

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 2056

Chapter 300, Laws of 2003

58th Legislature
2003 Regular Session

PUBLIC WORKS BIDDING

EFFECTIVE DATE: 7/27/03

Passed by the House April 26, 2003
Yeas 98 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 11, 2003
Yeas 48 Nays 0

BRAD OWEN

President of the Senate

Approved May 14, 2003.

GARY LOCKE

Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 2056** as passed by the House of Representatives and the Senate on the dates hereon set forth.

CYNTHIA ZEHNDER

Chief Clerk

FILED

May 14, 2003 - 3:30 p.m.

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 2056

AS RECOMMENDED BY THE CONFERENCE COMMITTEE

Passed Legislature - 2003 Regular Session

State of Washington 58th Legislature 2003 Regular Session

By House Committee on State Government (originally sponsored by Representatives Haigh, Armstrong and Miloscia)

READ FIRST TIME 03/05/03.

1 AN ACT Relating to the fairness of public works bidding; amending
2 RCW 39.10.020, 39.10.051, 39.10.061, and 39.10.902; adding new sections
3 to chapter 39.04 RCW; and adding new sections to chapter 39.10 RCW.

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

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 39.04 RCW
6 to read as follows:

7 When a municipality receives a written protest from a bidder for a
8 public works project which is the subject of competitive bids, the
9 municipality shall not execute a contract for the project with anyone
10 other than the protesting bidder without first providing at least two
11 full business days' written notice of the municipality's intent to
12 execute a contract for the project; provided that the protesting bidder
13 submits notice in writing of its protest no later than two full
14 business days following bid opening. Intermediate Saturdays, Sundays,
15 and legal holidays are not counted.

16 NEW SECTION. **Sec. 2.** A new section is added to chapter 39.04 RCW
17 to read as follows:

1 A low bidder on a public works project who claims error and fails
2 to enter into a contract is prohibited from bidding on the same project
3 if a second or subsequent call for bids is made for the project.

4 **Sec. 3.** RCW 39.10.020 and 2001 c 328 s 1 are each amended to read
5 as follows:

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

8 (1) "Alternative public works contracting procedure" means the
9 design-build and the general contractor/construction manager
10 contracting procedures authorized in RCW 39.10.051 and 39.10.061,
11 respectively.

12 (2) "Public body" means the state department of general
13 administration; the University of Washington; Washington State
14 University; every city with a population greater than seventy thousand
15 and any public authority chartered by such city under RCW 35.21.730
16 through 35.21.755 and specifically authorized as provided in RCW
17 39.10.120(4); every county with a population greater than four hundred
18 fifty thousand; every port district with total revenues greater than
19 fifteen million dollars per year; every public hospital district with
20 total revenues greater than fifteen million dollars per year utilizing
21 the design-build procedure authorized by RCW 39.10.051 and every public
22 hospital district, regardless of total revenues, proposing projects
23 that are considered and approved by the public hospital district
24 project review board under section 7 of this act; every public utility
25 district with revenues from energy sales greater than twenty-three
26 million dollars per year; and those school districts proposing projects
27 that are considered and approved by the school district project review
28 board under RCW 39.10.115.

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

31 **Sec. 4.** RCW 39.10.051 and 2002 c 46 s 1 are each amended to read
32 as follows:

33 (1) Notwithstanding any other provision of law, and after complying
34 with RCW 39.10.030, the following public bodies may utilize the design-
35 build procedure of public works contracting for public works projects
36 authorized under this section: The state department of general

1 administration; the University of Washington; Washington State
2 University; every city with a population greater than seventy thousand
3 and any public authority chartered by such city under RCW 35.21.730
4 through 35.21.755 and specifically authorized as provided in RCW
5 39.10.120(4); every county with a population greater than four hundred
6 fifty thousand; every public utility district with revenues from energy
7 sales greater than twenty-three million dollars per year; every public
8 hospital district with total revenues greater than fifteen million
9 dollars per year; and every port district with total revenues greater
10 than fifteen million dollars per year. The authority granted to port
11 districts in this section is in addition to and does not affect
12 existing contracting authority under RCW 53.08.120 and 53.08.130. For
13 the purposes of this section, "design-build procedure" means a contract
14 between a public body and another party in which the party agrees to
15 both design and build the facility, portion of the facility, or other
16 item specified in the contract.

