

**RCW 39.10 STATUTE – PROVISIONS RELEVANT TO THE DESIGN-BUILD METHOD****RCW 39.10.250****Project review committee—Duties.**

The committee shall:

- (1) Certify, or renew certification for, public bodies to use design-build or general contractor/construction manager contracting procedures, or both;
- (2) Review and approve the use of the design-build or general contractor/construction manager contracting procedures on a project by project basis for public bodies that are not certified under RCW [39.10.270](#);
- ~~(3) Review and approve not more than fifteen projects using the design-build contracting procedure by noncertified public bodies for projects that have a total project cost between two million and ten million dollars. Projects must meet the criteria in RCW [39.10.300\(1\)](#). Where possible, the committee shall approve projects among multiple public bodies. At least annually, the committee shall report to the board regarding the committee's review procedure of these projects and its recommendations for further use; and~~ [MOU1]
- (43) Review and approve not more than two design-build demonstration projects that include procurement of operations and maintenance services for a period longer than three years.

**RCW 39.10.270****Project review committee—Certification of public bodies.**

- (1) A public body may apply for certification to use the design-build or general contractor/construction manager contracting procedure, or both. Once certified, a public body may use the contracting procedure for which it is certified on individual projects without seeking committee approval for a period of three years. ~~Public bodies certified to use the design-build procedure are limited to no more than five projects with a total project cost between two and ten million dollars during the certification period.~~ [MOU2] A public body seeking certification must submit to the committee an application in a format and manner as prescribed by the committee. The application must include a description of the public body's qualifications, its capital plan during the certification period, and its intended use of alternative contracting procedures.
- (2) A public body seeking certification for the design-build procedure must demonstrate successful management of at least one design-build project within the previous five years. A public body seeking certification for the general contractor/construction manager procedure must demonstrate successful management of at least one general contractor/construction manager project within the previous five years.
- (3) To certify a public body, the committee shall determine that the public body:
  - (a) Has the necessary experience and qualifications to determine which projects are appropriate for using alternative contracting procedures;

- (b) Has the necessary experience and qualifications to carry out the alternative contracting procedure including, but not limited to: (i) Project delivery knowledge and experience; (ii) personnel with appropriate construction experience; (iii) a management plan and rationale for its alternative public works projects; (iv) demonstrated success in managing public works projects; (v) the ability to properly manage its capital facilities plan including, but not limited to, appropriate project planning and budgeting experience; and (vi) the ability to meet requirements of this chapter; and
        - (c) Has resolved any audit findings on previous public works projects in a manner satisfactory to the committee.
- (4) The committee shall, if practicable, make its determination at the public meeting during which an application for certification is reviewed. Public comments must be considered before a determination is made. Within ten business days of the public meeting, the committee shall provide a written determination to the public body, and make its determination available to the public on the committee's web site.
- (5) The committee may revoke any public body's certification upon a finding, after a public hearing, that its use of design-build or general contractor/construction manager contracting procedures no longer serves the public interest.
- (6) The committee may renew the certification of a public body for additional three-year periods. The public body must submit an application for recertification at least three months before the initial certification expires. The committee may accept late applications, if administratively feasible, to avoid expiration of certification on a case-by-case basis. The application shall include updated information on the public body's experience and current staffing with the procedure it is applying to renew, and any other information requested in advance by the committee. The committee must review the application for recertification at a meeting held before expiration of the applicant's initial certification period. A public body must reapply for certification under the process described in subsection (1) of this section once the period of recertification expires.
- (7) Certified public bodies must submit project data information as required in RCW [39.10.320](#) and [39.10.350](#).

#### **RCW 39.10.280**

##### **Project review committee—Project approval process.**

- (1) A public body not certified under RCW [39.10.270](#) must apply for approval from the committee to use the design-build or general contractor/construction manager contracting procedure on a project. A public body seeking approval must submit to the committee an application in a format and manner as prescribed by the committee. The application must include a description of the public body's qualifications, a description of the project, the public body's intended use of alternative contracting procedures, and, if applicable, a declaration that the public body has elected to procure the project as a heavy civil construction project.
- (2) To approve a proposed project, the committee shall determine that:

