CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1425

Chapter 376, Laws of 1997

55th Legislature
1997 Regular Session

ALTERNATIVE PUBLIC WORKS CONTRACTING PROCEDURES

EFFECTIVE DATE: 7/1/97

Passed by the House April 22, 1997
Yeas 93  Nays 4

Passed by the Senate April 10, 1997
Yeas 39   Nays 10

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is SUBSTITUTE HOUSE BILL 1425 as passed by the House of Representatives and the Senate on the dates hereon set forth.

BRAD OWEN
President of the Senate

APPROVED
May 15, 1997

GARY LOCKE
Governor of the State of Washington

Secretary of State
State of Washington
AN ACT Relating to alternative public works contracting procedures; amending RCW 39.10.020, 39.10.030, 39.10.050, 39.10.060, 39.10.110, 39.10.120, and 39.10.902; adding a new section to chapter 39.10 RCW; repealing 1996 c 18 s 17 (uncodified); providing an effective date; and declaring an emergency.

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

Sec. 1. RCW 39.10.020 and 1994 c 132 s 2 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Alternative public works contracting procedure" means the design-build and the general contractor/construction manager contracting procedures authorized in RCW 39.10.050 and 39.10.060, respectively.

(2) "Public body" means the state department of general administration; the University of Washington; Washington State University; every city with a population greater than one hundred fifty thousand; every city authorized to use the design-build procedure for a water system demonstration project under section 5(3) of this act;
every county with a population greater than four hundred fifty thousand; and every port district with a population greater than five hundred thousand.

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

Sec. 2. RCW 39.10.030 and 1994 c 132 s 3 are each amended to read as follows:

(1) An alternative public works contracting procedure authorized under this chapter may be used for a specific public works project only after a public body determines that use of the alternative procedure will serve the public interest by providing a substantial fiscal benefit, or that use of the traditional method of awarding contracts in lump sum to the low responsive bidder is not practical for meeting desired quality standards or delivery schedules.

(2) Whenever a public body determines to use one of the alternative public works contracting procedures authorized under this chapter for a public works project, it shall first ensure adequate public notification and opportunity for public review and comment by implementing the public hearing procedure under (a) of this subsection or the written public comment procedure under (b) of this subsection.

(a) Public hearing procedure:

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

((b)) (ii) The public body shall summarize in a written statement its reasons for using the alternative public works contracting procedure. This statement, along with other relevant information...
(c) (iii) The public body shall receive and record both written and oral comments concerning the preliminary determination at the public hearing.

(b) Written public comment procedure:

(i) The public body shall establish a thirty-day public comment period to receive public comment on its preliminary determination to use the alternative public works contracting procedure. At least seven days before the beginning of the public comment period, the public body shall cause notice of the public comment period to be published at least once in a legal newspaper of general circulation published in or as near as possible to that part of the county in which the public work will be done. The notice shall clearly describe the proposed project and the preliminary determination to use the alternative public works contracting procedure. The notice shall also indicate when, where, and how persons may submit their written comments on the preliminary determination, where persons may obtain additional written information describing the project, and the date, time, and location of the public hearing that shall be conducted under (b)(iv) of this subsection if significant adverse written comments are received by the public body.

(ii) The public body shall summarize in a written statement its reasons for using the alternative public works contracting procedure. This statement, along with other relevant information describing the project, shall be made available upon request to interested parties at least seven days before the beginning of the public comment period.

(iii) The public body shall receive written comments concerning the preliminary determination during the public comment period.

(iv) If the public body finds that it has received significant adverse comments relating to the use of the alternative public works contracting procedure, the public body shall conduct a public hearing to receive additional oral and written public comments on its preliminary determination to use the alternative public works contracting procedure. The public hearing shall be held on the date and at the time and location specified in the public notice published under (b)(i) of this subsection. At least seven days before the public hearing, the public body shall provide notice of the hearing to each person who has submitted written comments, and cause a notice of the hearing to be published at least once in a legal newspaper of
general circulation published in or as near as possible to that part of
the county in which the public work will be done.

(v) The public body shall receive and record written and oral
comments concerning the preliminary determination at the public
hearing.

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

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

Sec. 3. RCW 39.10.050 and 1994 c 132 s 5 are each amended to read
as follows:

(1) Notwithstanding any other provision of law, and after complying
with RCW 39.10.030, the following public bodies may utilize the design-
build procedure of public works contracting for public works projects
authorized under this section: The state department of general
administration; the University of Washington; Washington State
University; every city with a population greater than one hundred fifty
thousand; ((and)) every county with a population greater than four
hundred fifty thousand; and every port district with a population
greater than five hundred thousand. The authority granted to port
districts in this section is in addition to and does not affect
existing contracting authority under RCW 53.08.120 and 53.08.130. For
the purposes of this section, "design-build procedure" means a contract
between a public body and another party in which the party agrees to
both design and build the facility, portion of the facility, or other item specified in the contract.

