



DRAFT SMALL BUSINESS LEGISLATION - 2018

TO: INTERESTED PARTIES SUPPORTING SMALL BUSINESS

As Chair of the Washington State Capital Projects Advisory Review Board (CPARB) Small Business Task Force (SBTF), CEO of the Entrepreneurial Institute of Washington and as a small business inclusion agent for multiple mega capital improvement projects, I have personally interviewed and surveyed 100's of small businesses over the years. Upon review of multiple disparity studies and considering my personal experience as both as general contractor and a consultant, I have been collaborating with others with decades of experience supporting small and diverse firms across the United States.

The State of Washington executive offices and public agencies have communicated their commitment to small business inclusion, the draft language was *designed to empower all stakeholders with common interest in economic development and capacity building* of small and diverse businesses.

The primary purpose of this document is to share language that could be considered for future legislative efforts that will empower stakeholders to improve alternative works in a way that will create record small business participation.

The following recommendations span RCW Chapter 39 and address each of the contracting procedures. The purpose is to *increase inclusion, reduce barriers to inclusion, empower all stakeholders* to accelerate meeting inclusion objectives and to *create parity* with other related laws.

The below sections have twenty two (22) small changes that strengthen the existing language (total number of changes in each section are identified in "(#)").

The following pages (2-5) are the current RCWs titles with only the added recommendations highlighted in yellow.

QUESTIONS AND COMMENTS:

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SUMMARIZED RCW CHANGES ONLY

RCW 39.10.320 – In effort to increase inclusion. (1)

Design-build procedure—Project management and contracting requirements.

(f) Contract documents that require the contractor, subcontractors, and designers to submit inclusion plans for small business entities and disadvantaged business enterprises as subcontractors and suppliers for the project.

RCW 39.10.330 – In effort to empower agencies. (3)

Design-build contract award process.

Evaluation factors shall also include: (A) The proposer's past performance in utilization of small business entities; and (B) disadvantaged business enterprises.

The public body shall also consider a proposer's inclusion plan for small business entities and disadvantaged business enterprises as subcontractor and suppliers for the project

(8) The firm awarded the contract shall extend its performance and payment bonding coverage to all subcontractors at no cost to them, and as specified by the public body.

RCW 39.10.350 – In effort to increase inclusion. (1)

General contractor/construction manager procedure—Project management and contracting requirements.

(j) Contract documents that require the contractor, subcontractors, and designers to submit inclusion plans for small business entities and disadvantaged business enterprises as subcontractors and suppliers for the project.

RCW 39.10.360 – In effort to empower agencies. (2)

General contractor/construction manager procedure—Contract award process.

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

(7) The firm awarded the contract shall extend its performance and payment bonding coverage to all subcontractors at no cost to them, and as specified by the public body.



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RCW 39.10.370 – In effort to increase inclusion. (2)

General contractor/construction manager procedure—Maximum allowable construction cost.

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

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

RCW 39.10.380 – In effort to reduce barriers to inclusion. (1)

General contractor/construction manager procedure—Subcontract bidding procedure.

(3) All subcontractors who bid work over five hundred thousand dollars shall post a bid bond. All subcontractors who are awarded a contract over three five hundred thousand dollars shall provide a performance and payment bond for the contract amount. All other subcontractors shall provide a performance and payment bond if required by the general contractor/construction manager.

RCW 39.10.385 – In effort to reduce barriers to inclusion. (2)

General contractor/construction manager procedure—Alternative subcontractor selection process.

(3) All subcontractors who bid work over five hundred thousand dollars shall post a bid bond. All subcontractors who are awarded a contract over five hundred thousand dollars shall provide a performance and payment bond for the contract amount.

(e) The firm's inclusion plan for utilizing minority and women-owned businesses;

RCW 39.10.400 – In effort to increase inclusion. (1)

General contractor/construction manager procedure—Prebid determination of subcontractor eligibility.

(f) Ensure that the general contractor/construction manager's updated inclusion plan for small business entities, disadvantaged business entities, and any other disadvantaged or underutilized businesses as the public body may designate in the public solicitation of proposals, as subcontractors and suppliers for the project is a measure of the evaluation criteria for award.



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RCW 39.10.420 – In effort to empower agencies and reduce barriers to inclusion. (4) **Job order procedure—Which public bodies may use—Authorized use.**

(4) Public bodies shall ensure that the general contractor/construction manager's updated inclusion plan for small business entities, disadvantaged business entities, and any other disadvantaged or underutilized businesses as the public body may designate in the public solicitation of proposals, as subcontractors and suppliers for the project is a measure of the evaluation criteria for award.

RCW 39.10.430 – In effort to reduce barriers to inclusion. (3) **Job order procedure—Contract award process.**

(5) A public body shall also consider the firm's inclusion plan for small business entities and disadvantaged business enterprises, and the firm's past performance in the utilization of such firms as an evaluation factor.

