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HOUSE BILL 2607

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State of Washington                      53rd Legislature                      1994 Regular Session

By Representatives Wang, Ogden and Sehlin

Read first time 01/19/94. Referred to Committee on Capital Budget.

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.**    DECLARATION OF POLICIES AND PURPOSES.    (1)  
6 The legislature recognizes that the development of certain public  
7 projects may present complex technical, design, or environmental  
8 problems or may be subject to conditions so unique that conventional  
9 procurement procedures likely may limit a public body's ability to  
10 secure the highest quality in public works projects for a reasonable  
11 price and in the most timely manner. It is hereby declared to be the  
12 public policy of the state of Washington that state agencies and  
13 municipalities should be authorized to utilize the procurement  
14 procedures provided in this chapter to contract for such public works  
15 projects where such procedures are in the public interest for a  
16 specific project or procurement and the director of an agency or the  
17 legislative or governing body of a municipality specifically authorizes  
18 their use consistent with the policies and purposes of this chapter.  
19 This chapter is not intended to be utilized for conventional public

1 works projects such as roads and streets and basic utilities.  
2 Competitive bidding should continue to be utilized for most public  
3 construction projects as otherwise provided by state law.

4 (2) The legislature finds that the public interest of the citizens  
5 of the state will be advanced by authorizing state agencies and  
6 municipalities to utilize the most current methods of contracting for  
7 public works projects qualifying under this chapter, provided that all  
8 such procedures are conducted in a fair and impartial manner, and  
9 provided further that all qualified vendors, contractors, and suppliers  
10 have access to public business and that no offer or proposal is  
11 arbitrarily or capriciously excluded or evaluated.

12 (3) The legislative intent of this chapter is to supplement, not to  
13 limit, the current contracting powers and procurement practices of  
14 state agencies and municipalities.

15 (4) This chapter shall not be deemed to affect or in any way modify  
16 the current statutory, regulatory, or charter powers of state agencies  
17 or municipalities except to the extent that a procedure authorized by  
18 this chapter is adopted by a public body for application to a  
19 particular project or procurement. In that event, the normal  
20 contracting or procurement limits or requirements of a state agency or  
21 municipality as imposed by statute, ordinance, resolution, or  
22 regulation shall be deemed waived or amended to the extent necessary to  
23 accommodate such procedures only for the particular project or  
24 procurement.

25 (5) Notwithstanding the possible qualification of a project or  
26 procurement under section 3 of this act, this chapter shall not apply  
27 to cities and towns having a population less than one thousand five  
28 hundred.

29 (6) This chapter may also apply to joint projects between private  
30 profit or not-for-profit organizations and state agencies and  
31 municipalities, and joint projects between such public bodies, to the  
32 extent such projects are otherwise lawful.

33 (7) The procedures provided in this chapter may be implemented by  
34 ordinances, resolutions, regulations, motions, or other lawful actions  
35 consistent with this chapter adopted or promulgated by any public body  
36 empowered by law to undertake the activities described in this chapter.  
37 Any such public body may act by and through its duly designated or  
38 authorized officers or employees.

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 dispute resolution" means collaborative problem  
5 solving between a public body and a contractor to identify and resolve  
6 potential disputes prior to litigation and includes but is not limited  
7 to partnering, mediation, and arbitration.

8        (2) "Construction" means building, altering, repairing, improving,  
9 renovating, or demolishing any structure, building, or facility, and  
10 any related draining, dredging, excavation, grading, or similar work  
11 upon real property.

12        (3) "Construction management/multiple prime contract" means  
13 contracts between a public body and several parties in which one party  
14 agrees to both coordinate and administer contracts for construction or  
15 procurement entered into between the public body and other contractors.

16        (4) "Construction manager/general contractor contract" means a  
17 contract in which a party is retained by a public body to coordinate  
18 and administer contracts for construction services for the benefit of  
19 the public body, and may also include, if provided in the contract,  
20 both construction as a general contractor by the party so retained and  
21 services that may include life-cycle cost design considerations, value  
22 engineering, scheduling, cost estimating, constructibility, alternative  
23 construction options for cost savings and sequencing of work, all of  
24 which may be subject to a maximum allowable construction cost  
25 guaranteed by the contractor.

