
SENATE BILL 5446

State of Washington

55th Legislature

1997 Regular Session

By Senators Winsley, McCaslin, Haugen and Loveland

Read first time 01/27/97. Referred to Committee on Government Operations.

1 AN ACT Relating to alternative public works contracting procedures;
2 amending RCW 39.10.030, 39.10.050, 39.10.060, 39.10.110, 39.10.120, and
3 39.10.902; adding a new section to chapter 39.10 RCW; repealing 1996 c
4 18 s 17 (uncodified); providing an effective date; and declaring an
5 emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 39.10.030 and 1994 c 132 s 3 are each amended to read
8 as follows:

9 (1) An alternative public works contracting procedure authorized
10 under this chapter may be used for a specific public works project only
11 after a public body determines that use of the alternative procedure
12 will serve the public interest by providing a substantial fiscal
13 benefit, or that use of the traditional method of awarding contracts in
14 lump sum to the low responsive bidder is not practical for meeting
15 desired quality standards or delivery schedules.

16 (2) Whenever a public body determines to use one of the alternative
17 public works contracting procedures authorized under this chapter for
18 a public works project, it shall first ensure adequate public
19 notification and opportunity for public review and comment ((as

1 follows:)) by implementing the public hearing procedure under (a) of
2 this subsection or the written public comment procedure under (b) of
3 this subsection.

4 (a) Public hearing procedure:

5 (i) The public body shall conduct a public hearing to receive
6 public comment on its preliminary determination to use the alternative
7 public works contracting procedure. At least twenty days before the
8 public hearing, the public body shall cause notice of such hearing to
9 be published at least once in a legal newspaper of general circulation
10 published in or as near as possible to that part of the county in which
11 the public work will be done. The notice shall clearly describe the
12 proposed project and the preliminary determination to use the
13 alternative public works contracting procedure. The notice shall also
14 indicate when, where, and how persons may present their comments on the
15 preliminary determination, and where persons may obtain additional
16 written information describing the project.

17 (~~(b)~~) (ii) The public body shall summarize in a written statement
18 its reasons for using the alternative public works contracting
19 procedure. This statement, along with other relevant information
20 describing the project, shall be made available upon request to
21 interested parties at least twenty days before the public hearing.

22 (~~(c)~~) (iii) The public body shall receive and record both written
23 and oral comments concerning the preliminary determination at the
24 public hearing.

25 (b) Written public comment procedure:

26 (i) The public body shall establish a thirty-day public comment
27 period to receive public comment on its preliminary determination to
28 use the alternative public works contracting procedure. At least seven
29 days before the beginning of the public comment period, the public body
30 shall cause notice of the public comment period to be published at
31 least once in a legal newspaper of general circulation published in or
32 as near as possible to that part of the county in which the public work
33 will be done. The notice shall clearly describe the proposed project
34 and the preliminary determination to use the alternative public works
35 contracting procedure. The notice shall also indicate when, where, and
36 how persons may submit their written comments on the preliminary
37 determination, where persons may obtain additional written information
38 describing the project, and the date, time, and location of the public

1 hearing that shall be conducted under (b)(iv) of this subsection if
2 significant adverse written comments are received by the public body.

3 (ii) The public body shall summarize in a written statement its
4 reasons for using the alternative public works contracting procedure.
5 This statement, along with other relevant information describing the
6 project, shall be made available upon request to interested parties at
7 least seven days before the beginning of the public comment period.

8 (iii) The public body shall receive written comments concerning the
9 preliminary determination during the public comment period.

10 (iv) If the public body finds that it has received significant
11 adverse comments relating to the use of the alternative public works
12 contracting procedure, the public body shall conduct a public hearing
13 to receive additional oral and written public comments on its
14 preliminary determination to use the alternative public works
15 contracting procedure. The public hearing shall be held on the date
16 and at the time and location specified in the public notice published
17 under (b)(i) of this subsection. At least seven days before the
18 public hearing, the public body shall provide notice of the hearing to
19 each person who has submitted written comments, and cause a notice of
20 the hearing to be published at least once in a legal newspaper of
21 general circulation published in or as near as possible to that part of
22 the county in which the public work will be done.

