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SENATE BILL 5801

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State of Washington

58th Legislature

2003 Regular Session

By Senators Winsley, Benton, Kastama, Reardon and Schmidt

Read first time 02/13/2003. Referred to Committee on Government Operations & Elections.

1 AN ACT Relating to job order contracting for public works; amending  
2 RCW 39.10.020, 39.08.030, 39.30.060, 60.28.011, and 39.10.902; adding  
3 a new section to chapter 39.10 RCW; and adding new sections to chapter  
4 39.12 RCW.

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

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 39.10 RCW  
7 to read as follows:

8 (1) Public bodies may use a job order contract for public works  
9 projects when:

10 (a) A public body has made a determination that the use of job  
11 order contracts will benefit the public by providing an effective means  
12 of reducing the total lead-time and cost for public works projects or  
13 repair required at public facilities through the use of unit price  
14 books and work orders by eliminating time-consuming, costly aspects of  
15 the traditional public works process, which require separate  
16 contracting actions for each small project;

17 (b) The work order to be issued for a particular project does not  
18 exceed two hundred thousand dollars;

1 (c) Less than twenty percent of the dollar value of the work order  
2 consists of items of work not contained in the unit price book; and

3 (d) At least eighty percent of the job order contract must be  
4 subcontracted to entities other than the job order contractor.

5 (2) Public bodies shall award job order contracts through a  
6 competitive process utilizing public requests for proposals. Public  
7 bodies shall make an effort to solicit proposals from a certified  
8 minority or certified woman-owned contractor to the extent permitted by  
9 the Washington state civil rights act, RCW 49.60.400. The public body  
10 shall publish, at least once in a legal newspaper of general  
11 circulation published in or as near as possible to that part of the  
12 county in which the public works will be done, a request for proposals  
13 for job order contracts and the availability and location of the  
14 request for proposal documents. The public body shall ensure that the  
15 request for proposal documents at a minimum includes:

16 (a) A detailed description of the scope of the job order contract  
17 including performance, technical requirements and specifications,  
18 functional and operational elements, minimum and maximum work order  
19 amounts, duration of the contract, and options to extend the job order  
20 contract;

21 (b) The reasons for using job order contracts;

22 (c) A description of the qualifications required of the proposer;

23 (d) The identity of the specific unit price book to be used;

24 (e) The minimum contracted amount committed to the selected job  
25 order contractor;

26 (f) A description of the process the public body will use to  
27 evaluate qualifications and proposals, including evaluation factors and  
28 the relative weight of factors. The public body shall ensure that  
29 evaluation factors include, but are not limited to, proposal price and  
30 the ability of the proposer to perform the job order contract. In  
31 evaluating the ability of the proposer to perform the job order  
32 contract, the public body may consider: The ability of the  
33 professional personnel who will work on the job order contract; past  
34 performance on similar contracts; ability to meet time and budget  
35 requirements; ability to provide a performance and payment bond for the  
36 job order contract; recent, current, and projected work loads of the  
37 proposer; location; and the concept of the proposal;

38 (g) The form of the contract to be awarded;

1 (h) The method for pricing renewals of or extensions to the job  
2 order contract;

3 (i) A notice that the proposals are subject to the provisions of  
4 RCW 39.10.100; and

5 (j) Other information relevant to the project.

6 (3) A public body shall establish a committee to evaluate the  
7 proposals. After the committee has selected the most qualified  
8 finalists, the finalists shall submit final proposals, including sealed  
9 bids based upon the identified unit price book. Such bids may be in  
10 the form of coefficient markups from listed price book costs. The  
11 public body shall award the contract to the firm submitting the highest  
12 scored final proposal using the evaluation factors and the relative  
13 weight of factors published in the public request for proposals.

14 (4) The public body shall provide a protest period of at least ten  
15 business days following the day of the announcement of the apparent  
16 successful proposal to allow a protester to file a detailed statement  
17 of the grounds of the protest. The public body shall promptly make a  
18 determination on the merits of the protest and provide to all proposers  
19 a written decision of denial or acceptance of the protest. The public  
20 body shall not execute the contract until two business days following  
21 the public body's decision on the protest.

