

# SENATE BILL REPORT

## ESSB 5418

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As Amended by House, April 16, 2019

**Title:** An act relating to local government procurement modernization and efficiency.

**Brief Description:** Concerning local government procurement modernization and efficiency.

**Sponsors:** Senate Committee on Local Government (originally sponsored by Senators Takko, Zeiger and Liias).

**Brief History:**

**Committee Activity:** Local Government: 1/31/19, 2/19/19 [DPS, w/oRec].

**Floor Activity:**

Passed Senate: 3/08/19, 45-3.

Passed House: 4/16/19, 76-22.

### Brief Summary of Engrossed First Substitute Bill

- Allows counties of any population to create a purchasing department.
- Allows counties and water-sewer districts to procure public works with a unit priced contract.
- Increases the small works roster process and limited public works project cost thresholds.
- Requires a municipality soliciting competitive bids for public works to disclose all bids received if requested by a bidder.
- Changes the date by which a bidder must protest to within two business days of when a municipality discloses all bids received or, if no request is made, bid opening.
- Increases public works contract thresholds for public utility districts, second class cities and towns, first class cities, and fire protection districts.
- Allows a second class city or town to award certain competitive public works contracts to a bid within 5 percent of the lowest bid until July 2022.
- Requires a Capital Projects Advisory Review Board study of local government public works contracting processes by November 1, 2020.
- Expires all provisions in the act on March 31, 2021.

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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.*

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## SENATE COMMITTEE ON LOCAL GOVERNMENT

**Majority Report:** That Substitute Senate Bill No. 5418 be substituted therefor, and the substitute bill do pass.

Signed by Senators Takko, Chair; Salomon, Vice Chair; Short, Ranking Member; Lovelett.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Honeyford.

**Staff:** Bonnie Kim (786-7316)

**Background:** County–Contracts. Counties with a population of 400,000 or more may establish by resolution a purchasing department to enter into personal property leases on a competitive basis and purchase all supplies, materials, and equipment on a competitive basis, for all departments of the county. Counties must also generally contract on a competitive basis for public works except that regular county employees may perform public works of up to 10 percent of the public works construction budget.

Small Works Roster. State agencies and local governments may create a small works roster of contractors for certain work estimated to cost \$300,000 or less. Bids may be solicited from contractors on the appropriate small works roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder. However, if the estimated cost of the work is from \$150,000 to \$300,000, a state agency or local government that chooses to solicit bids from less than all the appropriate contractors on the appropriate small works roster must also notify the remaining contractors on the appropriate small works roster that quotations on the work are being sought. Notice may be given by newspaper, mail, or electronically.

Limited Public Works Projects. In lieu of the small works roster process, state agencies and local governments may award a contract for certain work, construction, alteration, repair, or improvement projects estimated to cost less than \$35,000 by soliciting bids from a minimum of three contractors from the appropriate small works roster and must award the contract to the lowest responsible bidder. After an award is made, the quotations must be open to public inspection and available by electronic request.

Public Works Contracts–Protests. Unless an exception applies, all municipalities must contract for the execution of public works after advertisement and competitive bid or by a contract awarded under the small works roster process. Generally, municipality means every city, county, town, port district, district, or other public agency authorized by law to require the execution of public work.

If a municipality receives a written protest from a bidder within two business days of a bid opening, the municipality may not execute a contract for the project with anyone other than the protesting bidder without first providing at least two full business days' written notice of the municipality's intent to execute a contract for the project.

Public Utility Districts. A public utility district (PUD) is a type of special purpose district authorized for the purpose of generating and distributing electricity, providing water and sewer services, and providing telecommunications services. PUDs are governed by a board of either three or five elected commissioners. PUDs are authorized to establish rates and charges for providing water and sewer services.

Public Utility Districts and Contracts. PUDs must contract for the following:

- any items of similar materials, equipment, or supplies estimated to cost more than \$15,000;
- any items of similar materials, equipment, or supplies estimated to cost more than \$7,500, if purchased within a single calendar month; and
- any work ordered by a district commission estimated to cost more than \$25,000.

Contracts are not required for work accepted as an industry practice under prudent utility management. Prudent utility management means performing work with regularly employed personnel utilizing material of a worth not exceeding \$150,000 in value without a contract. This limit does not include the value of individual items of equipment purchased or acquired and used as one unit of a project.

Unit price contractors must pay prevailing wages for all public works. Prevailing wages for all work performed pursuant to each work order must be the rates in effect at the time the individual work order is issued.

Water-Sewer Districts. Water-sewer districts provide water and sewer services to incorporated and unincorporated areas. District powers include the authority to purchase, construct, maintain, and supply waterworks to furnish water to inhabitants, and to develop and operate systems of sewers and drainage. Districts may also fix rates and charges for services, enter into contracts, levy taxes, and issue bonds. Generally, districts must solicit bids and award contracts for all work estimated to cost over \$50,000.

Second Class Cities or Towns and Public Works Contracts. A second class city or town may contract for public works without a competitive bidding process if:

- the estimated cost is \$65,000 or less and involves more than one craft or trade; or
- the estimated cost is \$40,000 or less and involves a single craft or trade or the public works is street signalization or street lighting.

