

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 2607

Chapter 132, Laws of 1994

53rd Legislature
1994 Regular Session

PUBLIC WORKS--ALTERNATIVE CONTRACTING PROCEDURE

EFFECTIVE DATE: 6/9/94

Passed by the House February 14, 1994
Yeas 55 Nays 41

BRIAN EBERSOLE

**Speaker of the
House of Representatives**

Passed by the Senate March 3, 1994
Yeas 45 Nays 3

JOEL PRITCHARD

President of the Senate

Approved March 28, 1994

MIKE LOWRY

Governor of the State of Washington

CERTIFICATE

I, Marilyn Showalter, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 2607** as passed by the House of Representatives and the Senate on the dates hereon set forth.

MARILYN SHOWALTER

Chief Clerk

FILED

March 28, 1994 - 11:38 a.m.

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 2607

Passed Legislature - 1994 Regular Session

State of Washington 53rd Legislature 1994 Regular Session

By House Committee on Capital Budget (originally sponsored by
Representatives Wang, Ogden and Sehlin)

Read first time 02/04/94.

1 AN ACT Relating to procurement by state agencies and municipalities
2 of public works that are unique due to cost, complexity, or public
3 interest; and adding a new chapter to Title 39 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** LEGISLATIVE FINDINGS. The legislature finds
6 that the traditional process of awarding public works contracts in lump
7 sum to the lowest responsible bidder is a fair and objective method of
8 selecting a contractor. However, under certain circumstances,
9 alternative public works contracting procedures may best serve the
10 public interest if such procedures are implemented in an open and fair
11 process based on objective and equitable criteria. The purpose of this
12 chapter is to authorize the use of certain supplemental alternative
13 public works contracting procedures by state agencies and large
14 municipalities under limited circumstances, to prescribe appropriate
15 requirements to ensure that such contracting procedures serve the
16 public interest, and to establish a process for evaluation of such
17 contracting procedures.

1 NEW SECTION. **Sec. 2.** DEFINITIONS. Unless the context clearly
2 requires otherwise, the definitions in this section apply throughout
3 this chapter.

4 (1) "Alternative public works contracting procedure" means the
5 design-build and the general contractor/construction manager
6 contracting procedures authorized in sections 5 and 6 of this act,
7 respectively.

8 (2) "Public body" means the state department of general
9 administration; the University of Washington; Washington State
10 University; every city with a population greater than one hundred fifty
11 thousand; every county with a population greater than four hundred
12 fifty thousand; and every port district with a population greater than
13 five hundred thousand.

14 (3) "Public works project" means any work for a public body within
15 the definition of the term public work in RCW 39.04.010.

16 NEW SECTION. **Sec. 3.** PUBLIC NOTIFICATION AND REVIEW PROCESS. (1)
17 An alternative public works contracting procedure authorized under this
18 chapter may be used for a specific public works project only after a
19 public body determines that use of the alternative procedure will serve
20 the public interest by providing a substantial fiscal benefit, or that
21 use of the traditional method of awarding contracts in lump sum to the
22 low responsive bidder is not practical for meeting desired quality
23 standards or delivery schedules.

24 (2) Whenever a public body determines to use one of the alternative
25 public works contracting procedures authorized under this chapter for
26 a public works project, it shall first ensure adequate public
27 notification and opportunity for public review and comment as follows:

28 (a) The public body shall conduct a public hearing to receive
29 public comment on its preliminary determination to use the alternative
30 public works contracting procedure. At least twenty days before the
31 public hearing, the public body shall cause notice of such hearing to
32 be published at least once in a legal newspaper of general circulation
33 published in or as near as possible to that part of the county in which
34 the public work will be done. The notice shall clearly describe the
35 proposed project and the preliminary determination to use the
36 alternative public works contracting procedure. The notice shall also
37 indicate when, where, and how persons may present their comments on the

1 preliminary determination, and where persons may obtain additional
2 written information describing the project.

3 (b) The public body shall summarize in a written statement its
4 reasons for using the alternative public works contracting procedure.
5 This statement, along with other relevant information describing the
6 project, shall be made available upon request to interested parties at
7 least twenty days before the public hearing.

8 (c) The public body shall receive and record both written and oral
9 comments concerning the preliminary determination at the public
10 hearing.

