

MEMORANDUM

TO: CPARB
FROM: Various Stakeholders
DATE: December 4, 2018
SUBJECT: Proposed Revision to RCW 39.04.105

Summary of Proposal

RCW 39.04.105 provides the method by which an interested party, or bidding contractor, in a competitive bidding process can challenge the award or proposed public works contract or challenge the terms of the solicitation for such contract. This statute serves as a check on the competitive bidding, public works procurement process to ensure that the rules of procurement are fair and followed and that the public entity acts properly in its selection of the successful low bidder.

The proposal is to modify the current language of RCW 39.04.105 to provide: (1) that a public entity may not execute a contract for the first two business days following bid opening to allow time for bidders to request copies of the other bids submitted to the public entity; and (2) that a public entity may not execute a contract with the selected bidder until two business days following delivery of the other bids to the bidders if requested by a bidder. A copy of the current statute with all of the proposed language shown in redline form is attached to this memo as **Attachment A**.

Who Supports the Proposal?

This proposal is currently supported by the National Utility Contractor's Association of Washington ("NUCA").

Why is this Proposal Necessary?

This proposal is necessary to clarify RCW 39.04.105's purpose, which is to grant bidders the right to protest the solicitation or bidder selection prior to execution of a contract. Without a mandatory protest period, public entities could execute contracts immediately, essentially rendering a bidder's RCW 39.04.105 right to protest meaningless. RCW 39.04.105 makes it mandatory that a municipality provide two days' notice of intent to execute a contract when a bidder protests within two days of the bid opening. The statute does not state that all bid protests must be filed within two days of a bid opening. However, some public owners wrongfully use the statute as a sword to create an artificial two-day deadline for submission of a bid protest. Neither the plain language of the statute nor the legislative intent support the "two-day bid protest deadline" flawed interpretation of the statute.

A public owner recently rejected a bid protest based on the flawed two-day deadline theory under particularly egregious circumstances. The contractor who was considering a bid protest contacted

the public owner and asked for the bid results and tabs on Friday morning, April 7, 2017, **the first business day after the job bid on April 6, 2017**. The purpose of requesting the bids and the bid tabs was to confirm that there was a basis to protest the low bid. Bids and bid tabs are provided immediately upon request by some public owners but not others. The contractor received no response to its day after the bid opening request for information.

The contractor again contacted the public owner on Monday, April 10, 2017, and received the following response: “The bid tabulation is being prepared by [the project engineer]and they have not provided it to us yet. I should have it today and will forward as soon as I receive it.”

After not receiving the information when promised on April 10, 2017, the contractor, for a third time, emailed the public owner trying to obtain the requested information on the morning of Tuesday, April 11, 2017. The information was provided later that day, and the contractor filed its bid protest that same day, i.e. even though the documents were requested on April 7, 2017, they were first provided on April 11 – the same day the protest was filed.

The public owner rejected the bid protest two weeks later, claiming it was not submitted within two days of the April 6, 2017 bid opening and therefore late. The public owner relied on RCW 39.04.105 arriving at its decision. The public owner ignored the fact that the bidder asked for the information the day after the bid opening but did not receive it until five days later. In effect, the public owner waited until after the false two-day deadline to provide the necessary information, and then rejected the protest as late because of its own late production of the requested documents.

Public owners are using the language of the statute to gain an unfair advantage, and it needs to be amended to protect both taxpayers and bidders.