HOUSE BILL REPORT
ESSB 5285

As Reported by House Committee On:
Local Government

Title: An act relating to updating the water quality joint development act to provide local government flexibility.

Brief Description: Updating the water quality joint development act to provide local government flexibility.

Sponsors: Senate Committee on Water, Energy & Environment (originally sponsored by Senators Poulsen, Morton, Rockefeller, Honeyford, Kline, Mulliken and Oke).

Brief History:
Committee Activity:
Local Government: 3/30/05 [DP].

Brief Summary of Engrossed Substitute Bill

- Revises provisions of the Water Quality Joint Development Act (Act) governing service agreements for the design, development, and operation of water pollution control facilities.
- Provides that, with respect to water pollution control facilities, state agencies and large municipalities eligible to utilize the alternative public works contracting procedures found in Chapter 39.10 RCW may utilize those procedures or those found in the Act for procurement of services.
- Authorizes the Department of Ecology (DOE) to enter into contracts with municipalities and other public corporations for purposes of assisting with the financing of the design, as well as the construction, of water pollution control projects and further provides that DOE is so authorized regardless of the statutory procurement scheme utilized.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

Majority Report: Do pass. Signed by 6 members: Representatives Simpson, Chair; Clibborn, Vice Chair; Schindler, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Takko and Woods.

Staff: CeCe Clynch (786-7168).

Background:

Water Quality Joint Development Act

The Water Quality Joint Development Act (Act) was enacted in 1986 with the stated purpose "to provide public bodies an additional means by which to provide for financing, development, and operation of water pollution control facilities." The Legislature intended "that public bodies be authorized to provide service from such facilities by means of service agreements with public or private parties."

"Water pollution control facilities" are defined as facilities or systems, whether owned or operated *by* a public body or *for* a public body, for the control, collection, and treatment of sanitary sewage, storm water, residential wastes, commercial wastes, industrial wastes, and agricultural wastes. Facilities covered under this Act do not include dams or water supply systems.

Under the Act, local governments may contract with a public or private service provider to design, finance, construct, own, operate, or maintain these facilities. Agreements may be for a term not to exceed 40 years or the life of the facility, whichever is longer, and are renewable. Payment obligations assumed by a public body pursuant to such a service agreement may be paid from taxes, user fees, or other revenues pledged to the payment of these obligations.

Service agreements must comply with numerous procedural requirements set forth in the Act, including requirements with respect to notice, requests for proposal (RFP), criteria by which RFPs are to be judged, performance bonds and other security, public hearings, and appeals. A service provider is required to demonstrate in its RFP that a public body's annual costs will be lower under its proposal than they would be if the public body financed, constructed, owned, operated, and maintained the facilities. The Department of Ecology must review and approve service agreements before finalization to ensure compliance with water pollution laws.

Alternative Public Works Contracting Procedures

In 1994, the Legislature recognized that while the traditional process of awarding public works contracts in a lump sum to the lowest responsible bidder is a fair and objective method, there are circumstances when alternative public works contracting procedures may best serve the public interest. Large public bodies, including state agencies, the two major research universities, and cities, counties, ports, hospital districts, school districts, and public utility districts of a certain size, were authorized to utilize the design-build and the general contractor/construction manager contracting procedures for public works contracting.

The design-build procedure contemplates 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. The general contractor/construction manager procedure includes a general contractor/construction manager which the public body selects and with which the public body has negotiated a maximum allowable construction cost to be guaranteed by the firm to provide services during the design phase that include cost design considerations, value engineering, scheduling, cost estimating, constructability, alternative

construction options, sequencing of work, and acting as the construction manager and general contractor during the construction phase.

Unlike the Act, the provisions found in Chapter 39.10 RCW are not limited to water pollution control facilities but may be utilized with respect to many different public works. Another notable difference is that the alternative public works contracting procedures set forth in Chapter 39.10 RCW are in almost all cases limited to contracts signed before July 1, 2007, and all but one of the sections in Chapter 39.10 are repealed effective July 1, 2007.

