

Comments by Carole Briggs on Behalf of The Connecticut Association of Municipal Attorneys
Regarding Raised Bill No. 646 on March 10, 2008

If enacted, the changes to C.G.S. §10-287 would treat design professionals the same as trade contractors for contract bid purposes. However, there is a fundamental difference between design professionals and trade contractors -- the design professionals provide guidance to owners and answer questions regarding their projects, i.e., they exercise independent professional judgment -- contractors on the other hand, ask questions and do not exercise independent judgment regarding the performance of their work; "They just build them, they don't design them.

The additional changes proposed to C.G.S. §10-287 would impose a standard objective method of selecting all school building project design professionals and contractors, using existing statutes previously applicable to only contractors, not design professionals. This shoehorning of design professionals into these statutes would create numerous compliance difficulties for towns.

For example, C.G.S. §49-59 states: "Lowest responsible qualified bidder means the bidder whose bid is lowest of bidders possessing the skill, ability, integrity necessary to faithful performance of the work based on objective criteria considering past performance and financial responsibility..."

Of these criteria, financial responsibility is not really relevant for professional service, so the Town would have to look solely to past performance. Strict application of this factor would seem to prevent consideration of potential design professionals without past experience on projects comparable to the proposed school building project.

The prequalification requirement would present a substantial potential compliance conflict to towns. Under the Amendment, C.G.S. §4a-100 would apply to all bidders. Presently, C.G.S. §4a-100 starts prequalification with contracts estimated to exceed \$500,000. C.G.S. §10-287 would conflict with this to require all contractors/design professionals to be prequalified. Towns could use DAS which doesn't have any procedure for prequalifying professional service providers, or create their own procedure which means they would probably need to hire a consultant to help them prepare a prequalification package for potential bidders.

The criteria used by DAS are entirely appropriate to prequalify trade contractors, which are:

- Integrity
- Work Experience
- Experience and Qualifications of supervisory personnel
- Financial Condition
- Safety

The last two are not really relevant to selecting a professional service provider, but per the proposed statute would have to be considered as part of any town prequalification program. What weight would the towns be required to place on these irrelevant criteria or risk noncompliance with the statute?

What is also not clear is whether the prequalification is on a project-by-project basis or whether it is to be some type of renewable certification, as is the current DAS procedure.

The consequences of failure to comply would seem rather harsh. If the town's prequalification program is determined to not comply with the statute after the fact, does this mean that the town has lost its funding from the State? If one subcontractor is not properly prequalified, does this also mean the town risks lost of funding for its project?

As of right now, the towns are struggling to comply with the most recent changes to C.G.S. §10-287. In the absence of case law construing the statute, it is difficult to give legal opinions that are 100% certain. Adding these additional burdens now would make it extremely difficult for municipal attorneys to provide legal guidance to their clients with assurance that they are in fact complying with all of the state's bidding requirements under this statute.