(56)

~~(6) The requirements of RCW [39.30.060](#) do not apply to requests for proposals for job order contracts.~~

(7) The firm awarded the contract shall extend its performance and payment bonding coverage to all subcontractors at no cost to them, and as specified by the public body.

RCW 39.10.460 – In effort to empower the public agency. (1) **Job order procedure—Required information to board.**

(5) A list of subcontractors certified by the OMWBE hired under each work order and amounts paid to them; and

RCW 39.30.060 – In effort to reduce barriers to inclusion. (1) **Bids on public works—Identification, substitution of subcontractors.**

(32) All subcontractors who bid work over five hundred thousand dollars shall post a bid bond. All subcontractors who are awarded a contract over five hundred thousand dollars shall provide a performance and payment bond for the contract amount.

(23)



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The following pages (6-23) are the current RCWs with the added recommendations highlighted in **yellow**.

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RCW 39.10.320

Design-build procedure—Project management and contracting requirements.

(1) A public body utilizing the design-build contracting procedure shall provide:

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

(b) Staff or consultants with expertise and prior experience in the management of comparable projects;

(c) Contract documents that include alternative dispute resolution procedures to be attempted prior to the initiation of litigation;

(d) Submission of project information, as required by the board; and

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

(f) Contract documents that require the contractor, subcontractors, and designers to submit inclusion plans for small business entities and disadvantaged business enterprises as subcontractors and suppliers for the project.

(2) A public body utilizing the design-build contracting procedure may provide incentive payments to contractors for early completion, cost savings, or other goals if such payments are identified in the request for proposals.

[[2013 c 222 § 10](#); [2007 c 494 § 203](#); [1994 c 132 § 7](#). Formerly RCW [39.10.070](#).]

NOTES:

Sunset Act application: See note following chapter digest.

Effective date—2013 c 222: See note following RCW [39.10.210](#).

RCW 39.10.330

Design-build contract award process.

(1) Contracts for design-build services shall be awarded through a competitive process using public solicitation of proposals for design-build services. The public body shall publish at least once in a legal newspaper of general circulation published in, or as near as possible to, that part of the county in which the public work will be done, a notice of its request for qualifications from proposers for design-build services, and the availability and location of the request for proposal documents. The request for qualifications documents shall include:

(a) A general description of the project that provides sufficient information for proposers to submit qualifications;

(b) The reasons for using the design-build procedure;

(c) A description of the qualifications to be required of the proposer including, but not limited to, submission of the proposer's accident prevention program;

(d) A description of the process the public body will use to evaluate qualifications and finalists' proposals, including evaluation factors and the relative weight of factors and any specific forms to be used by the proposers;

(i) Evaluation factors for request for qualifications shall include, but not be limited to, technical qualifications, such as specialized experience and technical competence; capability to perform; past performance of the proposers' team, including the architect-engineer and construction members; and other



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appropriate factors. Evaluation factors shall also include: (A) The proposer's past performance in utilization of small business entities; and (B) disadvantaged business enterprises. Cost or price-related factors are not permitted in the request for qualifications phase;

(ii) Evaluation factors for finalists' proposals shall include, but not be limited to, the factors listed in (d)(i) of this subsection, as well as technical approach design concept; ability of professional personnel; past performance on similar projects; ability to meet time and budget requirements; ability to provide a performance and payment bond for the project; recent, current, and projected workloads of the firm; location; and cost or price-related factors that may include operating costs. The public body shall also consider a proposer's inclusion plan for small business entities and disadvantaged business enterprises as subcontractor and suppliers for the project. Alternatively, if the public body determines that all finalists will be capable of producing a design that adequately meets project requirements, the public body may award the contract to the firm that submits the responsive proposal with the lowest price;

(e) Protest procedures including time limits for filing a protest, which in no event may limit the time to file a protest to fewer than four business days from the date the proposer was notified of the selection decision;

(f) The form of the contract to be awarded;

(g) The honorarium to be paid to finalists submitting responsive proposals and who are not awarded a design-build contract;

(h) The schedule for the procurement process and the project; and

(i) Other information relevant to the project.

(2) The public body shall establish an evaluation committee to evaluate the responses to the request for qualifications based solely on the factors, weighting, and process identified in the request for qualifications and any addenda issued by the public body. Based on the evaluation committee's findings, the public body shall select not more than five responsive and responsible finalists to submit proposals. The public body may, in its sole discretion, reject all proposals and shall provide its reasons for rejection in writing to all proposers.

(3) The public body must notify all proposers of the finalists selected to move to the next phase of the selection process. The process may not proceed to the next phase until two business days after all proposers are notified of the committee's selection decision. At the request of a proposer not selected as a finalist, the public body must provide the requesting proposer with a scoring summary of the evaluation factors for its proposal. Proposers filing a protest on the selection of the finalists must file the protest in accordance with the published protest procedures. The selection process may not advance to the next phase of selection until two business days after the final protest decision is transmitted to the protestor.

