
HOUSE BILL 2208

State of Washington

63rd Legislature

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By Representatives Haigh and Buys

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1 AN ACT Relating to heavy civil construction projects; amending RCW
2 39.10.210, 39.10.280, 39.10.340, 39.10.350, 39.10.360, 39.10.370, and
3 39.10.390; and reenacting and amending RCW 43.131.408.

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

5 **Sec. 1.** RCW 39.10.210 and 2013 c 222 s 1 are each amended to read
6 as follows:

7 Unless the context clearly requires otherwise, the definitions in
8 this section apply throughout this chapter.

9 (1) "Alternative public works contracting procedure" means the
10 design-build, general contractor/construction manager, and job order
11 contracting procedures authorized in RCW 39.10.300, 39.10.340, and
12 39.10.420, respectively.

13 (2) "Board" means the capital projects advisory review board.

14 (3) "Certified public body" means a public body certified to use
15 design-build or general contractor/construction manager contracting
16 procedures, or both, under RCW 39.10.270.

17 (4) "Committee," unless otherwise noted, means the project review
18 committee.

1 (5) "Design-build procedure" means a contract between a public body
2 and another party in which the party agrees to both design and build
3 the facility, portion of the facility, or other item specified in the
4 contract.

5 (6) "Disadvantaged business enterprise" means any business entity
6 certified with the office of minority and women's business enterprises
7 under chapter 39.19 RCW.

8 (7) "General contractor/construction manager" means a firm with
9 which a public body has selected to provide services during the design
10 phase and negotiated a maximum allowable construction cost to act as
11 construction manager and general contractor during the construction
12 phase.

13 (8) "Job order contract" means a contract in which the contractor
14 agrees to a fixed period, indefinite quantity delivery order contract
15 which provides for the use of negotiated, definitive work orders for
16 public works as defined in RCW 39.04.010.

17 (9) "Job order contractor" means a registered or licensed
18 contractor awarded a job order contract.

19 (10) "Maximum allowable construction cost" means the maximum cost
20 of the work to construct the project including a percentage for risk
21 contingency, negotiated support services, and approved change orders.

22 (11) "Negotiated support services" means items a general contractor
23 would normally manage or perform on a construction project including,
24 but not limited to surveying, hoisting, safety enforcement, provision
25 of toilet facilities, temporary heat, cleanup, and trash removal, and
26 that are negotiated as part of the maximum allowable construction cost.

27 (12) "Percent fee" means the percentage amount to be earned by the
28 general contractor/construction manager as overhead and profit.

29 (13) "Public body" means any general or special purpose government
30 in the state of Washington, including but not limited to state
31 agencies, institutions of higher education, counties, cities, towns,
32 ports, school districts, and special purpose districts.

33 (14) "Public works project" means any work for a public body within
34 the definition of "public work" in RCW 39.04.010.

35 (15) "Small business entity" means a small business as defined in
36 RCW 39.26.010.

37 (16) "Total contract cost" means the fixed amount for the detailed

1 specified general conditions work, the negotiated maximum allowable
2 construction cost, and the percent fee on the negotiated maximum
3 allowable construction cost.

4 (17) "Total project cost" means the cost of the project less
5 financing and land acquisition costs.

6 (18) "Unit price book" means a book containing specific prices,
7 based on generally accepted industry standards and information, where
8 available, for various items of work to be performed by the job order
9 contractor. The prices may include: All the costs of materials;
10 labor; equipment; overhead, including bonding costs; and profit for
11 performing the items of work. The unit prices for labor must be at the
12 rates in effect at the time the individual work order is issued.

13 (19) "Work order" means an order issued for a definite scope of
14 work to be performed pursuant to a job order contract.

15 (20) "Heavy civil construction project" means a civil engineering
16 project, the predominant features of which are infrastructure
17 improvements.