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

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

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

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

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

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

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

36 (4) Contracts for design-build services shall be awarded through a
37 competitive process utilizing public solicitation of proposals for
38 design-build services. The public body shall publish at least once in

1 a legal newspaper of general circulation published in or as near as
2 possible to that part of the county in which the public work will be
3 done, a notice of its request for proposals for design-build services
4 and the availability and location of the request for proposal
5 documents. The request for proposal documents shall include:

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

11 (b) The reasons for using the design-build procedure;

12 (c) A description of the qualifications to be required of the
13 proposer including, but not limited to, submission of the proposer's
14 accident prevention program;

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

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

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

26 (g) Other information relevant to the project.

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

34 (a) Best and final proposals shall be evaluated and scored based on
35 the factors, weighting, and process identified in the initial request
36 for proposals. The public body may score the proposals using a system
37 that measures the quality and technical merits of the proposal on a
38 unit price basis. Final proposals may not be considered if the

1 proposal cost is greater than the maximum allowable construction cost
2 identified in the initial request for proposals. The public body shall
3 initiate negotiations with the firm submitting the highest scored best
4 and final proposal. If the public body is unable to execute a contract
5 with the firm submitting the highest scored best and final proposal,
6 negotiations with that firm may be suspended or terminated and the
7 public body may proceed to negotiate with the next highest scored firm.
8 Public bodies shall continue in accordance with this procedure until a
9 contract agreement is reached or the selection process is terminated.

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

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

20 **Sec. 5.** RCW 39.10.061 and 2002 c 46 s 2 are each amended to read
21 as follows:

22 (1) Notwithstanding any other provision of law, and after complying
23 with RCW 39.10.030, a public body may utilize the general
24 contractor/construction manager procedure of public works contracting
25 for public works projects authorized under subsection (2) of this
26 section. For the purposes of this section, "general
27 contractor/construction manager" means a firm with which a public body
28 has selected and negotiated a maximum allowable construction cost to be
29 guaranteed by the firm, after competitive selection through formal
30 advertisement and competitive bids, to provide services during the
31 design phase that may include life-cycle cost design considerations,
32 value engineering, scheduling, cost estimating, constructability,
33 alternative construction options for cost savings, and sequencing of
34 work, and to act as the construction manager and general contractor
35 during the construction phase.

36 (2) Except those school districts proposing projects that are
37 considered and approved by the school district project review board and

1 those public hospital districts proposing projects that are considered
2 and approved by the public hospital district project review board,
3 public bodies authorized under this section may utilize the general
4 contractor/construction manager procedure for public works projects
5 valued over ten million dollars where:

6 (a) Implementation of the project involves complex scheduling
7 requirements; or

8 (b) The project involves construction at an existing facility which
9 must continue to operate during construction; or

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

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

15 (4) Contracts for the services of a general contractor/construction
16 manager under this section shall be awarded through a competitive
17 process requiring the public solicitation of proposals for general
18 contractor/construction manager services. The public solicitation of
19 proposals shall include: A description of the project, including
20 programmatic, performance, and technical requirements and
21 specifications when available; the reasons for using the general
22 contractor/construction manager procedure; a description of the
23 qualifications to be required of the proposer, including submission of
24 the proposer's accident prevention program; a description of the
25 process the public body will use to evaluate qualifications and
26 proposals, including evaluation factors and the relative weight of
27 factors; the form of the contract to be awarded; the estimated maximum
28 allowable construction cost; and the bid instructions to be used by the
29 general contractor/construction manager finalists. Evaluation factors
30 shall include, but not be limited to: Ability of professional
31 personnel, past performance in negotiated and complex projects, and
32 ability to meet time and budget requirements; the scope of work the
33 general contractor/construction manager proposes to self-perform and
34 its ability to perform it; location; recent, current, and projected
35 work loads of the firm; and the concept of their proposal. A public
36 body shall establish a committee to evaluate the proposals. After the
37 committee has selected the most qualified finalists, these finalists
38 shall submit final proposals, including sealed bids for the percent

1 fee, which is the percentage amount to be earned by the general
2 contractor/construction manager as overhead and profit, on the
3 estimated maximum allowable construction cost and the fixed amount for
4 the detailed specified general conditions work. The public body shall
5 select the firm submitting the highest scored final proposal using the
6 evaluation factors and the relative weight of factors published in the
7 public solicitation of proposals.