(4) Upon selection of the finalists, the public body shall issue a request for proposals to the finalists, which shall provide the following information:

(a) A detailed description of the project including programmatic, performance, and technical requirements and specifications; functional and operational elements; building performance goals and validation requirements; minimum and maximum net and gross areas of any building; and, at the discretion of the public body, preliminary engineering and architectural drawings; and

(b) The target budget for the design-build portion of the project.



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(5) The public body shall establish an evaluation committee to evaluate the proposals submitted by the finalists. Design-build contracts shall be awarded using the procedures in (a) or (b) of this subsection. The public body must identify in the request for qualifications which procedure will be used.

(a) The finalists' proposals shall be evaluated and scored based solely on the factors, weighting, and process identified in the initial request for qualifications and in any addenda published by the public body. Public bodies may request best and final proposals from finalists. The public body may initiate negotiations with the firm submitting the highest scored proposal. If the public body is unable to execute a contract with the firm submitting the highest scored proposal, negotiations with that firm may be suspended or terminated and the public body may proceed to negotiate with the next highest scored firm. Public bodies shall continue in accordance with this procedure until a contract agreement is reached or the selection process is terminated.

(b) If the public body determines that all finalists are capable of producing a design that adequately meets project requirements, the public body may award the contract to the firm that submits the responsive proposal with the lowest price.

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

(7) The firm awarded the contract shall provide a performance and payment bond for the contracted amount.

(8) The firm awarded the contract shall extend its performance and payment bonding coverage to all subcontractors at no cost to them, and as specified by the public body.

(89) The public body shall provide appropriate honorarium payments to finalists submitting responsive proposals that are not awarded a design-build contract. Honorarium payments shall be sufficient to generate meaningful competition among potential proposers on design-build projects. In determining the amount of the honorarium, the public body shall consider the level of effort required to meet the selection criteria.

[[2014 c 19 § 1](#); [2013 c 222 § 11](#); [2009 c 75 § 5](#); [2007 c 494 § 204](#).]

NOTES:

Sunset Act application: See note following chapter digest.

Effective date—2013 c 222: See note following RCW [39.10.210](#).

RCW 39.10.350

General contractor/construction manager procedure—Project management and contracting requirements.

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

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

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

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



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

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

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

(g) Contract documents that: (i) Obligate the public owner to accept or reject a request for equitable adjustment, change order, or claim within a specified time period but no later than sixty calendar days after the receipt by the public body of related documentation; and (ii) provide that if the public owner does not respond in writing to a request for equitable adjustment, change order, or claim within the specified time period, the request is deemed denied;

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

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

(j) Contract documents that require the contractor, subcontractors, and designers to submit inclusion plans for small business entities and disadvantaged business enterprises as subcontractors and suppliers for the project.

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

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

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

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

[[2014 c 42 § 4](#); [2007 c 494 § 302](#).]

NOTES:

Sunset Act application: See note following chapter digest.

RCW 39.10.360

General contractor/construction manager procedure—Contract award process.



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

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

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

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

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

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

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

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

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

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

(f) The estimated maximum allowable construction cost; and

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

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

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

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

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

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

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

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

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

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

(4) A public body shall establish a committee to evaluate the proposals. After the committee has selected the most qualified finalists, at the time specified by the public body, these finalists shall submit final proposals,



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including sealed bids for the percent fee on the estimated maximum allowable construction cost and the fixed amount for the general conditions work specified in the request for proposal. The public body shall establish a time and place for the opening of sealed bids for the percent fee on the estimated maximum allowable construction cost and the fixed amount for the general conditions work specified in the request for proposal. At the time and place named, these bids must be publicly opened and read and the public body shall make all previous scoring available to the public. The public body shall select the firm submitting the highest scored final proposal using the evaluation factors and the relative weight of factors published in the public solicitation of proposals. A public body shall not evaluate or disqualify a proposal based on the terms of a collective bargaining agreement.

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

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

(7) The firm awarded the contract shall extend its performance and payment bonding coverage to all subcontractors at no cost to them, and as specified by the public body.

[[2014 c 42 § 5](#); [2013 c 222 § 13](#); [2009 c 75 § 6](#); [2007 c 494 § 303](#).]

NOTES:

Sunset Act application: See note following chapter digest.

Effective date—2013 c 222: See note following RCW [39.10.210](#).

RCW 39.10.370

General contractor/construction manager procedure—Maximum allowable construction cost.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

(f) If the public body is unable to negotiate to its reasonable satisfaction a component of this subsection (7), negotiations with the firm must be terminated and the public body shall negotiate with the next highest scored firm and continue until an agreement is reached or the process is terminated.

[[2014 c 42 § 6](#); [2007 c 494 § 304](#).]

NOTES:

Sunset Act application: See note following chapter digest.

RCW 39.10.380

General contractor/construction manager procedure—Subcontract bidding procedure.



