

# SENATE BILL REPORT

## 2SHB 1506

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As Reported By Senate Committee On:  
Government Operations & Elections, March 27, 2007

**Title:** An act relating to alternative public works.

**Brief Description:** Changing alternative works provisions.

**Sponsors:** House Committee on Capital Budget (originally sponsored by Representatives Haigh, Armstrong, Hunt and Ormsby).

**Brief History:** Passed House: 3/12/07, 98-0.

**Committee Activity:** Government Operations & Elections: 3/26/07, 3/27/07 [DPA-WM].

### Brief Summary of Bill

- Extends and expands the use of the design-build and general contractor/construction manager contracting procedures;
- Establishes a project review committee to approve and certify the use of design-build and general contractor/construction manager contracting procedures; and
- Requires data collection for evaluation of alternative contracting procedures.

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

**Majority Report:** Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Fairley, Chair; Oemig, Vice Chair; Roach, Ranking Minority Member; Kline, Pridemore and Swecker.

**Staff:** Mac Nicholson (786-7445)

**Background:** Alternative forms of public works were first used on a very limited basis and then adopted in statute in 1994 for certain pilot projects. These alternative procedures included a design-build process and a general contractor/construction manager (GC/CM) process and may be used on projects costing in excess of \$10 million. The authorization to use alternative public works procedures expires June 30, 2007.

The design-build procedure is a multi-step competitive process to award a contract to a single firm that agrees to both design and build a public works project valued over \$10 million that meets specific criteria. A design-build contract is awarded to the firm that submits the best and final proposal with the lowest price following a public request for proposals and an extensive evaluation of the proposals.

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The GC/CM method employs the services of a project management firm that bears significant responsibility and risk in the contracting process. 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. When the plans and specifications for a project phase are complete, the GC/CM firm subcontracts with construction firms to construct that phase. Initial selection of GC/CM finalists is based on the qualifications and experience of the firm.

In 2003, job order contracting was authorized as an alternative public works contracting procedure. Under a job order contract, a contractor agrees to perform an indefinite quantity of public works jobs, defined by individual work orders, over a fixed period of time. A public entity may not have more than two job order contracts in effect at any one time. The maximum total dollar amount that is awarded under a job order contract may not exceed \$3 million in the first year, \$5 million over the first two years, or \$8 million over a three-year period if the contract is renewed or extended.

With some restrictions, the use of alternative public works contracting procedures are authorized to a limited number of public entities:

- Department of General Administration;
- University of Washington;
- Washington State University;
- cities with a population greater than 70,000 and any public authority chartered by such city;
- counties with a population greater than 450,000;
- public hospital districts with total revenues greater than \$15 million;
- port districts with total revenues greater than \$15 million per year;
- public utility districts with revenues from energy sales greater than \$23 million per year;
- school districts for GC/CM projects; and
- Washington State ferry system.

In 2005, the Capital Projects Advisory Review Committee was established to monitor and evaluate the use of traditional and alternative public works contracting procedures and evaluate potential future use of other alternative contracting procedures. The committee will also provide a forum in which best practices and concerns about alternative public works contracting can be discussed.

**Summary of Second Substitute Bill:** The use of alternative public works contracting procedures is extended to 2014. Public bodies seeking to use alternative public works contracting procedures must either be certified to use such procedures, or receive approval on a project by project basis.

Project Review Committee: A project review committee (committee) is created to approve the use of the design-build, GC/CM, or both procedures, through a certification process or through approval on a project by project basis. Members of the committee are appointed by the Capital Projects Advisory Review Board (Board), and appointments must represent a balance

among the industries and public owners represented on the Board. All meetings of the committee are public and the committee must allow for public comment.

A determination by the committee may be appealed to the Board within seven days of the committee's decision. The Board must resolve an appeal within 30 days, and the Board's decision is final.

Certification Process: A public body may apply to the committee for a three-year certification to use design-build, GC/CM, or both procedures. The public body must submit an application to the committee that includes a description of its qualifications, its capital plan for the certification period, its intended use of the alternative contracting procedures, and any other information requested by the committee.

To certify a public body, the committee must determine that the public body has the necessary experience and qualifications to determine which projects are appropriate for the alternative contracting procedures; the necessary experience and qualification to carry out the contracting procedures; and resolve any audit findings on previous public works projects.

Once a public body has been certified to use design-build, GC/CM, or both procedures, it may use the procedure without seeking project approval from the committee. However, a public body certified to use GC/CM must seek additional approval to use that procedure for projects estimated to cost less than \$10 million.

A public body may seek re-certification for one additional three-year period by submitting updated information on its capital plan to the committee. The committee may revoke any public body's certification upon a finding that its use of the alternative contracting procedure no longer serves the public interest.

Project by Project Approval: Public bodies that are not certified to use design-build or GC/CM may seek approval to use the procedure on a project by project basis by submitting an application that includes its qualifications, a description of the proposed project, and which alternative contracting procedure it plans to use.

To approve a proposed project, the committee must determine that the alternative contracting procedure will provide a substantial fiscal benefit or the use of the traditional method is not practical for meeting the desired quality standards or delivery schedules; the project meets the requirements for using the contracting procedure; the public body has the necessary experience or qualified team to use the alternative procedure; for design-build projects, construction personnel independent of the design-build team are knowledgeable in the design-build process; and the public body has resolved any audit findings related to previous public works projects.

Design-Build: Several policy changes are made relating to the use of the design-build procedure.

The procedure may no longer be used for construction of student housing. The procedure may be used for parking garages, regardless of cost. Projects involving the construction or erection of pre-engineered metal buildings or prefabricated modular buildings, regardless of cost, do not need the approval of the committee. Operations and maintenance services may be

included in design-build contracts for a period of three years, except for utility projects in which operations and maintenance may be ongoing.

