CERTIFICATION OF ENROLLMENT

HOUSE BILL 2208

Chapter 42, Laws of 2014

63rd Legislature 2014 Regular Session

ALTERNATIVE PUBLIC WORKS--HEAVY CIVIL CONSTRUCTION PROJECTS

EFFECTIVE DATE: 06/12/14

Passed by the House February 17, 2014 CERTIFICATE Yeas 98 Nays 0 I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2208** as passed by the House of FRANK CHOPP Speaker of the House of Representatives Representatives and the Senate on the dates hereon set forth. Passed by the Senate March 5, 2014 Yeas 48 Nays 1 BARBARA BAKER Chief Clerk BRAD OWEN President of the Senate Approved March 19, 2014, 2:32 p.m. FILED

March 19, 2014

JAY INSLEE

Secretary of State
State of Washington

Governor of the State of Washington

HOUSE BILL 2208

Passed Legislature - 2014 Regular Session

State of Washington

63rd Legislature

2014 Regular Session

By Representatives Haigh and Buys

Prefiled 01/10/14. Read first time 01/13/14. Referred to Committee on Capital Budget.

- AN ACT Relating to heavy civil construction projects; amending RCW
- 2 39.10.210, 39.10.280, 39.10.340, 39.10.350, 39.10.360, 39.10.370, and
- 3 39.10.390; and reenacting and amending RCW 43.131.408.
- 4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:
- 5 Sec. 1. RCW 39.10.210 and 2013 c 222 s 1 are each amended to read 6 as follows:
- 7 Unless the context clearly requires otherwise, the definitions in 8 this section apply throughout this chapter.
- 9 (1) "Alternative public works contracting procedure" means the design-build, general contractor/construction manager, and job order contracting procedures authorized in RCW 39.10.300, 39.10.340, and 39.10.420, respectively.
- 13 (2) "Board" means the capital projects advisory review board.
- 14 (3) "Certified public body" means a public body certified to use 15 design-build or general contractor/construction manager contracting
- 16 procedures, or both, under RCW 39.10.270.
- 17 (4) "Committee," unless otherwise noted, means the project review
- 18 committee.

p. 1 HB 2208.SL

- 1 (5) "Design-build procedure" means a contract between a public body 2 and another party in which the party agrees to both design and build 3 the facility, portion of the facility, or other item specified in the 4 contract.
 - (6) "Disadvantaged business enterprise" means any business entity certified with the office of minority and women's business enterprises under chapter 39.19 RCW.
 - (7) "General contractor/construction manager" means a firm with which a public body has selected to provide services during the design phase and negotiated a maximum allowable construction cost to act as construction manager and general contractor during the construction phase.
 - (8) "Job order contract" means a contract in which the contractor agrees to a fixed period, indefinite quantity delivery order contract which provides for the use of negotiated, definitive work orders for public works as defined in RCW 39.04.010.
 - (9) "Job order contractor" means a registered or licensed contractor awarded a job order contract.
 - (10) "Maximum allowable construction cost" means the maximum cost of the work to construct the project including a percentage for risk contingency, negotiated support services, and approved change orders.
 - (11) "Negotiated support services" means items a general contractor would normally manage or perform on a construction project including, but not limited to surveying, hoisting, safety enforcement, provision of toilet facilities, temporary heat, cleanup, and trash removal, and that are negotiated as part of the maximum allowable construction cost.
 - (12) "Percent fee" means the percentage amount to be earned by the general contractor/construction manager as overhead and profit.
 - (13) "Public body" means any general or special purpose government in the state of Washington, including but not limited to state agencies, institutions of higher education, counties, cities, towns, ports, school districts, and special purpose districts.
- 33 (14) "Public works project" means any work for a public body within 34 the definition of "public work" in RCW 39.04.010.
- 35 (15) "Small business entity" means a small business as defined in 36 RCW 39.26.010.
- 37 (16) "Total contract cost" means the fixed amount for the detailed

6 7

8

10 11

12

13

14

15

16 17

18

19 20

21

22

23

24

25

26

27

2829

3031

specified general conditions work, the negotiated maximum allowable construction cost, and the percent fee on the negotiated maximum allowable construction cost.