26        (5) "Contractor" means a contractor, vendor, or supplier acting as  
27 an individual, association, partnership, firm, company, corporation, or  
28 combination thereof, including joint venturers, who is offering to  
29 enter into an agreement with a public body to provide public works.

30        (6) "Design-build contract" means a contract between a public body  
31 and another party in which the party contracting with the public body  
32 agrees to both design and build the structure, facility, or other item  
33 specified in the contract.

34        (7) "Municipality" means any municipality as defined in  
35 RCW 39.04.010.

36        (8) "Public body" means any state agency or municipality with a  
37 population of over one thousand five hundred people except school  
38 districts, and any legislative, executive, or judicial body, agency,  
39 office, department, authority, post, commission, committee,

1 institution, board, or political subdivision created by law to exercise  
2 some sovereign power or to perform some governmental duty for such  
3 state agency or municipality, and empowered by law to undertake the  
4 activities described in this chapter.

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

7 (10) "Responsible bidder or proposer" means a contractor who, in  
8 the opinion of the public body, has demonstrated that it and its  
9 principal subcontractors and partners have, at a minimum:

10 (a) Adequate financial resources to perform the contract;

11 (b) Sufficient resources and experience to comply with the required  
12 or proposed delivery or performance schedule, taking into consideration  
13 all of its commitments;

14 (c) A satisfactory performance record;

15 (d) A satisfactory record of business integrity and reliability;

16 (e) Adequate organizational and operational experience and  
17 technical skills; and

18 (f) Necessary production, construction, and technical equipment and  
19 facilities.

20 (11) "Responsive bid" means a submitted bid that conforms in all  
21 material respects to the invitation to bid.

22 (12) "State agency" means an office, department, division, bureau,  
23 board, commission, or other agency of this state, including community  
24 college districts and public colleges and universities.

25 NEW SECTION. **Sec. 3.** IMPLEMENTATION. (1) The alternative  
26 procurement procedures authorized by section 5 of this act may be  
27 utilized by a public body whenever a public works project qualifies  
28 under one or more of the criteria set forth in this subsection. In  
29 order to utilize such procedures, a public works project must have an  
30 estimated construction cost of at least two million dollars. Any such  
31 project or procurement must also be characterized by one or more of the  
32 following criteria:

33 (a) Technical complexity or unique character;

34 (b) The qualifications, experience, or capability of contractors  
35 are a major factor in the success of the project;

36 (c) Design or environmental complexity where the contribution of  
37 contractors or of the community to the configuration or location of the  
38 project may contribute to the success of the project; or

1 (d) Unique scheduling requirements or urgent public need to secure  
2 procurement where time or budget constraints make utilization of the  
3 public body's normal procurement process infeasible or where such  
4 process would result in a delay presenting the risk of a serious  
5 financial or other injury to the public.

6 (2) The process under which a public body makes the determination  
7 to utilize the alternative procurement procedures provided in this  
8 chapter shall provide for notice to and opportunity to comment on the  
9 determination by the major associations representing design  
10 professionals, the construction industry, and organized labor.

11 NEW SECTION. **Sec. 4.** PROJECT MANAGEMENT REQUIREMENTS. (1)  
12 Whenever a public body determines to utilize the procedures authorized  
13 by section 5 of this act, the budget and planning for the project or  
14 procurement shall provide for:

15 (a) The preparation of reasonably complete and coordinated design  
16 documents consistent with the procurement procedure utilized;

17 (b) To the extent reasonable and appropriate, an independent review  
18 of the contract documents through value engineering or constructibility  
19 studies performed by persons or firms independent of the design team  
20 prior to bid or solicitation;

21 (c) Reasonable contingencies totaling not less than five percent of  
22 the anticipated contract value; and

23 (d) To the extent reasonable and appropriate, on-site architectural  
24 or engineering representatives during major construction or  
25 installation phases.

26 (2) In order for a public body to utilize the procedures authorized  
27 by section 5 of this act, the public body shall employ staff or  
28 contract with consultants with expertise and prior experience in the  
29 management of projects reasonably comparable to the one for which such  
30 procedures are proposed to be utilized.

31 (3) The contract documents for all such projects and procurements  
32 shall include requirements for alternative dispute resolution  
33 procedures to be attempted prior to the initiation of litigation.