18 **Sec. 2.** RCW 39.10.280 and 2013 c 222 s 8 are each amended to read
19 as follows:

20 (1) A public body not certified under RCW 39.10.270 must apply for
21 approval from the committee to use the design-build or general
22 contractor/construction manager contracting procedure on a project. A
23 public body seeking approval must submit to the committee an
24 application in a format and manner as prescribed by the committee. The
25 application must include a description of the public body's
26 qualifications, a description of the project, ~~((and its))~~ the public
27 body's intended use of alternative contracting procedures, and, if
28 applicable, a declaration that the public body has elected to procure
29 the project as a heavy civil construction project.

30 (2) To approve a proposed project, the committee shall determine
31 that:

32 (a) The alternative contracting procedure will provide a
33 substantial fiscal benefit or the use of the traditional method of
34 awarding contracts in lump sum to the low responsive bidder is not
35 practical for meeting desired quality standards or delivery schedules;

36 (b) The proposed project meets the requirements for using the

1 alternative contracting procedure as described in RCW 39.10.300 or
2 39.10.340;

3 (c) The public body has the necessary experience or qualified team
4 to carry out the alternative contracting procedure including, but not
5 limited to: (i) Project delivery knowledge and experience; (ii)
6 sufficient personnel with construction experience to administer the
7 contract; (iii) a written management plan that shows clear and logical
8 lines of authority; (iv) the necessary and appropriate funding and time
9 to properly manage the job and complete the project; (v) continuity of
10 project management team, including personnel with experience managing
11 projects of similar scope and size to the project being proposed; and
12 (vi) necessary and appropriate construction budget;

13 (d) For design-build projects, public body personnel or consultants
14 are knowledgeable in the design-build process and are able to oversee
15 and administer the contract; and

16 (e) The public body has resolved any audit findings related to
17 previous public works projects in a manner satisfactory to the
18 committee.

19 (3) The committee shall, if practicable, make its determination at
20 the public meeting during which a submittal is reviewed. Public
21 comments must be considered before a determination is made.

22 (4) Within ten business days after the public meeting, the
23 committee shall provide a written determination to the public body, and
24 make its determination available to the public on the committee's web
25 site. If the committee fails to make a written determination within
26 ten business days of the public meeting, the request of the public body
27 to use the alternative contracting procedure on the requested project
28 shall be deemed approved.

29 (5) Failure of the committee to meet within sixty calendar days of
30 a public body's application to use an alternative contracting procedure
31 on a project shall be deemed an approval of the application.

32 **Sec. 3.** RCW 39.10.340 and 2013 c 222 s 12 are each amended to read
33 as follows:

34 Subject to the process in RCW 39.10.270 or 39.10.280, public bodies
35 may utilize the general contractor/construction manager procedure for
36 public works projects where at least one of the following is met:

1 (1) Implementation of the project involves complex scheduling,
2 phasing, or coordination;

3 (2) The project involves construction at an occupied facility which
4 must continue to operate during construction;

5 (3) The involvement of the general contractor/construction manager
6 during the design stage is critical to the success of the project;

7 (4) The project encompasses a complex or technical work
8 environment; ((or))

9 (5) The project requires specialized work on a building that has
10 historic significance; or

11 (6) The project is, and the public body elects to procure the
12 project as, a heavy civil construction project. However, no provision
13 of this chapter pertaining to a heavy civil construction project
14 applies unless the public body expressly elects to procure the project
15 as a heavy civil construction project.

16 **Sec. 4.** RCW 39.10.350 and 2007 c 494 s 302 are each amended to
17 read as follows:

18 (1) A public body using the general contractor/construction manager
19 contracting procedure shall provide for:

20 (a) The preparation of appropriate, complete, and coordinated
21 design documents;

22 (b) Confirmation that a constructability analysis of the design
23 documents has been performed prior to solicitation of a subcontract bid
24 package;

25 (c) Reasonable budget contingencies totaling not less than five
26 percent of the anticipated contract value;

27 (d) To the extent appropriate, on-site architectural or engineering
28 representatives during major construction or installation phases;

29 (e) Employment of staff or consultants with expertise and prior
30 experience in the management of comparable projects, critical path
31 method schedule review and analysis, and the administration, pricing,
32 and negotiation of change orders;

