

HOUSE BILL REPORT

ESSB 5418

As Passed House - Amended:

April 16, 2019

Title: An act relating to local government procurement modernization and efficiency.

Brief Description: Concerning local government procurement modernization and efficiency.

Sponsors: Senate Committee on Local Government (originally sponsored by Senators Takko, Zeiger and Liias).

Brief History:

Committee Activity:

Local Government: 3/26/19, 3/28/19 [DPA].

Floor Activity:

Passed House - Amended: 4/16/19, 76-22.

Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Allows counties and water-sewer districts to procure public works with a unit-priced contract.
- Increases the small works roster process and limited public works project cost thresholds.
- Requires a municipality soliciting competitive bids for public works to disclose all bids received if requested by a bidder.
- Changes the date by which a bidder must protest to within two business days of when a municipality discloses all bids received or, if no request is made, bid opening.
- Increases public works contract thresholds for water-sewer districts, counties, cities, public utility districts, fire protection districts, and irrigation districts.
- Allows a second-class city or town to award certain competitive public works contracts to a bid within 5 percent of the lowest bid.
- Requires a Capital Projects Advisory Review Board study of local government public works contracting processes by November 1, 2020.

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 LOCAL GOVERNMENT

Majority Report: Do pass as amended. Signed by 5 members: Representatives Pollet, Chair; Peterson, Vice Chair; Appleton, Goehner and Senn.

Minority Report: Without recommendation. Signed by 1 member: Representative Griffey, Assistant Ranking Minority Member.

Minority Report: Do not pass. Signed by 1 member: Representative Kraft, Ranking Minority Member.

Staff: Robbi Kesler (786-7153). Yvonne Walker (786-7841).

Background:

Public Works.

"Public works" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality. All public works, including maintenance when performed by contract, must comply with prevailing wage statutes.

A "unit-priced" public works contract is a competitively bid contract in which public works are anticipated on a recurring basis to meet the business or operational needs of an agency, under which the contractor agrees to a fixed period indefinite quantity delivery of work, at a defined unit price for each category of work.

Water-Sewer Districts. Water-sewer districts provide water and sewer services to incorporated and unincorporated areas. Water-sewer district powers include the authority to purchase, construct, maintain, and supply waterworks to furnish water to inhabitants, and to develop and operate systems of sewers and drainage. Water-sewer districts may also fix rates and charges for services, enter into contracts, levy taxes, and issue bonds. Generally, water-sewer districts must solicit bids and award contracts for all work estimated to cost over \$50,000.

Counties. Counties with a population of 400,000 or more, which have established a purchasing department, must competitively bid all public works contracts. However, such counties may have county employers perform public works projects in an annual or biennial budget period provided the dollar value of the work does not exceed 10 percent of the public works construction budget. In addition to this percentage limitation, these counties may not have public employees perform a public works project in excess of:

- \$90,000 if more than one craft or trade is involved; or
- \$45,000 if only a single craft or trade is involved.

Under the statutes relating to counties, a "public works project" means a complete project; counties are not permitted to divide the project into units of work or classes of work to avoid meeting the contract limits. The cost of a separate public works project is the cost of materials, supplies, equipment, and labor on the construction of that project.

First-Class Cities. In first-class cities, competitive bids are required for all public works projects costing over \$90,000, if more than a single craft or trade is involved. If only a single craft or trade is involved, bids are required when the cost is over \$45,000.

Second-Class Cities. In second-class cities, towns, and code cities, competitive bids are required whenever the cost of a public works project, including the cost of materials, supplies, and equipment, will exceed \$65,000 if more than one craft or trade is involved. If only a single craft or trade is involved, or if the project is one of street signalization or street lighting, bids must be called for if the cost is greater than \$40,000. If the estimated cost is less than the \$65,000 or the \$40,000 thresholds, bids may be sought but are not required.