22 (5) The public body shall issue no work orders until it has  
23 approved, in consultation with the office of minority and women's  
24 business enterprises or the equivalent local agency, a plan prepared by  
25 the job order contractor that equitably spreads certified women and  
26 minority business enterprise subcontracting opportunities, to the  
27 extent permitted by the Washington state civil rights act, RCW  
28 49.60.400, among the various subcontract disciplines.

29 (6) Job order contracts may be executed for an initial contract  
30 term of not to exceed two years, with the option of extending or  
31 renewing the job order contract for one year. All extensions or  
32 renewals must be priced as provided in the request for proposals. The  
33 extension or renewal must be mutually agreed to by the public body and  
34 the job order contractor.

35 (7) The maximum total dollar amount that may be awarded under a job  
36 order contract shall not exceed three million dollars in the first year  
37 of the job order contract, five million dollars over the first two

1 years of the job order contract, and, if extended or renewed, eight  
2 million dollars over the three years of the job order contract.

3 (8) For each job order contract, public bodies shall not issue more  
4 than two work orders equal to or greater than one hundred fifty  
5 thousand dollars in a twelve-month contract performance period.

6 (9) All work orders issued for the same project shall be treated as  
7 a single work order for purposes of the one hundred fifty thousand  
8 dollar limit on work orders in subsection (8) of this section and the  
9 two hundred thousand dollar limit on work orders in subsection (1)(b)  
10 of this section.

11 (10) Any new permanent, enclosed building space constructed under  
12 a work order shall not exceed two thousand gross square feet.

13 (11) Each public body may have no more than two job order contracts  
14 in effect at any one time.

15 (12) For purposes of chapters 39.08, 39.76, and 60.28 RCW, each  
16 work order issued shall be treated as a separate contract.

17 (13) The requirements of RCW 39.30.060 do not apply to requests for  
18 proposals for job order contracts.

19 (14) Job order contractors shall pay prevailing wages for all work  
20 that would otherwise be subject to the requirements of chapter 39.12  
21 RCW. Prevailing wages for a job order contract must be determined as  
22 of the time of the execution of the job order contract and any  
23 extension or renewal.

24 (15) If, in the initial contract term, the public body, at no fault  
25 of the job order contractor, fails to issue the minimum amount of work  
26 orders stated in the public request for proposals, the public body  
27 shall pay the contractor an amount equal to the difference between the  
28 minimum work order amount and the actual total of the work orders  
29 issued multiplied by an appropriate percentage for overhead and profit  
30 contained in the general conditions for Washington state facility  
31 construction. This will be the contractor's sole remedy.

32 (16) All job order contracts awarded under this section must be  
33 executed before July 1, 2007, however the job order contract may be  
34 extended or renewed as provided for in this section.

35 (17) For purposes of this section, "public body" includes any  
36 school district.

1       **Sec. 2.** RCW 39.10.020 and 2001 c 328 s 1 are each amended to read  
2 as follows:

3       Unless the context clearly requires otherwise, the definitions in  
4 this section apply throughout this chapter.

5       (1) "Alternative public works contracting procedure" means the  
6 design-build and the general contractor/construction manager  
7 contracting procedures authorized in RCW 39.10.051 and 39.10.061,  
8 respectively.

9       (2) "Public body" means the state department of general  
10 administration; the University of Washington; Washington State  
11 University; every city with a population greater than seventy thousand  
12 and any public authority chartered by such city under RCW 35.21.730  
13 through 35.21.755 and specifically authorized as provided in RCW  
14 39.10.120(4); every county with a population greater than four hundred  
15 fifty thousand; every port district with total revenues greater than  
16 fifteen million dollars per year; every public utility district with  
17 revenues from energy sales greater than twenty-three million dollars  
18 per year; and those school districts proposing projects that are  
19 considered and approved by the school district project review board  
20 under RCW 39.10.115.

21       (3) "Public works project" means any work for a public body within  
22 the definition of the term public work in RCW 39.04.010.

23       (4) "Job order contract" means a contract between a public body or  
24 any school district and a registered or licensed contractor in which  
25 the contractor agrees to a fixed period, indefinite quantity delivery  
26 order contract which provides for the use of negotiated, definitive  
27 work orders for public works as defined in RCW 39.04.010.

