

SENATE BILL REPORT

SB 5032

As Amended by House, 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: State Government & Elections: 1/15/21, 1/20/21 [DP, w/oRec].

Floor Activity: Passed Senate: 2/3/21, 49-0.

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

Brief Summary of Bill

- Reauthorizes the use of alternative public works contracting procedures, subject to another sunset review in ten years.
- 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.

SENATE COMMITTEE ON STATE GOVERNMENT & ELECTIONS

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.

Majority Report: Do pass.

Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Hasegawa and Hawkins.

Minority Report: That it be referred without recommendation.

Signed by Senator Wilson, J., Ranking Member.

Staff: Melissa Van Gorkom (786-7491)

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; or to approve projects on a project-by-project basis; develop questionnaires for collecting quantitative and qualitative data on alternative public works contracting procedures; and advising the Legislature on policies related to public works delivery methods. CPARB consists of 23 members, including four nonvoting legislative members—two from the House of Representatives, appointed by the Speaker of the House, and two from the Senate, appointed by the President of the Senate.

Design-Build. The DB 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. Subject to PRC review, DB may be used on projects valued over \$2 million or for parking garages, regardless of cost. DB may also be used for portable facilities, preengineered metal buildings or not more than ten prefabricated modular buildings per installation site, regardless of cost, without PRC approval. Contracts for design-build 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. GC/CM 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 general contractor/construction manager 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, or claim 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, JOC was authorized in law as an alternative public works contracting procedure for a limited number of agencies, but in 2020, the Legislature authorized JOC for all public entities. JOC contracts are awarded through a competitive process using public requests for proposals which include sealed bids based upon the identified unit price book. Under JOC, a contractor agrees to perform an indefinite quantity of public works jobs, defined by individual work orders, over a fixed period of time. A job order contractor must subcontract 90 percent of the work under the contract, and may self perform 10 percent. 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 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 Bill: Alternative Contracting Procedures. Alternative public works are reauthorized, subject to another sunset review in ten 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. 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.

CPARB must develop and recommend to the legislature policies to encourage competition and further enhance equity in capital construction, including considerations for reducing barriers for participation by disadvantaged business entities. The requirement to collect quantitative and qualitative data on alternative public works contracting procedures is made

subject to the board's capacity and funding.

CPARB must coordinate and consult with the OMWBE, 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, 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 project review committee, appointed by CPARB, must include at least one member representing the interests of disadvantaged business enterprises. In addition to other duties, the committee 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. Public bodies using design build, including progressive design-build, for parking garages and preengineered metal buildings are subject to review by the project review committee, regardless of cost.

Washington State University (WSU) may perform design-build demonstration projects with a total project cost under \$2 million to develop best practices in encouraging small business participation and in managing capital projects under \$2 million. WSU must report to the board every other year, including information on the type of projects performed, the initial and final project cost and schedule of the projects, small business entity participation, the best practices derived from the projects, and outreach measures developed in concert with OMWBE.

General Contractor/Construction Manager. Public bodies should select GC/CMs at a time in the project when the GC/CM's participation provides value rather than early in the life of public works projects.

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; and
- the proposer's past performance in use of disadvantaged business enterprises, to the extent permitted by law.

Evaluation factors may also include 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 requests for equitable adjustment, change order, or claims, in writing within 30 calendar days, rather than 60. If a request is disputed or rejected, the public owner must state in writing why part or all of the request is disputed or rejected. 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 GC/CM must define the scope of the audit in the contract.

General Contractor/Construction Manager–Subcontractors. Bid packages should 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 references to mechanical or electrical contractors are generalized to subcontractor under the alternative selection process. An alternative selection process for subcontractor selection may be used by certified public bodies and noncertified public bodies if the process is approved for the project by the project review committee. In addition to other requirements, public solicitation of proposals under the alternative selection process must include descriptions of the projects unique aspects, complexities, and challenges.

The notice published by the GC/CM of intent to use the alternative selection process must include 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 as demonstrated 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 job order contract.

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.

All job order contracts must be signed before July 1, 2031. However, these contracts may be extended or renewed beyond this date as allowed by law.

