

HOUSE BILL REPORT

ESHB 2607

As Passed Legislature

Title: An act relating to procurement by state agencies and municipalities of public works that are unique due to cost, complexity or public interest.

Brief Description: Establishing alternative procurement procedures for state agencies and municipalities.

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

Brief History:

Reported by House Committee on:
Capital Budget, February 3, 1994, DPS;
Passed House, February 14, 1994, 55-41;
Passed Legislature.

HOUSE COMMITTEE ON CAPITAL BUDGET

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 14 members: Representatives Wang, Chair; Ogden, Vice Chair; Sehlin, Ranking Minority Member; McMorris, Assistant Ranking Minority Member; Brough; Eide; R. Fisher; Jacobsen; Jones; Moak; Romero; Silver; Sommers and B. Thomas.

Minority Report: Do not pass. Signed by 1 member: Representative Heavey.

Staff: Karl Herzog (786-7271).

Background: The public works process used by most state and local agencies for constructing buildings separates the architectural design phase of a project from the construction phase. Under this process, an architectural firm is retained to design the facility and prepare construction documents. After the detailed design and construction documents are complete, the construction phase of the project is put out for competitive bid. A construction contract is then awarded to the lowest responsible bidder.

Procurement of architectural and engineering services differs from the competitive low-bid process in that agencies are not required to select firms based on the

lowest bid, but may base their selection on the qualifications and past performance of the firm. Alternative forms of public works contracting have been used by state agencies and local governments on a limited basis. For example, three new state agency office buildings were recently constructed in Thurston County using the "design-build" process. In design-build, agencies enter into a single contract for both design and construction services from one contractor, and design is performed simultaneously with construction on earlier stages of the project.

The "general contractor/construction manager" (GC/CM) method, another alternative form of public works contracting, was recently used to construct new prison facilities in Airway Heights and Purdy. The GC/CM process melds the design and construction phases of a project into one, allowing design and construction to occur simultaneously. Under GC/CM, an agency enters into two contracts - one with an architectural firm to design the facility, and one with a GC/CM firm to assist in developing and evaluating the facility design and to manage the construction. Most of the actual construction work under GC/CM is broken into parts and competitively bid to subcontractors using the public bid process.

Agencies may negotiate an adjustment to the bid price with the lowest responsible bidder on a public works project in order to bring the bid within budget if the low bid exceeds available funds by 5 percent or less on projects under \$1 million, the greater of \$50,000 or 2.5 percent on projects between \$1 million and \$5 million, or the greater of \$125,000 or 1 percent for projects over \$5 million.

Summary of Bill: Alternative public works contracting procedures are authorized for use on a limited basis by specified state and local agencies.

Three state agencies, including the Department of General Administration, the University of Washington, and Washington State University, and six local governments, including cities with populations greater than 150,000 and counties with populations greater than 450,000, are authorized to use the design-build contracting procedure on the following projects valued over \$10 million: projects where construction activities are highly specialized and design-build is critical in developing the construction methodology, projects where the design is repetitive in nature and an incidental part of construction, and projects where the program elements of the design are simple and do not involve complex functional inter-relationships. The Department of General Administration may use design-build for only one project where the program elements of the

design are simple and do not involve complex functional inter-relationships.

Three state agencies, including the Department of General Administration, the University of Washington, and Washington State University, and eight local governments, including cities with populations greater than 150,000, counties with populations greater than 450,000, and port districts with populations greater than 500,000, are authorized to use the GC/CM contracting procedure on the following projects valued over \$10 million: projects which involve complex scheduling requirements, projects which involve construction at existing facilities which must continue to operate during construction, and projects where involvement of the GC/CM is critical to the success of the project.

A design-build or GC/CM contracting procedure may be used by a special agency, authority or other district established by a county for construction of a baseball stadium.

Decisions to use the alternative procurement procedures must be made following a specified public notification, review and comment process. Decisions to use the alternative procedures are subject to appeal in superior court within 30 days of the decision.

Design-build and GC/CM contracts must be awarded using a competitive process following the public solicitation of proposals. Each agency must establish a committee to evaluate and score proposals based on specified factors. After initial qualification for design-build projects, the agency must select between three and five finalists to submit best and final proposals and must negotiate a design-build contract with the highest-scoring firm. Agencies must provide honorarium payments to finalists who are not awarded a design-build contract. For GC/CM contracts, agencies must select the most qualified finalists to submit bids for GC/CM services and must negotiate a GC/CM contract with the low bidder. Firms awarded a design-build or GC/CM contract must post a performance and payment bond for the contracted amount.

All subcontract work on GC/CM projects must be competitively bid with public bid openings. Subcontractors who bid work over \$200,000 on a GC/CM project must post a bid bond. Subcontractors awarded contracts over \$200,000 on a GC/CM project must provide a performance and payment bond for their contract amount. The GC/CM may require subcontractors awarded work under \$200,000 to provide a performance and payment bond.

Agencies may negotiate an adjustment to the lowest bid or proposal price for design-build or GC/CM projects authorized in this legislation if all bids or proposal prices exceed available funds, the apparent low responsible bid or proposal does not exceed the available funds by more than \$125,000 or 2 percent for projects valued over \$10 million, whichever is greater, and the negotiated adjustment will bring the bid or proposal within the amount of available funds.

Agencies must utilize specified project planning, management and administration procedures when using alternative public works contracting methods. Contract documents must include project contingencies not less than 5 percent of the anticipated contract value and alternative dispute resolution procedures. Contracts may include incentive payments to contractors for early completion of the project, cost savings or other goals.

All proceedings, records and contracts relating to the use of the alternative public works contracting procedures must be available for public inspection except for trade secrets or proprietary information submitted by a bidder.

An independent oversight advisory committee is established to review utilization of the authorized alternative public works contracting procedures and to evaluate potential future utilization of other alternative contracting procedures such as contractor prequalification. Committee membership includes four members of the Legislature, one from each major caucus of the House of Representatives and Senate; and representatives from agencies authorized to use the alternative procedures, the construction and design industries, and organized labor, appointed by the Governor. The committee must report its findings to the Legislature by December 10, 1996.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Alternative construction contracting methods are used in the private sector to produce quality projects in a timely factor and to save money. Alternative public works contracting procedures can be especially useful for projects with complex environmental, design or scheduling conditions by allowing the introduction of contractor expertise earlier in the project development process. The GC/CM process requires public opening of subcontractor bids, thereby preventing bid-shopping. The proposed legislation

incorporates a rigorous public review process to encourage open competition and ensure fairness in awarding contracts.

Testimony Against: The bill would change the way public agencies and contractors do business. The traditional competitive bidding system has been successful. Though there may be a need for legislation to expand public agencies' options beyond the traditional lump-sum bidding process, many areas of the original bill need improvement, including restricting the agencies which qualify for the alternative procedures, and limiting the number of eligible projects.

Witnesses: Steve Sewell, Port of Seattle (pro); Fred King, Department of General Administration (pro); Jan Kaiser, METRO (pro); Bill Lewis, Dan Absher, Duke Schaub, and Margo Easton, Associated General Contractors; Gary Chandler and Frank Densmore, American Institute of Architects; Cliff Webster, Architects and Engineers Legislative Council; Larry Stevens, United Subcontractors Association; Dick Ducharme, Utility Contractors Association; and Allan Darr, Washington State Building Trades Council. (**NOTE:** The substitute bill addresses many of the concerns of those who spoke against the original bill.)