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(1) All subcontract work and equipment and material purchases shall be competitively bid with public bid openings. Subcontract bid packages and equipment and materials purchases shall be awarded to the responsible bidder submitting the lowest responsive bid. In preparing subcontract bid packages, the general contractor/construction manager shall not be required to violate or waive terms of a collective bargaining agreement.

(2) All subcontract bid packages in which bidder eligibility was not determined in advance shall include the specific objective criteria that will be used by the general contractor/construction manager and the public body to evaluate bidder responsibility. If the lowest bidder submitting a responsive bid is determined by the general contractor/construction manager and the public body not to be responsible, the general contractor/construction manager and the public body must provide written documentation to that bidder explaining their intent to reject the bidder as not responsible and afford the bidder the opportunity to establish that it is a responsible bidder. Responsibility shall be determined in accordance with criteria listed in the bid documents. Protests concerning bidder responsibility determination by the general contractor/construction manager and the public body shall be in accordance with subsection (4) of this section.

(3) All subcontractors who bid work over five hundred thousand dollars shall post a bid bond. All subcontractors who are awarded a contract over three five hundred thousand dollars shall provide a performance and payment bond for the contract amount. All other subcontractors shall provide a performance and payment bond if required by the general contractor/construction manager.

(4) If the general contractor/construction manager receives a written protest from a subcontractor bidder or an equipment or material supplier, the general contractor/construction manager shall not execute a contract for the subcontract bid package or equipment or material purchase order with anyone other than the protesting bidder without first providing at least two full business days' written notice to all bidders of the intent to execute a contract for the subcontract bid package. The protesting bidder must submit written notice of its protest no later than two full business days following the bid opening. Intermediate Saturdays, Sundays, and legal holidays are not counted.

(5) A low bidder who claims error and fails to enter into a contract is prohibited from bidding on the same project if a second or subsequent call for bids is made for the project.

(6) The general contractor/construction manager may negotiate with the lowest responsible and responsive bidder to negotiate an adjustment to the lowest bid or proposal price based upon agreed changes to the contract plans and specifications under the following conditions:

(a) All responsive bids or proposal prices exceed the available funds;

(b) The apparent low responsive bid or proposal does not exceed the available funds by the greater of one hundred twenty-five thousand dollars or two percent for projects valued over ten million dollars; and

(c) The negotiated adjustment will bring the bid or proposal price within the amount of available funds.

(7) If the negotiation is unsuccessful, the subcontract work or equipment or material purchases must be rebid.

(8) The general contractor/construction manager must provide a written explanation if all bids are rejected.



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[[2013 c 222 § 14](#); [2007 c 494 § 305](#).]

NOTES:

Sunset Act application: See note following chapter digest.

Effective date—2013 c 222: See note following RCW [39.10.210](#).

CERTIFICATION OF ENROLLMENT | SECOND SUBSTITUTE HOUSE BILL 1506

Chapter 494, Laws of 2007 | 60th Legislature | 2007 Regular Session

ALTERNATIVE PUBLIC WORKS

EFFECTIVE DATE: 07/01/07 - Except section 104, which becomes effective 05/15/07; and section 508, which becomes effective 06/30/07. Passed by the House April 17, 2007.

Passed by the Senate April 5, 2007.

Approved by the Governor May 15, 2007.

Filed in Office of Secretary of State May 16, 2007.

Pg. 24 - NEW SECTION. Sec. 302. PROJECT MANAGEMENT AND CONTRACTING REQUIREMENTS.

CERTIFICATION OF ENROLLMENT | SUBSTITUTE HOUSE BILL 1466

Chapter 222, Laws of 2013 | 63rd Legislature | 2013 Regular Session

PUBLIC WORKS—ALTERNATIVE PUBLIC WORKS CONTRACTING PROCEDURE

EFFECTIVE DATE: 06/30/13 – Except for section 24, which is contingent.

Passed by the House April 23, 2013.

Passed by the Senate April 16, 2013.

Approved by the Governor May 14, 2013.

Filed in Office of Secretary of State May 14, 2013.

Pg. 20 - Sec. 14. RCW 39.10.380 and 2007 c 494 s 305 are each amended to 27 read as follows:

RCW 39.10.385

General contractor/construction manager procedure—Alternative subcontractor selection process.

As an alternative to the subcontractor selection process outlined in RCW [39.10.380](#), a general contractor/construction manager may, with the approval of the public body, select mechanical subcontractors, electrical subcontractors, or both, using the process outlined in this section. This alternative selection process may only be used when the anticipated value of the subcontract will exceed three million dollars. When using the alternative selection process, the general contractor/construction manager should select the subcontractor early in the life of the public works project.