11 (3) Final determinations to use an alternative public works
12 contracting procedure may be made only by the legislative or governing
13 authority of the public body, or, in the case of state agencies, by the
14 agency director or chief administrative officer. Final determinations
15 shall be accompanied by a concise statement of the principal reasons
16 for overruling any considerations urged against the determination.
17 Final determinations are subject to appeal to superior court within
18 thirty days of the determination, provided that notice of such appeal
19 shall be provided to the public body within seven days of the
20 determination. The court may award reasonable attorneys' fees to the
21 prevailing party.

22 (4) Following completion of a public works project using one of the
23 alternative public works contracting procedures under this chapter, a
24 report shall be submitted to the legislative or governing authority of
25 the public body reviewing the utilization and performance of the
26 alternative public works contracting procedure. Such report shall be
27 made available to the public.

28 NEW SECTION. **Sec. 4.** SPECIAL COUNTY DEVELOPMENT AUTHORITY. An
29 alternative public works contracting procedure authorized in this
30 chapter may be used by a special agency, authority, or other district
31 established by a county for construction of a baseball stadium provided
32 that:

33 (1) The county is authorized to use the alternative public works
34 contracting procedure under this chapter;

35 (2) The special agency, authority, or district complies with all
36 the requirements of this chapter related to the alternative public
37 works contracting procedure utilized; and

1 (3) The county itself complies with section 3 of this act with
2 respect to the baseball stadium project to be undertaken by the special
3 agency, authority, or district.

4 NEW SECTION. **Sec. 5.** DESIGN-BUILD. (1) Notwithstanding any other
5 provision of law, and after complying with section 3 of this act, the
6 following public bodies may utilize the design-build procedure of
7 public works contracting for public works projects authorized under
8 this section: The state department of general administration; the
9 University of Washington; Washington State University; every city with
10 a population greater than one hundred fifty thousand; and every county
11 with a population greater than four hundred fifty thousand. For the
12 purposes of this section, "design-build procedure" means a contract
13 between a public body and another party in which the party agrees to
14 both design and build the structure, facility, or other item specified
15 in the contract.

16 (2) Public bodies authorized under this section may utilize the
17 design-build procedure for public works projects valued over ten
18 million dollars where:

19 (a) The construction activities are highly specialized and a
20 design-build approach is critical in developing the construction
21 methodology;

22 (b) The project design is repetitive in nature and is an incidental
23 part of the installation or construction; or

24 (c) The program elements of the project design are simple and do
25 not involve complex functional interrelationships.

26 (3) The state department of general administration may use the
27 design-build procedure authorized in subsection (2)(c) of this section
28 for one project.

29 (4) Contracts for design-build services shall be awarded through a
30 competitive process utilizing public solicitation of proposals for
31 design-build services. The public body shall publish at least once in
32 a legal newspaper of general circulation published in or as near as
33 possible to that part of the county in which the public work will be
34 done, a notice of its request for proposals for design-build services
35 and the availability and location of the request for proposal
36 documents. The request for proposal documents shall include:

37 (a) A detailed description of the project including programmatic,
38 performance, and technical requirements and specifications, functional

1 and operational elements, and minimum and maximum net and gross areas
2 of any building;

3 (b) The reasons for using the design-build procedure;

4 (c) A description of the qualifications, if any, to be required of
5 the proposer;

6 (d) A description of the process the public body will use to
7 evaluate qualifications and proposals, including evaluation factors and
8 the relative weight of factors. Evaluation factors shall include, but
9 not be limited to: Proposal price; ability of professional personnel;
10 past performance on similar projects; ability to meet time and budget
11 requirements; ability to provide a performance and payment bond for the
12 project; recent, current, and projected work loads of the firm; and the
13 concept of the proposal;

14 (e) The form of the contract to be awarded;

15 (f) The maximum allowable construction cost and minority and women
16 enterprise total project goals;

17 (g) The amount to be paid to finalists submitting best and final
18 proposals who are not awarded a design-build contract; and

19 (h) Other information relevant to the project.

20 (5) The public body shall establish a committee to evaluate the
21 proposals based on the factors, weighting, and process identified in
22 the request for proposals. Based on its evaluation, the public body
23 shall select not fewer than three nor more than five finalists to
24 submit best and final proposals. Best and final proposals shall be
25 evaluated and scored based on the factors, weighting, and process
26 identified in the initial request for proposals. Final proposals may
27 not be considered if the proposal cost is greater than the maximum
28 allowable construction cost identified in the initial request for
29 proposals.

