

HOUSE BILL REPORT

2SHB 1506

As Amended by the Senate

Title: An act relating to alternative public works.

Brief Description: Changing alternative works provisions.

Sponsors: By House Committee on Capital Budget (originally sponsored by Representatives Haigh, Armstrong, Hunt and Ormsby).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 2/2/07, 2/6/07 [DPS];
Capital Budget: 2/20/07, 2/27/07 [DP2S(w/o sub SGTA)].

Floor Activity:

Passed House: 3/12/07, 98-0.
Senate Amended.
Passed Senate: 4/5/07, 47-0.

Brief Summary of Second Substitute Bill

- Expands the use of the design-build and general contractor/construction manager (GC/CM) contracting procedures.
- Establishes a project review committee to approve the use of design-build and GC/CM contracting procedures.
- Requires data collection for evaluation of alternative contracting procedures.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Hunt, Chair; Appleton, Vice Chair; Chandler, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Green, McDermott, Miloscia and Ormsby.

Staff: Marsha Reilly (786-7135).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON CAPITAL BUDGET

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government & Tribal Affairs. Signed by 22 members: Representatives Fromhold, Chair; Ormsby, Vice Chair; Schual-Berke, Vice Chair; McDonald, Ranking Minority Member; Newhouse, Assistant Ranking Minority Member; Blake, Chase, Dunshee, Eickmeyer, Flannigan, Goodman, Hankins, Hasegawa, Kelley, McCune, Orcutt, Pearson, Pedersen, Sells, Skinner, Strow and Upthegrove.

Staff: Susan Howson (786-7142).

Background:

Alternative forms of public works were first used on a very limited basis and then adopted in statute in 1994 for certain pilot projects. These alternative procedures included a design-build process and a general contractor/construction manager (GC/CM) process and may be used on projects costing in excess of \$10 million.

The design-build procedure is a multi-step competitive process to award a contract to a single firm that agrees to both design and build a public facility that meets specific criteria. It may be used on projects valued over \$10 million where:

- the construction activities or technologies to be used are highly specialized and a design-build approach is critical in developing the construction methodology or implementing the proposed technology;
- the project design is repetitive in nature and is an incidental part of the installation or construction; or
- regular interaction with and feedback from facilities users and operators during design is not critical to an effective facility design.

The contract is awarded following a public request of proposals for design-build services. Following extensive evaluation of the proposals, the contract is awarded to the firm that submits the best and final proposal with the lowest price.

The GC/CM method employs the services of a project management firm that bears significant responsibility and risk in the contracting process. The government agency contracts with an architectural and engineering firm to design the facility and, early in the project, also contracts with a GC/CM firm to assist in the design of the facility, manage the construction of the facility, act as the general contractor, and guarantee that the facility will be built within budget. When the plans and specifications for a project phase are complete, the GC/CM firm subcontracts with construction firms to construct that phase. Initial selection of GC/CM finalists is based on the qualifications and experience of the firm.

In 2003, job order contracting was authorized as an alternative public works contracting procedure. Under a job order contract, a contractor agrees to perform an indefinite quantity of public works jobs, defined by individual work orders, over a fixed period of time. A public

entity may not have more than two job order contracts in effect at any one time. The maximum total dollar amount that is awarded under a job order contract may not exceed \$3 million in the first year, \$5 million over the first two years, or \$8 million over a three-year period if the contract is renewed or extended.

With some restrictions, the use of alternative public works contracting procedures are authorized to a limited number of public entities:

- the Department of General Administration;
- the University of Washington;
- Washington State University;
- cities with a population greater than 70,000 and any public authority chartered by such city;
- counties with a population greater than 450,000;
- public hospital districts with total revenues greater than \$15 million;
- port districts with total revenues greater than \$15 million per year;
- public utility districts with revenues from energy sales greater than \$23 million per year;
- school districts for GC/CM projects; and
- the state ferry system.

In 2005, the Capital Projects Advisory Review Board (Board) was established to monitor and evaluate the use of traditional and alternative public works contracting procedures and evaluate potential future use of other alternative contracting procedures. The Board will also provide a forum in which best practices and concerns about alternative public works contracting can be discussed.

The authorization to use alternative public works procedures expires June 30, 2007.

