

HOUSE BILL REPORT

SB 5032

As Passed House - Amended:

April 6, 2021

Title: An act relating to the reauthorization and improvements to alternative public works contracting procedures.

Brief Description: Concerning the reauthorization and improvements to alternative public works contracting procedures.

Sponsors: Senators Hasegawa, Warnick, Kuderer and Wilson, C..

Brief History:

Committee Activity:

Capital Budget: 2/17/21, 3/31/21 [DPA].

Floor Activity:

Passed House: 4/6/21, 98-0.

Brief Summary of Bill (As Amended By House)

- Extends the use of alternative public works contracting procedures until July 1, 2031.
- Amends the duties and membership of the Capital Projects Advisory Review Board.
- Amends the design-build, general contractor/construction manager, and job order contracting procedures.
- Requires the Capital Projects Advisory Review Board to develop best practices for increasing and sustaining access to contracting opportunities in alternative public works for minority, women, and veteran-owned businesses, and small businesses, and report to the Legislature any recommendations for changes to the statute by June 30, 2022.

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

HOUSE COMMITTEE ON CAPITAL BUDGET

Majority Report: Do pass as amended. Signed by 22 members: Representatives Tharinger, Chair; Callan, Vice Chair; Hackney, Vice Chair; Steele, Ranking Minority Member; Abbarno, Assistant Ranking Minority Member; McEntire, Assistant Ranking Minority Member; Bateman, Dye, Eslick, Gilday, Kloba, Kraft, Leavitt, MacEwen, Maycumber, Mosbrucker, Peterson, Riccelli, Rule, Santos, Sells and Shewmake.

Staff: Kelci Karl-Robinson (786-7116).

Background:

Alternative Contracting Procedures. There are three alternative procedures authorized by law: design-build (DB), job order contracting (JOC), and general contractor/construction manager (GC/CM). The authorization to use alternative public works procedures expires June 30, 2021.

Capital Projects Advisory Review Board. In 2005 the Capital Projects Advisory Review Board (CPARB) was established to monitor and evaluate the use of traditional and alternative public works contracting procedures and to evaluate potential future use of other alternative contracting procedures. In addition to evaluating public works contract procedures, CPARB appoints members to the Project Review Committee (PRC) to certify public bodies to use either, DB, GC/CM, or both procedures and to approve the use of DB or GC/CM procedures on a project-by-project basis. The CPARB is authorized to develop questionnaires for collecting quantitative and qualitative data on alternative public works contracting procedures and advise the Legislature on policies related to public works delivery methods. The CPARB consists of 23 members, including four nonvoting legislative members—two from the House of Representatives and two from the Senate.

Design-Build. The DB procedure is a multistep competitive process to award a contract to a single firm that agrees to both design and build a public facility that meets specific criteria. Subject to PRC review, DB procedures may be used on projects valued over \$2 million or for parking garages, regardless of cost. The DB procedure may also be used for portable facilities, pre-engineered metal buildings or not more than 10 prefabricated modular buildings per installation site, regardless of cost, without PRC approval. Contracts for DB services are awarded through a competitive process using public solicitations of proposals. Finalists' proposals are evaluated solely on factors identified in the request for proposals.

General Contractor/Construction Manager. Under the GC/CM method, 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. The GC/CM procedure may be used where:

- implementation of the project involves complex scheduling, phasing, or coordination;

- the project involves construction at an occupied facility which must continue to operate during construction;
- the involvement of the GC/CM during the design stage is critical to the success of the project;
- the project encompasses a complex or technical work environment;
- the project requires specialized work on a building that has historic significance; or
- the project is, and the public body elects to procure the project as, a heavy civil construction project.

Initial selection of a GC/CM finalist is based on the evaluation factors of the GC/CM which must include, but not be limited to:

- ability of the firm's professional personnel;
- the firm's past performance in negotiated and complex projects;
- the firm's ability to meet time and budget requirements;
- the scope of work the firm's proposes to self-perform and its ability to perform that work;
- the firm's proximity to the project location;
- recent, current, and projected workloads of the firm; and
- the firm's approach to executing the project.