23 (v) The public body shall receive and record written and oral
24 comments concerning the preliminary determination at the public
25 hearing.

26 (3) Final determinations to use an alternative public works
27 contracting procedure may be made only by the legislative or governing
28 authority of the public body, or, in the case of state agencies, by the
29 agency director or chief administrative officer. Final determinations
30 shall be accompanied by a concise statement of the principal reasons
31 for overruling any considerations urged against the determination.
32 Final determinations are subject to appeal to superior court within
33 thirty days of the determination, provided that notice of such appeal
34 shall be provided to the public body within seven days of the
35 determination. The court may award reasonable attorneys' fees to the
36 prevailing party.

37 (4) Following completion of a public works project using one of the
38 alternative public works contracting procedures under this chapter, a
39 report shall be submitted to the legislative or governing authority of

1 the public body reviewing the utilization and performance of the
2 alternative public works contracting procedure. Such report shall be
3 made available to the public.

4 **Sec. 2.** RCW 39.10.050 and 1994 c 132 s 5 are each amended to read
5 as follows:

6 (1) Notwithstanding any other provision of law, and after complying
7 with RCW 39.10.030, the following public bodies may utilize the design-
8 build procedure of public works contracting for public works projects
9 authorized under this section: The state department of general
10 administration; the University of Washington; Washington State
11 University; every city with a population greater than one hundred fifty
12 thousand; ~~((and))~~ every county with a population greater than four
13 hundred fifty thousand; and every port district with a population
14 greater than five hundred thousand. The authority granted to port
15 districts in this section is in addition to and does not affect
16 existing contracting authority under RCW 53.08.120 and 53.08.130. For
17 the purposes of this section, "design-build procedure" means a contract
18 between a public body and another party in which the party agrees to
19 both design and build the ~~((structure,))~~ facility, portion of the
20 facility, or other item specified in the contract.

21 (2) Public bodies authorized under this section may utilize the
22 design-build procedure for public works projects valued over ten
23 million dollars where:

24 (a) The construction activities or technologies to be used are
25 highly specialized and a design-build approach is critical in
26 developing the construction methodology or implementing the proposed
27 technology;

28 (b) The project design is repetitive in nature and is an incidental
29 part of the installation or construction; or

30 (c) ~~((The program elements of the project design are simple and do~~
31 ~~not involve complex functional interrelationships))~~ Regular interaction
32 with and feedback from facilities users and operators during design is
33 not critical to an effective facility design.

34 (3) ~~((The state department of general administration may use the~~
35 ~~design-build procedure authorized in subsection (2)(c) of this section~~
36 ~~for one project))~~ Public bodies authorized under this section may also
37 use the design-build procedure for the following projects that meet the
38 criteria in subsection (2)(b) and (c) of this section:

1 (a) The construction or erection of preengineered metal buildings
2 or prefabricated modular buildings, regardless of cost; or

3 (b) The construction of new student housing projects valued over
4 five million dollars.

5 (4) Contracts for design-build services shall be awarded through a
6 competitive process utilizing public solicitation of proposals for
7 design-build services. The public body shall publish at least once in
8 a legal newspaper of general circulation published in or as near as
9 possible to that part of the county in which the public work will be
10 done, a notice of its request for proposals for design-build services
11 and the availability and location of the request for proposal
12 documents. The request for proposal documents shall include:

13 (a) A detailed description of the project including programmatic,
14 performance, and technical requirements and specifications, functional
15 and operational elements, (~~and~~) minimum and maximum net and gross
16 areas of any building, and, at the discretion of the public body,
17 preliminary engineering and architectural drawings;

18 (b) The reasons for using the design-build procedure;

19 (c) A description of the qualifications(~~(, if any,)~~) to be required
20 of the proposer including, but not limited to, submission of the
21 proposer's accident prevention program;