28       (5) "Job order contractor" means a registered or licensed  
29 contractor awarded a job order contract.

30       (6) "Unit price book" means a book containing specific prices,  
31 based on generally accepted industry standards and information, where  
32 available, for various items of work to be performed by the job order  
33 contractor. The prices may include: All the costs of materials;  
34 labor; equipment; overhead, including bonding costs; and profit for  
35 performing the items of work.

36       (7) "Work order" means an order issued for a definite scope of work  
37 to be performed pursuant to a job order contract.

1       **Sec. 3.** RCW 39.08.030 and 1989 c 58 s 1 are each amended to read  
2 as follows:

3       The bond mentioned in RCW 39.08.010 shall be in an amount equal to  
4 the full contract price agreed to be paid for such work or improvement,  
5 except for job order contracts authorized in section 1 of this act, and  
6 shall be to the state of Washington, except as otherwise provided in  
7 RCW 39.08.100, and except in cases of cities and towns, in which cases  
8 such municipalities may by general ordinance fix and determine the  
9 amount of such bond and to whom such bond shall run: PROVIDED, The  
10 same shall not be for a less amount than twenty-five percent of the  
11 contract price of any such improvement, and may designate that the same  
12 shall be payable to such city, and not to the state of Washington, and  
13 all such persons mentioned in RCW 39.08.010 shall have a right of  
14 action in his, her, or their own name or names on such bond for work  
15 done by such laborers or mechanics, and for materials furnished or  
16 provisions and goods supplied and furnished in the prosecution of such  
17 work, or the making of such improvements: PROVIDED, That such persons  
18 shall not have any right of action on such bond for any sum whatever,  
19 unless within thirty days from and after the completion of the contract  
20 with an acceptance of the work by the affirmative action of the board,  
21 council, commission, trustees, officer, or body acting for the state,  
22 county or municipality, or other public body, city, town or district,  
23 the laborer, mechanic or subcontractor, or materialman, or person  
24 claiming to have supplied materials, provisions or goods for the  
25 prosecution of such work, or the making of such improvement, shall  
26 present to and file with such board, council, commission, trustees or  
27 body acting for the state, county or municipality, or other public  
28 body, city, town or district, a notice in writing in substance as  
29 follows:

30                               To (here insert the name of the state, county or  
31                               municipality or other public body, city, town or district):

1 Notice is hereby given that the undersigned (here  
2 insert the name of the laborer, mechanic or subcontractor,  
3 or materialman, or person claiming to have furnished  
4 labor, materials or provisions for or upon such contract or  
5 work) has a claim in the sum of . . . . . dollars (here insert  
6 the amount) against the bond taken from . . . . . (here  
7 insert the name of the principal and surety or sureties upon  
8 such bond) for the work of . . . . . (here insert a brief  
9 mention or description of the work concerning which said  
10 bond was taken).

11 (here to be signed) .....

12 Such notice shall be signed by the person or corporation making the  
13 claim or giving the notice, and said notice, after being presented and  
14 filed, shall be a public record open to inspection by any person, and  
15 in any suit or action brought against such surety or sureties by any  
16 such person or corporation to recover for any of the items hereinbefore  
17 specified, the claimant shall be entitled to recover in addition to all  
18 other costs, attorney's fees in such sum as the court shall adjudge  
19 reasonable: PROVIDED, HOWEVER, That no attorney's fees shall be  
20 allowed in any suit or action brought or instituted before the  
21 expiration of thirty days following the date of filing of the notice  
22 hereinbefore mentioned: PROVIDED FURTHER, That any city may avail  
23 itself of the provisions of RCW 39.08.010 through 39.08.030,  
24 notwithstanding any charter provisions in conflict herewith: AND  
25 PROVIDED FURTHER, That any city or town may impose any other or further  
26 conditions and obligations in such bond as may be deemed necessary for  
27 its proper protection in the fulfillment of the terms of the contract  
28 secured thereby, and not in conflict herewith. However, the bond for  
29 job order contracts authorized in section 1 of this act must be in an  
30 amount not less than the dollar value of all open work orders.