Criteria for evaluating proposals for design-bid contracts are added and include the proposer's technical qualifications, its capability to perform, and its past performance. Additional factors are considered for analyzing finalists' proposals, including the technical approach design concept; proposal price; ability of the professional personnel; past performance on similar projects; ability to meet time and budget requirements; ability to provide a performance and payment bond; recent, current, and projected work loads of the firm; and location.

If all proposals are rejected, the public body must provide its reasons to the proposers in writing.

General Contractor/Construction Manager: The major policy changes related to the use of GC/CM include the ability to use the procedure for projects valued under \$10 million with the approval of the committee; and expansion of the criteria for a GC/CM project to include projects that encompass a complex or technical work environment and projects that require specialized work on a building that has historic significance.

Numerous other procedural changes are made to the contracting procedure.

Contract management responsibilities are expanded. The public body must provide contract documents that obligate the public owner to accept or reject a request for equitable adjustment, change order, or claim within 60 days. If the public owner does not respond in writing, the request is deemed denied.

Incentive clauses for early completion, cost savings, or other performance goals must be included in the request for proposals. Incentives may not be paid from any contingency fund established for coordination of the construction documents or coordination of the work. The public body must issue a change order within 30 days on change orders agreed to, in writing, by the GC/CM. If the public body fails to issue the change order, interest at a rate of 1 percent per month shall accrue on the dollar amount of the additional work satisfactorily completed.

The maximum allowable contract cost (MACC) on a GC/CM project may only be negotiated when the design is at least 90 percent complete and major subcontractor bid packages may be bid prior to agreement of the MACC. The public body may authorize the GC/CM to bid and award bid packages before receipt of complete plans and specifications; however, any contracts awarded must be incorporated in the negotiated MACC. If the MACC varies more than 15 percent from the bid estimated MACC due to requested and approved changes by the public body, the percent fee shall be renegotiated.

Public bodies may not evaluate or disqualify proposals for a GC/CM contract based on the terms of a collective bargaining agreement. A GC/CM may not violate or waive the terms of a collective bargaining agreement in preparing subcontract bid packages.

Bidder eligibility criteria for subcontractors currently listed in statute is removed and responsibility is determined based on specific objective criteria that must be listed in the bid documents.

A GC/CM may only bid on subcontract work or for the supply of equipment or materials if that work is customarily performed or supplied by the GC/CM, if the bid opening is managed by the public body, and if notification of the GC/CM's intent to bid is included in the solicitation of bids. The GC/CM is prohibited from purchasing equipment and materials for assignment to subcontract bid package bidders for installation or warranty. The GC/CM may not perform subcontract work in excess of 30 percent of the negotiated MACC.

Prebid determination of subcontractor eligibility must be preceded by a public hearing to receive comments and determine if establishing bidder eligibility in advance of seeking bids is in the best interests of the project. If a subcontract bidder is determined to be "not responsible," the bidder must be given an opportunity to establish "responsibility."

Subcontract agreements must not delegate or assign the GC/CM's implied duty not to hinder or delay a subcontractor or delegate or assign the GC/CM's authority to resolve subcontractor conflicts; restrict a subcontractor's right to damages; require a subcontractor to bear the cost of trade damage repair; or require the subcontractor to execute progress payment applications that waive claims for additional time, compensation, bond, or retainage rights as a condition of receipt of progress payment.

Job Order Contracting: The authority to use the job order contracting procedure is limited to the same public bodies and has not been expanded. The maximum total dollar amount awarded under a job order contract is increased from \$3 million to \$4 million in the first year and from \$8 million to \$12 million over the three years of the contract. The Department of General Administration is authorized to have four job order contracts in effect at any one time. The amount of work that must be subcontracted on a job order contract is changed from 80 percent to 90 percent. The maximum dollar amount of a work order is increased from \$300,000 to \$350,000.

Data Collection: All contracting procedures require public owners, as well as contractors and subcontractors, to report data required by the board. The board must develop questionnaires designed to provide quantitative and qualitative data on alternative public works contracting procedures.

Other Provisions: Projects approved by the School District or Hospital District Project Review Boards prior to the effective date of the act may proceed without approval of the committee. If a design-build or GC/CM project has been advertised, but a contract has not been signed by the effective date of the act, the project may go forward without approval by the committee.

The act contains a sunset provision and requires an evaluation by the Joint Legislative Audit and Review Committee by June 30, 2013.

**EFFECT OF CHANGES MADE BY RECOMMENDED AMENDMENT(S) AS PASSED COMMITTEE (Government Operations & Elections):** Provides that sales tax is not included in the total contract cost for GC/CM projects. The board can grant an exemption from any provision of the legislation for projects advertised before the effective date of the legislation. A public body seeking an exemption must submit a request in writing to the board no later than December 31, 2007, and the board must respond within sixty calendar days.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains an emergency clause and takes effect on July 1, 2007, except for section 104, relating to the creation of the committee, which takes effect immediately, and section 507, relating to the repealer of the expiration date, which takes effect June 30, 2007.

**Staff Summary of Public Testimony:** PRO: Capitol Projects Advisory Review Board (CPARB) worked for a year putting together language in the bill. Representatives from all parts of design and construction industry were involved, and CPARB unanimously supports the bill. There are a couple of technical changes CPARB would like to see. This is the third renewal of the alternative public works authority. The bill is the product of a lot of compromise among the involved parties. Cities and counties support the bill, but would like to see the floor of ten million for design-build projects amended. The cost of the project is often related to size of the jurisdiction, consequently in the smaller to mid-sized jurisdictions, design-build authority cannot be used.

**Persons Testifying:** PRO: John Lynch, General Administration; Ashley Probart, Association of Washington Cities; Julie Murray, Washington State Association of Counties.