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

26 (6) All subcontract work shall be competitively bid with public bid
27 openings. When critical to the successful completion of a
28 subcontractor bid package and after publication of notice of intent to
29 determine bidder eligibility in a legal newspaper of general
30 circulation published in or as near as possible to that part of the
31 county in which the public work will be done at least twenty days
32 before requesting qualifications from interested subcontract bidders,
33 the owner and general contractor/construction manager may determine
34 subcontractor bidding eligibility using the following evaluation
35 criteria:

36 (a) Adequate financial resources or the ability to secure such
37 resources;

1 (b) History of successful completion of a contract of similar type
2 and scope;

3 (c) Project management and project supervision personnel with
4 experience on similar projects and the availability of such personnel
5 for the project;

6 (d) Current and projected workload and the impact the project will
7 have on the subcontractor's current and projected workload;

8 (e) Ability to accurately estimate the subcontract bid package
9 scope of work;

10 (f) Ability to meet subcontract bid package shop drawing and other
11 coordination procedures;

12 (g) Eligibility to receive an award under applicable laws and
13 regulations; and

14 (h) Ability to meet subcontract bid package scheduling
15 requirements.

16 The owner and general contractor/construction manager shall weigh
17 the evaluation criteria and determine a minimum acceptable score to be
18 considered an eligible subcontract bidder.

19 After publication of notice of intent to determine bidder
20 eligibility, subcontractors requesting eligibility shall be provided
21 the evaluation criteria and weighting to be used by the owner and
22 general contractor/construction manager to determine eligible
23 subcontract bidders. After the owner and general
24 contractor/construction manager determine eligible subcontract bidders,
25 subcontractors requesting eligibility shall be provided the results and
26 scoring of the subcontract bidder eligibility determination.

27 Subcontract bid packages shall be awarded to the responsible bidder
28 submitting the low responsive bid. The requirements of RCW 39.30.060
29 apply to each subcontract bid package. All subcontractors who bid work
30 over three hundred thousand dollars shall post a bid bond and all
31 subcontractors who are awarded a contract over three hundred thousand
32 dollars shall provide a performance and payment bond for their contract
33 amount. All other subcontractors shall provide a performance and
34 payment bond if required by the general contractor/construction
35 manager. If a general contractor/construction manager receives a
36 written protest from a subcontractor bidder, the general
37 contractor/construction manager shall not execute a contract for the
38 subcontract bid package with anyone other than the protesting bidder

1 without first providing at least two full business days' written notice
2 of the general contractor/construction manager's intent to execute a
3 contract for the subcontract bid package; provided that the protesting
4 bidder submits notice in writing of its protest no later than two full
5 business days following bid opening. Intermediate Saturdays, Sundays,
6 and legal holidays are not counted. A low bidder who claims error and
7 fails to enter into a contract is prohibited from bidding on the same
8 project if a second or subsequent call for bids is made for the
9 project. Except as provided for under subsection (7) of this section,
10 bidding on subcontract work by the general contractor/construction
11 manager or its subsidiaries is prohibited. The general
12 contractor/construction manager may negotiate with the low-responsive
13 bidder in accordance with RCW 39.10.080 or, if unsuccessful in such
14 negotiations, rebid.

15 (7) The general contractor/construction manager, or its
16 subsidiaries, may bid on subcontract work if:

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

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

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

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

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

1 NEW SECTION. **Sec. 6.** A new section is added to chapter 39.10 RCW
2 to read as follows:

3 (1) In addition to the projects authorized in RCW 39.10.061, public
4 hospital districts may also use the general contractor/construction
5 manager contracting procedure for the construction of public hospital
6 district capital demonstration projects, subject to the following
7 conditions:

8 (a) The project must receive approval from the public hospital
9 district project review board established under section 7 of this act.

10 (b) The public hospital district project review board may not
11 authorize more than ten demonstration projects valued between five and
12 ten million dollars.

13 (2) Public hospital districts may also use the general
14 contractor/construction manager contracting procedure for the
15 construction of any public hospital district capital project that has
16 a value over ten million dollars and that has received approval from
17 the public hospital district project review board established under
18 section 7 of this act.