34 (4) The contract documents for any project utilizing the procedures  
35 authorized by this chapter may provide for incentive payments to the  
36 contractor for early completion, cost savings, or other goals  
37 identified in advance of contract award. The amounts of any such  
38 incentive payments to be made for contractor performance on any

1 particular project shall be determined pursuant to criteria  
2 incorporated in project contract documents.

3 NEW SECTION. **Sec. 5.** ALTERNATIVE PROCUREMENT PROCEDURES. (1)  
4 Notwithstanding any other provision of law, if a public body determines  
5 that a public works project or procurement qualifies under section 3 of  
6 this act, such public body may utilize such alternative procurement  
7 procedures as design-build, construction manager/general contractor, or  
8 construction manager/multiple prime contracts, or combinations thereof,  
9 for such project or procurement pursuant to the procedures provided in  
10 this section.

11 (2) In determining that a public works project or procurement  
12 qualifies under section 3 of this act for use of an alternative  
13 procurement method authorized in this chapter and for utilizing a  
14 chosen method or methods, the public body shall:

15 (a) Identify with reasonable specificity the basis for its  
16 determination that a public works project or procurement qualifies  
17 under section 3 of this act for use of an alternative procurement  
18 method.

19 (b) Authorize the issuance of a written request for qualifications  
20 and proposals consistent with the alternative procurement method to be  
21 utilized that includes:

22 (i) Any particular qualifications to be required of the contractor;

23 (ii) A general description of the process the public body will use  
24 to evaluate qualifications or proposals in contemplation of the award  
25 of a contract;

26 (iii) The factors the public body will use in evaluating  
27 qualifications, including but not limited to those factors identified  
28 in section 6(2) of this act, and the relative weight to be accorded  
29 such factors in the evaluation process;

30 (iv) The factors the public body will use in evaluating and rating  
31 proposals and the relative weight to be accorded such factors in the  
32 proposal evaluation process;

33 (v) A basic description of the form of the contract sought to be  
34 awarded; and

35 (vi) Other information relevant to the project.

36 (c) Provide public notice of its determination that a public works  
37 project or procurement qualifies for use of an alternative procurement  
38 method and of the availability of its requests for qualifications and

1 proposals in such place or places or manner such public body  
2 customarily provides such notice.

3 (d) Advertise its determination that a public works project or  
4 procurement qualifies for use of an alternative procurement method and  
5 of the availability of its requests for qualifications and proposals in  
6 the manner in which such public body customarily advertises for bidders  
7 for public works.

8 (3) The public body may request that qualifications and proposals  
9 be submitted at the same time.

10 (4) Qualifications submitted at the request of the public body  
11 shall be evaluated pursuant to the factors, weighting, and process  
12 identified in the initial request for qualifications. Based on the  
13 information submitted or developed by the public body through its  
14 process, not fewer than two or no more than five finalists deemed by  
15 the public body most qualified for the project or procurement shall be  
16 requested to submit proposals or bids.

17 (5) Proposals submitted at the request of the public body shall be  
18 evaluated pursuant to the factors, weighting, and process identified in  
19 the initial request for proposals. Such factors may include price.  
20 The process may include negotiations with two or more finalists  
21 commencing with the firm submitting the highest scored proposal. If  
22 the public body is unable to execute a contract with that firm,  
23 negotiations with that firm may be suspended or terminated and the  
24 public body may proceed to negotiate with the next highest scored firm  
25 and continue in accordance with this procedure until a contract  
26 agreement is reached or the selection process is terminated. The  
27 public body may, in its sole discretion, reject all proposals.

28 (6) Utilization of the design-build alternative procurement method  
29 shall be subject to the following additional requirements:

30 (a) The request for proposals shall also include:

31 (i) A description of the major program requirements for the project  
32 or procurement including matters such as the minimum and maximum net  
33 and gross areas of any building; and

34 (ii) A project budget including reasonable contingencies totaling  
35 not less than five percent of the anticipated contract value;

36 (b) Prior to issuing its request for proposals, the public body  
37 shall determine whether to authorize appropriate payments to finalists  
38 who are not awarded a design-build contract, provided that, if

1 authorized, such payments shall be no less than fifteen one-hundredths  
2 of one percent of the anticipated contract value.