- (17) "Total project cost" means the cost of the project less financing and land acquisition costs.
- (18) "Unit price book" means a book containing specific prices, based on generally accepted industry standards and information, where available, for various items of work to be performed by the job order contractor. The prices may include: All the costs of materials; labor; equipment; overhead, including bonding costs; and profit for performing the items of work. The unit prices for labor must be at the rates in effect at the time the individual work order is issued.
- 13 (19) "Work order" means an order issued for a definite scope of 14 work to be performed pursuant to a job order contract.
- 15 (20) "Heavy civil construction project" means a civil engineering
 16 project, the predominant features of which are infrastructure
 17 improvements.
- **Sec. 2.** RCW 39.10.280 and 2013 c 222 s 8 are each amended to read 19 as follows:
 - (1) A public body not certified under RCW 39.10.270 must apply for approval from the committee to use the design-build or general contractor/construction manager contracting procedure on a project. A public body seeking approval must submit to the committee an application in a format and manner as prescribed by the committee. The application must include a description of the public body's qualifications, a description of the project, ((and its)) the public body's intended use of alternative contracting procedures, and, if applicable, a declaration that the public body has elected to procure the project as a heavy civil construction project.
- 30 (2) To approve a proposed project, the committee shall determine 31 that:
 - (a) The alternative contracting procedure will provide a substantial fiscal benefit or the use of the traditional method of awarding contracts in lump sum to the low responsive bidder is not practical for meeting desired quality standards or delivery schedules;
 - (b) The proposed project meets the requirements for using the

p. 3 HB 2208.SL

alternative contracting procedure as described in RCW 39.10.300 or 39.10.340;

- (c) The public body has the necessary experience or qualified team to carry out the alternative contracting procedure including, but not limited to: (i) Project delivery knowledge and experience; (ii) sufficient personnel with construction experience to administer the contract; (iii) a written management plan that shows clear and logical lines of authority; (iv) the necessary and appropriate funding and time to properly manage the job and complete the project; (v) continuity of project management team, including personnel with experience managing projects of similar scope and size to the project being proposed; and (vi) necessary and appropriate construction budget;
- (d) For design-build projects, public body personnel or consultants are knowledgeable in the design-build process and are able to oversee and administer the contract; and
- (e) The public body has resolved any audit findings related to previous public works projects in a manner satisfactory to the committee.
- (3) The committee shall, if practicable, make its determination at the public meeting during which a submittal is reviewed. Public comments must be considered before a determination is made.
- (4) Within ten business days after the public meeting, the committee shall provide a written determination to the public body, and make its determination available to the public on the committee's web site. If the committee fails to make a written determination within ten business days of the public meeting, the request of the public body to use the alternative contracting procedure on the requested project shall be deemed approved.
- (5) Failure of the committee to meet within sixty calendar days of a public body's application to use an alternative contracting procedure on a project shall be deemed an approval of the application.
- **Sec. 3.** RCW 39.10.340 and 2013 c 222 s 12 are each amended to read 33 as follows:
- Subject to the process in RCW 39.10.270 or 39.10.280, public bodies may utilize the general contractor/construction manager procedure for public works projects where at least one of the following is met:

1 (1) Implementation of the project involves complex scheduling, 2 phasing, or coordination;

3

4 5

6 7

8

18 19

20

21

22

23

24

2526

27

28

2930

31

3233

34

- (2) The project involves construction at an occupied facility which must continue to operate during construction;
 - (3) The involvement of the general contractor/construction manager during the design stage is critical to the success of the project;
 - (4) The project encompasses a complex or technical work environment; ((or))
- 9 (5) The project requires specialized work on a building that has 10 historic significance; or
- 11 (6) The project is, and the public body elects to procure the
 12 project as, a heavy civil construction project. However, no provision
 13 of this chapter pertaining to a heavy civil construction project
 14 applies unless the public body expressly elects to procure the project
 15 as a heavy civil construction project.
- 16 **Sec. 4.** RCW 39.10.350 and 2007 c 494 s 302 are each amended to read as follows:
 - (1) A public body using the general contractor/construction manager contracting procedure shall provide for:
 - (a) The preparation of appropriate, complete, and coordinated design documents;
 - (b) Confirmation that a constructability analysis of the design documents has been performed prior to solicitation of a subcontract bid package;
 - (c) Reasonable budget contingencies totaling not less than five percent of the anticipated contract value;
 - (d) To the extent appropriate, on-site architectural or engineering representatives during major construction or installation phases;
 - (e) Employment of staff or consultants with expertise and prior experience in the management of comparable projects, critical path method schedule review and analysis, and the administration, pricing, and negotiation of change orders;
 - (f) Contract documents that include alternative dispute resolution procedures to be attempted before the initiation of litigation;
- 35 (g) Contract documents that: (i) Obligate the public owner to 36 accept or reject a request for equitable adjustment, change order, or 37 claim within a specified time period but no later than sixty calendar