30 (6) The public body shall initiate negotiations with the firm
31 submitting the highest scored final proposal. If the public body is
32 unable to execute a contract with that firm, negotiations with that
33 firm may be suspended or terminated and the public body may proceed to
34 negotiate with the next highest scored firm. Public bodies shall
35 continue in accordance with this procedure until a contract agreement
36 is reached or the selection process is terminated. The public body
37 may, in its sole discretion, reject all proposals. The finalist
38 awarded the contract shall provide a performance and payment bond for
39 the contracted amount. The public body shall provide appropriate

1 honorarium payments to finalists submitting best and final proposals
2 who are not awarded a design-build contract. Honorarium payments shall
3 be sufficient to generate meaningful competition among potential
4 proposers on design-build projects.

5 NEW SECTION. **Sec. 6.** GENERAL CONTRACTOR/CONSTRUCTION MANAGER.

6 (1) Notwithstanding any other provision of law, and after complying
7 with section 3 of this act, the following public bodies may utilize the
8 general contractor/construction manager procedure of public works
9 contracting for public works projects authorized under subsection (2)
10 of this section: The state department of general administration; the
11 University of Washington; Washington State University; every city with
12 a population greater than one hundred fifty thousand; every county with
13 a population greater than four hundred fifty thousand; and every port
14 district with a population greater than five hundred thousand. For the
15 purposes of this section, "general contractor/construction manager"
16 means a firm with which a public body has selected and negotiated a
17 maximum allowable construction cost to be guaranteed by the firm, after
18 competitive selection through formal advertisement and competitive
19 bids, to provide services during the design phase that may include
20 life-cycle cost design considerations, value engineering, scheduling,
21 cost estimating, constructability, alternative construction options for
22 cost savings, and sequencing of work, and to act as the construction
23 manager and general contractor during the construction phase.

24 (2) Public bodies authorized under this section may utilize the
25 general contractor/construction manager procedure for public works
26 projects valued over ten million dollars where:

27 (a) Implementation of the project involves complex scheduling
28 requirements;

29 (b) The project involves construction at an existing facility which
30 must continue to operate during construction; or

31 (c) The involvement of the general contractor/construction manager
32 during the design stage is critical to the success of the project.

33 (3) Contracts for the services of a general contractor/construction
34 manager under this section shall be awarded through a competitive
35 process requiring the public solicitation of proposals for general
36 contractor/construction manager services. Minority and women business
37 enterprise total project goals shall be specified in the public
38 solicitation of proposals and the bid instructions to the general

1 contractor/construction manager finalists. A public body is authorized
2 to include an incentive clause in any contract awarded under this
3 section for savings of either time or cost or both from that originally
4 negotiated. No incentives granted shall exceed five percent of the
5 maximum allowable construction cost. A public body shall establish a
6 committee to evaluate the proposals considering such factors as:
7 Ability of professional personnel; past performance in negotiated and
8 complex projects; ability to meet time and budget requirements;
9 location; recent, current, and projected work loads of the firm; and
10 the concept of their proposal. After the committee has selected the
11 most qualified finalists, these finalists shall submit sealed bids for
12 the percent fee, which is the percentage amount to be earned by the
13 general contractor/construction manager as overhead and profit, on the
14 estimated maximum allowable construction cost and the fixed amount for
15 the detailed specified general conditions work. The maximum allowable
16 construction cost may be negotiated between the public body and the
17 selected firm after the scope of the project is adequately determined
18 to establish a guaranteed contract cost for which the general
19 contractor/construction manager will provide a performance and payment
20 bond. The guaranteed contract cost includes the fixed amount for the
21 detailed specified general conditions work, the negotiated maximum
22 allowable construction cost, the percent fee on the negotiated maximum
23 allowable construction cost, and sales tax. If the public body is
24 unable to negotiate a satisfactory maximum allowable construction cost
25 with the firm selected that the public body determines to be fair,
26 reasonable, and within the available funds, negotiations with that firm
27 shall be formally terminated and the public body shall negotiate with
28 the next low bidder and continue until an agreement is reached or the
29 process is terminated. If the maximum allowable construction cost
30 varies more than fifteen percent from the bid estimated maximum
31 allowable construction cost due to requested and approved changes in
32 the scope by the public body, the percent fee shall be renegotiated.
33 All subcontract work shall be competitively bid with public bid
34 openings. Specific contract requirements for women and minority
35 enterprise participation shall be specified in each subcontract bid
36 package that exceeds ten percent of the public body's estimated project
37 cost. All subcontractors who bid work over two hundred thousand
38 dollars shall post a bid bond and all subcontractors who are awarded a
39 contract over two hundred thousand dollars shall provide a performance