3 (7) Combinations of the procedures provided under this section and  
4 section 6 of this act may be utilized by a public body for qualified  
5 projects and procurements and combinations of projects and procurements  
6 under this chapter.

7 (8) Notwithstanding any other provision of law, a contract  
8 utilizing the procedures under this section or section 6 of this act  
9 may include provisions that promote cooperation and motivate  
10 contractors to improve the project quality or function, to reduce the  
11 cost, or to save time in construction or delivery and installation by  
12 using such methods as shared savings for value engineering, incentive  
13 payments, reimbursement for proposal or bid preparation expenses and  
14 preconstruction planning, and partnering.

15 NEW SECTION. **Sec. 6.** PREQUALIFICATION. (1) To assist a public  
16 body in determining whether a bidder or proposer is a responsible  
17 bidder or proposer, prospective contractors and their principal  
18 subcontractors may be prequalified for particular projects or  
19 procurements, and the consideration of bids or proposals may be limited  
20 to such prequalified contractors or subcontractors when their  
21 qualifications and experience are deemed by the public body to be  
22 critical to the success of the project due to its technical, design, or  
23 environmental complexities.

24 (2) Prequalification procedures shall clearly specify the relative  
25 weight of each factor to be used in making the prequalification  
26 determination. The factors may reflect unique project requirements and  
27 any other experience, performance, or capability requirement that will  
28 have a significant effect on the final procurement decision. However,  
29 the factors shall include the following:

30 (a) Experience by the contractor or subcontractor in construction  
31 and management of construction similar in size and complexity to the  
32 proposed project;

33 (b) Commitment to supervision and management of the project by  
34 principal officers and employees of the contractor or subcontractor  
35 with appropriate experience on projects of similar size and complexity,  
36 including proposed job titles and descriptions;

37 (c) With respect to projects for which conventional bonding is  
38 inappropriate or inadequate, specified evidence of sufficient financial



1 capability to perform the project or procurement such as by  
2 communications from banks, auditing firms, or other financial  
3 references, financial statements, and similar reports consistent with  
4 the size and complexity of the project;

5 (d) Evidence of appropriate licensing and registrations necessary  
6 to perform the project or procurement;

7 (e) Safety record on projects of comparable size and complexity;  
8 and

9 (f) Information on any public contracts or projects of similar size  
10 and complexity on which the contractor, subcontractor, or any business  
11 or corporate affiliate has been terminated for cause, including  
12 information on the ultimate disposition of any such terminations.

13 (3) A public body may prequalify specific types of subcontractors  
14 when their qualifications and experience are deemed by the public body  
15 to be a major factor in the success of the project due to its  
16 technical, design, or environmental complexity. Whenever feasible, a  
17 public body shall prequalify not fewer than three subcontractors for  
18 any major component of such a project pursuant to the procedures  
19 provided in this section. The public body may require proposers or  
20 bidders to utilize a subcontractor from among those prequalified for  
21 the component of such a project.

22 (4) In the event a contractor or subcontractor is not deemed  
23 qualified, the public body shall provide a written explanation to the  
24 contractor or subcontractor of the reasons for the determination. The  
25 prequalification procedures shall provide bidders or proposers with a  
26 reasonable opportunity to protest or challenge the determination to  
27 utilize prequalification, the prequalification criteria, and the  
28 prequalification determination. Notice and advertisement of the  
29 request for prequalifications shall conform to the requirements of  
30 section 5 of this act.

31 (5) Following selection of prequalified contractors or  
32 subcontractors, the public body may award a contract to a prequalified  
33 contractor submitting the lowest responsive bid pursuant to competitive  
34 sealed bidding or may do so pursuant to a process described in its  
35 initial request for prequalification consistent with the requirements  
36 of section 5 of this act.

37 NEW SECTION. **Sec. 7.** DIRECTOR, LEGISLATIVE, OR GOVERNING  
38 AUTHORITY AUTHORIZATION. The determination to use any of the

1 procurement procedures authorized by this chapter shall be made by a  
2 state agency director or by the legislative or governing authority of  
3 a municipality or the office or authority of a public body otherwise  
4 authorized to make procurement decisions for the public body following  
5 a public process that ensures that the recommendations and reasons for  
6 utilizing the procedures are summarized in writing and that there is an  
7 opportunity for public comment on such reasons and recommendations and  
8 on the proposed determination. The determination shall be subject to  
9 appeal to superior court within seven days of the determination by the  
10 public body.