p. 5 HB 2208.SL

- days after the receipt by the public body of related documentation; and (ii) provide that if the public owner does not respond in writing to a request for equitable adjustment, change order, or claim within the specified time period, the request is deemed denied;
- 5 (h) Submission of project information, as required by the board; 6 and
 - (i) Contract documents that require the contractor, subcontractors, and designers to submit project information required by the board.
 - (2) A public body using the general contractor/construction manager contracting procedure may include an incentive clause for early completion, cost savings, or other performance goals if such incentives are identified in the request for proposals. No incentives granted may exceed five percent of the maximum allowable construction cost. No incentives may be paid from any contingency fund established for coordination of the construction documents or coordination of the work.
 - (3) If the construction is completed for less than the maximum allowable construction cost, any savings not otherwise negotiated as part of an incentive clause shall accrue to the public body. If the construction is completed for more than the maximum allowable construction cost, the additional cost is the responsibility of the general contractor/construction manager.
 - (4) If the public body and the general contractor/construction manager agree, in writing, on a price for additional work, the public body must issue a change order within thirty days of the written agreement. If the public body does not issue a change order within the thirty days, interest shall accrue on the dollar amount of the additional work satisfactorily completed until a change order is issued. The public body shall pay this interest at a rate of one percent per month.
- 30 (5) For a project procured as a heavy civil construction project, 31 an independent audit, paid for by the public body, must be conducted to 32 confirm the proper accrual of costs as outlined in the contract.
- 33 **Sec. 5.** RCW 39.10.360 and 2013 c 222 s 13 are each amended to read as follows:
- 35 (1) Public bodies should select general contractor/construction 36 managers early in the life of public works projects, and in most 37 situations no later than the completion of schematic design.

8

10

11

1213

14

15

16 17

18

19 20

2122

23

24

25

2627

(2) Contracts for the services of a general contractor/construction manager under this section shall be awarded through a competitive process requiring the public solicitation of proposals for general contractor/construction manager services. The public solicitation of proposals shall include:

- (a) A description of the project, including programmatic, performance, and technical requirements and specifications when available;
- (b) The reasons for using the general contractor/construction manager procedure <u>including</u>, <u>if applicable</u>, <u>a clear statement that the public body is electing to procure the project as a heavy civil construction project</u>, in which case the solicitation must additionally:
- (i) Indicate the minimum percentage of the cost of the work to
 construct the project that will constitute the negotiated self-perform
 portion of the project;
 - (ii) Indicate whether the public body will allow the price to be paid for the negotiated self-perform portion of the project to be deemed a cost of the work to which the general contractor/construction manager's percent fee applies; and
 - (iii) Require proposals to indicate the proposer's fee for the negotiated self-perform portion of the project;
 - (c) A description of the qualifications to be required of the firm, including submission of the firm's accident prevention program;
 - (d) A description of the process the public body will use to evaluate qualifications and proposals, including evaluation factors, the relative weight of factors, and protest procedures including time limits for filing a protest, which in no event may limit the time to file a protest to fewer than four business days from the date the proposer was notified of the selection decision;
- 30 (e) The form of the contract, including any contract for 31 preconstruction services, to be awarded;
 - (f) The estimated maximum allowable construction cost; and
 - (g) The bid instructions to be used by the general contractor/construction manager finalists.
- 35 (3)(a) Evaluation factors for selection of the general contractor/construction manager shall include, but not be limited to:
 - (i) Ability of the firm's professional personnel;