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

(a) The construction activities or technologies to be used are highly specialized and a design-build approach is critical in developing the construction methodology or implementing the proposed technology;

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

(c) Regular interaction with and feedback from facilities users and operators during design is not critical to an effective facility design.

(3) Public bodies authorized under this section may also use the design-build procedure for the following projects that meet the criteria in subsection (2)(b) and (c) of this section:

(a) The construction or erection of preengineered metal buildings or prefabricated modular buildings, regardless of cost; or

(b) The construction of new student housing projects valued over five million dollars.

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

(a) A detailed description of the project including programmatic, performance, and technical requirements and specifications, functional and operational elements, minimum and maximum net and gross areas of any building, and, at the discretion of the public body, preliminary engineering and architectural drawings;

(b) The reasons for using the design-build procedure;
(c) A description of the qualifications (if any) to be required of the proposer including, but not limited to, submission of the proposer’s accident prevention program;

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

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

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

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

(h) Other information relevant to the project.

(5) The public body shall establish a committee to evaluate the proposals based on the factors, weighting, and process identified in the request for proposals. Based on its evaluation, the public body shall select not fewer than three nor more than five finalists to submit best and final proposals. The public body may, in its sole discretion, reject all proposals. Design-build contracts shall be awarded using the procedures in (a) or (b) of this subsection.

(a) Best and final proposals shall be evaluated and scored based on the factors, weighting, and process identified in the initial request for proposals. The public body may score the proposals using a system that measures the quality and technical merits of the proposal on a unit price basis. Final proposals may not be considered if the proposal cost is greater than the maximum allowable construction cost identified in the initial request for proposals. (((6))) The public body shall initiate negotiations with the firm submitting the highest scored best and final proposal. If the public body is unable to execute a contract with ((that)) the firm submitting the highest scored best and final proposal, negotiations with that firm may be suspended or terminated and the public body may proceed to negotiate with the next highest scored firm. Public bodies shall continue in accordance with this procedure until a contract agreement is reached or the
selection process is terminated. ((The public body may, in its sole
discretion, reject all proposals.))

(b) If the public body determines that all finalists are capable of
producing plans and specifications that adequately meet project
requirements, the public body may award the contract to the firm that
submits the responsive best and final proposal with the lowest price.

(6) The ((finalist)) firm awarded the contract shall provide a
performance and payment bond for the contracted amount. The public
body shall provide appropriate honorarium payments to finalists
submitting best and final proposals who are not awarded a design-build
contract. Honorarium payments shall be sufficient to generate
meaningful competition among potential proposers on design-build
projects.

Sec. 4. RCW 39.10.060 and 1996 c 18 s 6 are each amended to read
as follows:

(1) Notwithstanding any other provision of law, and after complying
with RCW 39.10.030, the following public bodies may utilize the general
contractor/construction manager procedure of public works contracting
for public works projects authorized under subsection (2) of this
section: The state department of general administration; the
University of Washington; Washington State University; every city with
a population greater than one hundred fifty thousand; every county with
a population greater than four hundred fifty thousand; and every port
district with a population greater than five hundred thousand. For the
purposes of this section, "general contractor/construction manager"
means a firm with which a public body has selected and negotiated a
maximum allowable construction cost to be guaranteed by the firm, after
competitive selection through formal advertisement and competitive
bids, to provide services during the design phase that may include
life-cycle cost design considerations, value engineering, scheduling,
cost estimating, constructability, alternative construction options for
cost savings, and sequencing of work, and to act as the construction
manager and general contractor during the construction phase.

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

(a) Implementation of the project involves complex scheduling
requirements;
(b) The project involves construction at an existing facility which must continue to operate during construction; or

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

(3) Public bodies should select general contractor/construction managers early in the life of public works projects, and in most situations no later than the completion of schematic design.

