

# SENATE BILL REPORT

## SHB 1295

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As Passed Senate, April 16, 2019

**Title:** An act relating to public works contracting procedures.

**Brief Description:** Concerning public works contracting procedures.

**Sponsors:** House Committee on Capital Budget (originally sponsored by Representative Tharinger).

**Brief History:** Passed House: 3/07/19, 96-1.

**Committee Activity:** State Government, Tribal Relations & Elections: 3/27/19, 3/29/19 [DP].

**Floor Activity:**

Passed Senate: 4/16/19, 48-0.

### Brief Summary of Bill

- Removes limitations on design-build projects between \$2 million and \$10 million.
- Modifies evaluation criteria and reporting requirements for design-build contracts.
- Makes job order contracting available to any public entity.
- Modifies job order contracting restrictions.
- Requires an apprenticeship utilization program for any contract over \$350,000 and exceeding 600 hours in a single trade.
- Modifies public disclosure exemptions for certain information.

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### SENATE COMMITTEE ON STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS

**Majority Report:** Do pass.

Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Zeiger, Ranking Member; Hasegawa and Takko.

**Staff:** Melissa Van Gorkom (786-7491)

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*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:** Capital Projects Advisory Review Board. 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. Public works contracts of a large dollar amount meeting certain criteria and 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), job order contracting (JOC), and general contractor/construction manager (GCCM). The authorization to use alternative public works procedures expires June 30, 2021.

Project Review Committee. The Project Review Committee (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. A public body using DB must provide the committee:

- reasonable budget constraints of at least 5 percent of the anticipated contract value;
- experience in management of comparable projects; and
- certain contract documents that include alternative dispute resolution procedures and require the contractor, subcontractors, and designers to submit project information required.

The use of DB procedures are generally limited to projects with a total project cost of \$10 million or more. The committee may review and approve a limited number of projects using the DB contracting procedure for projects that have a total project cost between \$2 million and \$10 million. The review committee must report annually to CPARB on these projects and make recommendations for further use.

Design-Build Contracting. DB is an alternative contracting method melding design and construction activities into a single contract. The public body contracts with a single firm to both design and construct the facility based on the needs identified by the agency. Contracts for DB services are awarded through a competitive process using public solicitations for proposals. Finalist proposals are evaluated solely on factors identified in the request for qualifications and proposal process.

Job Order Contracting. Under JOC, a contractor agrees to perform an indefinite quantity of public works jobs, defined by individual work orders, over a fixed period of time. A job order contractor must subcontract 90 percent of the work under the contract, and may self-perform 10 percent. JOCs may be executed for an initial contract term of two years, with an option to extend or renew the contract for an additional year, provided any extension or renewal is priced as provided in the original proposal and is mutually agreed upon by the public body and the job order contractor. A public entity may not have more than two JOCs in effect at any one time, except for the Department of Enterprise Services, which may have six contracts in effect.

The maximum total dollar amount awarded under a JOC may not exceed \$4 million per year for a maximum of three years, except for counties with a population of more than one million, which may award up to a maximum of \$6 million per year for a maximum of three years. Individual work orders are limited to no more than \$350,000. No more than two work

orders of \$350,000 may be issued by a public body in a 12-month period. The direct use of JOC procedures is authorized for a limited number of public entities.

Office of Minority and Women's Business Enterprises. The Office of Minority and Women's Business Enterprises (OMWBE) is the sole authority in Washington for certifying minority, women-owned, and socially and economically disadvantaged business enterprises. Certified business enterprises are listed in the OMWBE database. Cities, counties, state agencies, transportation, and educational institutions use the database to source small and diverse firms for potential contracting opportunities.

Public Works Apprenticeship Utilization Requirements. Contracts for public works estimated to cost \$1 million or more must require at least 15 percent of the labor hours be performed by apprentices enrolled in approved apprenticeship training programs. This requirement applies to most contracts awarded by the state, school districts, and state four-year higher education institutions. Awarding entities may adjust the apprentice utilization requirements on specific projects for certain reasons, such as if there is a lack of apprentices in a specific geographic area.

Public Records. Generally under the Public Records Act all proceedings, records, contracts, and other public records relating to alternative public works transactions are public records and available for public inspection and copying. However, trade secrets or other proprietary information submitted by a bidder, offeror, or contractor are not subject to public disclosure if the bidder, offeror, or contractor specifically states in writing why protection is necessary.

