

SENATE BILL REPORT

SHB 1466

As Reported by Senate Committee On:
Governmental Operations, March 26, 2013
Ways & Means, April 9, 2013

Title: An act relating to revisions to alternative public works contracting procedures.

Brief Description: Revising alternative public works contracting procedures.

Sponsors: House Committee on Capital Budget (originally sponsored by Representatives Haigh, Warnick, Dunshee, Fey, Kristiansen and Reykdal).

Brief History: Passed House: 3/09/13, 95-0.

Committee Activity: Governmental Operations: 3/21/13, 3/26/13 [DP-WM, w/oRec].
Ways & Means: 4/08/13, 4/09/13 [DPA, w/oRec].

SENATE COMMITTEE ON GOVERNMENTAL OPERATIONS

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

Signed by Senators Roach, Chair; Benton, Vice Chair; Hasegawa, Ranking Member; Conway and Fraser.

Minority Report: That it be referred without recommendation.

Signed by Senators Braun and Rivers.

Staff: Karen Epps (786-7424)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.

Signed by Senators Hill, Chair; Baumgartner, Vice Chair; Honeyford, Capital Budget Chair; Hargrove, Ranking Member; Bailey, Becker, Braun, Dammeier, Hatfield, Hewitt, Kohl-Welles, Padden, Parlette, Rivers, Schoesler and Tom.

Minority Report: That it be referred without recommendation.

Signed by Senators Conway, Hasegawa, Keiser, Murray and Ranker.

Staff: Brian Sims (786-7431)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background: The Capital Projects Advisory Review Board (CPARB) provides an evaluation of public capital project construction processes, including the impact of contracting methods on project outcomes, and advises the Legislature on policies related to public works delivery methods. Twenty-three members serve on CPARB. Fourteen members are appointed by the Governor, including representatives from general construction, architecture, engineering, subcontracting, construction trades labor organizations, private industry, a few state agencies, and domestic insurers. The remaining members are selected as such:

- three members representing local public owners, selected by the Association of Washington Cities, the Washington State Association of Counties, and the Washington Public Ports Association;
- one member, representing public hospital districts, selected by the Association of Washington Public Hospital Districts;
- one member, representing school districts, selected by the Washington State School Directors' Association; and
- four members of the Legislature, two from the House of Representatives and two from the Senate, one from each major caucus, appointed by the Speaker of the House of Representatives and the President of the Senate.

Public works contracts of a large dollar amount that meet certain criteria and are approved by CPARB may be awarded through an alternative contracting procedure in which the selection of a contractor is based on factors other than low bid. There are three alternative procedures authorized by law: Design-Build (DB), General Contractor/Construction Manager (GCCM), and Job Order Contracting (JOC).

A project review committee (review committee) was created to certify public bodies to use either DB, GCCM, or both procedures, or to approve projects on a project-by-project basis. The certification is for three years. The use of the procedures is generally limited to projects with a total project cost of \$10 million or more. However, the GCCM process may be used on projects with a total project cost of less than \$10 million with the approval of the review committee. The review committee reviews and approves not more than ten projects using the DB contracting procedure for projects that have a total project cost between \$2 million and \$10 million.

DB is an alternative contracting method that melds design and construction activities into a single contract. The government agency contracts with a single firm to both design and construct the facility based on the needs identified by the agency. Selection of the firm is based on a weighted scoring of factors, including firms' qualifications and experience, project proposals, and bid prices. In addition to projects that are highly specialized or repetitive in nature, DB may be used for construction of parking garages, and the erection of pre-engineered metal buildings or prefabricated modular buildings.

GCCM is another alternative contracting method that utilizes the services of a project management firm which bears significant responsibility and risk in the contracting process. Under GCCM, the public entity contracts with an architectural and engineering firm to design a facility. The public entity also contracts with a GCCM firm to assist in the design of the facility, particularly in the areas of material selection, construction methods, value engineering, and constructability; 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 GCCM firm subcontracts with construction firms to construct that phase. Initial selection of GCCM finalists is based on the qualifications and experience of the firm. Final selection is based on the bid price of GCCM fees.

Under the JOC method, the public entity awards a contract to a contractor who agrees to perform an indefinite quantity of public works jobs, defined by individual work orders, over a fixed period of time. For JOC, the maximum total dollar amount that may be awarded is \$4 million.

Summary of Bill (Recommended Amendments): The use of alternative public works contracting procedures is extended to 2021. The CPARB member representing cities is appointed by the Governor. Vacancies are filled in the same manner as appointments.

The review committee is no longer required to review and approve the use of GCCM by certified public bodies for projects under \$10 million. Certified public bodies may use GCCM on any size project without obtaining the review committee's approval. Once certified, a public body may use the certified contracting procedure for a period of three years.

Public bodies may use DB for projects in which the construction activities are highly specialized and a DB approach is critical in developing construction methodology; the projects selected provide opportunity for greater innovation or efficiencies between the designer and the builder; or significant savings in project delivery time would be realized. Prefabricated modular buildings are limited to ten per installation site under a DB procedure. The review committee may approve 15 DB projects. The review committee must report annually to CPARB on these projects and make recommendations for further use. Certified public bodies may use the DB procedure on no more than five projects between \$2 million and \$10 million during the certification period. The \$10 million project cost requirement is removed.