p. 7 HB 2208.SL

- 1 (ii) The firm's past performance in negotiated and complex 2 projects;
 - (iii) The firm's ability to meet time and budget requirements;
 - (iv) The scope of work the firm proposes to self-perform and its ability to perform that work;
 - (v) The firm's proximity to the project location;
 - (vi) Recent, current, and projected workloads of the firm; and
 - (vii) The firm's approach to executing the project.
- 9 (b) An agency may also consider the firm's outreach plan to include 10 small business entities and disadvantaged business enterprises, and the 11 firm's past performance in the utilization of such firms as an 12 evaluation factor.
 - (4) A public body shall establish a committee to evaluate the proposals. After the committee has selected the most qualified finalists, at the time specified by the public body, these finalists shall submit final proposals, including sealed bids for the percent fee on the estimated maximum allowable construction cost and the fixed amount for the general conditions work specified in the request for The public body shall establish a time and place for the proposal. opening of sealed bids for the percent fee on the estimated maximum allowable construction cost and the fixed amount for the general conditions work specified in the request for proposal. At the time and place named, these bids must be publicly opened and read and the public body shall make all previous scoring available to the public. public body shall select the firm submitting the highest scored final proposal using the evaluation factors and the relative weight of factors published in the public solicitation of proposals. A public body shall not evaluate or disqualify a proposal based on the terms of a collective bargaining agreement.
 - (5) The public body shall notify all finalists of the selection decision and make a selection summary of the final proposals available to all proposers within two business days of such notification. If the public body receives a timely written protest from a proposer, the public body may not execute a contract until two business days after the final protest decision is transmitted to the protestor. The protestor must submit its protest in accordance with the published protest procedures.

45

6 7

8

13 14

15 16

17

18

19

2021

22

2324

25

2627

2829

30

3132

33

34

35

(6) Public bodies may contract with the selected firm to provide services during the design phase that may include life-cycle cost design considerations, value engineering, scheduling, cost estimating, constructability, alternative construction options for cost savings, and sequencing of work, and to act as the construction manager and general contractor during the construction phase.

- **Sec. 6.** RCW 39.10.370 and 2007 c 494 s 304 are each amended to 8 read as follows:
 - (1) The maximum allowable construction cost shall be used to establish a total contract cost for which the general contractor/construction manager shall provide a performance and payment bond. The maximum allowable construction cost shall be negotiated between the public body and the selected firm when the construction documents and specifications are at least ninety percent complete.
 - (2) Major bid packages may be bid in accordance with RCW 39.10.380 before agreement on the maximum allowable construction cost between the public body and the selected general contractor/construction manager. The general contractor/construction manager may issue an intent to award to the responsible bidder submitting the lowest responsive bid.
 - (3) The public body may, at its option, authorize the general contractor/construction manager to proceed with the bidding and award of bid packages and construction before receipt of complete project plans and specifications. Any contracts awarded under this subsection shall be incorporated in the negotiated maximum allowable construction cost.
 - (4) The total contract cost includes the fixed amount for the detailed specified general conditions work, the negotiated maximum allowable construction cost, the negotiated support services, and the percent fee on the negotiated maximum allowable construction cost. Negotiated support services may be included in the specified general conditions at the discretion of the public body.
 - (5) If the public body is unable to negotiate a satisfactory maximum allowable construction cost with the firm selected that the public body determines to be fair, reasonable, and within the available funds, negotiations with that firm shall be formally terminated and the public body shall negotiate with the next highest scored firm and continue until an agreement is reached or the process is terminated.