All other public works contracts must be entered into following either a competitive bidding process or the small works roster process.

Lowest Responsible Bidder. State law requires local agencies to award public works contracts to a responsible bidder with the lowest responsive bid, otherwise referred to as the lowest responsible bidder. Responsive bids are bids submitted on time with all of the information the agency requested. Responsible bidders must meet a number of mandatory criteria:

- be a registered contractor;
- have a current Unified Business Identifier number;
- have industrial insurance and workers' compensation coverage;
- have an Employment Security Department account;

- have a state excise tax registration number;
- not be disqualified from bidding from a violation relating to registration, license, or wages;
- not have any apprenticeship violations, if applicable; and
- certify through a sworn statement that they are not a willful violator of labor laws within the past three years.

Responsible bidders must also choose to:

- have received training, provided by the Department of Labor and Industries (L&I) or by a provider whose curriculum has been approved by L&I, on the requirements related to public works and prevailing wages; or
- have completed three or more public works projects and maintained a valid business license in Washington for at least three years.

First Class Cities and Public Works Contracts. Generally, a first class city may have public works performed by contract following public notice and call for competitive bids. City employees may perform public works costing 10 percent or less of the city's public works construction budget. Any cost in excess of the allowable 10 percent is deducted from the otherwise permitted amount of public works that may be performed by public employees in the city's next budget period.

In addition to the percentage limitation, a first class city must contract for public works with a competitive bidding process if:

- the estimated cost is more than \$90,000 and involves more than one craft or trade; or
- the estimated cost is more than \$45,000 and involves a single craft or trade or the public works is street signalization or street lighting.

Fire Protection Districts. A fire protection district is a type of special purpose district created to provide fire prevention, fire suppression, and emergency medical services within a district's boundaries, which can include incorporated and unincorporated areas. A formal sealed bid procedure must be used for purchases and contracts for purchases made by the board of commissioners. Formal sealed bidding is not required for:

- the purchase of materials when such materials, equipment, or supplies have an estimated cost not exceeding \$10,000; however, whenever the estimated cost does not exceed \$50,000, the commissioners may by resolution use the alternative bidding process available for municipalities;
- contracting for work involving the construction or improvement of a fire station or other buildings where the estimated cost does not exceed \$20,000;
- contracts using the small works roster process; and
- any contract for purchases or public work which are exempt from competitive bidding requirements.

Alternative Bidding Process. Municipalities are offered an alternative process for competitive bidding of purchases through a vendor list process. The process may be used only by those municipalities having statutory authorization. Statutes governing which municipalities may use the process must include the maximum dollar thresholds for contracts awarded under the process. Contracts awarded using this process do not need to be advertised.

**Summary of Engrossed First Substitute Bill: County-Contracts.** All counties may establish by resolution a purchasing department to enter into personal property leases on a competitive basis and purchase all supplies, materials, and equipment on a competitive basis, for all departments of the county.

**Unit Priced Contracts-Counties and Water-Sewer Districts.** A county and a water-sewer district may procure public works with a unit priced contract to complete anticipated types of work based on hourly rates or unit pricing for one or more categories of work or trades. "Unit priced contract" is defined as a competitively bid contract in which public works are anticipated on a recurring basis to meet the business or operational needs of a county or a water-sewer district, under which the contractor agrees to a fixed period indefinite quantity delivery of work, at a defined unit price, for each category of work. Although an initial contract term may not exceed three years, districts may extend or renew a contract for one additional year.

Invitations for unit price bids must include the following information:

- estimated quantities of the anticipated types of work or trades; and
- how the county or a water-sewer district will issue or release work assignments, work orders, or task authorizations for projects based on the hourly rates or unit prices bid by the contractor.

Whenever possible, a county or a water-sewer district must invite at least one proposal from a minority or woman contractor. Contracts must be awarded to the lowest responsible bidder. Unit price contractors must pay prevailing wages for all public works that would otherwise be subject to the requirements of chapter 39.12 RCW. Prevailing wages for all work must be the rates in effect at the beginning date for each contract year. Unit priced contracts must have prevailing wage rates updated annually.

**Small Works Roster.** State agencies and local governments may use the small works roster process for projects estimated to cost \$500,000 or less. Governments may choose to solicit bids from less than all the appropriate contracts on an appropriate small works roster for projects estimated to cost between \$150,000 and \$500,000.

**Limited Public Works Projects.** State agencies and local governments may award a contract for certain work, construction, alteration, repair, or improvement projects estimated to cost less than \$50,000 by soliciting bids from a minimum of three contractors from the appropriate small works roster.

**Public Works Contracts-Protests.** A municipality soliciting competitive bids for a public works project must provide copies of bids received if requested to do so. A bidder must now submit a written protest to a municipality soliciting bids within two business days of the municipality disclosing all bids received or, if no request is made, bid opening.

**Public Utility Districts.** Contract thresholds for when competitive bidding is required for PUDs are increased as follows:

- any items of similar materials, equipment, or supplies estimated to cost more than \$30,000;

- any items of similar materials, equipment, or supplies estimated to cost more than \$12,000, if purchased within a single calendar month; and
- any work ordered by a district commission estimated to cost more than \$50,000.