33 (f) Contract documents that include alternative dispute resolution
34 procedures to be attempted before the initiation of litigation;

35 (g) Contract documents that: (i) Obligate the public owner to
36 accept or reject a request for equitable adjustment, change order, or
37 claim within a specified time period but no later than sixty calendar

1 days after the receipt by the public body of related documentation; and
2 (ii) provide that if the public owner does not respond in writing to a
3 request for equitable adjustment, change order, or claim within the
4 specified time period, the request is deemed denied;

5 (h) Submission of project information, as required by the board;
6 and

7 (i) Contract documents that require the contractor, subcontractors,
8 and designers to submit project information required by the board.

9 (2) A public body using the general contractor/construction manager
10 contracting procedure may include an incentive clause for early
11 completion, cost savings, or other performance goals if such incentives
12 are identified in the request for proposals. No incentives granted may
13 exceed five percent of the maximum allowable construction cost. No
14 incentives may be paid from any contingency fund established for
15 coordination of the construction documents or coordination of the work.

16 (3) If the construction is completed for less than the maximum
17 allowable construction cost, any savings not otherwise negotiated as
18 part of an incentive clause shall accrue to the public body. If the
19 construction is completed for more than the maximum allowable
20 construction cost, the additional cost is the responsibility of the
21 general contractor/construction manager.

22 (4) If the public body and the general contractor/construction
23 manager agree, in writing, on a price for additional work, the public
24 body must issue a change order within thirty days of the written
25 agreement. If the public body does not issue a change order within the
26 thirty days, interest shall accrue on the dollar amount of the
27 additional work satisfactorily completed until a change order is
28 issued. The public body shall pay this interest at a rate of one
29 percent per month.

30 (5) For a project procured as a heavy civil construction project,
31 an independent audit, paid for by the public body, must be conducted to
32 confirm the proper accrual of costs as outlined in the contract.

33 **Sec. 5.** RCW 39.10.360 and 2013 c 222 s 13 are each amended to read
34 as follows:

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

1 (2) Contracts for the services of a general contractor/
2 construction manager under this section shall be awarded through a
3 competitive process requiring the public solicitation of proposals for
4 general contractor/construction manager services. The public
5 solicitation of proposals shall include:

6 (a) A description of the project, including programmatic,
7 performance, and technical requirements and specifications when
8 available;

9 (b) The reasons for using the general contractor/construction
10 manager procedure including, if applicable, a clear statement that the
11 public body is electing to procure the project as a heavy civil
12 construction project, in which case the solicitation must additionally:

13 (i) Indicate the minimum percentage of the cost of the work to
14 construct the project that will constitute the negotiated self-perform
15 portion of the project;

16 (ii) Indicate whether the public body will allow the price to be
17 paid for the negotiated self-perform portion of the project to be
18 deemed a cost of the work to which the general contractor/construction
19 manager's percent fee applies; and

20 (iii) Require proposals to indicate the proposer's fee for the
21 negotiated self-perform portion of the project;

22 (c) A description of the qualifications to be required of the firm,
23 including submission of the firm's accident prevention program;

24 (d) A description of the process the public body will use to
25 evaluate qualifications and proposals, including evaluation factors,
26 the relative weight of factors, and protest procedures including time
27 limits for filing a protest, which in no event may limit the time to
28 file a protest to fewer than four business days from the date the
29 proposer was notified of the selection decision;

30 (e) The form of the contract, including any contract for
31 preconstruction services, to be awarded;

32 (f) The estimated maximum allowable construction cost; and

33 (g) The bid instructions to be used by the general
34 contractor/construction manager finalists.

35 (3)(a) Evaluation factors for selection of the general
36 contractor/construction manager shall include, but not be limited to:

37 (i) Ability of the firm's professional personnel;

1 (ii) The firm's past performance in negotiated and complex
2 projects;

3 (iii) The firm's ability to meet time and budget requirements;

4 (iv) The scope of work the firm proposes to self-perform and its
5 ability to perform that work;

6 (v) The firm's proximity to the project location;

7 (vi) Recent, current, and projected workloads of the firm; and

8 (vii) The firm's approach to executing the project.