19 NEW SECTION. **Sec. 7.** A new section is added to chapter 39.10 RCW
20 to read as follows:

21 (1) The public hospital district project review board is
22 established to review public hospital district proposals submitted by
23 public hospital districts to use alternative public works contracting
24 procedures. The board shall select and approve qualified projects
25 based upon an evaluation of the information submitted by the public
26 hospital district under subsection (2) of this section. Any
27 appointments for full terms or to fill a vacancy shall be made by the
28 governor and shall include the following representatives, each having
29 experience with public works or commercial construction: One
30 representative from the department of health; one representative from
31 the office of financial management; two representatives from the
32 construction industry, one of whom works for a construction company
33 with gross annual revenues of twenty million dollars or less; one
34 representative from the specialty contracting industry; one
35 representative from organized labor; one representative from the design
36 industry; one representative from a public body previously authorized
37 under this chapter to use an alternative public works contracting

1 procedure who has experience using such alternative contracting
2 procedures; one representative from public hospital districts with
3 total revenues greater than fifteen million dollars per year; and one
4 representative from public hospital districts with total revenues equal
5 to or less than fifteen million dollars per year. Each member shall be
6 appointed for a term of three years, with the first three-year term
7 commencing after July 27, 2003. Any member of the public hospital
8 district project review board who is directly affiliated with any
9 applicant before the board must recuse him or herself from
10 consideration of the application.

11 (2) A public hospital district seeking to use alternative
12 contracting procedures authorized under this chapter pursuant to
13 section 6 of this act shall file an application with the public
14 hospital district project review board. The application form shall
15 require the district to submit a detailed statement of the proposed
16 project, including the public hospital district's name; the current
17 projected total budget for the project, including the estimated
18 construction costs, costs for professional services, equipment and
19 furnishing costs, off-site costs, contract administration costs, and
20 other related project costs; the anticipated project design and
21 construction schedule; a summary of the public hospital district's
22 construction activity for the preceding six years; and an explanation
23 of why the public hospital district believes the use of an alternative
24 contracting procedure is in the public interest and why the public
25 hospital district is qualified to use an alternative contracting
26 procedure, including a summary of the relevant experience of the public
27 hospital district's management team. The applicant shall also provide
28 in a timely manner any other information concerning implementation of
29 projects under this chapter requested by the public hospital district
30 project review board to assist in its consideration.

31 (3) Any public hospital district whose application is approved by
32 the public hospital district project review board shall comply with the
33 public notification and review requirements in RCW 39.10.030.

34 (4) Any public hospital district whose application is approved by
35 the public hospital district project review board shall not use as an
36 evaluation factor whether a contractor submitting a bid for the
37 approved project has had prior general contractor/construction manager
38 procedure experience.

1 **Sec. 8.** RCW 39.10.902 and 2002 c 46 s 4 are each amended to read
2 as follows:

3 The following acts or parts of acts, as now existing or hereafter
4 amended, are each repealed, effective July 1, 2007:

- 5 (1) RCW 39.10.010 and 1994 c 132 s 1;
- 6 (2) RCW 39.10.020 and 2003 c ... s 3 (section 3 of this act), 2001
7 c 328 s 1, 2000 c 209 s 1, 1997 c 376 s 1, & 1994 c 132 s 2;
- 8 (3) RCW 39.10.030 and 1997 c 376 s 2 & 1994 c 132 s 3;
- 9 (4) RCW 39.10.040 and 1994 c 132 s 4;
- 10 (5) RCW 39.10.051 and 2003 c ... s 4 (section 4 of this act), 2002
11 c 46 s 1, & 2001 c 328 s 2;
- 12 (6) RCW 39.10.061 and 2003 c ... s 5 (section 5 of this act), 2002
13 c 46 s 2, & 2001 c 328 s 3;
- 14 (7) RCW 39.10.065 and 1997 c 376 s 5;
- 15 (8) RCW 39.10.067 and 2002 c 46 s 3 & 2000 c 209 s 3;
- 16 (9) RCW 39.10.070 and 1994 c 132 s 7;
- 17 (10) RCW 39.10.080 and 1994 c 132 s 8;
- 18 (11) RCW 39.10.090 and 1994 c 132 s 9;
- 19 (12) RCW 39.10.100 and 1994 c 132 s 10;
- 20 (13) RCW 39.10.115 and 2001 c 328 s 4 & 2000 c 209 s 4;
- 21 (14) RCW 39.10.900 and 1994 c 132 s 13; (~~and~~);
- 22 (15) RCW 39.10.901 and 1994 c 132 s 14;
- 23 (16) RCW 39.10.--- and 2003 c ... s 6 (section 6 of this act); and
- 24 (17) RCW 39.10.--- and 2003 c ... s 7 (section 7 of this act).

Passed by the House April 26, 2003.
Passed by the Senate April 11, 2003.
Approved by the Governor May 14, 2003.
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