p. 9 HB 2208.SL

- 1 (6) If the maximum allowable construction cost varies more than 2 fifteen percent from the bid estimated maximum allowable construction 3 cost due to requested and approved changes in the scope by the public 4 body, the percent fee shall be renegotiated.
 - (7) As part of the negotiation of the maximum allowable construction cost under subsection (1) of this section, on a project that the public body has elected to procure as a heavy civil construction project:
- 9 <u>(a) The general contractor/construction manager shall submit a</u>
 10 <u>proposed construction management and contracting plan, which must</u>
 11 include, at a minimum:
 - (i) The scope of work and cost estimates for each bid package;
- 13 <u>(ii) A proposed price and scope of work for the negotiated self-</u>
 14 perform portion of the project;
- (iii) The bases used by the general contractor/construction manager
 to develop all cost estimates, including the negotiated self-perform
 portion of the project; and
- (iv) The general contractor/construction manager's updated outreach
 plan to include small business entities, disadvantaged business
 entities, and any other disadvantaged or underutilized businesses as
 the public body may designate in the public solicitation of proposals,
 as subcontractors and suppliers for the project;
 - (b) The public body and general contractor/construction manager may negotiate the scopes of work to be procured by bid and the price and scope of work for the negotiated self-perform portion of the project, if any;
 - (c) The negotiated self-perform portion of the project must not exceed fifty percent of the cost of the work to construct the project;
 - (d) Subject to the limitation of RCW 39.10.390(4), the public body may additionally negotiate with the general contractor/construction manager to determine on which scopes of work the general contractor/construction manager will be permitted to bid, if any;
- (e) The public body and general contractor/construction manager
 shall negotiate, to the public body's satisfaction, a fair and
 reasonable outreach plan;
- 36 <u>(f) If the public body is unable to negotiate to its reasonable</u> 37 satisfaction a component of this subsection (7), negotiations with the

6 7

8

12

2324

2526

27

28

29

30

- 1 firm must be terminated and the public body shall negotiate with the
- 2 next highest scored firm and continue until an agreement is reached or
- 3 the process is terminated.

- **Sec. 7.** RCW 39.10.390 and 2013 c 222 s 16 are each amended to read 5 as follows:
 - (1) Except as provided in this section, bidding on subcontract work or for the supply of equipment or materials by the general contractor/construction manager or its subsidiaries is prohibited.
 - (2) The general contractor/construction manager, or its subsidiaries, may bid on subcontract work or for the supply of equipment or materials if:
 - (a) The work within the subcontract bid package or equipment or materials is customarily performed or supplied by the general contractor/construction manager;
 - (b) The bid opening is managed by the public body and is in compliance with RCW 39.10.380; and
 - (c) Notification of the general contractor/construction manager's intention to bid is included in the public solicitation of bids for the bid package or for the equipment or materials.
 - (3) In no event may the general contractor/construction manager or its subsidiaries assign warranty responsibility or the terms of its contract or purchase order with vendors for equipment or material purchases to subcontract bid package bidders or subcontractors who have been awarded a contract. The value of subcontract work performed and equipment and materials supplied by the general contractor/construction manager may not exceed thirty percent of the negotiated maximum allowable construction cost, unless procured as a heavy civil construction project under this chapter. Negotiated support services performed by the general contractor/construction manager shall not be considered subcontract work for purposes of this subsection.
 - (4) Notwithstanding any contrary provision of this chapter, for a project that a public body has elected to procure as a heavy civil construction project under this chapter, at least thirty percent of the cost of the work to construct the project included in the negotiated maximum allowable construction cost must be procured through competitive sealed bidding in which bidding by the general contractor/construction manager or its subsidiaries is prohibited.