(1) In order to use this alternative selection process, the general contractor/construction manager and the public body must determine that it is in the best interest of the public. In making this determination the general contractor/construction manager and the public body must:

(a) Publish a notice of intent to use this alternative selection process in a legal newspaper published in or as near as possible to that part of the county where the public work will be constructed. Notice must be published at least fourteen calendar days before conducting a public hearing. The notice must include the date, time, and location of the hearing; a statement justifying the basis and need for the alternative selection process; how interested parties may, prior to the hearing, obtain the evaluation criteria and applicable weight



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given to each criteria that will be used for evaluation; and protest procedures including time limits for filing a protest, which may in no event, limit the time to file a protest to fewer than four business days from the date the proposer was notified of the selection decision;

(b) Conduct a hearing and provide an opportunity for any interested party to submit written and verbal comments regarding the justification for using this selection process, the evaluation criteria, weights for each criteria, and protest procedures;

(c) After the public hearing, consider the written and verbal comments received and determine if using this alternative selection process is in the best interests of the public; and

(d) Issue a written final determination to all interested parties. All protests of the decision to use the alternative selection process must be in writing and submitted to the public body within seven calendar days of the final determination. Any modifications to the criteria, weights, and protest procedures based on comments received during the public hearing process must be included in the final determination.

(2) Contracts for the services of a subcontractor under this section must be awarded through a competitive process requiring a public solicitation of proposals. Notice of the public solicitation of proposals must be provided to the office of minority and women's business enterprises.

(3) All subcontractors who bid work over five hundred thousand dollars shall post a bid bond. All subcontractors who are awarded a contract over five hundred thousand dollars shall provide a performance and payment bond for the contract amount. The public solicitation of proposals must include:

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

(b) The reasons for using the alternative selection process;

(c) A description of the minimum qualifications required of the firm;

(d) A description of the process used to evaluate qualifications and proposals, including evaluation factors and the relative weight of factors;

(e) Protest procedures;

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

(g) The estimated maximum allowable subcontract cost; and

(h) The bid instructions to be used by the finalists.

(34) Evaluation factors for selection of the subcontractor must include, but not be limited to:

(a) Ability of the firm's professional personnel;

(b) The firm's past performance on similar projects;

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

(d) The scope of work the firm proposes to perform with its own forces and its ability to perform that work;

(e) The firm's inclusion plan for utilizing minority and women-owned businesses;

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

(g) The firm's capacity to successfully complete the project;

(h) The firm's approach to executing the project;

(i) The firm's approach to safety on the project;



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(j) The firm's safety history; and

(k) If the firm is selected as one of the most qualified finalists, the firm's fee and cost proposal.

(45) The general contractor/construction manager shall establish a committee to evaluate the proposals. At least one representative from the public body shall serve on the committee. Final proposals, including sealed bids for the percent fee on the estimated maximum allowable subcontract cost, and the fixed amount for the subcontract general conditions work specified in the request for proposal, will be requested from the most qualified firms.

(56) The general contractor/construction manager must notify all proposers of the most qualified firms that will move to the next phase of the selection process. The process may not proceed to the next phase until two business days after all proposers are notified of the committee's selection decision. At the request of a proposer, the general contractor/construction manager must provide the requesting proposer with a scoring summary of the evaluation factors for its proposal. Proposers filing a protest on the selection of the most qualified finalists must file the protest with the public body in accordance with the published protest procedures. The selection process may not advance to the next phase of selection until two business days after the final protest decision issued by the public body is transmitted to the protestor.

(67) The general contractor/construction manager and the public body shall select the firm submitting the highest scored final proposal using the evaluation factors and the relative weight of factors identified in the solicitation of proposals. The scoring of the nonprice factors must be made available at the opening of the fee and cost proposals. The general contractor/construction manager shall notify all proposers of the selection decision and make a selection summary of the final proposals, which shall be available to all proposers within two business days of such notification. The general contractor/construction manager may not evaluate or disqualify a proposal based on the terms of a collective bargaining agreement.

(78) If the public body receives a timely written protest from a "most qualified firm," the general contractor/construction manager may not execute a contract for the protested subcontract work until two business days after the final protest decision issued by the public body is transmitted to the protestor. The protestor must submit its protest in accordance with the published protest procedures.

(89) If the general contractor/construction manager is unable to negotiate a satisfactory maximum allowable subcontract cost with the firm selected deemed by public body and the general contractor/construction manager to be fair, reasonable, and within the available funds, negotiations with that firm must be formally terminated and the general contractor/construction manager may negotiate with the next highest scored firm until an agreement is reached or the process is terminated.

(910) With the approval of the public body, the general contractor/construction manager may contract with the selected firm to provide preconstruction services during the design phase that may include life-cycle cost design considerations, value engineering, scheduling, cost estimating, constructability, alternative construction options for cost savings, and sequencing of work; and to act as the mechanical or electrical subcontractor during the construction phase.

(1011) The maximum allowable subcontract cost must be used to establish a total subcontract cost for purposes of a performance and payment bond. Total subcontract cost means the fixed amount for the detailed specified general conditions work, the negotiated maximum allowable subcontract cost, and the



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percent fee on the negotiated maximum allowable subcontract cost. Maximum allowable subcontract cost means the maximum cost to complete the work specified for the subcontract, including the estimated cost of work to be performed by the subcontractor's own forces, a percentage for risk contingency, negotiated support services, and approved change orders. The maximum allowable subcontract cost must be negotiated between the general contractor/construction manager and the selected firm when the construction documents and specifications are at least ninety percent complete. Final agreement on the maximum allowable subcontract cost is subject to the approval of the public body.

