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ENGROSSED SUBSTITUTE HOUSE BILL 2607

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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.

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