Public bodies may consider cost factors other than up-front, lump-sum pricing on a DB contract. Evaluation factors, weights, and process used by the selection committee must be included in a DB procedure. The evaluation of DB proposers may include the following:

- the proposer's past performance in the utilization of disadvantaged businesses and small businesses; and
- the proposer's outreach plans to disadvantaged businesses and small businesses.

Protest procedures including time limits for filing a protest, must be included in the request for qualifications from proposers of DB services. The public body must notify all proposers of the finalists selected to move to the next phase of the selection process. Proposers filing a protest on the selection of the finalists must file the protest in accordance with the published protest procedures.

CPARB must recommend rules regarding life-cycle cost analysis and energy efficiency as related to the DB procurement method.

Protest procedures must be included in the public notice when selecting a subcontractor on a GCCM project and in the public solicitation of proposals for GCCM services. Protest procedures must include time limits for filing a protest and can be no fewer than four days from the date the subcontractor, or proposer, was notified of the selection decision. An opportunity for comment on the protest procedures must be provided at the public hearing for a GCCM alternative subcontractor selection process. The process may not proceed to the next phase until two days after all proposers are notified of the committee's selection decision. A proposer may obtain a scoring summary of the evaluation factors for its proposal. The GCCM firm must notify all proposers of the selection decision and make a selection summary of the final proposals available within two days of notification. If a public body receives a timely protest from the most qualified firm, the GCCM firm may execute a contract until two business days after the final protest decision issued by the public body is transmitted to the protestor. Evaluation factors for selection of GCCM may also consider the firm's outreach plan to include small business entities and disadvantaged business enterprises and the firm's past performance in using these types of business.

A GCCM firm must not assign warranty responsibility nor the terms of its contract or purchase order with vendors for equipment or material purchases, to subcontract bid package bidders, or subcontractors who were awarded a contract. The GCCM firm and the public body must make the specific eligibility criteria and applicable weights given to each criteria available at least five days before a hearing. The evaluation factors for selecting GCCM may include outreach plans to disadvantaged businesses and small businesses.

For JOC, the maximum total dollar amount that may be awarded in counties with a population of more than 1 million is \$6 million.

EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Recommended Amendments): The amendment removes provisions regarding consideration of contractors' experience with life-cycle cost analysis and energy performance goals. Requires CPARB to recommend rules regarding life-cycle cost analysis and energy efficiency as related to the DB procurement method.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony (Governmental Operations): PRO: This bill is a reauthorization bill that also includes additional amendments, including language about minority and women-owned businesses, that are very important. It is critical that CPARB be reauthorized. CPARB does good work and moved the state forward in the bidding process. CPARB looks at projects to see if these more-efficient processes will work, saving the state money on public works projects. It is important to renew CPARB and the alternative contracting procedures for another six years. About 25 percent of the cost of buildings are the hard costs of building the building. About 75 percent of the costs are in the long-term

overall costs of the building and the life-cycle of the building. The bill provides that, because so much of the long-term costs of the building are in the operating and long-term costs, CPARB may consider the issue of the life-cycle of the building. The objective of the amendments is to save taxpayers money and build better buildings. This model drives innovation and limits costs. By requiring the public body to provide a model, this lets every contractor know the model that they must consider when bidding on a public works project.

OTHER: This bill is slightly different than the companion that the committee heard in February. This bill now includes language that was not fully vetted by CPARB. CPARB does not review the validity of the project, the scope of the project, or any of the financing of the project, but only whether the public owner has the expertise to use the alternative contracting method to ensure that the end product can be delivered. There is concern that some of the changes adding in life-cycle costing and energy conservation into the alternative contracting procedures add complexity and ambiguity and in doing so, raise the prospect of conflict and litigation. These changes have broad ramifications in how they interact with the existing statutes and with the Leadership in Energy and Environmental Design program. Life-cycle costing includes what the building will be used for, which CPARB would not consider for procurement of the public works project. There are concerns about the amendments on the life-cycle costs.

Persons Testifying (Governmental Operations): PRO: Representative Haigh, prime sponsor; Representative Dunshee, sponsor; Noah Reandeu, NW Energy Efficiency Council.

OTHER: Bob Maruska, CPARB; Van Collins, Associated General Contractors; Larry Stevens, Mechanical Contractors Assn., National Electrical Contractors Assn.

Staff Summary of Public Testimony on Substitute House Bill (Ways & Means): PRO: The substitute bill contains important language that allows for the consideration of life-cycle cost and energy efficiency experience in selecting contractors, although the language can be improved. About 25 percent of the cost of buildings come from the hard costs of building the building. About 75 percent of the costs are in the long-term overall costs of the building and the life-cycle of the building. The bill provides that, because so much of the long-term costs of the building are in the operating and long-term costs, CPARB may consider the issue of the life-cycle of the building.

CON: The life-cycle cost requirements are ambiguous and will lead to unnecessary bidding disputes. It will narrow the field of qualified contractors and reduce competition. The language is confusing and has not been vetted by the full process of CPARB.

Persons Testifying (Ways & Means): PRO: Stan Bowman, American Institute of Architects WA Council; Noah Reandeu, NW Energy Efficiency Council; Bob Maruska, CPARB.

CON: Van Collins, Associated General Contractors; Cliff Webster, American Council of Engineering Companies of WA.