22 (d) A description of the process the public body will use to
23 evaluate qualifications and proposals, including evaluation factors and
24 the relative weight of factors. Evaluation factors shall include, but
25 not be limited to: Proposal price; ability of professional personnel;
26 past performance on similar projects; ability to meet time and budget
27 requirements; ability to provide a performance and payment bond for the
28 project; recent, current, and projected work loads of the firm;
29 location; and the concept of the proposal;

30 (e) The form of the contract to be awarded;

31 (f) The maximum allowable construction cost and minority and women
32 enterprise total project goals;

33 (g) The amount to be paid to finalists submitting best and final
34 proposals who are not awarded a design-build contract; and

35 (h) Other information relevant to the project.

36 (5) The public body shall establish a committee to evaluate the
37 proposals based on the factors, weighting, and process identified in
38 the request for proposals. Based on its evaluation, the public body
39 shall select not fewer than three nor more than five finalists to

1 submit best and final proposals. The public body may, in its sole
2 discretion, reject all proposals. Design-build contracts shall be
3 awarded using the procedures in (a) or (b) of this subsection.

4 (a) Best and final proposals shall be evaluated and scored based on
5 the factors, weighting, and process identified in the initial request
6 for proposals. The public body may score the proposals using a system
7 that measures the quality and technical merits of the proposal on a
8 unit price basis. Final proposals may not be considered if the
9 proposal cost is greater than the maximum allowable construction cost
10 identified in the initial request for proposals. ~~((+6))~~ The public
11 body shall initiate negotiations with the firm submitting the highest
12 scored best and final proposal. If the public body is unable to
13 execute a contract with ~~((that))~~ the firm submitting the highest scored
14 best and final proposal, negotiations with that firm may be suspended
15 or terminated and the public body may proceed to negotiate with the
16 next highest scored firm. Public bodies shall continue in accordance
17 with this procedure until a contract agreement is reached or the
18 selection process is terminated. ~~((The public body may, in its sole~~
19 ~~discretion, reject all proposals.))~~

20 (b) If the public body determines that all finalists are capable of
21 producing plans and specifications that adequately meet project
22 requirements, the public body may award the contract to the firm that
23 submits the responsive best and final proposal with the lowest price.

24 (6) The ~~((finalist))~~ firm awarded the contract shall provide a
25 performance and payment bond for the contracted amount. The public
26 body shall provide appropriate honorarium payments to finalists
27 submitting best and final proposals who are not awarded a design-build
28 contract. Honorarium payments shall be sufficient to generate
29 meaningful competition among potential proposers on design-build
30 projects.

31 **Sec. 3.** RCW 39.10.060 and 1996 c 18 s 6 are each amended to read
32 as follows:

33 (1) Notwithstanding any other provision of law, and after complying
34 with RCW 39.10.030, the following public bodies may utilize the general
35 contractor/construction manager procedure of public works contracting
36 for public works projects authorized under subsection (2) of this
37 section: The state department of general administration; the
38 University of Washington; Washington State University; every city with

1 a population greater than one hundred fifty thousand; every county with
2 a population greater than four hundred fifty thousand; and every port
3 district with a population greater than five hundred thousand. For the
4 purposes of this section, "general contractor/construction manager"
5 means a firm with which a public body has selected and negotiated a
6 maximum allowable construction cost to be guaranteed by the firm, after
7 competitive selection through formal advertisement and competitive
8 bids, to provide services during the design phase that may include
9 life-cycle cost design considerations, value engineering, scheduling,
10 cost estimating, constructability, alternative construction options for
11 cost savings, and sequencing of work, and to act as the construction
12 manager and general contractor during the construction phase.

13 (2) Public bodies authorized under this section may utilize the
14 general contractor/construction manager procedure for public works
15 projects valued over ten million dollars where:

16 (a) Implementation of the project involves complex scheduling
17 requirements;

18 (b) The project involves construction at an existing facility which
19 must continue to operate during construction; or

20 (c) The involvement of the general contractor/construction manager
21 during the design stage is critical to the success of the project.