Each public body must maintain and make available the following information for each job order contract:

- 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 design-build or GC/CM contract for payment of project costs that are not the responsibility of the design-builder or 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.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony: PRO: This bill reauthorizes CPARB, which is a board made up of volunteers who do tremendous work and provide a lot of value to the state. The additional members being proposed for CPARB would bring additional perspectives from horizontal construction by adding a transportation representative as well as a dedicated position to represent the interests of disadvantaged businesses. CPARB developed this bill through an 18 month process that included multiple subcommittees with stakeholders from a variety of groups who reviewed the statute and made recommendations regarding the changes to the contracting procedures that are included in the bill. The amendments being made to the alternative contracting procedures will help promote competitiveness, clarify criteria and modernize the bid notification process. This bill enables the design community to come together to apply their knowledge and experience on a project in the most valuable way. Sometimes it is difficult for small businesses to compete on these large projects, so it is important to increase participation in the subcontracting process. There is more work to do, but the language in this bill provides meaningful steps forward. This bill incorporates improvements to focus on equity and inclusion and an ongoing process to review this work and continue to make recommendations. I would like to see language that allows for local governments to complete street repairs if there are no bids.

Persons Testifying: PRO: Senator Bob Hasegawa, Prime Sponsor; Rebecca Keith, Chair of Capital Projects Advisory Review Board and Representative for Washington Cities; Lisa van der Lugt, Director, Washington State Office of Minority & Women's Business Enterprises; Bill Frare, Washington Department of Enterprise Service, Facility Professional Services; Andrew Thompson, Vice Chair of Capital Projects Advisory Review Board/General Contractor Representative; Santosh Kuruvilla, Engineer Representative of Capital Projects Advisory Review Board; Matthew Hepner, Construction Trades Labor Representative of Capital Projects Advisory Review Board; Penny Sweet, City of Kirkland.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

Alternative Contracting Procedures

- Makes consistent that notifications should be encouraged to be posted on websites for business associations, the office of minority and women's business enterprises, and other locations and mediums.

Capital Projects Advisory Review Board

- Requires CPARB members 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.
- Requires CPARB to reflect the gender, racial, ethnic, and geographic diversity of the state, including the interests of persons with disabilities.
- Requires CPARB to provide opportunities for persons not represented on the board to participate and provide insight, particularly with respect to the experience of minority, women, and veteran-owned businesses and small businesses.
- Changes CPARB duties from recommending policies to further enhance equity to equitable participation by disadvantaged business enterprises in capital construction projects, including specific recommendations for reducing barriers for and increasing participation by disadvantaged business enterprises.
- Authorizes CPARB to direct DES to collect quantitative and qualitative data on alternative public works contracting procedures to inform their work in evaluation of public capital projects construction processes.
- Requires the PRC to include a balance of public and private sector representatives.
- Requires PRC panel members to include a member representing the interests of disadvantaged business enterprises.

Design Build

- Adds minority, women, and veteran-owned businesses along with small businesses participation to the reporting and development of best practices in the WSU DB demonstration project with total cost under \$2 million.
- Requires evaluation factors for qualifications include the proposer's past performance in utilization of small business entities.

- Requires evaluation factors for finalist proposals to include the contractor's inclusion plan for small business entities and disadvantaged business enterprises as subconsultants, subcontractors, and suppliers for the project, to the extent permitted by law.
- Requires DB firms to report utilization of minority and women's business enterprises certified businesses and veteran certified businesses to the office of minority and women's business enterprises.

General Contractor/Construction Manager

- Requires evaluation factors for GC/CM qualifications to include the contractor's inclusion plan for small business entities and disadvantaged business enterprises as subconsultants, subcontractors, and suppliers for the project, to the extent permitted by law.
- Requires the public body and GC/CM to negotiate a fair and reasonable inclusion plan, rather than outreach plan, for heavy civil projects.

General Contractor/Construction Manager–Subcontractors

- Requires subcontractor bid packages to be prepared to reduce barriers for and increase participation by disadvantaged business enterprises.
- Clarifies that the GC/CM must provide a written explanation to the public body if all subcontract bids are rejected.
- Requires the written final determination for use of the alternative subcontractor selection process state the reasons it is in the best interest of the public.

Job Order Contracting

- Requires public bodies to prioritize efforts to solicit proposals from certified minority or women-owned contractors for job order contracts, to the extent permitted by law.
- Requires an agency committee established to evaluate JOC proposals 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.