Public Works Contracts—Protests. Unless an exception applies, all municipalities must contract for the execution of public works after advertisement and competitive bid or by a contract awarded under the small works roster process. Generally, municipality means every city, county, town, port district, district, or other public agency authorized by law to require the execution of public work. If a municipality receives a written protest from a bidder within two business days of a bid opening, the municipality may not execute a contract for the project with anyone other than the protesting bidder without first providing at least two full business days' written notice of the municipality's intent to execute a contract for the project.

Small Works Rosters.

Small works rosters (SWR) are lists of qualified contractors who can bid for an eligible project estimated to cost \$300,000 or less. Any responsible contractor may request to be on a SWR, which may be a single general list or may include lists for various specialties or categories of work. Under the SWR process, no advertising of such contract opportunities is required. Instead, a state agency or local government will solicit bids from all contractors who have requested to be on the appropriate SWR or from at least five of the listed contractors. Governmental entities that do not have specific public works statutes may also use a similar roster process, although they do not have to comply with statutory requirements.

Limited Public-Works Process. The SWR process also allows for a limited public-works process for projects estimated to cost \$35,000 or less. Under the limited public-works process, the state agency or local government solicits bids from at least three contractors from the appropriate SWR and awards the contract to the lowest responsible bidder.

For limited public works projects, the state agency or local government may waive payment, performance bond, and retainage requirements. "Retainage" means a portion, not to exceed 5 percent, of the contractor's payment that is withheld by the contracting agency until the project is complete. The retainage is used to satisfy claims that a person, such as a laborer or supplier, may have under the contract and to pay any taxes or penalties that may be due from the contractor. In instances where retainage is not waived, certain notice of completion requirements apply. The Department of Revenue (DOR), the Employment Security Department (ESD), and the Department of Labor and Industries (L&I) are required to provide notice, upon completion of a contract over \$35,000, that the contractor has paid all taxes, increases, and penalties due before retained funds are released.

A state agency or local government may use the limited public-works process to solicit and award SWR contracts to small businesses that are registered as contractors with gross revenues of \$1 million or less. When using the small-works or limited public-works processes for a project, state agencies and local governments must attempt to equitably distribute opportunities for the project among the listed contractors.

For public works contracts in excess of \$10,000, contractors and subcontractors must submit a Statement of Intent to Pay Prevailing Wages, which includes the contractor's registration certificate number, the prevailing wage for each worker classification, and how many workers are anticipated to work on the project. When retainage is not waived for these contracts, the contractor and subcontractors must submit an Affidavit of Wages Paid for retained funds to be released after final acceptance of the project. When retainage is waived, only contractors or subcontractors of public improvement contracts funded in whole or in part by federal transportation funds, are required to provide an Affidavit of Wages Paid to the state, county, municipality, or other public body prior to accepting the public works project.

Public Utility District.

A public utility district (PUD) is a type of special purpose district (SPD) that is authorized to provide electricity, water, sewer, and telecommunications services to its jurisdiction. A PUD:

- must contract for any item, or items of the same kind of materials, equipment and supplies estimated over \$15,000;
- may directly purchase materials, equipment and supplies estimated less than \$7,500 in any calendar month without a contract; and
- must contract for work estimated over \$25,000. However, a PUD may have its own employees perform work, which is an accepted industry practice under prudent utility management, without a contract.

"Prudent utility management" means performing work with regular employees utilizing materials under \$150,000 in value without a contract.

Vendor List. Certain governmental entities may use an informal vendor list process. A vendor list is a directory, maintained by a local government agency, of solicited vendors who are interested in selling equipment, materials, and supplies to that agency. The statute authorizing each local government to use the vendor list procedure establishes a range of dollar values of purchases that may be made using this procedure. Generally, purchases below that range of dollar values may be made without any competitive solicitation and purchases above that range must be made using formal competitive bidding procedures. A PUD may use the vendor list process for the purchase of any item, or items of the same kind of material, supplies, and equipment estimated between \$15,000 and \$60,000 per calendar month, in lieu of the formal competitive bidding process.

Fire Protection Districts.