Prudent utility management means performing work with regularly employed personnel utilizing material of a worth not exceeding \$300,000 in value without a contract. This limit does not include the value of individual items of equipment, regardless of whether they are purchased or acquired and used as one unit of a project.

Equipment is defined to include a conductor, cabling, wire, pipe, or lines used for electrical, water, fiber optic, or telecommunications.

Prevailing wage rates must be those in effect at the beginning date for each contract year. Unit priced contracts must have prevailing wage rates updated annually. Intents and affidavits for prevailing wages paid must be submitted annually for all work completed within the previous 12-month period of the unit priced contract.

Second Class Cities or Towns—Lowest Responsible Bidder. Until July 28, 2022, as an alternative to awarding competitive public works contracts to the lowest responsible bidder, second-class cities may award the contract to a responsive bid that meets responsible bidder criteria and is within 5 percent of the lowest bid. Additionally, the bidder must have delivered at least one project of similar size and scope within the last five years for the city on time, within budget, and according to required specifications; and not have delivered a project to the city within the last five years that was late, over budget, or did not meet specifications.

Cities—Public Works Contracts. Contract thresholds for when competitive bidding is required for a first class city, second class city, or town are increased as follows:

- the estimated cost is \$116,155 or more and involves more than one craft or trade; or
- the estimated cost is \$75,500 or more and involves a single craft or trade or the public works is street signalization or street lighting.

Fire Protection Districts. Contract thresholds for when competitive bidding is required for a fire protection district are increased as follows:

- the estimated cost exceeds \$40,000;
- the estimated cost exceeds \$75,000, when using the alternative bidding process; and
- the estimated cost exceeds \$30,000, when contracting for work involving the construction or improvement of a fire station or other buildings.

Capital Projects Advisory Review Board Study. The Capital Projects Advisory Review Board must review the public works contracting processes for local governments, including the small works roster and limited public works processes, and report to the Governor and appropriate committees of the Legislature by November 1, 2020. The report must include the following:

- identification of the most common contracting procedures used by local governments;
- identification of the dollar amounts set for local government public works contracting processes;

- analysis of whether the dollar amounts comport with estimated project costs within the relevant industries;
- an analysis of the potential application of an inflation-based increaser to the dollar amounts;
- recommendations to increase uniformity and efficiency for local government public works contracting processes; and
- rates of and barriers to participation in the small works roster and limited public works contracting processes.

"Local governments" refers to all counties, cities, towns, other political subdivisions, and special purpose districts.

This Act expires on March 31, 2021.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**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 on Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: This is another bid limit threshold update and efficiency bill. This bill would provide counties the authority to use unit priced contracts for small construction projects. Cities and port districts already have this authority. We use these contracts for unexpected or unplanned construction needs. These contracts are fast by eliminating the need for separate bidding processes for projects. Raising bid limit thresholds will increase opportunities for smaller companies. Transit agencies would like to have authority to use unit priced contracts as well.

**Persons Testifying:** PRO: Senator Dean Takko, Prime Sponsor; Ken Guy, King County; Michael Shaw, Pierce County; Hanna Jones, Pierce Transit; Justin Leighton, Washington State Transit Association.

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

#### **EFFECT OF HOUSE AMENDMENT(S):**

- Adds provisions to amend public works contract thresholds proposed for PUDs, cities, and fire protection districts.
- Amends the definition of "lowest responsible bidder" as the person with the lowest bid. However, authorizes a city to award the contract to the second lowest bidder—whose bid is within 5 percent of the lowest bid—if the city finds in writing that the lowest bidder has delivered a project to the city within the last three years that was late, over budget, or not meeting specifications and has not shown how they would improve performance to be likely to meet project specifications.

- Requires a city or town that awards a project to a bidder under the new allowable lowest bidder criteria to report the number of bids awarded to certified minority or women contractors to the Department of Commerce on an annual basis.
- Amends the small works roster (SWR) cost thresholds and requires that after a bid is awarded for a SWR project, all bids received be open for public inspection and made available upon request.
- Authorizes state agencies and local governments to use the limited public works process to solicit and award SWR contracts to minibusinesses and microbusinesses.
- Allows agencies, for projects awarded under the SWR process, to waive certain retainage requirements and assume liability for the contractor's nonpayment of taxes and of laborers, subcontractors, mechanics, materialpersons, and suppliers.
- Requires an agency or local government to distribute opportunities for limited public works projects equitably.
- Requires irrigation boards, when calling for bid proposals, to advertise on the irrigation district's website or the county's website.
- Authorizes county public transportation authorities, public transportation benefit areas, and regional transit authorities to use unit priced contracts for public works.
- Authorizes irrigation district boards to use the SWR process for public works contracting processes and purchases.
- Provides that the Capital Projects Advisory Review Board's study is subject to appropriation and requires that its report include an analysis of the potential application of an inflation-based increaser taking regional factors into consideration.
- Removes a section that would have expired the entire act on March 31, 2021.