~~(1112)~~ If the work of the mechanical contractor or electrical contractor is completed for less than the maximum allowable subcontract cost, any savings not otherwise negotiated as part of an incentive clause becomes part of the risk contingency included in the general contractor/construction manager's maximum allowable construction cost. If the work of the mechanical contractor or the electrical contractor is completed for more than the maximum allowable subcontract cost, the additional cost is the responsibility of that subcontractor. An independent audit, paid for by the public body, must be conducted to confirm the proper accrual of costs as outlined in the contract.

~~(1213)~~ A mechanical or electrical contractor selected under this section may perform work with its own forces. In the event it elects to subcontract some of its work, it must select a subcontractor utilizing the procedure outlined in RCW [39.10.380](#).

[[2013 c 222 § 15](#); [2010 c 163 § 1](#).]

NOTES:

Sunset Act application: See note following chapter digest.

Effective date—2013 c 222: See note following RCW [39.10.210](#).

RCW 39.10.400

General contractor/construction manager procedure—Prebid determination of subcontractor eligibility.

(1) If determination of subcontractor eligibility prior to seeking bids is in the best interest of the project and critical to the successful completion of a subcontract bid package, the general contractor/construction manager and the public body may determine subcontractor eligibility to bid. The general contractor/construction manager and the public body must:

(a) Conduct a hearing and provide an opportunity for any interested party to submit written and verbal comments regarding the justification for conducting bidder eligibility, the evaluation criteria, and weights for each criteria and subcriteria;

(b) Publish a notice of intent to evaluate and determine bidder eligibility in a legal newspaper published in or as near as possible to that part of the county where the public work will be constructed at least fourteen calendar days before conducting a public hearing;

(c) Ensure the public hearing notice includes the date, time, and location of the hearing, a statement justifying the basis and need for performing eligibility analysis before bid opening, and how interested parties may, at least five days before the hearing, obtain the specific eligibility criteria and applicable weights given to each criteria and subcriteria that will be used during evaluation;



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(d) After the public hearing, consider written and verbal comments received and determine if establishing bidder eligibility in advance of seeking bids is in the best interests of the project and critical to the successful completion of a subcontract bid package; and

(e) Issue a written final determination to all interested parties. All protests of the decision to establish bidder eligibility before issuing a subcontractor bid package must be filed with the superior court within seven calendar days of the final determination. Any modifications to the eligibility criteria and weights shall be based on comments received during the public hearing process and shall be included in the final determination.

(f) Ensure that the general contractor/construction manager's updated inclusion plan for small business entities, disadvantaged business entities, and any other disadvantaged or underutilized businesses as the public body may designate in the public solicitation of proposals, as subcontractors and suppliers for the project is a measure of the evaluation criteria for award.

(2) Determinations of bidder eligibility shall be in accordance with the evaluation criteria and weights for each criteria established in the final determination and shall be provided to interested persons upon request. Any potential bidder determined not to meet eligibility criteria must be afforded one opportunity to establish its eligibility. Protests concerning bidder eligibility determinations shall be in accordance with subsection (1) of this section.

[[2013 c 222 § 17](#); [2007 c 494 § 307](#).]

NOTES:

Sunset Act application: See note following chapter digest.

Effective date—2013 c 222: See note following RCW [39.10.210](#).

RCW 39.10.410

General contractor/construction manager procedure—Subcontract agreements.

Subcontract agreements used by the general contractor/construction manager shall not:

(1) Delegate, restrict, or assign the general contractor/construction manager's implied duty not to hinder or delay the subcontractor. Nothing in this subsection (1) prohibits the general contractor/construction manager from requiring subcontractors not to hinder or delay the work of the general contractor/construction manager or other subcontractors and to hold subcontractors responsible for such damages;

(2) Delegate, restrict, or assign the general contractor/construction manager's authority to resolve subcontractor conflicts. The general contractor/construction manager may delegate or assign coordination of specific elements of the work, including: (a) The coordination of shop drawings among subcontractors; (b) the coordination among subcontractors in ceiling spaces and mechanical rooms; and (c) the coordination of a subcontractor's lower tier subcontractors. Nothing in this subsection prohibits the general contractor/construction manager from imposing a duty on its subcontractors to cooperate with the general contractor/construction manager and other subcontractors in the coordination of the work;

(3) Restrict the subcontractor's right to damages for changes to the construction schedule or work to the extent that the delay or disruption is caused by the general contractor/construction manager or entities acting for it. The general contractor/construction manager may require the subcontractor to provide notice that rescheduling or resequencing will result in delays or additional costs;



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(4) Require the subcontractor to bear the cost of trade damage repair except to the extent the subcontractor is responsible for the damage. Nothing in this subsection (4) precludes the general contractor/construction manager from requiring the subcontractor to take reasonable steps to protect the subcontractor's work from trade damage; or

(5) Require the subcontractor to execute progress payment applications that waive claims for additional time or compensation or bond or retainage rights as a condition of receipt of progress payment, except to the extent the subcontractor has received or will receive payment. Nothing in this section precludes the general contractor/construction manager from requiring the subcontractor to provide notice of claims for additional time or compensation as a condition precedent to right of recovery or to execute a full and final release, including a waiver of bond and retainage rights, as a condition of final payment.