A fire protection district is a type of SPD created to provide fire prevention, fire suppression, and emergency medical services within a district's boundaries, which can include incorporated and unincorporated areas. A formal sealed bid procedure must be used for purchases and contracts for purchases made by a fire protection district's board of commissioners. Formal sealed bidding is not required for:

- the purchase of materials when such materials, equipment, or supplies have an estimated cost not exceeding \$10,000; however, whenever the estimated cost does not exceed \$50,000, the commissioners may by resolution use the alternative bidding (vendor list) process available for municipalities;
- contracting for work involving the construction or improvement of a fire station or other buildings where the estimated cost does not exceed \$20,000;
- contracts using the SWR process; and
- any contract for purchases or public works projects which are exempt from competitive bidding requirements.

Irrigation District.

An irrigation district is a type of SPD with broad statutory authorization to engage in a wide range of activities and provide a myriad of services. Generally, irrigation districts provide for the construction, improvement, maintenance, and operation of irrigation systems. Irrigation districts also may provide drainage, domestic water supply, electric power facilities, fire hydrants, and street lighting. Irrigation districts may finance their operations and actions through fees, charges, and assessments, but do not have the authority to impose property taxes.

If the board of an irrigation district purchases work or materials by contract, it must use a publicly conducted, sealed bidding procedure. Notice calling for sealed proposals must be published in appropriate newspapers at least once a week for two weeks. The sealed bids must be opened publicly at a time and place appointed in the notice. The board must then award the contract to the lowest responsible bidder, or may reject all bids and readvertise, or may proceed to construct the work under its own superintendence.

Summary of Amended Bill:

Public Works.

Water-Sewer Districts and Counties. A county and a water-sewer district may procure public works with a unit-priced contract to complete anticipated types of work based on hourly rates or unit-pricing for one or more categories of work or trades. "Unit-priced contract" is defined as a competitively bid contract in which public works are anticipated on a recurring basis to meet the business or operational needs of a county or a water-sewer district, under which the contractor agrees to a fixed period indefinite quantity delivery of work, at a defined unit-price, for each category of work. Although an initial contract term may not exceed one year, water-sewer districts may extend or renew a contract for one additional year.

Invitations for unit-price bids must include the following information:

- estimated quantities of the anticipated types of work or trades; and
- how the county or a water-sewer district will issue or release work assignments, work orders, or task authorizations for projects based on the hourly rates or unit-prices bid by the contractor.

Whenever possible, a county or a water-sewer district must invite at least one proposal from a certified minority or woman contractor. Contracts must be awarded to the lowest responsible bidder. Unit-price contractors must pay prevailing wages for all public works

and are subject to the requirements of the statutes governing prevailing wages on public works. Prevailing wages for all work must be the rates in effect at the beginning date for each contract year. Unit-priced contracts must have prevailing wage rates updated annually. Intents and affidavits for prevailing wages paid must be submitted annually for all work completed within the previous 12-month period of the unit-priced contract.

All counties (instead of solely those counties with a population of 400,000 or more) may establish by resolution a purchasing department to enter into personal property leases on a competitive basis and purchase all supplies, materials, and equipment on a competitive basis, for all departments of the county.

In addition to counties and water-sewer districts, all county public transportation, public transportation benefit areas, and regional transit authorities are also authorized to procure public works contracts with a unit-priced contract to complete anticipated types of work based on hourly rates or unit-pricing for one or more categories of work or trades.

First-Class Cities. Contract thresholds for when competitive bidding is required for a first-class city are increased to:

- \$150,000 or more (from \$90,000) if more than one craft or trade is involved; or
- \$75,500 or more (from \$45,000) if only a single craft or trade is involved with the public works or the project is street signalization or street lighting.

Second-Class Cities. Contract thresholds for when competitive bidding is required for a second-class city, town, and code cities are increased to:

- \$116,155 or more (from \$65,000) if more than one craft or trade is involved; or
- \$75,500 or more (from \$40,000) if only a single craft or trade is involved with the public works or the project is street signalization or street lighting.