- (a) The alternative contracting procedure will provide a substantial fiscal benefit or the use of the traditional method of awarding contracts in lump sum to the low responsive bidder is not practical for meeting desired quality standards or delivery schedules;
  - (b) The proposed project meets the requirements for using the alternative contracting procedure as described in RCW [39.10.300](#) or [39.10.340](#);
  - (c) The public body has the necessary experience or qualified team to carry out the alternative contracting procedure including, but not limited to: (i) Project delivery knowledge and experience; (ii) sufficient personnel with construction experience to administer the contract; (iii) a written management plan that shows clear and logical lines of authority; (iv) the necessary and appropriate funding and time to properly manage the job and complete the project; (v) continuity of project management team, including personnel with experience managing projects of similar scope and size to the project being proposed; and (vi) necessary and appropriate **construction project [MOU3]** budget;
  - (d) For design-build projects, public body personnel or consultants are knowledgeable in the design-build process and are able to oversee and administer the contract; and
  - (e) The public body has resolved any audit findings related to previous public works projects in a manner satisfactory to the committee.
- (3) The committee shall, if practicable, make its determination at the public meeting during which a submittal is reviewed. Public comments must be considered before a determination is made.
- (4) Within ten business days after the public meeting, the committee shall provide a written determination to the public body, and make its determination available to the public on the committee's web site. If the committee fails to make a written determination within ten business days of the public meeting, the request of the public body to use the alternative contracting procedure on the requested project shall be deemed approved.
- (5) Failure of the committee to meet within sixty calendar days of a public body's application to use an alternative contracting procedure on a project shall be deemed an approval of the application.

### **39.10.300**

#### **Design-build procedure—Uses.**

- (1) Subject to the requirements in RCW 39.10.250, 39.10.270, or 39.10.280, public bodies may utilize the design-build procedure for public works projects in which the total project cost is over **twoer [MOU4]** million dollars and where:
- (a) The construction activities are highly specialized and a design-build approach is critical in developing the construction methodology; or
  - (b) The projects selected provide opportunity for greater innovation or efficiencies between the designer and the builder; or
  - (c) Significant savings in project delivery time would be realized.

- (2) Subject to the process in RCW 39.10.270 or 39.10.280, public bodies may use the design-build procedure for parking garages, regardless of cost.
- (3) The design-build procedure may be used for the construction or erection of portable facilities as defined in WAC 392-343-018, preengineered metal buildings, or not more than ten prefabricated modular buildings per installation site, regardless of cost and is not subject to approval by the committee.
- (4) Except for utility projects and approved demonstration projects, the design-build procedure may not be used to procure operations and maintenance services for a period longer than three years. State agency projects that propose to use the design-build-operate-maintain procedure shall submit cost estimates for the construction portion of the project consistent with the office of financial management's capital budget requirements. Operations and maintenance costs must be shown separately and must not be included as part of the capital budget request.
- ~~(5) Subject to the process in RCW 39.10.280, public bodies may use the design-build procedure for public works projects in which the total project cost is between two million and ten million dollars and that meet one of the criteria in subsection (1)(a), (b), or (c) of this section. [MOU5]~~
- (65)** Subject to the process in RCW 39.10.280, a public body may seek committee approval for a design-build demonstration project that includes procurement of operations and maintenance services for a period longer than three years.

**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;[MOU6]
  - (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.
- (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.

**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 appropriate factors. Evaluation factors may also include: (A) The proposer's past performance in utilization of small business entities; and (B) disadvantaged business enterprises.[MOU7]

**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 [MOU8]; ability of professional personnel; past performance on similar projects; ability to meet time and budget requirements; [MOU9]ability to provide a performance and payment bond for the project [MOU10]; recent, current, and projected workloads of the firm; location; [MOU11]and cost or price-related factors that may include operating costs [MOU12]. The public body may also consider a proposer's outreach plan to include small business entities and disadvantaged business enterprises as subcontractor and suppliers for the project. [MOU13]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; [MOU14]**
- (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 [MOU15] 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 [MOU16]
- (b) The target budget for the design-build portion of the project. [MOU17]
- (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. [MOU18] 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. [MOU19]
- (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 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. [MOU20]

### **39.10.470**

**Public inspection of certain records—Protection of trade secrets—Protection of proposals submitted by design-build finalists.**

- (1) Except as provided in subsections (2) and (3) of this section, all proceedings, records, contracts, and other public records relating to alternative public works transactions under this chapter shall be open to the inspection of any interested person, firm, or corporation in accordance with chapter 42.56 RCW.**
- (2) Trade secrets, as defined in RCW 19.108.010, or other proprietary information submitted by a bidder, offeror, or contractor in connection with an alternative public works transaction under this chapter shall not be subject to chapter 42.56 RCW if the bidder, offeror, or contractor specifically states in writing the reasons why protection is necessary, and identifies the data or materials to be protected.**
- (3) Proposals submitted by design-build finalists are exempt from disclosure until the notification of the highest scoring finalist is made in accordance with RCW 39.10.330(5) or the selection process is terminated.**

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