1 and payment bond for their contract amount. All other subcontractors
2 shall provide a performance and payment bond if required by the general
3 contractor/construction manager. Bidding on subcontract work by the
4 general contractor/construction manager or its subsidiaries is
5 prohibited. The general contractor/construction manager may negotiate
6 with the low-responsive bidder in accordance with section 8 of this act
7 or, if unsuccessful in such negotiations, rebid.

8 (4) If the project is completed for less than the agreed upon
9 maximum allowable construction cost, any savings not otherwise
10 negotiated as part of an incentive clause shall accrue to the public
11 body. If the project is completed for more than the agreed upon
12 maximum allowable construction cost, excepting increases due to any
13 contract change orders approved by the public body, the additional cost
14 shall be the responsibility of the general contractor/construction
15 manager.

16 NEW SECTION. **Sec. 7.** PROJECT MANAGEMENT AND CONTRACTING
17 REQUIREMENTS. (1) A public body utilizing the alternative public works
18 contracting procedures authorized under sections 5 and 6 of this act
19 shall provide for:

20 (a) The preparation of appropriate, complete, and coordinated
21 design documents consistent with the procedure utilized;

22 (b) To the extent appropriate, an independent review of the
23 contract documents through value engineering or constructability
24 studies prior to bid or proposal solicitation;

25 (c) Reasonable budget contingencies totaling not less than five
26 percent of the anticipated contract value;

27 (d) To the extent appropriate, on-site architectural or engineering
28 representatives during major construction or installation phases;

29 (e) Employment of staff or consultants with expertise and prior
30 experience in the management of comparable projects; and

31 (f) Contract documents that include alternative dispute resolution
32 procedures to be attempted prior to the initiation of litigation.

33 (2) A public body utilizing the alternative public works
34 contracting procedures under sections 5 and 6 of this act may provide
35 incentive payments to contractors for early completion, cost savings,
36 or other goals if such payments are identified in the request for
37 proposals.

1 NEW SECTION. **Sec. 8.** NEGOTIATION WITH LOWEST RESPONSIBLE BIDDER
2 OR PROPOSER. Notwithstanding the provisions of RCW 39.04.015, a public
3 body is authorized to negotiate an adjustment to the lowest bid or
4 proposal price for a public works project awarded under sections 5 and
5 6 of this act based upon agreed changes to the contract plans and
6 specifications under the following conditions:

7 (1) All responsive bids or proposal prices exceed the available
8 funds, as certified by an appropriate fiscal officer;

9 (2) The apparent low-responsive bid or proposal does not exceed the
10 available funds by the greater of one hundred twenty-five thousand
11 dollars or two percent for projects valued over ten million dollars;
12 and

13 (3) The negotiated adjustment will bring the bid or proposal price
14 within the amount of available funds.

15 NEW SECTION. **Sec. 9.** IMPLEMENTATION. This chapter shall not be
16 construed to affect or modify the existing statutory, regulatory, or
17 charter powers of public bodies except to the extent that a procedure
18 authorized by this chapter is adopted by a public body for a particular
19 public works project. In that event, the normal contracting or
20 procurement limits or requirements of a public body as imposed by
21 statute, ordinance, resolution, or regulation shall be deemed waived or
22 amended only to the extent necessary to accommodate such procedures for
23 a particular public works project.

24 NEW SECTION. **Sec. 10.** PUBLIC INSPECTION OF CERTAIN RECORDS. (1)
25 Except as provided in subsection (2) of this section, all proceedings,
26 records, contracts, and other public records relating to alternative
27 public works transactions under this chapter shall be open to the
28 inspection of any interested person, firm, or corporation in accordance
29 with chapter 42.17 RCW.

30 (2) Trade secrets, as defined in RCW 19.108.010, or other
31 proprietary information submitted by a bidder, offeror, or contractor
32 in connection with an alternative public works transaction under this
33 chapter shall not be subject to chapter 42.17 RCW if the bidder,
34 offeror, or contractor specifically states in writing the reasons why
35 protection is necessary, and identifies the data or materials to be
36 protected.