[[2007 c 494 § 308.](#)]

NOTES:

Sunset Act application: See note following chapter digest.

RCW 39.10.420

Job order procedure—Which public bodies may use—Authorized use.

(1) The following public bodies of the state of Washington are authorized to award job order contracts and use the job order contracting procedure:

- (a) The department of enterprise services;
- (b) The state universities, regional universities, and The Evergreen State College;
- (c) Sound transit (central Puget Sound regional transit authority);
- (d) Every city with a population greater than seventy thousand and any public authority chartered by such city under RCW [35.21.730](#) through [35.21.755](#);
- (e) Every county with a population greater than four hundred fifty thousand;
- (f) Every port district with total revenues greater than fifteen million dollars per year;
- (g) Every public utility district with revenues from energy sales greater than twenty-three million dollars per year;
- (h) Every school district;
- (i) The state ferry system;
- (j) The Washington state department of transportation, for the administration of building improvement, replacement, and renovation projects only;
- (k) Every public hospital district with total revenues greater than fifteen million dollars per year; and
- (l) Every public transportation benefit area authority as defined under RCW [36.57A.010](#).

(2)(a) The department of enterprise services may issue job order contract work orders for Washington state parks department projects and public hospital districts.

(b) The department of enterprise services, the University of Washington, and Washington State University may issue job order contract work orders for the state regional universities and The Evergreen State College.

(3) Public bodies may use a job order contract for public works projects when a determination is made that the use of job order contracts will benefit the public by providing an effective means of reducing the total lead-time and cost for the construction of public works projects for repair and renovation required at public



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facilities through the use of unit price books and work orders by eliminating time-consuming, costly aspects of the traditional public works process, which require separate contracting actions for each small project.

(4) Public bodies shall ensure that the general contractor/construction manager's updated inclusion plan for small business entities, disadvantaged business entities, and any other disadvantaged or underutilized businesses as the public body may designate in the public solicitation of proposals, as subcontractors and suppliers for the project is a measure of the evaluation criteria for award.

[[2017 c 136 § 1](#); [2016 c 52 § 1](#). Prior: [2013 c 222 § 18](#); [2013 c 186 § 1](#); [2012 c 102 § 1](#); [2009 c 75 § 7](#); [2007 c 494 § 401](#); [2003 c 301 § 1](#). Formerly RCW [39.10.130](#).]

NOTES:

Sunset Act application: See note following chapter digest.

Effective date—2013 c 222: See note following RCW [39.10.210](#).

RCW 39.10.430

Job order procedure—Contract award process.

(1) Job order contracts shall be awarded through a competitive process using public requests for proposals.

(2) The public body shall make an effort to solicit proposals from certified minority or certified woman-owned contractors to the extent permitted by the Washington state civil rights act, RCW [49.60.400](#).

(3) The public body shall publish, at least once in a statewide publication and legal newspaper of general circulation published in every county in which the public works project is anticipated, a request for proposals for job order contracts and the availability and location of the request for proposal documents. The public body shall ensure that the request for proposal documents at a minimum includes:

(a) A detailed description of the scope of the job order contract including performance, technical requirements and specifications, functional and operational elements, minimum and maximum work order amounts, duration of the contract, and options to extend the job order contract;

(b) The reasons for using job order contracts;

(c) A description of the qualifications required of the proposer;

(d) The identity of the specific unit price book to be used;

(e) The minimum contracted amount committed to the selected job order contractor;

(f) A description of the process the public body will use to evaluate qualifications and proposals, including evaluation factors and the relative weight of factors. The public body shall ensure that evaluation factors include, but are not limited to, proposal price and the ability of the proposer to perform the job order contract. In evaluating the ability of the proposer to perform the job order contract, the public body may consider: The ability of the professional personnel who will work on the job order contract; past performance on similar contracts; ability to meet time and budget requirements; ability to provide a performance and payment bond for the job order contract; recent, current, and projected workloads of the proposer; location; and the concept of the proposal;

(g) The form of the contract to be awarded;

(h) The method for pricing renewals of or extensions to the job order contract;

(i) A notice that the proposals are subject to RCW [39.10.470](#); and



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(j) Other information relevant to the project.

(4) A public body shall establish a committee to evaluate the proposals. After the committee has selected the most qualified finalists, the finalists shall submit final proposals, including sealed bids based upon the identified unit price book. Such bids may be in the form of coefficient markups from listed price book costs. The public body shall award the contract to the firm submitting the highest scored final proposal using the evaluation factors and the relative weight of factors published in the public request for proposals and will notify the board of the award of the contract.