As an alternative to awarding competitive public works contracts to the lowest responsible bidder, second-class cities, towns, and code cities may award the contract to a lowest responsive bidder. A "lowest responsible bidder" must meet bidder criteria and is the bidder who has the lowest bid provided, that if the city issues a written finding that the lowest bidder has delivered a project to the city within the last three years which was late, over budget, or did not meet specifications, and the city does not find in writing that such bidder has shown how they would improve performance to be likely to meet project specifications then the city may choose the second lowest bidder whose bid is within 5 percent of the lowest bid and meets the same criteria as the lowest bidder.

A city or town that awards a project to a bidder under the new allowable lowest bidder criteria must submit an annual report to the Department of Commerce (COM) identifying the total number of bids awarded to certified minority or women contractors.

Public Works Contracts—Protests. A municipality soliciting competitive bids for a public works project must provide copies of bids received if requested to do so. A bidder must now submit a written protest to a municipality soliciting bids within two business days of the municipality disclosing all bids received or, if no request is made, bid opening.

Small Works Rosters.

For the SWR process, the project cost threshold is increased for projects estimated to cost \$350,000 or less (instead of \$300,000 or less). Governments may choose to solicit bids from less than all the appropriate contracts on an appropriate SWR for projects estimated to cost between \$250,000 and \$350,000 (instead of \$150,000 to \$300,000). After a bid is awarded for a SWR project all bid quotations received must be open for public inspection and made available by telephone or electronic request.

For projects awarded under the SWR process, a state agency or authorized local government may waive certain retainage requirements and assume liability for the contractor's nonpayment of taxes and of laborers, subcontractors, mechanics, material persons, and suppliers. The state agency or local government retains the right of recovery against the contractor for any payments made on the contractor's behalf. Recovery of unpaid wages and benefits must be the first priority of actions filed against the contract.

For actions filed against the retainage, the state agency or local government must seek recovery of unpaid wages and benefits first.

Limited Public-Works Process. For the limited public-works process, the project cost threshold is increased to \$50,000 (from \$35,000). Updates are made to notice of completion requirements for projects where retainage is not waived. The DOR, the ESD, and the L&I must certify, upon completion of a contract up to \$50,000, that the contractor has paid all taxes, increases, and penalties due before retained funds are released. Additionally, when retainage is waived, contractors and subcontractors of limited public works projects are required to submit an Affidavit of Wages Paid, confirming their payment of prevailing wages as required by their Statement of Intent to Pay Prevailing Wages, before there is final acceptance of the project. When retainage is waived, the ESD and the L&I may collect and recover taxes, increases, and penalties owed.

A state agency or authorized local government may use the limited public-works process to solicit and award SWR contracts to minibusinesses and microbusinesses. A state agency or authorized local government using the limited public-works process must equitably distribute opportunities for the project among the listed contractors. "Equitably distribute opportunities" means a state agency or authorized local government may not favor certain contractors on the appropriate SWR over other contractors on the same roster who perform similar services.

Public Utility District Bid Thresholds.

Contract thresholds for when competitive bidding is required for PUDs are increased. A PUD:

- must contract for any item, or items of the same kind of materials, equipment and supplies estimated over \$30,000 (instead of \$15,000);
- may directly purchase materials, equipment and supplies estimated less than \$12,000 (instead of \$7,500) in any calendar month without a contract; and
- must contract for work estimated over \$50,000 (instead of \$25,000).

"Prudent utility management" is redefined to mean work performed by regular employed personnel utilizing material less than \$300,000 (instead of \$150,000) in value without a contract.

Vendor List. A PUD may use the vendor list process for material, supplies, and equipment between \$30,000 and \$120,000 (instead of \$15,000 to \$60,000) per calendar year, in lieu of the general bidding process.

Prevailing wage rates must be those in effect at the beginning date for each contract year. Unit-priced contracts must have prevailing wage rates updated annually. Intents and affidavits for prevailing wages paid must be submitted annually for all work completed within the previous 12-month period of the unit-priced contract.

"Equipment" is defined to include a conductor, cabling, wire, pipe, or lines used for electrical, water, fiber optic, or telecommunications.