Proposals submitted by DB finalists in response to a competitive solicitation for projects using the DB contracting method are also exempt from public disclosure until either the public body notifies the highest scoring finalist for the bid or the selection process is terminated.

**Summary of Bill:** Committee. Requirements for committee review of projects between \$2 million and \$10 million are removed. Public bodies certified by the committee may use DB contracts for any project with cost over \$2 million.

In addition to other information required for certification by the committee, public bodies must submit contract documents that require the design builder to submit plans for inclusion of underutilized firms as subcontractors and suppliers, as allowed by law.

Design-Build Contracting. The request for qualifications must include the estimated contract value and intended use of the project. The evaluation factors for qualifications must include past performance utilization of OMWBE certified businesses, and the ability of the contractor to provide a performance and payment bond. Evaluation factors for finalists must include a management plan to meet time and budget requirements and one or more price-related factors. The signed contract must include reporting requirements for utilization of OMWBE certified businesses and veteran owned businesses.

Job Order Contracting. JOC is available to any public entity. Request for proposal evaluation factors must include past performance on approved subcontractor inclusion plans.

The restrictions for JOCs are amended to:

- exclude sales tax from the total amount allowed per year;
- allow unused capacity to be transferred to the next year;
- increase the maximum amount for a work order from \$350,000 to \$500,000 excluding sales tax; and
- increase the number of contracts allowed by a public entity at any one time to three.

Bonding requirements for subcontractors are limited and apprenticeship utilization is required for any work order over \$350,000 with over 600 hours in a single trade.

Public Records. Exemptions from public disclosure include:

- financial information supplied for the purpose of qualifying to submit a bid or proposal for alternative public works contracting procedures; and
- all documents related to the DB contract award process until either the public body notifies the highest scoring finalist for the bid, or the selection process is terminated, except that a scoring summary of the evaluation factors may be provided upon the request of a proposer not selected as a finalist.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony:** PRO: CPARB worked on this legislation for about 5 years involving numerous stakeholders to improve contract flexibility. CPARB takes a thorough and disciplined approach to engaging stakeholders to fulfill our statutory obligation to propose changes to the Legislature regarding alternative public works issues. While Gordian was not an appointed member of the committee they were present at meetings and welcome to participate. Other groups have brought concerns to CPARB, and CPARB has worked with them to revise language. It is important that changes align with Washington law and some of the changes proposed do not align with Washington law or are better served to be part of best practices guidelines, rather than statute. Public owners support the bill as is currently drafted and would have some concerns regarding the proposed amendments. For example, the conflict of interest issues is an issue with almost any contract and this is currently handled through best practices and public owners need the flexibility to determine what they want to be in the price book cost, but the proposed inclusion of a coefficient would mandate a coefficient and limited public owners in that respect. These are not substantial flaws in the law that need to be fixed now. CPARB encourages you to move the bill forward as written and allow us to work with Gordian on proposed changes and come back to you with any potential changes when we come back for reauthorization.

OTHER: The bill is necessary to help local municipalities throughout the state navigate the design build process. Northwest Council of Carpenters is supportive of an amendment to hold contractors to their quoted bid as well as eliminate potential conflict of interest by

excluding any entity that assists in the development of a job order contract document from bidding or participating in the bid for the contract.

There are three areas for improvement within the legislation: (1) technical changes to cleanup terms and obsolete language, and provide missing definitions; (2) governance changes to insert language that requires a list of work under the work order and eliminating language that allows negotiation at the job order level, only allowing it at the time of the contract, and requiring that it be certified by someone other than the contractor; and (3) policy changes to adjust the bonding provisions to make it easier for small or disadvantaged businesses to participate in the contracting. Gordian did not participate in the development of this legislation but is willing to play a formal role on CPARB in the future to share learnings from around the country and benefit future legislative recommendations such as the amendments provided this year.

**Persons Testifying:** PRO: Representative Steve Tharinger, Prime Sponsor; Walter Schacht, Capital Projects Advisory Review Board; Rebecca Keith, CPARB.

OTHER: Cory Elliott, Northwest Council of Carpenters; Tom DiGangi, Gordian.

**Persons Signed In To Testify But Not Testifying:** No one.