(4) Contracts for the services of a general contractor/construction manager under this section shall be awarded through a competitive process requiring the public solicitation of proposals for general contractor/construction manager services. (Minority and women business enterprise total project goals shall be specified in) The public solicitation of proposals shall include: A description of the project, including programmatic, performance, and technical requirements and specifications when available; the reasons for using the general contractor/construction manager procedure; a description of the qualifications to be required of the proposer, including submission of the proposer’s accident prevention program; a description of the process the public body will use to evaluate qualifications and proposals, including evaluation factors and the relative weight of factors; the form of the contract to be awarded; the estimated maximum allowable construction cost; minority and women business enterprise total project goals, where applicable; and the bid instructions to be used by the general contractor/construction manager finalists. (A public body is authorized to include an incentive clause in any contract awarded under this section for savings of either time or cost or both from that originally negotiated. No incentives granted shall exceed five percent of the maximum allowable construction cost.) Evaluation factors shall include, but not be limited to: Ability of professional personnel, past performance in negotiated and complex projects, and ability to meet time and budget requirements; location; recent, current, and projected work loads of the firm; and the concept of their proposal. A public body shall establish a committee to evaluate the proposals ((considering such factors as: Ability of professional personnel; past performance in negotiated and complex projects; ability to meet time and budget requirements; location; recent, current, and projected work loads of the firm; and the concept of their proposal)). After the committee has selected the most qualified finalists, these finalists shall submit final proposals.
including sealed bids for the percent fee, which is the percentage amount to be earned by the general contractor/construction manager as overhead and profit, on the estimated maximum allowable construction cost and the fixed amount for the detailed specified general conditions work. The public body shall select the firm submitting the highest scored final proposal using the evaluation factors and the relative weight of factors published in the public solicitation of proposals.

(5) The maximum allowable construction cost may be negotiated between the public body and the selected firm after the scope of the project is adequately determined to establish a guaranteed contract cost for which the general contractor/construction manager will provide a performance and payment bond. The guaranteed contract cost includes the fixed amount for the detailed specified general conditions work, the negotiated maximum allowable construction cost, the percent fee on the negotiated maximum allowable construction cost, and sales tax. If the public body is unable to negotiate a satisfactory maximum allowable construction cost with the firm selected that the public body determines to be fair, reasonable, and within the available funds, negotiations with that firm shall be formally terminated and the public body shall negotiate with the next ((low bidder)) highest scored firm and continue until an agreement is reached or the process is terminated. If the maximum allowable construction cost varies more than fifteen percent from the bid estimated maximum allowable construction cost due to requested and approved changes in the scope by the public body, the percent fee shall be renegotiated.

(6) All subcontract work shall be competitively bid with public bid openings. ((Specific contract requirements for women and minority enterprise participation shall be specified in each subcontract bid package that exceeds ten percent of the public body’s estimated project cost.)) Subcontract work shall not be issued for bid until the public body has approved, in consultation with the office of minority and women’s business enterprises or the equivalent local agency, a plan prepared by the general contractor/construction manager for attaining applicable minority and women business enterprise total project goals that equitably spreads women and minority enterprise opportunities to as many firms in as many bid packages as is practicable. When critical to the successful completion of a subcontractor bid package the owner and general contractor/construction manager may evaluate for bidding eligibility a subcontractor’s ability, time, budget, and specification
requirements based on the subcontractor’s performance of those items on previous projects. Subcontract bid packages shall be awarded to the responsible bidder submitting the low responsive bid. The requirements of RCW 39.30.060 apply to each subcontract bid package. All subcontractors who bid work over (two) three hundred thousand dollars shall post a bid bond and all subcontractors who are awarded a contract over (two) three hundred thousand dollars shall provide a performance and payment bond for their contract amount. All other subcontractors shall provide a performance and payment bond if required by the general contractor/construction manager. A low bidder who claims error and fails to enter into a contract is prohibited from bidding on the same project if a second or subsequent call for bids is made for the project. ((All other subcontractors shall provide a performance and payment bond if required by the general contractor/construction manager.)) Except as provided for under subsection (7) of this section, bidding on subcontract work by the general contractor/construction manager or its subsidiaries is prohibited. The general contractor/construction manager may negotiate with the low-responsive bidder in accordance with RCW 39.10.080 or, if unsuccessful in such negotiations, rebid. (((4)) (7) The general contractor/construction manager, or its subsidiaries, may bid on subcontract work on projects valued over twenty million dollars if:

(a) The work within the subcontract bid package is customarily performed by the general contractor/construction manager;

(b) The bid opening is managed by the public body; and

(c) Notification of the general contractor/construction manager’s intention to bid is included in the public solicitation of bids for the bid package.

In no event may the value of subcontract work performed by the general contractor/construction manager exceed twenty percent of the negotiated maximum allowable construction cost.

(8) A public body may include an incentive clause in any contract awarded under this section for savings of either time or cost or both from that originally negotiated. No incentives granted may exceed five percent of the maximum allowable construction cost. If the project is completed for less than the agreed upon maximum allowable construction cost, any savings not otherwise negotiated as part of an incentive clause shall accrue to the public body. If the project is completed
for more than the agreed upon maximum allowable construction cost, excepting increases due to any contract change orders approved by the public body, the additional cost shall be the responsibility of the general contractor/construction manager.

