

The Bidding Book

**for Washington Cities
and Towns**

The Bidding Book

**for Washington Cities
and Towns**

Updates to our publications can be found on our web site at
<http://www.mrsc.org/publications/mrscpubs.aspx>.

Copyright © 2010 by the Municipal Research and Services Center of Washington. All rights reserved. Except as permitted under the Copyright Act of 1976, no part of this publication may be reproduced or distributed in any form or by any means or stored in a database or retrieval system without the prior written permission of the publisher; however, governmental entities in the state of Washington are granted permission to reproduce and distribute this publication for official use.

Municipal Research and Services Center
2601 Fourth Avenue, Suite 800
Seattle, WA 98121-1280
www.mrsc.org
mrsc@mrsc.org
206.625.1300



Foreword

This publication, *The Bidding Book for Washington Cities and Towns* is a revision of a publication originally produced in 1977 and last revised in 2006. It is designed to assist city officials in determining whether competitive bids are required for purchases or when contracting for public works.

Legal Consultant Paul Sullivan prepared this revision to *The Bidding Book* with significant assistance from consultants John Carpita and Robert Meinig. Special recognition is given to Michael Purdy, principal of the firm Michael E. Purdy Associates, for his assistance in the development of text and appendices on alternative bidding techniques.

Richard Yukubousky
Executive Director

Contents

- Introduction** **1**
 - Navigating this Publication 1
- The First Steps to Take** **3**
 - What Kind of Purchase or Project Is This, Anyway? 3
 - “Public Work” or “Ordinary Maintenance”? 3
 - Materials, Supplies, and Equipment Not Used in Connection with a
Public Work; Services 4
 - Cost of a Public Works Project or Purchase 5
 - Inclusion of Retail Sales and Use Tax 6
- Bid Limits That Differ by Class of City** **7**
 - First Class Cities 7
 - Public Works Bid Limits — The Traditional Interpretation 7
 - Public Works Projects Bidding Limits 7
 - First Class City Bid Laws — An Alternative View 8
 - What's the Background of this Law? 9
 - Which Interpretation of the Law Should Cities Follow? 10
 - Reporting and Notice Requirements 10
 - Women's and Minority Business Enterprise (WMBE) Requirements 10
 - Minor Exceptions 11
 - Materials, Supplies and Equipment 11
 - Services 12
 - Bid Limits for Second Class Cities, Towns, and Code Cities 12
 - Public Works 12
 - Materials, Supplies, and Equipment 13
 - Purchases by Use of Vendor Lists 13
 - Lease with an Option to Purchase 14
 - Services 14
 - The Single Unclassified, Territorial Charter City 15
- Exceptions to the Bidding Laws** **16**
 - Brand Name Bidding, Monopolies, Sole Source Contracting, and
“Special Market Conditions” 16
 - Brand Name Bidding 16
 - Monopolies and Sole Source Bidding 17
 - Special Market Conditions — What Are They? 18
 - Auctions 19
 - Emergencies 19
 - Neighborhood “Self-Help” Projects 20
 - State or County Construction or Repair of Streets 20
 - Pollution Control Facilities 21

Bid Laws That Apply to All Cities and Towns	23
Architectural and Engineering Services	23
“Bid Splitting” — Breaking a Public Works Project or Purchase of Equipment, Materials, or Supplies into Segments	25
Bidding Laws and Projects Done by Private Parties	25
Purchasing from Other Governments and on Other Governments' Contracts	27
Federal Government	27
Intergovernmental Purchases and Bidding	27
The Bidding Process	30
Advertising for Bids	30
Second Class Cities, Towns, and Code Cities	30
First Class Cities	30
Information to Include in the Advertisement	31
Questions Addressing Other Considerations	31
Bid and Performance Bonds	33
Second Class Cities, Towns, and Code Cities	33
First Class Cities	34
Performance Bonds for All Cities for All Public Works Contracts	34
The Bid Decision	34
Determining the Lowest Responsible Bidder	35
Accepting or Rejecting the Bid	37
Protest of Contract Award	38
Bidding Irregularities	39
Errors in Bid Procedures or in Complying with Specifications	39
Bid Amount Errors	39
Alternative Public Works Contracting Processes	42
Small Works Roster	42
Limited Public Works Process	43
Performance-Based Contracts for Energy Equipment	44
Job Order Contracting	44
Design Build Procedures	45
General Contractor/Construction Manager Procedures	46
Water Pollution Control Facilities	46
Other Bidding Issues	47
Change Orders	47
Conflict of Interest	48
Results of Violation of Bid Statutes	49
Appendix A	
Cost of Project or Purchase at Which Competitive Bids Are Required by Statute	
Appendix B	
Model Small Works Roster Resolution	
Appendix C	
A Sample Intergovernmental Cooperative Purchasing Agreement	
Appendix D	
Alternative Public Works Contracting Procedures	

