
HOUSE BILL 1292

State of Washington

59th Legislature

2005 Regular Session

By Representatives Haigh and Nixon

Read first time 01/20/2005. Referred to Committee on State Government Operations & Accountability.

1 AN ACT Relating to compensating the responsible bidder submitting
2 the lowest responsive bid when the state, municipality, or an
3 institution of higher education rejects all bids for a public works
4 contract; reenacting and amending RCW 39.10.061; adding a new section
5 to chapter 39.04 RCW; and creating a new section.

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

7 NEW SECTION. **Sec. 1.** The legislature recognizes that fair and
8 open competition is a basic tenet of public works procurement, that
9 such competition reduces the appearance of and opportunity for
10 favoritism and inspires public confidence that contracts are awarded
11 equitably and economically. Preservation of the integrity of the
12 competitive bid system for both the bidder and the public owner
13 dictates that the contract should be awarded to the lowest responsible
14 bidder who prepares and submits the lowest responsive bid, unless good
15 cause is shown.

16 NEW SECTION. **Sec. 2.** A new section is added to chapter 39.04 RCW
17 to read as follows:

18 After bids for a public work have been opened by the state, a

1 municipality, or an institution of higher education as defined in RCW
2 28B.10.016, award must be made to the responsible bidder who submitted
3 the lowest responsive bid unless it is determined in writing by the
4 state, municipality, or institution of higher education that there is
5 good cause to reject all bids and cancel the invitation. Any decision
6 to reject all bids and cancel the invitation shall result in the
7 payment of ten thousand dollars or five percent of the project cost
8 estimate, whichever amount is less, to the contractor that otherwise
9 would have been awarded the contract as the responsible bidder who
10 submitted the lowest responsive bid.

11 **Sec. 3.** RCW 39.10.061 and 2003 c 352 s 3 and 2003 c 300 s 5 are
12 each reenacted and amended to read as follows:

13 (1) Notwithstanding any other provision of law, and after complying
14 with RCW 39.10.030, a public body may utilize the general
15 contractor/construction manager procedure of public works contracting
16 for public works projects authorized under subsection (2) of this
17 section. For the purposes of this section, "general
18 contractor/construction manager" means a firm with which a public body
19 has selected and negotiated a maximum allowable construction cost to be
20 guaranteed by the firm, after competitive selection through formal
21 advertisement and competitive bids, to provide services during the
22 design phase that may include life-cycle cost design considerations,
23 value engineering, scheduling, cost estimating, constructability,
24 alternative construction options for cost savings, and sequencing of
25 work, and to act as the construction manager and general contractor
26 during the construction phase.

27 (2) Except those school districts proposing projects that are
28 considered and approved by the school district project review board and
29 those public hospital districts proposing projects that are considered
30 and approved by the public hospital district project review board,
31 public bodies authorized under this section may utilize the general
32 contractor/construction manager procedure for public works projects
33 valued over ten million dollars where:

34 (a) Implementation of the project involves complex scheduling
35 requirements; or

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

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

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

6 (4) Contracts for the services of a general contractor/construction
7 manager under this section shall be awarded through a competitive
8 process requiring the public solicitation of proposals for general
9 contractor/construction manager services. The public solicitation of
10 proposals shall include: A description of the project, including
11 programmatic, performance, and technical requirements and
12 specifications when available; the reasons for using the general
13 contractor/construction manager procedure; a description of the
14 qualifications to be required of the proposer, including submission of
15 the proposer's accident prevention program; a description of the
16 process the public body will use to evaluate qualifications and
17 proposals, including evaluation factors and the relative weight of
18 factors; the form of the contract to be awarded; the estimated maximum
19 allowable construction cost; and the bid instructions to be used by the
20 general contractor/construction manager finalists. Evaluation factors
21 shall include, but not be limited to: Ability of professional
22 personnel, past performance in negotiated and complex projects, and
23 ability to meet time and budget requirements; the scope of work the
24 general contractor/construction manager proposes to self-perform and
25 its ability to perform it; location; recent, current, and projected
26 work loads of the firm; and the concept of their proposal. A public
27 body shall establish a committee to evaluate the proposals. After the
28 committee has selected the most qualified finalists, these finalists
29 shall submit final proposals, including sealed bids for the percent
30 fee, which is the percentage amount to be earned by the general
31 contractor/construction manager as overhead and profit, on the
32 estimated maximum allowable construction cost and the fixed amount for
33 the detailed specified general conditions work. The public body shall
34 select the firm submitting the highest scored final proposal using the
35 evaluation factors and the relative weight of factors published in the
36 public solicitation of proposals.

37 (5) The maximum allowable construction cost may be negotiated
38 between the public body and the selected firm after the scope of the

1 project is adequately determined to establish a guaranteed contract
2 cost for which the general contractor/construction manager will provide
3 a performance and payment bond. The guaranteed contract cost includes
4 the fixed amount for the detailed specified general conditions work,
5 the negotiated maximum allowable construction cost, the percent fee on
6 the negotiated maximum allowable construction cost, and sales tax. If
7 the public body is unable to negotiate a satisfactory maximum allowable
8 construction cost with the firm selected that the public body
9 determines to be fair, reasonable, and within the available funds,
10 negotiations with that firm shall be formally terminated and the public
11 body shall negotiate with the next highest scored firm and continue
12 until an agreement is reached or the process is terminated. If the
13 maximum allowable construction cost varies more than fifteen percent
14 from the bid estimated maximum allowable construction cost due to
15 requested and approved changes in the scope by the public body, the
16 percent fee shall be renegotiated.

