Act when §§ 8.285 – 8.291, RSMo., were adopted in 1983. This presumption leads to the conclusion that the cost proposed by a professional service firm is not to be considered in determining which firms are most highly qualified.

As provided above, §§ 8.285 through 8.291, RSMo., present a mandatory sequence for agencies to follow when hiring professional service firms for government work. Statutory language encouraging the provision of statements of qualifications by professional service firms to agencies does not contemplate the communication of information beyond a statement of the firm's qualifications and performance data, such as a proposed statement of work or cost bid. From these statements of qualifications, the agency first determines which professional service firm is most highly qualified to perform the project work, according to the terms of § 8.289, RSMo., and then enters into contract negotiations with that firm. The firm's proposed cost is not listed as a factor when considering which firm is the most highly qualified. Express mention of one thing implies the exclusion of another. *Harrison v. MFA Mutual Insurance Co.*, 607 S.W.2d 137, 146 (Mo. banc 1980.) As a basis for negotiations, the agency presents a written

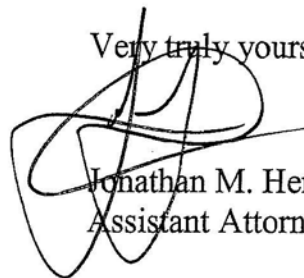
² 1972 U.S. Code Cong. and Admin. News, pp. 4769 and 4774. For additional analysis of this issue, please see Missouri Attorney General Opinion No. 153-91, dated October 18, 1991.

statement of the proposed services, and the agency and professional service firm work to negotiate a contract. If negotiations with the first firm selected fail to yield an acceptable agreement, such negotiations may be terminated, and the agency may begin discussions with another of the highly qualified firms listed until agreement is reached. Section 8.291.3 & .4, RSMo. Sections 8.285 – 8.291, RSMo., do not expressly permit professional service firms to submit proposals to agencies at all, and even if such permission is implied, it is only permitted by a firm once the agency has chosen that firm as the most highly qualified firm and is actively engaged in contract negotiations with that firm. Likewise, a professional service firm's proposed cost for project work is not a permitted consideration when determining which firm is most highly qualified, and is only a permitted consideration when the agency and chosen firm attempt to negotiate a contract.

If the situation presented is one in which an agency has already selected the most highly qualified firm according to § 8.289, RSMo., and is engaged in contract negotiations with the firm, then the agency is permitted to consider the firm's project work proposal and proposed costs – sealed or not. However, if the situation is one in which the agency is considering a project requiring professional services, but has not yet entered into contract negotiations with the firm it has found to be the most highly qualified according to § 8.289, RSMo., then, according to the terms of §§ 8.285 – 8.291, RSMo., the agency is not permitted to consider the firm's project work proposal or its proposed costs, nor is the firm permitted to submit this information to the agency for consideration.

In conclusion, it is not appropriate or lawful for an architect, professional engineer, professional land surveyor or landscape architect, who is willing to provide professional services to a public governmental body pursuant to the provisions of §§ 8.285 to 8.291, RSMo., to submit its proposal for the work intended by the agency, or to provide a sealed envelope that contains its proposed costs to provide those professional services to the governmental body, unless that firm has already been selected by the agency as the most highly qualified for the job, pursuant to § 8.289, RSMo., and the firm's submission of its work and price proposal is made during the contract negotiation process described in § 8.291, RSMo. Proposed cost is not a proper consideration when determining which firm is most highly qualified, and the firm's proposed statement of work is not permitted to be considered by the agency until the agency has already chosen such firm as the most highly qualified for the job.

Very truly yours,



Jonathan M. Hensley
Assistant Attorney General