Summary of Bill:

The Act is revised in the following ways:

- The original language states that a service provider may "design, finance, construct, own, operate, *or* maintain" facilities. New prefatory language indicates that a service provider could perform one or more of these services.
- A provision that final notice of the RFP process shall be published not less than 60 days before the date for submission is changed to require publication not less than 30 days prior.
- Rather than require the service provider to include in the RFP a demonstration that the public body's annual costs will be lower under the proposal than they would be if the public body financed, constructed, owned, operated, and maintained such facilities, the service provider is required to demonstrate to the public body's satisfaction that "it is in the public interest to enter into the service agreement and that the service agreement is financially sound and advantageous to the public body from the standpoint of annual costs, quality of services, experience of the provider, reduction of risk, and other factors."
- Provides that the legislative authority may, but is not required to, designate a person to act as its designee and assist with issuing and evaluating the RFPs. Further provides that the designee may be a person within or outside the public body and removes the prohibition that a designee may not be a member of the legislative body.
- Authorizes the public body, at its discretion, to aggregate qualified, responsive proposals into a short list.
- The legislative authority is expressly authorized to negotiate with a service provider. If a designee conducts the negotiations, the legislative authority must oversee the process and provide direction to the designee.
- Clarifies that the DOE must approve the agreement and there must be a public hearing *before* finalizing the agreement.
- Deletes the requirement that a hearing on an appeal filed by an aggrieved service provider must be conducted in accordance with Chapter 34.05 RCW since those laws apply to state agencies and "agency action" as defined in that chapter specifically excludes an agency decision regarding contracting or procurement of goods, services, and public works.
- A provision that all service agreements had to include a provision for an option by which a public body could acquire the facilities at fair market value is changed to require such a

provision only in situations in which the original service agreement contemplates that the service provider will own all or a portion of the facilities.

- With respect to the review by the DOE, provisions are added to require that the review be completed within 30 days and to indicate that such a review is not intended to replace any additional permitting or regulatory reviews required under other laws.
- Specifically allows public bodies that are eligible to use alternative public works contracting procedures, such as the design-build or general contractor/construction manager procedures, to use those procedures or those found in the Act as its method of procurement.

A similar provision is added to the Alternative Public Works Contracting Procedures allowing a large public body to use those procedures or the ones found under the Act in connection with procuring services related to water pollution control facilities.

In the context of the powers and authority conferred on the DOE, language is added indicating: (1) that the DOE may enter into contracts with municipalities and public corporations for the purpose of assisting with the financing of design, as well as construction, of water pollution control facilities; and, (2) that the DOE has such authority regardless of the particular procurement laws which are utilized by the municipality or public corporation.

Finally, the repealer at the end of the chapter dealing with Alternative Public Works Contracting Procedures is amended to reflect that changes were made in the 2003 as well as the 2005 legislative session.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: Recently, the cities of Sunnyside and South CleElum tried to use provisions of the Act but experienced difficulties in doing so and, as a result, recommended changes to be made to the law so as to make it more workable. This represents an attempt to answer and clarify questions and issues which came up during implementation efforts. For instance, rather than require a service provider to demonstrate only that the cost would be lower than if built and operated by the public entity, the service provider must demonstrate that it is in the public interest to enter into the service agreement, looking at the project holistically and taking into account several factors including cost, the experience of the provider, environmental requirements, and the like. There are risks with looking only at costs without looking at other factors as well. This process is an open and competitive process. Design/build/operate offers real opportunities but the process needs to be workable. By making these changes, small and medium-sized public entities will be able to take advantage of the process. With service agreements between public entities and private providers, the private sector partner often guarantees that there will be compliance with environmental rules and regulations. The City

of Vancouver's wastewater facility provides an example of the benefits which can result from public/private partnerships. Following installation of a process control system, the facility has incurred no major fines or penalties in 22 years of operation.

Testimony Against: None.

Persons Testifying: Ashley Probart, Association of Washington Cities; Andrea McNamara, Veolia; and Melode Selby, Department of Ecology.

Persons Signed In To Testify But Not Testifying: None.