17 (6) All subcontract work shall be competitively bid with public bid
18 openings. When critical to the successful completion of a
19 subcontractor bid package and after publication of notice of intent to
20 determine bidder eligibility in a legal newspaper of general
21 circulation published in or as near as possible to that part of the
22 county in which the public work will be done at least twenty days
23 before requesting qualifications from interested subcontract bidders,
24 the owner and general contractor/construction manager may determine
25 subcontractor bidding eligibility using the following evaluation
26 criteria:

27 (a) Adequate financial resources or the ability to secure such
28 resources;

29 (b) History of successful completion of a contract of similar type
30 and scope;

31 (c) Project management and project supervision personnel with
32 experience on similar projects and the availability of such personnel
33 for the project;

34 (d) Current and projected workload and the impact the project will
35 have on the subcontractor's current and projected workload;

36 (e) Ability to accurately estimate the subcontract bid package
37 scope of work;

1 (f) Ability to meet subcontract bid package shop drawing and other
2 coordination procedures;

3 (g) Eligibility to receive an award under applicable laws and
4 regulations; and

5 (h) Ability to meet subcontract bid package scheduling
6 requirements.

7 The owner and general contractor/construction manager shall weigh
8 the evaluation criteria and determine a minimum acceptable score to be
9 considered an eligible subcontract bidder.

10 After publication of notice of intent to determine bidder
11 eligibility, subcontractors requesting eligibility shall be provided
12 the evaluation criteria and weighting to be used by the owner and
13 general contractor/construction manager to determine eligible
14 subcontract bidders. After the owner and general
15 contractor/construction manager determine eligible subcontract bidders,
16 subcontractors requesting eligibility shall be provided the results and
17 scoring of the subcontract bidder eligibility determination.

18 Subcontract bid packages shall be awarded to the responsible bidder
19 submitting the low responsive bid, unless it is determined in writing
20 by the owner and general contractor/construction manager that there is
21 good cause to reject all bids and cancel the invitation. Any decision
22 by the owner and general contractor/construction manager to reject all
23 subcontract bid packages and cancel the invitation shall result in the
24 payment of ten thousand dollars or five percent of the project cost
25 estimate, whichever amount is less, to the contractor that otherwise
26 would have been awarded the contract as the responsible bidder who
27 submitted the lowest responsive bid. The requirements of RCW 39.30.060
28 apply to each subcontract bid package. All subcontractors who bid work
29 over three hundred thousand dollars shall post a bid bond and all
30 subcontractors who are awarded a contract over three hundred thousand
31 dollars shall provide a performance and payment bond for their contract
32 amount. All other subcontractors shall provide a performance and
33 payment bond if required by the general contractor/construction
34 manager. If a general contractor/construction manager receives a
35 written protest from a subcontractor bidder, the general
36 contractor/construction manager shall not execute a contract for the
37 subcontract bid package with anyone other than the protesting bidder
38 without first providing at least two full business days' written notice

1 of the general contractor/construction manager's intent to execute a
2 contract for the subcontract bid package; provided that the protesting
3 bidder submits notice in writing of its protest no later than two full
4 business days following bid opening. Intermediate Saturdays, Sundays,
5 and legal holidays are not counted. A low bidder who claims error and
6 fails to enter into a contract is prohibited from bidding on the same
7 project if a second or subsequent call for bids is made for the
8 project. Except as provided for under subsection (7) of this section,
9 bidding on subcontract work by the general contractor/construction
10 manager or its subsidiaries is prohibited. The general
11 contractor/construction manager may negotiate with the low-responsive
12 bidder in accordance with RCW 39.10.080 or, if unsuccessful in such
13 negotiations, rebid.

14 (7) The general contractor/construction manager, or its
15 subsidiaries, may bid on subcontract work if:

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

18 (b) The bid opening is managed by the public body; and

19 (c) Notification of the general contractor/construction manager's
20 intention to bid is included in the public solicitation of bids for the
21 bid package.

22 In no event may the value of subcontract work performed by the
23 general contractor/construction manager exceed thirty percent of the
24 negotiated maximum allowable construction cost.

25 (8) A public body may include an incentive clause in any contract
26 awarded under this section for savings of either time or cost or both
27 from that originally negotiated. No incentives granted may exceed five
28 percent of the maximum allowable construction cost. If the project is
29 completed for less than the agreed upon maximum allowable construction
30 cost, any savings not otherwise negotiated as part of an incentive
31 clause shall accrue to the public body. If the project is completed
32 for more than the agreed upon maximum allowable construction cost,
33 excepting increases due to any contract change orders approved by the
34 public body, the additional cost shall be the responsibility of the
35 general contractor/construction manager.

36 (9) The authority provided to the state ferry system in this
37 section is limited to projects concerning construction, renovation,

1 preservation, demolition, and reconstruction of ferry terminals and
2 associated land-based facilities.

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