Evaluation factors may also consider the firm's outreach plan to include small business entities and disadvantaged business enterprises, and the firm's past performance in use of such firms as an evaluation factor.

After the public body selects the most qualified finalists, these finalists 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 proposal. When the design is at least 90 percent complete, the public body and the GC/CM negotiate the maximum allowable construction cost. When the plans and specifications for a project phase are complete, the GC/CM firm subcontracts with construction firms to construct that phase.

The contract documents must obligate the public owner to accept or reject a change order within a specific time period, but no later than 60 calendar days after receipt. If the public body elects to procure the project as a GC/CM heavy civil construction project additional requirements must be met including, but not limited to, an independent audit, paid for by the public body, to confirm the proper accrual of costs as outlined in the contract.

General Contractor/Construction Manager—Subcontractors. The GC/CM firm subcontracts with firms to complete construction using a competitive bidding process which may be completed before agreement on the maximum allowable construction cost.

When the anticipated value of the subcontract will exceed \$3 million, an alternative selection process may be used, with the approval of the public body, when contracting with

mechanical or electrical contractors if it is in the best interest of the public. The alternative process allows for the GC/CM to select contractors based on evaluation factors which must be included in the solicitation for proposal. If the work of the mechanical or electrical contractor is completed for less than the maximum allowable cost, any savings not negotiated as part of an incentive clause become part of the risk contingency of the GC/CM maximum allowable construction cost. If the work of the mechanical or electrical contractor is completed for more than the maximum allowable subcontract cost, the additional cost is the responsibility of the subcontractor. An independent audit must be conducted to confirm the proper accrual of costs outlined in the contract.

Job Order Contracting. In 2003 the JOC procedure was authorized in law as an alternative public works contracting procedure for a limited number of agencies, but in 2019, the Legislature authorized the JOC procedure for all public entities. Job ordering contracts are awarded through a competitive process using public requests for proposals which include sealed bids based upon the identified unit price book. Under the JOC procedure, a contractor agrees to perform an indefinite quantity of public works jobs, defined by individual work orders, over a fixed period of time. The JOCs must subcontract 90 percent of the work under the contract, and may self-perform 10 percent. The JOCs may be executed for an initial contract term of two years, with an option to extend or renew the contract for an additional year, provided any extension or renewal is priced as provided in the original proposal and is mutually agreed upon by the public body and the job order contractor. A public entity may not have more than three job order contracts in effect at any one time, except for the Department of Enterprise Services (DES), which may have six. The maximum total dollar amount awarded under a job order contract may not exceed \$4 million per year, except for the DES, counties with a population of more than one million, and cities with a population of more than 400,000, which may award up to a maximum of \$6 million per year. Individual work orders are limited to no more than \$500,000, excluding sales tax.

Summary of Amended Bill:

Alternative Contracting Procedures. Alternative public works are reauthorized, subject to another sunset review in 10 years. Notification requirements are made uniform across all alternative contracting procedures to publish, at minimum, a notice at least once in a legal newspaper of general circulation. Public bodies are encouraged to post notifications in additional areas such as websites for business associations or the Office of Minority and Women's Business Enterprises (OMWBE) to further publicize the opportunity.

Capital Projects Advisory Review Board. The CPARB membership is altered to add one individual from the private sector representing the interests of the disadvantaged business enterprises community, appointed by the Governor, and one member representing transit, selected by the Washington State Transit Association. Participation from businesses owned by minorities, women, and veterans, and small businesses is encouraged. The CPARB members are required to be knowledgeable or have experience in state and federal laws,

rules, and best practices concerning public contracting for minority, women, and veteran-owned businesses and small businesses. The CPARB must reflect the gender, racial, ethnic, and geographic diversity of the state, including the interests of persons with disabilities.

The CPARB must develop and recommend to the Legislature policies to encourage competition and further enhance equitable participation in capital construction, including considerations for reducing barriers for participation by disadvantaged business enterprises. The CPARB's duty to collect quantitative and qualitative data on alternative public works contracting procedures is changed to direct the DES to collect data.