Fire Protection Districts.

Contract thresholds for when competitive bidding is required for a fire protection district are increased when the estimated costs exceeds:

- \$40,000 (instead of \$10,000) for materials, supplies, or equipment or \$75,000 (instead of \$50,000) when using the alternative bidding process;
- \$30,000 (instead of \$20,000) for contract work involving the construction or improvement of a fire station or other buildings.

Irrigation District.

An irrigation board, when calling for bid proposals for contract work or for materials, must advertise on the irrigation district's website (in addition to the local newspapers) or the county's website if the irrigation district does not have a website. In regards to contracts for irrigation district work, irrigation district boards are authorized to contract using the SWR process for public works contracts and for purchasing materials.

Capital Projects Advisory Review Board Study.

Subject to appropriation, the Capital Projects Advisory Review Board must review the public works contracting processes for local governments, including the SWR and limited public works processes, and report to the governor and appropriate committees of the Legislature by November 1, 2020. The report must include the following:

- identification of the most common contracting procedures used by local governments;
- identification of the dollar amounts set for local government public works contracting processes;
- analysis of whether the dollar amounts comport with estimated project costs within the relevant industries;
- an analysis of the potential application of an inflation-based increaser to the dollar amounts, "taking regional factors" into consideration, such: (1) applying the implicit price deflator for government purchases of goods and services; and (2) adjusting the bid limit dollar thresholds for inflation, on a regional basis, by the building cost index during that time period;
- recommendations to increase uniformity and efficiency for local government public works contracting processes; and
- rates of and barriers to participation in the SWR and limited public works contracting processes.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Several procurement bills have been included for efficiency. Bid threshold limits should be reasonable and should be reviewed on a regular basis to review market conditions.

Updating the lowest bidder concept would help when a lowest bid comes in but the contractor is not able to complete the job or lacks the experience necessary. An inexperienced contract can end up costing a city more in the long run.

Bid limits for second-class and code cities have not been increased in some time. It is appropriate to look at these on a regular basis. The updated SWR process does not eliminate the steps that a city must follow, it just catches up the project cost limit to reflect today's dollars.

Allowing unit-priced contracting is beneficial, particular for small agencies that need public works for craft-specific work. Unit-priced contracts help reduce emergency contracts, which are costly and time consuming.

Allowing contractors to see the bids will create a more informed bid protest process. Currently, a contractor may have to make a protest before being able to review the bids.

Public employees support the bill because it will create more efficiencies.

(Opposed) The lowest responsible bidder section may have a negative impact on small and new contractors and their ability to compete and enter the market. There could be a better way to address the concerns. The various bid limit increases exceeds the rate of inflation. Competitive bid process limits are going up faster than inflation.

(Other) There are concerns that more flexibility in bidding processes may cause more work to be done inhouse. A sunset clause and a study would be helpful in order to review the effect of this bill. Going out to bid is not an administrative burden. It is important for the Legislature to take a look at all these changes. There should be some significant changes to the lowest responsible bidder process to ensure it is being used effectively. There is support for some aspects of this bill and the belief that these should be broken out into separate bills, particularly if there is no sunset clause or study.

Persons Testifying: (In support) Senator Takko, prime sponsor; Candice Bock, Association of Washington Cities; Nicholas Garcia, Washington Public Utilities District Association; Linda Shilley, Pierce Transit; Matt Doumit, Cascade Water Alliance; Steve Taylor, City of Kelso; Mike Kardis, City of Kelso; J Pat Thompson, Washington State Council of County

and City Employees; Tymon Berger, Berger Construction Law; Rory Paine-Donovan, Seattle Public Utilities; Michael Shaw, Washington State Transit Association; Jane Wall, Washington State Association of Counties; and Joe Daniels, Washington State Association of Water-Sewer Districts.

(Opposed) Brent Ludeman, National Electrical Contractors Association.

(Other) Mike Transue, Mechanical Contractors Association of Western Washington.

Persons Signed In To Testify But Not Testifying: None.