22 (3) Public bodies should select general contractor/construction
23 managers early in the life of public works projects, and in most
24 situations no later than the completion of schematic design.

25 (4) Contracts for the services of a general contractor/construction
26 manager under this section shall be awarded through a competitive
27 process requiring the public solicitation of proposals for general
28 contractor/construction manager services. ((Minority and women
29 business enterprise total project goals shall be specified in)) The
30 public solicitation of proposals shall include: A description of the
31 project, including programmatic, performance, and technical
32 requirements and specifications when available; the reasons for using
33 the general contractor/construction manager procedure; a description of
34 the qualifications to be required of the proposer, including submission
35 of the proposer's accident prevention program; a description of the
36 process the public body will use to evaluate qualifications and
37 proposals, including evaluation factors and the relative weight of
38 factors; the form of the contract to be awarded; the estimated maximum
39 allowable construction cost; minority and women business enterprise

1 total project goals, where applicable; and the bid instructions to be
2 used by the general contractor/construction manager finalists. ((A
3 public body is authorized to include an incentive clause in any
4 contract awarded under this section for savings of either time or cost
5 or both from that originally negotiated. No incentives granted shall
6 exceed five percent of the maximum allowable construction cost.))
7 Evaluation factors shall include, but not be limited to: Ability of
8 professional personnel, past performance in negotiated and complex
9 projects, and ability to meet time and budget requirements; location;
10 recent, current, and projected work loads of the firm; and the concept
11 of their proposal. A public body shall establish a committee to
12 evaluate the proposals ((considering such factors as: Ability of
13 professional personnel; past performance in negotiated and complex
14 projects; ability to meet time and budget requirements; location;
15 recent, current, and projected work loads of the firm; and the concept
16 of their proposal)). After the committee has selected the most
17 qualified finalists, these finalists shall submit final proposals,
18 including sealed bids for the percent fee, which is the percentage
19 amount to be earned by the general contractor/construction manager as
20 overhead and profit, on the estimated maximum allowable construction
21 cost and the fixed amount for the detailed specified general conditions
22 work. The public body shall select the firm submitting the highest
23 scored final proposal using the evaluation factors and the relative
24 weight of factors published in the public solicitation of proposals.

25 (5) The maximum allowable construction cost may be negotiated
26 between the public body and the selected firm after the scope of the
27 project is adequately determined to establish a guaranteed contract
28 cost for which the general contractor/construction manager will provide
29 a performance and payment bond. The guaranteed contract cost includes
30 the fixed amount for the detailed specified general conditions work,
31 the negotiated maximum allowable construction cost, the percent fee on
32 the negotiated maximum allowable construction cost, and sales tax. If
33 the public body is unable to negotiate a satisfactory maximum allowable
34 construction cost with the firm selected that the public body
35 determines to be fair, reasonable, and within the available funds,
36 negotiations with that firm shall be formally terminated and the public
37 body shall negotiate with the next ((low bidder)) highest scored firm
38 and continue until an agreement is reached or the process is
39 terminated. If the maximum allowable construction cost varies more

1 than fifteen percent from the bid estimated maximum allowable
2 construction cost due to requested and approved changes in the scope by
3 the public body, the percent fee shall be renegotiated.