31 **Sec. 4.** RCW 39.30.060 and 2002 c 163 s 2 are each amended to read  
32 as follows:

33 (1) Every invitation to bid on a prime contract that is expected to  
34 cost one million dollars or more for the construction, alteration, or  
35 repair of any public building or public work of the state or a state  
36 agency or municipality as defined under RCW 39.04.010 or an institution  
37 of higher education as defined under RCW 28B.10.016 shall require each

1 prime contract bidder to submit as part of the bid, or within one hour  
2 after the published bid submittal time, the names of the subcontractors  
3 with whom the bidder, if awarded the contract, will subcontract for  
4 performance of the work of: HVAC (heating, ventilation, and air  
5 conditioning); plumbing as described in chapter 18.106 RCW; and  
6 electrical as described in chapter 19.28 RCW, or to name itself for the  
7 work. The prime contract bidder shall not list more than one  
8 subcontractor for each category of work identified, unless  
9 subcontractors vary with bid alternates, in which case the prime  
10 contract bidder must indicate which subcontractor will be used for  
11 which alternate. Failure of the prime contract bidder to submit as  
12 part of the bid the names of such subcontractors or to name itself to  
13 perform such work or the naming of two or more subcontractors to  
14 perform the same work shall render the prime contract bidder's bid  
15 nonresponsive and, therefore, void.

16 (2) Substitution of a listed subcontractor in furtherance of bid  
17 shopping or bid peddling before or after the award of the prime  
18 contract is prohibited and the originally listed subcontractor is  
19 entitled to recover monetary damages from the prime contract bidder who  
20 executed a contract with the public entity and the substituted  
21 subcontractor but not from the public entity inviting the bid. It is  
22 the original subcontractor's burden to prove by a preponderance of the  
23 evidence that bid shopping or bid peddling occurred. Substitution of  
24 a listed subcontractor may be made by the prime contractor for the  
25 following reasons:

26 (a) Refusal of the listed subcontractor to sign a contract with the  
27 prime contractor;

28 (b) Bankruptcy or insolvency of the listed subcontractor;

29 (c) Inability of the listed subcontractor to perform the  
30 requirements of the proposed contract or the project;

31 (d) Inability of the listed subcontractor to obtain the necessary  
32 license, bonding, insurance, or other statutory requirements to perform  
33 the work detailed in the contract; or

34 (e) The listed subcontractor is barred from participating in the  
35 project as a result of a court order or summary judgment.

36 (3) The requirement of this section to name the prime contract  
37 bidder's proposed HVAC, plumbing, and electrical subcontractors applies



1 only to proposed HVAC, plumbing, and electrical subcontractors who will  
2 contract directly with the prime contract bidder submitting the bid to  
3 the public entity.

4 (4) This section does not apply to job order contract requests for  
5 proposals under section 1 of this act.

6 NEW SECTION. **Sec. 5.** A new section is added to chapter 39.12 RCW  
7 to read as follows:

8 Job order contracts under section 1 of this act must pay prevailing  
9 wages for all work that would otherwise be subject to the requirements  
10 of this chapter. Prevailing wages for a job order contract must be  
11 determined as of the time the job order contract and any extension or  
12 renewal is executed.

13 **Sec. 6.** RCW 60.28.011 and 2000 c 185 s 1 are each amended to read  
14 as follows:

15 (1) Public improvement contracts shall provide, and public bodies  
16 shall reserve, a contract retainage not to exceed five percent of the  
17 moneys earned by the contractor as a trust fund for the protection and  
18 payment of: (a) The claims of any person arising under the contract;  
19 and (b) the state with respect to taxes imposed pursuant to Title 82  
20 RCW which may be due from such contractor.

21 (2) Every person performing labor or furnishing supplies toward the  
22 completion of a public improvement contract shall have a lien upon  
23 moneys reserved by a public body under the provisions of a public  
24 improvement contract. However, the notice of the lien of the claimant  
25 shall be given within forty-five days of completion of the contract  
26 work, and in the manner provided in RCW 39.08.030.

27 (3) The contractor at any time may request the contract retainage  
28 be reduced to one hundred percent of the value of the work remaining on  
29 the project.

30 (a) After completion of all contract work other than landscaping,  
31 the contractor may request that the public body release and pay in full  
32 the amounts retained during the performance of the contract, and sixty  
33 days thereafter the public body must release and pay in full the  
34 amounts retained (other than continuing retention of five percent of  
35 the moneys earned for landscaping) subject to the provisions of  
36 chapters 39.12 and 60.28 RCW.