p. 11 HB 2208.SL

- Sec. 8. RCW 43.131.408 and 2013 c 222 s 22 and 2013 c 186 s 2 are each reenacted and amended to read as follows:
- The following acts or parts of acts, as now existing or hereafter amended, are each repealed, effective June 30, 2022:
- 5 (1) RCW 39.10.200 and 2010 1st sp.s. c 21 s 2, 2007 c 494 s 1, & 6 1994 c 132 s 1;
- 7 (2) RCW 39.10.210 and 2014 c ... s 1 (section 1 of this act), 2013 8 c 222 s 1, 2010 1st sp.s. c 36 s 6014, 2007 c 494 s 101, & 2005 c 469 9 s 3;
- 10 (3) RCW 39.10.220 and 2013 c 222 s 2, 2007 c 494 s 102, & 2005 c 11 377 s 1;
- 12 (4) RCW 39.10.230 and 2013 c 222 s 3, 2010 1st sp.s. c 21 s 3, 2009 c 75 s 1, 2007 c 494 s 103, & 2005 c 377 s 2;
- 14 (5) RCW 39.10.240 and 2013 c 222 s 4 & 2007 c 494 s 104;
- 15 (6) RCW 39.10.250 and 2013 c 222 s 5, 2009 c 75 s 2, & 2007 c 494 16 s 105;
- 17 (7) RCW 39.10.260 and 2013 c 222 s 6 & 2007 c 494 s 106;
- 18 (8) RCW 39.10.270 and 2013 c 222 s 7, 2009 c 75 s 3, & 2007 c 494 19 s 107;
- 20 (9) RCW 39.10.280 and <u>2014 c ... s 2 (section 2 of this act)</u>, 2013 21 c 222 s 8₂ & 2007 c 494 s 108;
- 22 (10) RCW 39.10.290 and 2007 c 494 s 109;
- 23 (11) RCW 39.10.300 and 2013 c 222 s 9, 2009 c 75 s 4, & 2007 c 494 s 201;
- 25 (12) RCW 39.10.320 and 2013 c 222 s 10, 2007 c 494 s 203, & 1994 c
- 27 (13) RCW 39.10.330 and 2013 c 222 s 11, 2009 c 75 s 5, & 2007 c 494 28 s 204;
- 29 (14) RCW 39.10.340 and <u>2014 c ... s 3 (section 3 of this act)</u>, 2013 30 c 222 s 12, & 2007 c 494 s 301;
- 31 (15) RCW 39.10.350 and <u>2014 c ... s 4 (section 4 of this act) & 2007</u>
- 32 c 494 s 302;

132 s 7;

- 33 (16) RCW 39.10.360 and $\underline{2014 \text{ c} \dots \text{ s} \text{ 5} \text{ (section 5 of this act)}}$, 2013
- 34 c 222 s 13, 2009 c 75 s 6, & 2007 c 494 s 303;
- 35 (17) RCW 39.10.370 and <u>2014 c ... s 6 (section 6 of this act)&</u> 2007 36 c 494 s 304;
- 37 (18) RCW 39.10.380 and 2013 c 222 s 14 & 2007 c 494 s 305;
- 38 (19) RCW 39.10.385 and 2013 c 222 s 15 & 2010 c 163 s 1;

```
(20) RCW 39.10.390 and 2014 c ... s 7 (section 7 of this act), 2013
1
 2
     c 222 s 16, & 2007 c 494 s 306;
         (21) RCW 39.10.400 and 2013 c 222 s 17 & 2007 c 494 s 307;
 3
         (22) RCW 39.10.410 and 2007 c 494 s 308;
 4
 5
         (23) RCW 39.10.420 and 2013 c 222 s 18, 2013 c 186 s 1, 2012 c 102
     s 1, 2009 c 75 s 7, 2007 c 494 s 401, & 2003 c 301 s 1;
 6
7
         (24) RCW 39.10.430 and 2007 c 494 s 402;
         (25) RCW 39.10.440 and 2013 c 222 s 19 & 2007 c 494 s 403;
8
         (26) RCW 39.10.450 and 2012 c 102 s 2 & 2007 c 494 s 404;
9
         (27) RCW 39.10.460 and 2012 c 102 s 3 & 2007 c 494 s 405;
10
         (28) RCW 39.10.470 and 2005 c 274 s 275 & 1994 c 132 s 10;
11
12
         (29) RCW 39.10.480 and 1994 c 132 s 9;
13
         (30) RCW 39.10.490 and 2013 c 222 s 20, 2007 c 494 s 501, & 2001 c
14
     328 s 5;
         (31) RCW 39.10.900 and 1994 c 132 s 13;
15
16
         (32) RCW 39.10.901 and 1994 c 132 s 14;
17
         (33) RCW 39.10.903 and 2007 c 494 s 510;
         (34) RCW 39.10.904 and 2007 c 494 s 512; and
18
         (35) RCW 39.10.905 and 2007 c 494 s 513.
19
         Passed by the House February 17, 2014.
         Passed by the Senate March 5, 2014.
         Approved by the Governor March 19, 2014.
         Filed in Office of Secretary of State March 19, 2014.
```

p. 13 HB 2208.SL