Summary of Second Substitute Bill:

The use of alternative public works contracting procedures is extended to 2014.

Project Review Committee

A Project Review Committee (Committee) is created to approve the use of the design-build, GC/CM, or both procedures, through a certification process or through approval on a project-by-project basis. Members of the Committee are appointed by the Board, and appointments must represent a balance among the industries and public owners represented on the Board. All meetings of the Committee are public and they must allow for public comment.

Certification Process

A public body may apply to the Committee for a three-year certification to use design-build, GC/CM, or both procedures. The public body must submit an application to the Committee that includes a description of its qualifications, its capital plan for the certification period, its intended use of the alternative contracting procedures, and any other information requested by the committee.

To certify a public body, the Committee must determine that the public body has:

- the necessary experience and qualifications to determine which projects are appropriate for the alternative contracting procedures;
- the necessary experience and qualification to carry out the contracting procedures; and
- resolved any audit findings on previous public works projects.

Once a public body has been certified to use design-build, GC/CM, or both procedures, it may use the procedure without seeking approval by the Committee on a project-by-project basis. However, a public body certified to use GC/CM must seek additional approval to use that procedure for projects estimated to cost less than \$10 million.

Project by Project Approval

A public body may seek certification for one additional three-year period by submitting updated information on its capital plan to the Committee. The Committee may revoke any public body's certification upon a finding that its use of the alternative contracting procedure no longer serves the public interest.

Public bodies that are not certified to use design-build or GC/CM may seek approval to use the procedure on a project-by-project basis by submitting an application that includes its qualifications, a description of the proposed project, and which alternative contracting procedure it plans to use.

To approve a proposed project, the Committee must determine that:

- the alternative contracting procedure will provide a substantial fiscal benefit or the use of the traditional method is not practical for meeting the desired quality standards or delivery schedules;
- the project meets the requirements for using the contracting procedure;
- the public body has the necessary experience or qualified team to use the alternative procedure;
- for design-build projects, construction personnel independent of the design-build team are knowledgeable in the design-build process; and
- the public body has resolved any audit findings related to previous public works projects.

Appeal of Committee Determinations

A determination by the Committee may be appealed to the Board within seven days of the Committee's decision. The Board must resolve an appeal within 45 days, and the Board's decision is final.

Design-Build

Several policy changes are made relating to the use of the design-build procedure, including:

- the design-build procedure may be used for parking garages, regardless of cost;
- the design-build procedure may no longer be used for construction of student housing;
- projects involving the construction or erection of pre-engineered metal buildings or prefabricated modular buildings, regardless of cost, do not need the approval of the Committee; and

- operations and maintenance services may be included in design-build contracts for a period of three years, except for utility projects in which operations and maintenance may be ongoing.

Criteria for evaluating proposals for design-bid contracts are added and include the proposer's technical qualifications, its capability to perform, and its past performance. Additional factors are considered for analyzing finalists' proposals, including:

- the technical approach design concept;
- proposal price;
- ability of the professional personnel;
- past performance on similar projects;
- ability to meet time and budget requirements;
- ability to provide a performance and payment bond;
- recent, current, and projected work loads of the firm; and
- location.

If all proposals are rejected, the public body must provide its reasons to the proposers in writing.

General Contractor/Construction Manager.

The major policy changes related to the use of GC/CM include:

- the ability to use the procedure for projects valued under \$10 million with the approval of the Committee; and
- expansion of the criteria for a GC/CM project to include projects that encompass a complex or technical work environment and projects that require specialized work on a building that has historic significance.

Numerous other procedural changes are made to the contracting procedure.

Contract management responsibilities are expanded. The public body must provide contract documents that obligate the public owner to accept or reject a request for equitable adjustment, change order, or claim within 60 days. If the public owner does not respond in writing, the request is deemed denied.

Incentive clauses for early completion, cost savings, or other performance goals must be included in the request for proposals. Incentives may not be paid from any contingency fund established for coordination of the construction documents or coordination of the work. The public body must issue a change order within 30 days on change orders agreed to, in writing, by the GC/CM. If the public body fails to issue the change order, interest at a rate of 1 percent per month shall accrue on the dollar amount of the additional work satisfactorily completed.