**NEW SECTION. Sec. 5.** A new section is added to chapter 39.10 RCW to read as follows:

(1) In addition to the projects authorized in RCW 39.10.050 and 39.10.060, public bodies may use the general contractor/construction manager or design-build procedure for demonstration projects valued between three million dollars and ten million dollars as follows:

(a) Three demonstration projects by the department of general administration; and

(b) One demonstration project by each of the public bodies authorized in RCW 39.10.020(2) other than the department of general administration.

(2) Public bodies shall give weight to proposers’ experience working on projects valued between three million dollars and ten million dollars in the evaluation process for the selection of a general contractor/construction manager or design-build firm for demonstration projects authorized in subsection (1) of this section.

(3) Cities which supply water to over three hundred fifty thousand people may use the design-build procedure for one water system demonstration project valued over ten million dollars. Use of the design-build procedure shall be deemed to effect compliance with the requirement for competitive bids under RCW 43.155.060.

(4) All contracts authorized under this section must be entered into before July 1, 1999.

(5) In the event that a public body determines not to perform a demonstration project using its authority under this section, it may transfer its authority to another public body.

**Sec. 6.** RCW 39.10.110 and 1994 c 132 s 11 are each amended to read as follows:

(1) There is established a temporary independent oversight committee to review the utilization of the alternative public works contracting procedures authorized under this chapter (and) to evaluate potential future utilization of other alternative contracting procedures, including, but not limited to, contractor prequalification.
and, if desired by the committee, to review traditional public works contracting procedures used by state agencies and municipalities. The committee shall also pursue the development of a mentoring program for expansion of the authorities in this chapter to other public bodies. The membership of the committee shall include: Two members of the house of representatives, one from each major caucus, appointed by the speaker of the house of representatives; two members of the senate, one from each major caucus, appointed by the president of the senate; representatives from the appropriate segments of the construction, contracting, subcontracting, and design industries, appointed by the governor; representatives from appropriate labor organizations, appointed by the governor; representatives from public bodies authorized to use the alternative public works contracting procedures under this chapter, appointed by the governor; a representative from the office of minority and women’s business enterprises, appointed by the governor; and a representative from the office of financial management, appointed by the governor. The governor shall maintain a balance between representatives from public agencies and the private sector when appointing members to the committee, and shall consider the recommendations of the established organizations representing the construction, contracting, subcontracting, and design industries and organized labor in making the industry and labor appointments ((to the committee)).

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

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

(4) The committee shall report to the appropriate standing committees of the legislature by December 10, ((1996)) 2000, concerning its findings and recommendations.

Sec. 7. RCW 39.10.120 and 1995 3rd sp.s. c 1 s 305 are each amended to read as follows:
(1) Except as provided in subsection (2) of this section, the alternative public works contracting procedures authorized under this chapter are limited to public works contracts signed before July 1, 2001. Methods of public works contracting authorized by RCW 39.10.050 and 39.10.060 shall remain in full force and effect until completion of contracts signed before July 1, 2001.

(2) For the purposes of a baseball stadium as defined in RCW 82.14.0485, the design-build contracting procedures under RCW 39.10.050 shall remain in full force and effect until completion of contracts signed before December 31, 1997.

Sec. 8. RCW 39.10.902 and 1995 3rd sp.s. c 1 s 306 are each amended to read as follows:

The following acts or parts of acts, as now existing or hereafter amended, are each repealed, effective July 1, 2001:

(1) RCW 39.10.010 and 1994 c 132 s 1;
(2) RCW 39.10.020 and 1994 c 132 s 2;
(3) RCW 39.10.030 and 1994 c 132 s 3;
(4) RCW 39.10.040 and 1994 c 132 s 4;
(5) RCW 39.10.050 and 1994 c 132 s 5;
(6) RCW 39.10.060 and 1994 c 132 s 6;
(7) RCW 39.10.--- and 1997 c . . . s 5 (section 5 of this act);
(8) RCW 39.10.070 and 1994 c 132 s 7;
((8)) (9) RCW 39.10.080 and 1994 c 132 s 8;
((9)) (10) RCW 39.10.090 and 1994 c 132 s 9;
((10)) (11) RCW 39.10.100 and 1994 c 132 s 10;
((11)) (12) RCW 39.10.110 and 1994 c 132 s 11;
((12)) (13) RCW 39.10.900 and 1994 c 132 s 13;
((13)) (14) RCW 39.10.901 and 1994 c 132 s 14; and
((14)) (15) RCW 39.10.902 and 1994 c 132 s 15.

NEW SECTION. Sec. 9. 1996 c 18 s 17 (uncodified) is repealed.

NEW SECTION. Sec. 10. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1997.