
HOUSE BILL 2024

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By Representatives Haigh, Hankins, Wallace, Haler, Grant, Strow, Sells, Hasegawa, Conway, Williams, Ormsby, Green, Hunt, Chase and Kenney

Read first time 02/15/2005. Referred to Committee on State Government Operations & Accountability.

1 AN ACT Relating to open and fair public work contracts bidding;
2 amending RCW 39.04.010; reenacting and amending RCW 39.10.061 and
3 39.10.902; adding a new section to chapter 39.04 RCW; and creating a
4 new section.

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

6 NEW SECTION. **Sec. 1.** The legislature finds that:

7 (1) Fair and open competition is a basic tenet of public work
8 procurement;

9 (2) Fair and open competition reduces the appearance of, and
10 opportunity for, favoritism and inspires public confidence that public
11 work contracts are awarded equitably and economically; and

12 (3) Preservation of the integrity of the competitive bid system
13 dictates that a public work contract should be awarded to the lowest
14 responsible bidder unless good cause is shown.

15 **Sec. 2.** RCW 39.04.010 and 2000 c 138 s 102 are each amended to
16 read as follows:

17 (~~The term~~) (1) "State" (~~shall~~) includes the state of Washington
18 and all departments, supervisors, commissioners, and agencies thereof.

1 (~~The term~~) (2) "Municipality" (~~shall~~) includes every city,
2 county, town, district, or other public agency thereof which is
3 authorized by law to require the execution of public work, except
4 drainage districts, diking districts, diking and drainage improvement
5 districts, drainage improvement districts, diking improvement
6 districts, consolidated diking and drainage improvement districts,
7 consolidated drainage improvement districts, consolidated diking
8 improvement districts, irrigation districts, or any such other
9 districts as shall from time to time be authorized by law for the
10 reclamation or development of waste or undeveloped lands.

11 (~~The term~~) (3) "Public work" (~~shall~~) includes all work,
12 construction, alteration, repair, or improvement other than ordinary
13 maintenance, executed at the cost of the state or of any municipality,
14 or which is by law a lien or charge on any property therein. All
15 public works, including maintenance when performed by contract shall
16 comply with the provisions of chapter 39.12 RCW (~~39.12.020~~). (~~The~~
17 ~~term~~) "Public work" does not include work, construction, alteration,
18 repair, or improvement performed under contracts entered into under RCW
19 36.102.060(4) or under development agreements entered into under RCW
20 36.102.060(7) or leases entered into under RCW 36.102.060(8).

21 (~~The term~~) (4) "Contract" (~~shall~~) means a contract in writing
22 for the execution of public work for a fixed or determinable amount
23 duly awarded after advertisement and competitive bid. (~~However, a~~
24 ~~contract which is awarded from a small works roster need not be~~
25 ~~advertised.)) "Contract" also means a contract awarded under the small
26 works roster process in RCW 39.04.155.~~

27 (5) "Lowest responsible bidder" means a contractor whose bid is
28 under consideration for award of a public works contract or subcontract
29 and whose status has been verified by the awarding agency or its
30 assignee, after exercising due diligence, as meeting at least the
31 requirements in RCW 43.19.1911 for determining the lowest responsible
32 bidder.

33 NEW SECTION. Sec. 3. A new section is added to chapter 39.04 RCW
34 to read as follows:

35 (1) After bids for a public work contract have been opened by the
36 state, a municipality, or an institution of higher education as defined
37 in RCW 28B.10.016, the contract must be awarded to the lowest

1 responsible bidder unless the awarding agency determines in writing,
2 specifying the reasons, that there is good cause to reject all bids and
3 cancel the invitation. Public agencies or their assignees may require
4 bidders to submit additional information that is subject to
5 verification before contract award.

6 (2) The director of the department of labor and industries shall
7 adopt rules to administer this section, including methods for
8 implementing this section and contractor review and appeal procedures.

9 **Sec. 4.** RCW 39.10.061 and 2003 c 352 s 3 and 2003 c 300 s 5 are
10 each reenacted and amended to read as follows:

11 (1) Notwithstanding any other provision of law, and after complying
12 with RCW 39.10.030, a public body may utilize the general
13 contractor/construction manager procedure of public works contracting
14 for public works projects authorized under subsection (2) of this
15 section. For the purposes of this section, "general
16 contractor/construction manager" means a firm with which a public body
17 has selected and negotiated a maximum allowable construction cost to be
18 guaranteed by the firm, after competitive selection through formal
19 advertisement and competitive bids, to provide services during the
20 design phase that may include life-cycle cost design considerations,
21 value engineering, scheduling, cost estimating, constructability,
22 alternative construction options for cost savings, and sequencing of
23 work, and to act as the construction manager and general contractor
24 during the construction phase.

25 (2) Except those school districts proposing projects that are
26 considered and approved by the school district project review board and
27 those public hospital districts proposing projects that are considered
28 and approved by the public hospital district project review board,
29 public bodies authorized under this section may utilize the general
30 contractor/construction manager procedure for public works projects
31 valued over ten million dollars where:

32 (a) Implementation of the project involves complex scheduling
33 requirements; or

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

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

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

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

35 (5) The maximum allowable construction cost may be negotiated
36 between the public body and the selected firm after the scope of the
37 project is adequately determined to establish a guaranteed contract
38 cost for which the general contractor/construction manager will provide

1 a performance and payment bond. The guaranteed contract cost includes
2 the fixed amount for the detailed specified general conditions work,
3 the negotiated maximum allowable construction cost, the percent fee on
4 the negotiated maximum allowable construction cost, and sales tax. If
5 the public body is unable to negotiate a satisfactory maximum allowable
6 construction cost with the firm selected that the public body
7 determines to be fair, reasonable, and within the available funds,
8 negotiations with that firm shall be formally terminated and the public
9 body shall negotiate with the next highest scored firm and continue
10 until an agreement is reached or the process is terminated. If the
11 maximum allowable construction cost varies more than fifteen percent
12 from the bid estimated maximum allowable construction cost due to
13 requested and approved changes in the scope by the public body, the
14 percent fee shall be renegotiated.