The maximum allowable construction cost (MACC) may only be negotiated when the design is at least 90 percent complete and major subcontractor bid packages may be bid prior to agreement of the MACC. The public body may authorize the GC/CM to bid and award bid packages before receipt of complete plans and specifications; however, any contracts awarded must be incorporated in the negotiated MACC. If the MACC varies more than 15 percent from

the bid estimated MACC due to approved changes in the scope of work, the percent fee must be renegotiated.

Public bodies may not evaluate or disqualify proposals for a GC/CM contract based on the terms of a collective bargaining agreement. A GC/CM may not violate or waive the terms of a collective bargaining agreement in preparing subcontract bid packages.

Bidder eligibility criteria for subcontractors currently listed in statute is removed and responsibility is determined based on specific objective criteria that must be listed in the bid documents. If a determination is made that a bidder is not responsible, the bidder must be given an opportunity to establish responsibility.

A GC/CM may only bid on subcontract work or for the supply of equipment or materials if that work is customarily performed or supplied by the GC/CM, if the bid opening is managed by the public body, and if notification of the GC/CM's intent to bid is included in the solicitation of bids. The GC/CM is prohibited from purchasing equipment and materials for assignment to subcontract bid package bidders for installation or warranty. The GC/CM may not perform subcontract work in excess of 30 percent of the negotiated MACC.

Prebid determination of subcontractor eligibility must be preceded by a public hearing to receive comments and determine if establishing bidder eligibility in advance of seeking bids is in the best interests of the project.

If a subcontract bidder is determined to be "not responsible," the bidder must be given an opportunity to establish "responsibility."

Subcontract agreements must not delegate or assign the GC/CM's implied duty not to hinder or delay a subcontractor or delegate or assign the GC/CM's authority to resolve subcontractor conflicts; restrict a subcontractor's right to damages; require a subcontractor to bear the cost of trade damage repair; or require the subcontractor to execute progress payment applications that waive claims for additional time or compensation or bond or retainage rights as a condition of receipt of progress payment.

Job Order Contracting.

The authority to use the job order contracting procedure is limited to the same public bodies and is not expanded. The maximum total dollar amount awarded under a job order contract is increased from \$3 million to \$4 million in the first year and from \$8 million to \$12 million over the three years of the contract. The Department of General Administration is authorized to have four job order contracts in effect at any one time. The amount of work that must be subcontracted on a job order contract is changed from 80 percent to 90 percent. The maximum dollar amount of a work order is increased from \$300,000 to \$350,000.

Data Collection.

All contracting procedures require public owners, as well as contractors and subcontractors, to report data required by the Board. The Board must develop questionnaires designed to provide quantitative and qualitative data on alternative public works contracting procedures.

Other Provisions.

Projects approved by the School District Project Review Board and the Hospital District Project Review Board prior to the effective date of the act may proceed without approval of the Committee. If a design-build or GC/CM project has been advertised, but a contract has not been signed by the effective date of the act, the project may go forward without approval by the Committee.

The act contains a sunset provision and requires an evaluation by the Joint Legislative Audit and Review Committee by June 30, 2013.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment allows the Capital Projects Advisory Review Board to grant an exemption from any provision of the legislation for projects advertised before the effective date of the legislation. A public body seeking an exemption must submit a request in writing to the Board no later than December 31, 2007, and the Board must respond within sixty calendar days. The amendment also provides that sales tax is not included in the total contract cost for GC/CM projects.

All other provisions are the same.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect July 1, 2007, except for Section 104, relating to the creation of the committee, which takes effect immediately, and Section 507, relating to the repealer of the expiration date, which takes effect June 30, 2007.

Staff Summary of Public Testimony: (State Government & Tribal Affairs)

(In support) The alternative public works contracting procedures deadline was looming and there has been much controversy around the procedures, such as who could use it, and was it cost efficient. The Capital Projects Advisory Review Board (Board) was established to work on these issues. These and other issues have been worked on over the past year and the bill is a compromise from all the parties. The proposed substitute bill represents the work of the Board. There was unanimous support on the bill. Representation on the Board includes representation of a broad base. Alternative public works is good policy, and other states and the federal government use it. The bill includes data collection that will help determine how well the procedures work. The law is much improved from what it was. All projects go before the Project Review Committee. The maximum allowable construction cost is guaranteed at 90 percent, a point where contractors believe lessens the risk. The design-build procedure is very expensive to bid. If design-build projects are less than \$10 million, general contractors will likely not bid.