4 (6) All subcontract work shall be competitively bid with public bid
5 openings. ((Specific contract requirements for women and minority
6 enterprise participation shall be specified in each subcontract bid
7 package that exceeds ten percent of the public body's estimated project
8 cost.)) Subcontract work shall not be issued for bid until the public
9 body has approved, in consultation with the office of minority and
10 women's business enterprises or the equivalent local agency, a plan
11 prepared by the general contractor/construction manager for attaining
12 applicable minority and women business enterprise total project goals
13 that equitably spreads women and minority enterprise opportunities to
14 as many firms in as many bid packages as is practicable. The owner and
15 general contractor/construction manager may use reasonable and
16 objective criteria to prequalify bidders. Subcontract bid packages
17 shall be awarded to the responsible bidder submitting the low
18 responsive bid. The requirements of RCW 39.30.060 apply to each
19 subcontract bid package. All subcontractors who bid work over ((two))
20 three hundred thousand dollars shall post a bid bond and all
21 subcontractors who are awarded a contract over ((two)) three hundred
22 thousand dollars shall provide a performance and payment bond for their
23 contract amount. All other subcontractors shall provide a performance
24 and payment bond if required by the general contractor/construction
25 manager. A low bidder who claims error and fails to enter into a
26 contract is prohibited from bidding on the same project if a second or
27 subsequent call for bids is made for the project. ((All other
28 subcontractors shall provide a performance and payment bond if required
29 by the general contractor/construction manager.)) Except as provided
30 for under subsection (7) of this section, bidding on subcontract work
31 by the general contractor/construction manager or its subsidiaries is
32 prohibited. The general contractor/construction manager may negotiate
33 with the low-responsive bidder in accordance with RCW 39.10.080 or, if
34 unsuccessful in such negotiations, rebid.

35 ((+4)) (7) The general contractor/construction manager, or its
36 subsidiaries, may bid on subcontract work on projects valued over
37 twenty million dollars if:

38 (a) The work within the subcontract bid package is customarily
39 performed by the general contractor/construction manager;

1 (b) The bid opening is managed by the public body; and
2 (c) Notification of the general contractor/construction manager's
3 intention to bid is included in the public solicitation of bids for the
4 bid package.

5 In no event may the value of subcontract work performed by the
6 general contractor/construction manager exceed twenty percent of the
7 negotiated maximum allowable construction cost.

8 (8) A public body may include an incentive clause in any contract
9 awarded under this section for savings of either time or cost or both
10 from that originally negotiated. No incentives granted may exceed five
11 percent of the maximum allowable construction cost. If the project is
12 completed for less than the agreed upon maximum allowable construction
13 cost, any savings not otherwise negotiated as part of an incentive
14 clause shall accrue to the public body. If the project is completed
15 for more than the agreed upon maximum allowable construction cost,
16 excepting increases due to any contract change orders approved by the
17 public body, the additional cost shall be the responsibility of the
18 general contractor/construction manager.

19 NEW SECTION. Sec. 4. A new section is added to chapter 39.10 RCW
20 to read as follows:

21 (1) In addition to the projects authorized in RCW 39.10.050 and
22 39.10.060, public bodies may use the general contractor/construction
23 manager or design-build procedure for demonstration projects valued
24 between three million dollars and ten million dollars as follows:

25 (a) Three demonstration projects by the department of general
26 administration; and

27 (b) One demonstration project by each of the public bodies
28 authorized in RCW 39.10.020(2) other than the department of general
29 administration.

30 (2) Public bodies shall give weight to proposers' experience
31 working on projects valued between three million dollars and ten
32 million dollars in the evaluation process for the selection of a
33 general contractor/construction manager or design-build firm.

34 (3) All contracts authorized under this section must be entered
35 into before July 1, 1999.

36 (4) In the event that a public body determines not to perform a
37 demonstration project using its authority under this section, it may
38 transfer its authority to another public body.

1 **Sec. 5.** RCW 39.10.110 and 1994 c 132 s 11 are each amended to read
2 as follows:

3 (1) There is established a temporary independent oversight
4 committee to review the utilization of the alternative public works
5 contracting procedures authorized under this chapter (~~and~~), to
6 evaluate potential future utilization of other alternative contracting
7 procedures, including, but not limited to, contractor prequalification,
8 and, if desired by the committee, to review traditional public works
9 contracting procedures used by state agencies and municipalities. The
10 committee shall also pursue the development of a mentoring program for
11 expansion of the authorities in this chapter to other public bodies.
12 The membership of the committee shall include: Two members of the
13 house of representatives, one from each major caucus, appointed by the
14 speaker of the house of representatives; two members of the senate, one
15 from each major caucus, appointed by the president of the senate;
16 representatives from the appropriate segments of the construction,
17 contracting, subcontracting, and design industries, appointed by the
18 governor; representatives from appropriate labor organizations,
19 appointed by the governor; representatives from public bodies
20 authorized to use the alternative public works contracting procedures
21 under this chapter, appointed by the governor; a representative from
22 the office of minority and women's business enterprises, appointed by
23 the governor; and a representative from the office of financial
24 management, appointed by the governor. The governor shall maintain a
25 balance between representatives from public agencies and the private
26 sector when appointing members to the committee, and shall consider the
27 recommendations of the established organizations representing the
28 construction, contracting, subcontracting, and design industries and
29 organized labor in making the industry and labor appointments (~~to the~~
30 ~~committee~~)).