9 (b) An agency may also consider the firm's outreach plan to include
10 small business entities and disadvantaged business enterprises, and the
11 firm's past performance in the utilization of such firms as an
12 evaluation factor.

13 (4) A public body shall establish a committee to evaluate the
14 proposals. After the committee has selected the most qualified
15 finalists, at the time specified by the public body, these finalists
16 shall submit final proposals, including sealed bids for the percent fee
17 on the estimated maximum allowable construction cost and the fixed
18 amount for the general conditions work specified in the request for
19 proposal. The public body shall establish a time and place for the
20 opening of sealed bids for the percent fee on the estimated maximum
21 allowable construction cost and the fixed amount for the general
22 conditions work specified in the request for proposal. At the time and
23 place named, these bids must be publicly opened and read and the public
24 body shall make all previous scoring available to the public. The
25 public body shall select the firm submitting the highest scored final
26 proposal using the evaluation factors and the relative weight of
27 factors published in the public solicitation of proposals. A public
28 body shall not evaluate or disqualify a proposal based on the terms of
29 a collective bargaining agreement.

30 (5) The public body shall notify all finalists of the selection
31 decision and make a selection summary of the final proposals available
32 to all proposers within two business days of such notification. If the
33 public body receives a timely written protest from a proposer, the
34 public body may not execute a contract until two business days after
35 the final protest decision is transmitted to the protestor. The
36 protestor must submit its protest in accordance with the published
37 protest procedures.

1 (6) Public bodies may contract with the selected firm to provide
2 services during the design phase that may include life-cycle cost
3 design considerations, value engineering, scheduling, cost estimating,
4 constructability, alternative construction options for cost savings,
5 and sequencing of work, and to act as the construction manager and
6 general contractor during the construction phase.

7 **Sec. 6.** RCW 39.10.370 and 2007 c 494 s 304 are each amended to
8 read as follows:

9 (1) The maximum allowable construction cost shall be used to
10 establish a total contract cost for which the general
11 contractor/construction manager shall provide a performance and payment
12 bond. The maximum allowable construction cost shall be negotiated
13 between the public body and the selected firm when the construction
14 documents and specifications are at least ninety percent complete.

15 (2) Major bid packages may be bid in accordance with RCW 39.10.380
16 before agreement on the maximum allowable construction cost between the
17 public body and the selected general contractor/construction manager.
18 The general contractor/construction manager may issue an intent to
19 award to the responsible bidder submitting the lowest responsive bid.

20 (3) The public body may, at its option, authorize the general
21 contractor/construction manager to proceed with the bidding and award
22 of bid packages and construction before receipt of complete project
23 plans and specifications. Any contracts awarded under this subsection
24 shall be incorporated in the negotiated maximum allowable construction
25 cost.

26 (4) The total contract cost includes the fixed amount for the
27 detailed specified general conditions work, the negotiated maximum
28 allowable construction cost, the negotiated support services, and the
29 percent fee on the negotiated maximum allowable construction cost.
30 Negotiated support services may be included in the specified general
31 conditions at the discretion of the public body.

32 (5) If the public body is unable to negotiate a satisfactory
33 maximum allowable construction cost with the firm selected that the
34 public body determines to be fair, reasonable, and within the available
35 funds, negotiations with that firm shall be formally terminated and the
36 public body shall negotiate with the next highest scored firm and
37 continue until an agreement is reached or the process is terminated.

1 (6) If the maximum allowable construction cost varies more than
2 fifteen percent from the bid estimated maximum allowable construction
3 cost due to requested and approved changes in the scope by the public
4 body, the percent fee shall be renegotiated.