1 (b) Sixty days after completion of all contract work the public  
2 body must release and pay in full the amounts retained during the  
3 performance of the contract subject to the provisions of chapters 39.12  
4 and 60.28 RCW.

5 (4) The moneys reserved by a public body under the provisions of a  
6 public improvement contract, at the option of the contractor, shall be:

7 (a) Retained in a fund by the public body;

8 (b) Deposited by the public body in an interest bearing account in  
9 a bank, mutual savings bank, or savings and loan association. Interest  
10 on moneys reserved by a public body under the provision of a public  
11 improvement contract shall be paid to the contractor;

12 (c) Placed in escrow with a bank or trust company by the public  
13 body. When the moneys reserved are placed in escrow, the public body  
14 shall issue a check representing the sum of the moneys reserved payable  
15 to the bank or trust company and the contractor jointly. This check  
16 shall be converted into bonds and securities chosen by the contractor  
17 and approved by the public body and the bonds and securities shall be  
18 held in escrow. Interest on the bonds and securities shall be paid to  
19 the contractor as the interest accrues.

20 (5) The contractor or subcontractor may withhold payment of not  
21 more than five percent from the moneys earned by any subcontractor or  
22 sub-subcontractor or supplier contracted with by the contractor to  
23 provide labor, materials, or equipment to the public project. Whenever  
24 the contractor or subcontractor reserves funds earned by a  
25 subcontractor or sub-subcontractor or supplier, the contractor or  
26 subcontractor shall pay interest to the subcontractor or sub-  
27 subcontractor or supplier at a rate equal to that received by the  
28 contractor or subcontractor from reserved funds.

29 (6) A contractor may submit a bond for all or any portion of the  
30 contract retainage in a form acceptable to the public body and from a  
31 bonding company meeting standards established by the public body. The  
32 public body shall accept a bond meeting these requirements unless the  
33 public body can demonstrate good cause for refusing to accept it. This  
34 bond and any proceeds therefrom are subject to all claims and liens and  
35 in the same manner and priority as set forth for retained percentages  
36 in this chapter. The public body shall release the bonded portion of  
37 the retained funds to the contractor within thirty days of accepting  
38 the bond from the contractor. Whenever a public body accepts a bond in

1 lieu of retained funds from a contractor, the contractor shall accept  
2 like bonds from any subcontractors or suppliers from which the  
3 contractor has retained funds. The contractor shall then release the  
4 funds retained from the subcontractor or supplier to the subcontractor  
5 or supplier within thirty days of accepting the bond from the  
6 subcontractor or supplier.

7 (7) If the public body administering a contract, after a  
8 substantial portion of the work has been completed, finds that an  
9 unreasonable delay will occur in the completion of the remaining  
10 portion of the contract for any reason not the result of a breach  
11 thereof, it may, if the contractor agrees, delete from the contract the  
12 remaining work and accept as final the improvement at the stage of  
13 completion then attained and make payment in proportion to the amount  
14 of the work accomplished and in this case any amounts retained and  
15 accumulated under this section shall be held for a period of sixty days  
16 following the completion. In the event that the work is terminated  
17 before final completion as provided in this section, the public body  
18 may thereafter enter into a new contract with the same contractor to  
19 perform the remaining work or improvement for an amount equal to or  
20 less than the cost of the remaining work as was provided for in the  
21 original contract without advertisement or bid. The provisions of this  
22 chapter are exclusive and shall supersede all provisions and  
23 regulations in conflict herewith.

24 (8) Whenever the department of transportation has contracted for  
25 the construction of two or more ferry vessels, sixty days after  
26 completion of all contract work on each ferry vessel, the department  
27 must release and pay in full the amounts retained in connection with  
28 the construction of the vessel subject to the provisions of RCW  
29 60.28.020 and chapter 39.12 RCW. However, the department of  
30 transportation may at its discretion condition the release of funds  
31 retained in connection with the completed ferry upon the contractor  
32 delivering a good and sufficient bond with two or more sureties, or  
33 with a surety company, in the amount of the retained funds to be  
34 released to the contractor, conditioned that no taxes shall be  
35 certified or claims filed for work on the ferry after a period of sixty  
36 days following completion of the ferry; and if taxes are certified or  
37 claims filed, recovery may be had on the bond by the department of  
38 revenue and the materialmen and laborers filing claims.