31 (2) The committee shall meet (~~quarterly~~) beginning after July 1,
32 1994. (~~At the first meeting of the committee,~~) A chair or cochair
33 shall be selected from among the committee's membership. Staff support
34 for the committee shall be provided by the agencies and organizations
35 represented on the committee.

36 (3) Public bodies utilizing the alternative contracting procedures
37 authorized under this chapter shall provide any requested information
38 concerning implementation of projects under this chapter to the

1 committee in a timely manner, excepting any trade secrets or
2 proprietary information.

3 (4) The committee shall report to the appropriate standing
4 committees of the legislature by December 10, (~~(1996)~~) 2000, concerning
5 its findings and recommendations.

6 **Sec. 6.** RCW 39.10.120 and 1995 3rd sp.s. c 1 s 305 are each
7 amended to read as follows:

8 (1) Except as provided in subsection (2) of this section, the
9 alternative public works contracting procedures authorized under this
10 chapter are limited to public works contracts signed before July 1,
11 (~~(1997)~~) 2001. Methods of public works contracting authorized by RCW
12 39.10.050 and 39.10.060 shall remain in full force and effect until
13 completion of contracts signed before July 1, (~~(1997)~~) 2001.

14 (2) For the purposes of a baseball stadium as defined in RCW
15 82.14.0485, the design-build contracting procedures under RCW 39.10.050
16 shall remain in full force and effect until completion of contracts
17 signed before December 31, 1997.

18 **Sec. 7.** RCW 39.10.902 and 1995 3rd sp.s. c 1 s 306 are each
19 amended to read as follows:

20 The following acts or parts of acts, as now existing or hereafter
21 amended, are each repealed, effective July 1, (~~(1997)~~) 2001:

- 22 (1) RCW 39.10.010 and 1994 c 132 s 1;
- 23 (2) RCW 39.10.020 and 1994 c 132 s 2;
- 24 (3) RCW 39.10.030 and 1994 c 132 s 3;
- 25 (4) RCW 39.10.040 and 1994 c 132 s 4;
- 26 (5) RCW 39.10.050 and 1994 c 132 s 5;
- 27 (6) RCW 39.10.060 and 1994 c 132 s 6;
- 28 (7) RCW 39.10.--- and 1997 c . . . s 4 (section 4 of this act);
- 29 (8) RCW 39.10.070 and 1994 c 132 s 7;
- 30 (~~(8)~~) (9) RCW 39.10.080 and 1994 c 132 s 8;
- 31 (~~(9)~~) (10) RCW 39.10.090 and 1994 c 132 s 9;
- 32 (~~(10)~~) (11) RCW 39.10.100 and 1994 c 132 s 10;
- 33 (~~(11)~~) (12) RCW 39.10.110 and 1994 c 132 s 11;
- 34 (~~(12)~~) (13) RCW 39.10.900 and 1994 c 132 s 13;
- 35 (~~(13)~~) (14) RCW 39.10.901 and 1994 c 132 s 14; and
- 36 (~~(14)~~) (15) RCW 39.10.902 and 1994 c 132 s 15.

1 NEW SECTION. **Sec. 8.** 1996 c 18 s 17 (uncodified) is repealed.

2 NEW SECTION. **Sec. 9.** This act is necessary for the immediate
3 preservation of the public peace, health, or safety, or support of the
4 state government and its existing public institutions, and takes effect
5 July 1, 1997.

--- END ---