5 (7) As part of the negotiation of the maximum allowable
6 construction cost under subsection (1) of this section, on a project
7 that the public body has elected to procure as a heavy civil
8 construction project:

9 (a) The general contractor/construction manager shall submit a
10 proposed construction management and contracting plan, which must
11 include, at a minimum:

12 (i) The scope of work and cost estimates for each bid package;

13 (ii) A proposed price and scope of work for the negotiated self-
14 perform portion of the project;

15 (iii) The bases used by the general contractor/construction manager
16 to develop all cost estimates, including the negotiated self-perform
17 portion of the project; and

18 (iv) The general contractor/construction manager's updated outreach
19 plan to include small business entities, disadvantaged business
20 entities, and any other disadvantaged or underutilized businesses as
21 the public body may designate in the public solicitation of proposals,
22 as subcontractors and suppliers for the project;

23 (b) The public body and general contractor/construction manager may
24 negotiate the scopes of work to be procured by bid and the price and
25 scope of work for the negotiated self-perform portion of the project,
26 if any;

27 (c) The negotiated self-perform portion of the project must not
28 exceed fifty percent of the cost of the work to construct the project;

29 (d) Subject to the limitation of RCW 39.10.390(4), the public body
30 may additionally negotiate with the general contractor/construction
31 manager to determine on which scopes of work the general
32 contractor/construction manager will be permitted to bid, if any;

33 (e) The public body and general contractor/construction manager
34 shall negotiate, to the public body's satisfaction, a fair and
35 reasonable outreach plan;

36 (f) If the public body is unable to negotiate to its reasonable
37 satisfaction a component of this subsection (7), negotiations with the

1 firm must be terminated and the public body shall negotiate with the
2 next highest scored firm and continue until an agreement is reached or
3 the process is terminated.

4 **Sec. 7.** RCW 39.10.390 and 2013 c 222 s 16 are each amended to read
5 as follows:

6 (1) Except as provided in this section, bidding on subcontract work
7 or for the supply of equipment or materials by the general
8 contractor/construction manager or its subsidiaries is prohibited.

9 (2) The general contractor/construction manager, or its
10 subsidiaries, may bid on subcontract work or for the supply of
11 equipment or materials if:

12 (a) The work within the subcontract bid package or equipment or
13 materials is customarily performed or supplied by the general
14 contractor/construction manager;

15 (b) The bid opening is managed by the public body and is in
16 compliance with RCW 39.10.380; and

17 (c) Notification of the general contractor/construction manager's
18 intention to bid is included in the public solicitation of bids for the
19 bid package or for the equipment or materials.

20 (3) In no event may the general contractor/construction manager or
21 its subsidiaries assign warranty responsibility or the terms of its
22 contract or purchase order with vendors for equipment or material
23 purchases to subcontract bid package bidders or subcontractors who have
24 been awarded a contract. The value of subcontract work performed and
25 equipment and materials supplied by the general contractor/construction
26 manager may not exceed thirty percent of the negotiated maximum
27 allowable construction cost, unless procured as a heavy civil
28 construction project under this chapter. Negotiated support services
29 performed by the general contractor/construction manager shall not be
30 considered subcontract work for purposes of this subsection.

31 (4) Notwithstanding any contrary provision of this chapter, for a
32 project that a public body has elected to procure as a heavy civil
33 construction project under this chapter, at least thirty percent of the
34 cost of the work to construct the project included in the negotiated
35 maximum allowable construction cost must be procured through
36 competitive sealed bidding in which bidding by the general
37 contractor/construction manager or its subsidiaries is prohibited.

1 **Sec. 8.** RCW 43.131.408 and 2013 c 222 s 22 and 2013 c 186 s 2 are
2 each reenacted and amended to read as follows:

3 The following acts or parts of acts, as now existing or hereafter
4 amended, are each repealed, effective June 30, 2022:

5 (1) RCW 39.10.200 and 2010 1st sp.s. c 21 s 2, 2007 c 494 s 1, &
6 1994 c 132 s 1;

7 (2) RCW 39.10.210 and 2014 c ... s 1 (section 1 of this act), 2013
8 c 222 s 1, 2010 1st sp.s. c 36 s 6014, 2007 c 494 s 101, & 2005 c 469
9 s 3;