The CPARB must coordinate and consult with the OMWBE, the DES, the Office of Equity, community stakeholders and advocates, and subject matter experts to create best practices guidelines for increasing and sustaining access to contracting opportunities in alternative public works for minority, women, and veteran-owned businesses, and small businesses. The best practices must address, at a minimum:

- guidelines for use of race-neutral and race-conscious programs;
- elements of successful inclusion plans;
- the use of aspirational inclusion goals;
- evaluation of inclusion plans in the contract award process; and
- the evaluation of inclusion plans and past performance in public body certification and project approval processes.

By June 30, 2022, the CPARB must make the best practices guidelines available on its website and have a plan to update the practices to keep them relevant for use; and report to the appropriate committees of the Legislature any recommendations for changes to state law that are advisable based upon the best practices guidelines.

Membership of the PRC, appointed by the CPARB, and PRC appointed panels must include at least one member representing the interests of disadvantaged business enterprises. In addition to other duties, the PRC must review and approve the use of alternative subcontractor selection on a project-by-project basis for public bodies that are not otherwise certified, wherein review and approval may be concurrent with project approval.

Design-Build. Design-build procedures for pre-engineered metal buildings are subject to review by the PRC. To the extent permitted by law, evaluation factors for finalist's proposals of DB firms must include the firm's inclusion plans for small business and disadvantaged business enterprises. The DB contractors must submit their utilization of OMWBE-certified and veteran-certified businesses to the OMWBE.

Washington State University (WSU) may perform DB demonstration projects with a total project cost under \$2 million to develop best practices in encouraging small business and minority, women, and veteran-owned business participation and in managing capital projects under \$2 million. Every other year, the WSU must report to the board information on the type of projects performed, the initial and final project cost and schedule of the

projects, small business and minority, women, and veteran-owned business entity participation, the best practices derived from the projects, and outreach measures developed in concert with the OMWBE.

General Contractor/Construction Manager. Public bodies should select the GC/CMs at a time in the project when the GC/CM's participation provides value rather than no later than completion of schematic design.

Evaluation factors for qualifications of the GC/CM must include, but not be limited to:

- experience and technical competence of key personnel;
- the proposer's past performance with negotiated or similarly complex projects;
- the proposer's capacity to perform the work;
- the scope of work the firm proposes to self-perform and its past performance of that scope of work;
- the proposer's approach to executing the project, including ability to meet the project time and budget requirements;
- the proposer's past performance in use of disadvantaged business enterprises, to the extent permitted by law; and
- the proposer's inclusion plans for small business and disadvantaged business enterprises, to the extent permitted by law.

Selected finalists must submit final proposals that must include sealed bids for the percent fee on the estimated maximum allowable construction cost which may include other price-related factors identified in the request for proposal. In no event may a price-related factor include a request for overall project budget, estimate, or bid.

With respect to total contract costs, unless portions or all are converted to lump sum, negotiated support services must be treated as a contractual allowance, subject to reconciliation at the conclusion of work.

Contract documents must obligate the public owner to accept, dispute, or reject change orders, in writing within 30 calendar days, rather than 60. If a request is disputed or rejected, the public owner must state the reason in writing. If a public owner fails to respond within the specified time period, the contractor is not deemed to have waived any right to the claims process.

Heavy civil project requirements are consolidated into a new section.

Where independent audits are required to confirm the proper accrual of costs as outlined in the contract, the public body or the GC/CM must define the scope of the audit in the contract.

General Contractor/Construction Manager–Subcontractors. Bid packages must be prepared to reduce barriers for and increase participation by disadvantaged business enterprises.

Individual bid packages are to be prepared with trades separated in the manner consistent with industry practice to maximize participation and competition across all trades. Bundling of trades not normally combined into one bid package is not allowed without justification and specific approval by the public body.

The GM/CM may negotiate with the lowest responsible and responsive bidder to negotiate an adjustment to the lowest bid or proposal price to reduce cost based upon agreed changes to the contract plans and specifications under the following conditions:

- all responsive bids or proposal prices exceed the published bid package estimates; and
- the apparent low responsive bid or proposal does not exceed the published bid package estimates by more than 10 percent.

The alternative selection process is available for all subcontracts for certified public bodies or for projects that are individually approved by the PRC. In addition to other requirements, public solicitation of proposals under the alternative selection process must include descriptions of the project's unique aspects, complexities, and challenges.