(5) A public body shall also consider the firm's inclusion plan for small business entities and disadvantaged business enterprises, and the firm's past performance in the utilization of such firms as an evaluation factor.

(56) The public body shall provide a protest period of at least ten business days following the day of the announcement of the apparent successful proposal to allow a protester to file a detailed statement of the grounds of the protest. The public body shall promptly make a determination on the merits of the protest and provide to all proposers a written decision of denial or acceptance of the protest. The public body shall not execute the contract until two business days following the public body's decision on the protest.

~~(6) The requirements of RCW [39.30.060](#) do not apply to requests for proposals for job order contracts.~~

(7) The firm awarded the contract shall extend its performance and payment bonding coverage to all subcontractors at no cost to them, and as specified by the public body.

[[2007 c 494 § 402.](#)]

NOTES:

Sunset Act application: See note following chapter digest.

RCW 39.10.460

Job order procedure—Required information to board.

Each year, a public body shall provide to the board the following information for each job order contract for the period July 1st through June 30th:

(1) A list of work orders issued;

(2) The cost of each work order;

(3) A list of subcontractors hired under each work order;

(4) If requested by the board, a copy of the intent to pay prevailing wage and the affidavit of wages paid for each work order subcontract; ~~and~~

(5) A list of subcontractors certified by the OMWBE hired under each work order and amounts paid to them; and

(56) Any other information requested by the board.

[[2012 c 102 § 3](#); [2007 c 494 § 405.](#)]

NOTES:

Sunset Act application: See note following chapter digest.

RCW 39.30.060

Bids on public works—Identification, substitution of subcontractors.

(1) Every invitation to bid on a prime contract that is expected to cost one million dollars or more for the construction, alteration, or repair of any public building or public work of the state or a state agency or



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municipality as defined under RCW 39.04.010 or an institution of higher education as defined under RCW 28B.10.016 shall require each prime contract bidder to submit as part of the bid, or within one hour after the published bid submittal time, the names of the subcontractors with whom the bidder, if awarded the contract, will subcontract for performance of the work of: HVAC (heating, ventilation, and air conditioning); plumbing as described in chapter 18.106 RCW; and electrical as described in chapter 19.28 RCW, or to name itself for the work. The prime contract bidder shall not list more than one subcontractor for each category of work identified, unless subcontractors vary with bid alternates, in which case the prime contract bidder must indicate which subcontractor will be used for which alternate. Failure of the prime contract bidder to submit as part of the bid the names of such subcontractors or to name itself to perform such work or the naming of two or more subcontractors to perform the same work shall render the prime contract bidder's bid nonresponsive and, therefore, void.

(32) All subcontractors who bid work over five hundred thousand dollars shall post a bid bond. All subcontractors who are awarded a contract over five hundred thousand dollars shall provide a performance and payment bond for the contract amount.

(23) Substitution of a listed subcontractor in furtherance of bid shopping or bid peddling before or after the award of the prime contract is prohibited and the originally listed subcontractor is entitled to recover monetary damages from the prime contract bidder who executed a contract with the public entity and the substituted subcontractor but not from the public entity inviting the bid. It is the original subcontractor's burden to prove by a preponderance of the evidence that bid shopping or bid peddling occurred. Substitution of a listed subcontractor may be made by the prime contractor for the following reasons:

- (a) Refusal of the listed subcontractor to sign a contract with the prime contractor;
- (b) Bankruptcy or insolvency of the listed subcontractor;
- (c) Inability of the listed subcontractor to perform the requirements of the proposed contract or the project;
- (d) Inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract; or
- (e) The listed subcontractor is barred from participating in the project as a result of a court order or summary judgment.

(3) The requirement of this section to name the prime contract bidder's proposed HVAC, plumbing, and electrical subcontractors applies only to proposed HVAC, plumbing, and electrical subcontractors who will contract directly with the prime contract bidder submitting the bid to the public entity.

(4) This section does not apply to job order contract requests for proposals under *RCW 39.10.130 [2003 c 301 § 5; 2002 c 163 § 2; 1999 c 109 § 1; 1995 c 94 § 1; 1994 c 91 § 1; 1993 c 378 § 1.]

NOTES:

***Reviser's note:** RCW 39.10.130 was recodified as RCW 39.10.420 pursuant to 2007 c 494 § 511, effective July 1, 2007.

Intent—2002 c 163: "This act is intended to discourage bid shopping and bid peddling on Washington state public building and works projects." [2002 c 163 § 1.]



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Application—1994 c 91: "This act applies prospectively only and not retroactively. It applies only to invitations to bid issued on or after June 9, 1994." [1994 c 91 § 2.]

Application—1993 c 378: "This act applies prospectively only and not retroactively. It applies only to invitations to bid issued on or after July 25, 1993." [1993 c 378 § 2.]