10 (3) RCW 39.10.220 and 2013 c 222 s 2, 2007 c 494 s 102, & 2005 c
11 377 s 1;

12 (4) RCW 39.10.230 and 2013 c 222 s 3, 2010 1st sp.s. c 21 s 3, 2009
13 c 75 s 1, 2007 c 494 s 103, & 2005 c 377 s 2;

14 (5) RCW 39.10.240 and 2013 c 222 s 4 & 2007 c 494 s 104;

15 (6) RCW 39.10.250 and 2013 c 222 s 5, 2009 c 75 s 2, & 2007 c 494
16 s 105;

17 (7) RCW 39.10.260 and 2013 c 222 s 6 & 2007 c 494 s 106;

18 (8) RCW 39.10.270 and 2013 c 222 s 7, 2009 c 75 s 3, & 2007 c 494
19 s 107;

20 (9) RCW 39.10.280 and 2014 c ... s 2 (section 2 of this act), 2013
21 c 222 s 8, & 2007 c 494 s 108;

22 (10) RCW 39.10.290 and 2007 c 494 s 109;

23 (11) RCW 39.10.300 and 2013 c 222 s 9, 2009 c 75 s 4, & 2007 c 494
24 s 201;

25 (12) RCW 39.10.320 and 2013 c 222 s 10, 2007 c 494 s 203, & 1994 c
26 132 s 7;

27 (13) RCW 39.10.330 and 2013 c 222 s 11, 2009 c 75 s 5, & 2007 c 494
28 s 204;

29 (14) RCW 39.10.340 and 2014 c ... s 3 (section 3 of this act), 2013
30 c 222 s 12, & 2007 c 494 s 301;

31 (15) RCW 39.10.350 and 2014 c ... s 4 (section 4 of this act)& 2007
32 c 494 s 302;

33 (16) RCW 39.10.360 and 2014 c ... s 5 (section 5 of this act), 2013
34 c 222 s 13, 2009 c 75 s 6, & 2007 c 494 s 303;

35 (17) RCW 39.10.370 and 2014 c ... s 6 (section 6 of this act)& 2007
36 c 494 s 304;

37 (18) RCW 39.10.380 and 2013 c 222 s 14 & 2007 c 494 s 305;

38 (19) RCW 39.10.385 and 2013 c 222 s 15 & 2010 c 163 s 1;

- 1 (20) RCW 39.10.390 and 2014 c ... s 7 (section 7 of this act), 2013
2 c 222 s 16, & 2007 c 494 s 306;
- 3 (21) RCW 39.10.400 and 2013 c 222 s 17 & 2007 c 494 s 307;
- 4 (22) RCW 39.10.410 and 2007 c 494 s 308;
- 5 (23) RCW 39.10.420 and 2013 c 222 s 18, 2013 c 186 s 1, 2012 c 102
6 s 1, 2009 c 75 s 7, 2007 c 494 s 401, & 2003 c 301 s 1;
- 7 (24) RCW 39.10.430 and 2007 c 494 s 402;
- 8 (25) RCW 39.10.440 and 2013 c 222 s 19 & 2007 c 494 s 403;
- 9 (26) RCW 39.10.450 and 2012 c 102 s 2 & 2007 c 494 s 404;
- 10 (27) RCW 39.10.460 and 2012 c 102 s 3 & 2007 c 494 s 405;
- 11 (28) RCW 39.10.470 and 2005 c 274 s 275 & 1994 c 132 s 10;
- 12 (29) RCW 39.10.480 and 1994 c 132 s 9;
- 13 (30) RCW 39.10.490 and 2013 c 222 s 20, 2007 c 494 s 501, & 2001 c
14 328 s 5;
- 15 (31) RCW 39.10.900 and 1994 c 132 s 13;
- 16 (32) RCW 39.10.901 and 1994 c 132 s 14;
- 17 (33) RCW 39.10.903 and 2007 c 494 s 510;
- 18 (34) RCW 39.10.904 and 2007 c 494 s 512; and
- 19 (35) RCW 39.10.905 and 2007 c 494 s 513.

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