

HOUSE BILL REPORT

ESSB 6528

As Reported by House Committee On:

State Government

Title: An act relating to the selection of responsible contractors bidding on public works.

Brief Description: Allowing governmental entities that award publicly funded contracts to select contractors using the lowest responsible bidder method.

Sponsors: Senate Committee on State & Local Government (originally sponsored by Senators Keiser, Eide and Costa).

Brief History:

Committee Activity:

State Government: 2/26/02, 3/1/02 [DPA].

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

- Allows state and local government agencies to use the lowest responsible bidder method in awarding contracts for public works projects.

HOUSE COMMITTEE ON STATE GOVERNMENT

Majority Report: Do pass as amended. Signed by 4 members: Representatives Romero, Chair; Miloscia, Vice Chair; McDermott and Upthegrove.

Minority Report: Do not pass. Signed by 3 members: Representatives McMorris, Ranking Minority Member; Schindler and Schmidt.

Staff: Catherine Blinn (786-7114).

Background:

Public works projects include the construction, building, renovation, remodeling, alteration, repair, or improvement of real property. The process for public works contracting varies based on the size of the government entity and the size of the contract.

Very low cost projects may be completed by in-house labor or by contract without a bid

process. Contracts of a low estimated cost may be awarded using a limited public works process for contracts under \$35,000, or using a small works roster process for contracts under \$200,000. Contracts of a medium estimated cost, over \$200,000, are awarded to the lowest bidder following publication of the call for bids and a formal sealed bid process. High cost contracts, over \$12 million, may be awarded by authorized state agencies and local governments through one of the alternative public works contracting procedures, either the "design-build" procedure or the "general contractor/construction manager (GCCM)" procedure.

Both alternative public works procedures require extensive preparation and evaluation of the bids, and require government entities to consider, among other factors, the ability of the professional personnel, a firm's past performance on similarly complex projects, a firm's ability to meet time and budget requirements, the scope of the work the firm proposes to perform itself and its ability to perform it, location, current and projected work loads of the firm, and the concept of the proposal. Firms awarded a contract under the GCCM process may judge subcontractor eligibility by considering whether the financial resources of the subcontractor are adequate or can be adequately secured, history of successful completion of a contract of similar type and scope, the project management, whether the supervising personnel have experience on similar projects, the availability of such personnel for the project, the current and projected workload of the subcontractor, ability to accurately estimate the bid package, the eligibility to receive an award under applicable laws and regulations, and the ability to meet scheduling requirements.

When purchasing material, supplies, services, and equipment for state agencies through a formal sealed bid process, the Department of General Administration (GA) must usually award the contract to the lowest responsible bidder. In determining "lowest responsible bidder", the GA must consider, in addition to price, the ability, capacity, and skill of the bidder to perform the contract or provide the service; the character, integrity, reputation, judgment, experience, and efficiency of the bidder; whether the bidder can perform the contract within the time specified; the quality of previous performance; and the bidder's previous and current compliance with relevant law.

Summary of Amended Bill:

State and local governments may use the lowest responsible bidder method when awarding contracts for public works projects. The bill does not supersede the alternative public works requirements, or existing contracting procedures for four-year institutions of higher education. A government entity that awards a public works contract estimated to cost over \$200,000 must make an affirmative determination that the lowest responsive bidder is responsible after considering at least the following criteria:

- the ability, capacity, and skill of the bidder to perform the contract or provide the service required;

- the experience of the bidder;
- whether the bidder has demonstrated the ability to perform within the time specified by previous contracts;
- the satisfactory completion of previous contracts or services by the bidder; and
- previous and current compliance by the bidder with contracting laws.

Government entities may create their own questionnaire or may use a questionnaire created by the GA to determine whether a bidder meets the requirements.

The apparent low bidder must supply the requested information within three business days of the bid opening. Failing to timely submit the information will render the bid nonresponsible and will cause the bidder to forfeit any bid deposit submitted in support of the bid. Providing materially false information on the questionnaire will also render the bid nonresponsible. Immediately after an award is made, the bids received are open for public inspection. If the lowest responsive bidder is determined to be not responsible, the public agency must notify the bidder of the reasons why. The bidder may provide additional information within three days to prove responsibility. The government agency must then reconsider the bid, and make a second, final determination of responsibility within three business days.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill clarifies that lowest responsible bidder requirements apply to "public works projects" rather than "publicly funded projects." The bill does not supercede the contracting procedures currently used by four-year institutions. Government entities may consider other criteria in addition to those listed in the bill. Government entities may create their own questionnaire.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Amended Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: There is no definition of responsible for purposes of lowest responsible bidder. As a result, the lowest bidder is awarded the contract. The holes in the current law became apparent after a nightmare situation at Highline Community College. The Office of the Attorney General told Highline that they had to accept the lowest bidder's bid, despite the fact that they knew he would not be able to complete the project satisfactorily. A consistent manner is needed to determine whether the lowest responsive bidder is responsible. The bill is targeting the small government entities that cannot risk awarding the contract to the second lowest bidder because they fear litigation. Delays in

awarding the contract pale in comparison to the delay that will result if the project has to be fixed or finished by a second contractor.

Testimony Against: The intent to make contracting more responsible is applaudable, but the bill may limit local governments more than they are currently limited. Current law allows local governments to set their own responsible bidder criteria. The Department of Transportation also has criteria. "Publicly funded project" could mean services, rather than public works projects. The bill invites bid protests from contractors, and the criteria provide a great source of cross-examination if the contract goes to litigation. The bill will probably preempt any existing local legislation that provides responsible bidder criteria. Ports are concerned that the bill will hamper ports' ability to award contracts quickly, and to use flexibility in the criteria for evaluating responsibility. The bill will probably add from a week to months to the award process. The city of Seattle is concerned about the bill because, under current law, all government entities can articulate and use their own criteria for responsibility. Flexibility is very important in public works projects. The bill does not provide an appropriate remedy for a rare problem. The criteria should be objective, rather than subjective.

Testified: (In support) Senator Keiser, prime sponsor; Mitch Seaman, Washington Building Trades; Laura Saunders, Highline Community College; Richard King, Independent Brotherhood of Electrical Workers; and Dan Sexton, Washington State Association of Plumbers & Pipefitters.

(In support with amendment) Joe Daniels, Washington State Association of Water/Sewer Districts.

(Concerns) Peter Camp, city of Everett; Janet Quimby, Port of Tacoma; Rodney Eng, city of Seattle; Kathleen Nichols, University of Washington; Larry Ganders, Washington State University; and John Lynch, Department of General Administration.

(Opposed) Dave Ducharme, Utility Contractor's Association of Washington; Rick Slunaker, Associated General Contractors; and Mel Sorenson, Contractors Bonding and Insurance Company.