15 (6) All subcontract work shall be competitively bid with public bid
16 openings. When critical to the successful completion of a
17 subcontractor bid package and after publication of notice of intent to
18 determine bidder eligibility in a legal newspaper of general
19 circulation published in or as near as possible to that part of the
20 county in which the public work will be done at least twenty days
21 before requesting qualifications from interested subcontract bidders,
22 the owner and general contractor/construction manager must exercise due
23 diligence in verifying that each contractor or subcontractor under
24 consideration meets at least the standards established in RCW
25 43.19.1911 for determining the lowest responsible bidder and, in
26 addition to this verification, may determine subcontractor bidding
27 eligibility using the following evaluation criteria:

28 (a) Adequate financial resources or the ability to secure such
29 resources;

30 (b) History of successful completion of a contract of similar type
31 and scope;

32 (c) Project management and project supervision personnel with
33 experience on similar projects and the availability of such personnel
34 for the project;

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

37 (e) Ability to accurately estimate the subcontract bid package
38 scope of work;

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

3 (g) Eligibility to receive an award under applicable laws and
4 regulations; and

5 (h) Ability to meet subcontract bid package scheduling
6 requirements.

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

10 After publication of notice of intent to determine bidder
11 eligibility, subcontractors requesting eligibility shall be provided
12 the evaluation criteria and weighting to be used by the owner and
13 general contractor/construction manager to determine eligible
14 subcontract bidders. After the owner and general
15 contractor/construction manager determine eligible subcontract bidders,
16 subcontractors requesting eligibility shall be provided the results and
17 scoring of the subcontract bidder eligibility determination.

18 Subcontract bid packages shall be awarded to the responsible bidder
19 submitting the low responsive bid. The requirements of RCW 39.30.060
20 apply to each subcontract bid package. All subcontractors who bid work
21 over three hundred thousand dollars shall post a bid bond and all
22 subcontractors who are awarded a contract over three hundred thousand
23 dollars shall provide a performance and payment bond for their contract
24 amount. All other subcontractors shall provide a performance and
25 payment bond if required by the general contractor/construction
26 manager. If a general contractor/construction manager receives a
27 written protest from a subcontractor bidder, the general
28 contractor/construction manager shall not execute a contract for the
29 subcontract bid package with anyone other than the protesting bidder
30 without first providing at least two full business days' written notice
31 of the general contractor/construction manager's intent to execute a
32 contract for the subcontract bid package; provided that the protesting
33 bidder submits notice in writing of its protest no later than two full
34 business days following bid opening. Intermediate Saturdays, Sundays,
35 and legal holidays are not counted. A low bidder who claims error and
36 fails to enter into a contract is prohibited from bidding on the same
37 project if a second or subsequent call for bids is made for the
38 project. Except as provided for under subsection (7) of this section,

1 bidding on subcontract work by the general contractor/construction
2 manager or its subsidiaries is prohibited. The general
3 contractor/construction manager may negotiate with the low-responsive
4 bidder in accordance with RCW 39.10.080 or, if unsuccessful in such
5 negotiations, rebid.

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

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

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

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

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

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

28 (9) The authority provided to the state ferry system in this
29 section is limited to projects concerning construction, renovation,
30 preservation, demolition, and reconstruction of ferry terminals and
31 associated land-based facilities.

32 **Sec. 5.** RCW 39.10.902 and 2003 c 301 s 8 and 2003 c 300 s 8 are
33 each reenacted and amended to read as follows:

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

36 (1) RCW 39.10.010 and 1994 c 132 s 1;

- 1 (2) RCW 39.10.020 and 2003 c 301 s 2, 2003 c 300 s 3, 2001 c 328 s
2 1, 2000 c 209 s 1, 1997 c 376 s 1, & 1994 c 132 s 2;
3 (3) RCW 39.10.030 and 1997 c 376 s 2 & 1994 c 132 s 3;
4 (4) RCW 39.10.040 and 1994 c 132 s 4;
5 (5) RCW 39.10.051 and 2003 c 300 s 4, 2002 c 46 s 1, & 2001 c 328
6 s 2;
7 (6) RCW 39.10.061 and section 4 of this act, 2003 c 300 s 5, 2002
8 c 46 s 2, & 2001 c 328 s 3;
9 (7) RCW 39.10.065 and 1997 c 376 s 5;
10 (8) RCW 39.10.067 and 2003 c 301 s 3, 2002 c 46 s 3, & 2000 c 209
11 s 3;
12 (9) RCW 39.10.070 and 1994 c 132 s 7;
13 (10) RCW 39.10.080 and 1994 c 132 s 8;
14 (11) RCW 39.10.090 and 1994 c 132 s 9;
15 (12) RCW 39.10.100 and 1994 c 132 s 10;
16 (13) RCW 39.10.115 and 2001 c 328 s 4 & 2000 c 209 s 4;
17 (14) RCW 39.10.900 and 1994 c 132 s 13;
18 (15) RCW 39.10.901 and 1994 c 132 s 14;
19 (16) RCW 39.10.068 and 2003 c 300 s 6;
20 (17) RCW 39.10.117 and 2003 c 300 s 7; and
21 (18) RCW 39.10.130 and 2003 c 301 s 1.

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