Labor supports the bill. No one was left out of the process. Four committees worked on different issues in the bill, as well as several subcommittees. The Joint Legislative Audit and

Review Committee reported that there was not enough information collected to determine if the procedures are a good use of public dollars. The first task was to form a data collection committee. The committee approval process is critical to make sure that the particular procedure is appropriate for the proposed project. The process has been one of collaboration and negotiation.

Subcontractor groups had concerns about the original legislation and the Board has helped to address many of those concerns.

The Puget Sound Schools Coalition is supportive of the bill.

Mechanical and electrical contractors believe the bill improves the process and has addressed many of the issues that have been of concern. The data collection process will provide hard data.

(With concerns) The Associated General Contractors are supportive of the bill but do have a concern. The GC/CM process was originally for very large complex projects. Very few general contractors are large enough to be able to bid on GC/CM projects. The other general contractors participate primarily in the tradition design, bid, build projects. The \$10 million threshold should be reinserted.

The University of Washington (UW) is very supportive and is one of the leading users of the GC/CM procedure. The design-build procedure has been used by the UW for design-build-operate-maintain (DBOM), and has received an award for its use of this procedure on one project. In the bill before you, the DBOM is limited to a three-year process and it is recommended that this be extended to six years.

Washington State Parks (State Parks) are supportive, but with concerns regarding the use of job order contracting. Most work done by State Parks are smaller projects which fall under job order contracting. An attorney general ruling indicated that State Parks cannot contract with The Department of General Administration (GA) for job order contracting. It is recommended that language be added so that the GA can perform job order contracting for State Parks.

The counties and cities are supportive of the bill but would like the \$10 million threshold for design-build to be removed. Smaller county projects are normally between \$5 - \$10 million. Currently the Department of Transportation may use design-build on projects as low as \$2 million. Cities also have projects that would be a good use for design-build and would like the opportunity to demonstrate that design-build could be used successfully for these projects.

(Opposed) None.

Staff Summary of Public Testimony: (Capital Budget)

(In support) The Capital Project Advisory Review Board (Board) has broad representation and operates on a consensus basis. The Board voted unanimously in support of the bill language. A lot of work went into the bill with much give and take among the Board membership. Nobody ended up with everything they wanted. The final product represents a delicate balance

between the stakeholders. The alternative public works processes have evolved in a positive way. The alternative public works contracting procedures require contracts to be awarded competitively in an open process. This has provisions that protect subcontractors by requiring the general contractor to publicly bid subcontract work. This bill will help to bring down the cost of construction. The data collection effort outlined in the bill will allow project costs to be tracked more effectively. Safeguards have been built into the bill language to address concerns raised by labor. The certification process outlined in the bill is very important. A project review committee will be reviewing these projects on a regular basis.

(Opposed) None.

Persons Testifying: (State Government & Tribal Affairs) (In support) Representative Haigh, prime sponsor; John Lynch, General Administration, Capital Projects Advisory Review Board (CPARB); Dan Absher, Absher Construction, CPARB; Dave Johnson, Washington State Building Trades; Ed Kommers, Mechanical Contractors Association, CPARB; Charlie Brown, Puget Sound School Coalition; and Larry Stevens, Mechanical Contractors, National Electrical Contractors Association.

(With concerns) Duke Schaub, Associated General Contractors; Eric Smith, University of Washington; Fred Romero and Joe Ward, Washington State Parks; Greg Shafer, Clark County Public Works; Julie Murray, Washington State Association of Counties; and Ashley Probart, Association of Washington Cities.

Persons Testifying: (Capital Budget) Representative Haigh, prime sponsor; John Lynch, General Administration/Capital Projects Advisory Review Board; Larry Stevens, Mechanical Contractors Association/National Electrical Contractors; Dave Johnson, Washington State Building Trades; Rick Slunaker, Associated General Contractors; and Julie Murray, Washington Association of Counties.

Persons Signed In To Testify But Not Testifying: (State Government & Tribal Affairs) None.

Persons Signed In To Testify But Not Testifying: (Capital Budget) None.