1 (9) Except as provided in subsection (1) of this section,  
2 reservation by a public body for any purpose from the moneys earned by  
3 a contractor by fulfilling its responsibilities under public  
4 improvement contracts is prohibited.

5 (10) Contracts on projects funded in whole or in part by farmers  
6 home administration and subject to farmers home administration  
7 regulations are not subject to subsections (1) through (9) of this  
8 section.

9 (11) This subsection applies only to a public body that has  
10 contracted for the construction of a facility using the general  
11 contractor/construction manager procedure, as defined under RCW  
12 (~~(39.10.060)~~) 39.10.061. If the work performed by a subcontractor on  
13 the project has been completed within the first half of the time  
14 provided in the general contractor/construction manager contract for  
15 completing the work, the public body may accept the completion of the  
16 subcontract. The public body must give public notice of this  
17 acceptance. After a forty-five day period for giving notice of liens,  
18 and compliance with the retainage release procedures in RCW 60.28.021,  
19 the public body may release that portion of the retained funds  
20 associated with the subcontract. Claims against the retained funds  
21 after the forty-five day period are not valid.

22 (12) Unless the context clearly requires otherwise, the definitions  
23 in this subsection apply throughout this section.

24 (a) "Contract retainage" means an amount reserved by a public body  
25 from the moneys earned by a person under a public improvement contract.

26 (b) "Person" means a person or persons, mechanic, subcontractor, or  
27 materialperson who performs labor or provides materials for a public  
28 improvement contract, and any other person who supplies the person with  
29 provisions or supplies for the carrying on of a public improvement  
30 contract.

31 (c) "Public body" means the state, or a county, city, town,  
32 district, board, or other public body.

33 (d) "Public improvement contract" means a contract for public  
34 improvements or work, other than for professional services, or a work  
35 order as defined in RCW 39.10.020.

36 **Sec. 7.** RCW 39.10.902 and 2002 c 46 s 4 are each amended to read  
37 as follows:

1 The following acts or parts of acts, as now existing or hereafter  
2 amended, are each repealed, effective July 1, 2007:

3 (1) RCW 39.10.010 and 1994 c 132 s 1;

4 (2) RCW 39.10.020 and 2003 c ... s 2 (section 2 of this act), 2001  
5 c 328 s 1, 2000 c 209 s 1, 1997 c 376 s 1, & 1994 c 132 s 2;

6 (3) RCW 39.10.030 and 1997 c 376 s 2 & 1994 c 132 s 3;

7 (4) RCW 39.10.040 and 1994 c 132 s 4;

8 (5) RCW 39.10.051 and 2002 c 46 s 1 & 2001 c 328 s 2;

9 (6) RCW 39.10.061 and 2002 c 46 s 2 & 2001 c 328 s 3;

10 (7) RCW 39.10.065 and 1997 c 376 s 5;

11 (8) RCW 39.10.067 and 2002 c 46 s 3 & 2000 c 209 s 3;

12 (9) RCW 39.10.070 and 1994 c 132 s 7;

13 (10) RCW 39.10.080 and 1994 c 132 s 8;

14 (11) RCW 39.10.090 and 1994 c 132 s 9;

15 (12) RCW 39.10.100 and 1994 c 132 s 10;

16 (13) RCW 39.10.115 and 2001 c 328 s 4 & 2000 c 209 s 4;

17 (14) RCW 39.10.900 and 1994 c 132 s 13; (~~and~~)

18 (15) RCW 39.10.901 and 1994 c 132 s 14; and

19 (16) RCW 39.10.-- and 2003 c ... s 1 (section 1 of this act).

20 NEW SECTION. Sec. 8. A new section is added to chapter 39.12 RCW  
21 to read as follows:

22 The following acts or parts of acts, as now existing or hereafter  
23 amended, are each repealed, effective July 1, 2007:

24 RCW 39.12.-- and 2003 c . . . s 5 (section 5 of this act).

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