The notice published by the GC/CM of intent to use the alternative selection process must include where interested parties may obtain the evaluation criteria and application weight given to each criteria, including clear definitions of what should be considered specified general conditions work and what should be considered the fee. The evaluation criteria, weights assigned to each criteria, and justification for using this selection process must be available upon request at least seven calendar days before the public hearing. Final determination must reasonably address comments received regarding the criteria and weights for each criterion.

Evaluation factors for selecting the subcontractor under the alternative selection process are amended to include the ability of a firm to meet the requirements on projects of similar size, scope, or complexity. If interviews are part of the selection process, the solicitation must describe how interviews will be scored or evaluated, and evaluations must be included in the written selection summary.

The GC/CM and the public body must select the firm submitting the highest scored final proposal using the evaluation factors and the relative weight of factors identified in the solicitation of proposals. Scoring of the nonprice factors must be added to the scoring of the fee and cost proposals to determine the highest scored firm.

Job Order Contracting. The request for proposal documents must include, among other things, the identity of the specific unit price book to be used and a description of which elements will be included in the coefficient as necessary to establish a firm fixed price on work orders to be awarded under the JOC.

Public bodies must prioritize efforts to solicit proposals from disadvantaged businesses for JOCs and to include a member with knowledge and experience in state and federal laws,

rules, and best practices concerning public contracting for minority, women, and veteran-owned businesses and small businesses on the job order selection committee.

Sealed bids for selected finalists must include, but are not limited to, coefficients. Such bids may be in the form of coefficient adjustments to the listed unit price book.

Instead of providing the information to the CPARB annually, each public body must maintain and make available the following information for each JOC:

- a list of work orders issued;
- the cost of each work order;
- a list of subcontractors hired under each work order, including whether those subcontractors were certified small, minority, women, or veteran-owned businesses; and
- a copy of the intent to pay prevailing wage and the affidavit of wages paid for each work order subcontract.

Definitions Added. "Budget contingencies" is defined as contingencies established by a public body outside of the DB or GC/CM contract for payment of project costs that are not the responsibility of the design-builder or the GC/CM under the respective contract.

"Coefficient" is defined as the job order contractor's competitively bid numerical factor applied to the public body's prices as published in the unit price book.

"Risk contingency" is defined as a contingency for use as defined in the contract and established as part of the maximum allowable construction cost for unexpected cost of work items that have not otherwise been included or addressed in the maximum allowable construction cost.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) The CPARB reauthorization is crucial due to the fact that the statute expires shortly after session ends. The Joint Legislative Audit Review Committee report recommends reauthorization. Minority-owned business participation dropped as a result of the passage of Initiative Measure No. 200. The CPARB will focus on increasing diverse business participation in the public works contracting processes. Innovation and diverse voices make projects stronger. Projects with complex scheduling, phasing, coordination, and technical work make the GC/CM procedure essential. Job order contracting allows work to start two to three months quicker than traditional public works bid processes and

results in a higher utilization of disadvantaged business enterprises. Alternative public works contracting tools allow public owners to engage with contractors sooner and integrate them into the project's success. This well-vetted bill promotes competition, increases transparency, and encourages innovation resulting in benefits to project costs, schedules, and the mitigation of risks. Public owners and projects are vetted to be sure they use the alternative public works tools well. The CPARB is a broad-based industry wide group that represents multiple stakeholders and supports the recommended changes. The CPARB provides an important table to discuss contentious issues, like bid listing concerns. The CPARB worked on the bill over 18 months with stakeholder outreach and involvement, including incorporating provisions related to equity and inclusion. The bill is a meaningful step towards ensuring barriers to competition for minority- and women-owned businesses are eliminated.

(Opposed) None.

Persons Testifying: Senator Hasegawa, prime sponsor; Alexandra Mather, Pierce Transit; Janice Zahn, Rebecca Keith, Santosh Kuruvilla, and Andrew Thompson, Capital Projects Advisory Review Board; Lisa Van der Lugt, Washington Office of Minority and Women's Business Enterprises; and Matthew Hepner, Construction Trades Labor.

Persons Signed In To Testify But Not Testifying: None.