1 NEW SECTION. **Sec. 11.** INDEPENDENT REVIEW AND STUDY. (1) There is
2 established a temporary independent oversight committee to review the
3 utilization of the alternative public works contracting procedures
4 authorized under this chapter and to evaluate potential future
5 utilization of other alternative contracting procedures, including, but
6 not limited to, contractor prequalification. The membership of the
7 committee shall include: Two members of the house of representatives,
8 one from each major caucus, appointed by the speaker of the house of
9 representatives; two members of the senate, one from each major caucus,
10 appointed by the president of the senate; representatives from the
11 appropriate segments of the construction and design industries,
12 appointed by the governor; representatives from appropriate labor
13 organizations, appointed by the governor; representatives from public
14 bodies authorized to use the alternative public works contracting
15 procedures under this chapter, appointed by the governor; and a
16 representative from the office of financial management, appointed by
17 the governor. The governor shall consider the recommendations of the
18 established organizations representing the construction and design
19 industries and organized labor in making the industry and labor
20 appointments to the committee.

21 (2) The committee shall meet quarterly beginning after July 1,
22 1994. At the first meeting of the committee, a chair or cochairs shall
23 be selected from among the committee's membership. Staff support for
24 the committee shall be provided by the agencies and organizations
25 represented on the committee.

26 (3) Public bodies utilizing the alternative contracting procedures
27 authorized under this chapter shall provide any requested information
28 concerning implementation of projects under this chapter to the
29 committee in a timely manner, excepting any trade secrets or
30 proprietary information.

31 (4) The committee shall report to the appropriate standing
32 committees of the legislature by December 10, 1996, concerning its
33 findings and recommendations.

34 NEW SECTION. **Sec. 12.** APPLICATION. The alternative public works
35 contracting procedures authorized under this chapter are limited to
36 public works contracts signed before July 1, 1997. Methods of public
37 works contracting authorized by sections 5 and 6 of this act shall

1 remain in full force and effect until completion of contracts signed
2 before July 1, 1997.

3 NEW SECTION. **Sec. 13.** CAPTIONS. Captions as used in this act do
4 not constitute any part of law.

5 NEW SECTION. **Sec. 14.** If any provision of this act or its
6 application to any person or circumstance is held invalid, the
7 remainder of the act or the application of the provision to other
8 persons or circumstances is not affected.

9 NEW SECTION. **Sec. 15.** The following acts or parts of acts, as now
10 existing or hereafter amended, are each repealed, effective July 1,
11 1997:

- 12 (1) RCW 39.---.--- and 1994 c . . . s 1 (section 1 of this act);
- 13 (2) RCW 39.---.--- and 1994 c . . . s 2 (section 2 of this act);
- 14 (3) RCW 39.---.--- and 1994 c . . . s 3 (section 3 of this act);
- 15 (4) RCW 39.---.--- and 1994 c . . . s 4 (section 4 of this act);
- 16 (5) RCW 39.---.--- and 1994 c . . . s 5 (section 5 of this act);
- 17 (6) RCW 39.---.--- and 1994 c . . . s 6 (section 6 of this act);
- 18 (7) RCW 39.---.--- and 1994 c . . . s 7 (section 7 of this act);
- 19 (8) RCW 39.---.--- and 1994 c . . . s 8 (section 8 of this act);
- 20 (9) RCW 39.---.--- and 1994 c . . . s 9 (section 9 of this act);
- 21 (10) RCW 39.---.--- and 1994 c . . . s 10 (section 10 of this act);
- 22 (11) RCW 39.---.--- and 1994 c . . . s 11 (section 11 of this act);
- 23 (12) RCW 39.---.--- and 1994 c . . . s 12 (section 12 of this act);
- 24 (13) RCW 39.---.--- and 1994 c . . . s 13 (section 13 of this act);
- 25 (14) RCW 39.---.--- and 1994 c . . . s 14 (section 14 of this act);
- 26 and
- 27 (15) RCW 39.---.--- and 1994 c . . . s 15 (section 15 of this act).

28 NEW SECTION. **Sec. 16.** CODIFICATION. Sections 1 through 15 of
29 this act shall constitute a new chapter in Title 39 RCW.

Passed the House February 14, 1994.

Passed the Senate March 3, 1994.

Approved by the Governor March 28, 1994.

Filed in Office of Secretary of State March 28, 1994.