11 NEW SECTION. **Sec. 8.** PUBLIC INSPECTION OF CERTAIN RECORDS. (1)  
12 Except as provided in this section, all proceedings, records,  
13 contracts, and other public records relating to procurement  
14 transactions authorized under this chapter shall be open to the  
15 inspection of any citizen, or any interested person, firm, or  
16 corporation in accordance with the Washington public disclosure act,  
17 chapter 42.17 RCW, subject to the additional limits set forth in  
18 subsection (2) of this section.

19 (2) Trade secrets or proprietary information submitted by a bidder,  
20 offeror, or contractor in connection with a procurement transaction  
21 shall not be subject to public disclosure under the Washington public  
22 disclosure act, chapter 42.17 RCW if the bidder, offeror, or contractor  
23 invokes the protections of this section prior to or upon submission of  
24 the data or other materials, and must identify the data or other  
25 materials to be protected and state the reasons why protection is  
26 necessary.

27 NEW SECTION. **Sec. 9.** NEGOTIATION WITH LOWEST RESPONSIBLE BIDDER  
28 OR PROPOSER. Notwithstanding the provisions of RCW 39.04.015 or any  
29 other provision of law, a public body is authorized to negotiate an  
30 adjustment to the lowest bid or proposal price under consideration for  
31 award for a project or procurement qualifying under the terms of this  
32 chapter based upon agreed changes to the contract plans and  
33 specifications under the following conditions:

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

36 (2) The apparent low responsive bid or proposal does not exceed the  
37 available funds by two hundred fifty thousand dollars or two percent

1 for projects valued over five million dollars, whichever is greater;  
2 and

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

5 NEW SECTION. **Sec. 10.** COMPLIANCE WITH CONDITIONS ON FEDERAL  
6 GRANTS OR CONTRACTS. Where a procurement transaction implemented under  
7 this chapter involves the expenditure of federal grant assistance or  
8 contract funds, the receipt of which is conditioned upon compliance  
9 with mandatory requirements in federal laws or regulations not in  
10 conformance with this chapter or state or local laws, charter  
11 provisions, and regulations, a public body may comply with such federal  
12 requirements, notwithstanding the provisions of such laws, charters,  
13 regulations, or this chapter if acceptance of the grant or contract  
14 funds under the applicable conditions is in the public interest.

15 NEW SECTION. **Sec. 11.** LIBERAL CONSTRUCTION. The rule of strict  
16 construction shall have no application to this chapter, but this  
17 chapter shall be liberally construed in all respects to carry out the  
18 purposes and objects for which this chapter is intended.

19 NEW SECTION. **Sec. 12.** APPLICATION. This act shall apply  
20 prospectively only and not retroactively; provided, however, that this  
21 act shall not be deemed to imply that any use of the procurement  
22 procedures identified in this act by state agencies and municipalities  
23 prior to the effective date of this act were utilized without legal  
24 authority or that such state agencies or municipalities lacked power to  
25 take such actions.

26 NEW SECTION. **Sec. 13.** MANDATORY REVIEW. The governor shall  
27 establish an independent oversight advisory committee with  
28 representatives of interest groups with an interest in this subject  
29 area, including municipalities with experience in utilizing the  
30 procedures authorized in this chapter, and the private sector to review  
31 experience with such procedures. The oversight advisory committee  
32 shall report its findings to the legislature prior to the session which  
33 convenes in January 2001.

1        NEW SECTION.   **Sec. 14.**   SHORT TITLE.   This chapter may be known and  
2        cited as the Washington alternative public procurement procedures act.

3        NEW SECTION.   **Sec. 15.**   CAPTIONS.   Captions as used in this act do  
4        not constitute any part of the law.

5        NEW SECTION.   **Sec. 16.**   SEVERABILITY.   If any provision of this act  
6        or its 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. 17.**   Sections 1 through 16 of this act shall  
10       constitute a new chapter in Title 39 RCW.

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