Introduction

The purpose of competitive bidding is to provide a fair forum for those interested in bidding on public contracts and to help ensure that public contracts are performed satisfactorily and efficiently at the least cost to the public, while avoiding fraud and favoritism in their award.¹ This publication is intended to familiarize officials with: (1) competitive bidding requirements; (2) the recommended bidding procedures for the contracting of public works and improvements; and (3) public purchasing procedures. Public policy favors competitive bidding, and ambiguous statutes are generally construed in favor of requiring competitive bidding. However, competitive bidding procedures do not have to be followed unless they are required by statute, local charter provision, or local rule or ordinance. This publication deals only with the requirements imposed by the state statutes.

Navigating this Publication

Although relatively few, the statutes governing bidding are quite complicated. There are different “rules” for bidding public works; for purchasing materials, supplies, and equipment not used in connection with a public work; and for procuring architectural and engineering services. Also, city² classification and population determine what types of projects must be put out for bid, and the dollar threshold at which bidding is required. A number of exceptions and special situations exist, many of which apply to all cities, while some apply only to certain classes of cities. To use this publication, we suggest that you follow the steps below.

1. Read the section titled “What Kind of Project or Purchase Is This Anyway?” This will help you determine whether you are: (a) dealing with a public works project; (b) purchasing materials, supplies, or equipment unconnected with a public works project; or (c) obtaining a service.³ This initial determination is important, because the amount a city can spend without going out for bid

¹*Gostovich v. West Richland*, 75 Wn. 2d 583, 587 (1969).

²Throughout this publication, the word “city” is used rather than the phrase “city and town.” Unless otherwise noted, everything said about cities also applies to towns.

³Chapter 273, Laws of 1994, removed services from the bid requirements for second class cities, towns, and code cities with a population under 20,000. First class cities have never been required to put service contracts out for bid. Chapter 273, Laws of 1994, did not amend RCW 35.23.352(7), which requires that bids be called annually to select the official newspaper.

varies for the different categories of contracts. The statutes do not require that cities bid for any services, but they do require an advertising and negotiation process when obtaining architectural and engineering services.⁴

2. Next, read the section on “Costs of Projects or Purchases” so that you know what costs must be included if it turns out that your project or purchase is of a type that may have to go out to bid.
3. Then refer to the sections on bid limits.

If your city is a first class city, go to the section beginning on page 7 for information on the unique bid laws that apply to such cities.

Readers in second class cities, towns, and code cities will find the laws applying specifically to them discussed beginning on page 12.

4. Review the table of contents. There are additional bidding laws and exceptions to those laws that apply to every class of city. One might apply to your project or purchase. Special rules apply to purchasing from other governments.
5. The final section of this publication reviews the bidding process itself, including potential pitfalls.

⁴Chapter 39.80 RCW sets out the procedures for acquiring architectural and engineering services. See Contracting for Professional Services in Washington State, Information Bulletin No. 485 (Municipal Research and Services Center of Washington), April 1994.

The First Steps to Take

First, determine what category the project or purchase falls into: public work; maintenance; purchase of materials, equipment, or supplies unconnected with a public work; or service. Then, if the category is determined to be one where bidding may be necessary, the cost must be estimated.

What Kind of Purchase or Project Is This, Anyway?

“Public Work” or “Ordinary Maintenance”?

If the cost of the project exceeds a certain amount, a city **must** go out for bid on public works projects.⁵ RCW 39.04.010 defines the term “public work” as follows:

The term public work shall include all work, construction, alteration, repair or improvement **other than ordinary maintenance**, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.⁶ (Emphasis added.)

Note that this definition of public work includes construction and repair but excludes ordinary maintenance. But what is “ordinary maintenance”? The statutes provide no definition. However, WAC 296-127-010(7)(b)(iii), which defines “ordinary maintenance” in the context of prevailing wages, can be used to craft a definition that distinguishes ordinary maintenance from a public work for bidding purposes:

[Ordinary maintenance is] defined as work not performed by contract and that is performed on a regularly scheduled basis (e.g., daily, weekly, monthly, seasonally, semiannually, but not less frequently than once per year), to service, check, or replace items that are not broken; or work not performed by contract that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary.⁷ (Emphasis supplied.)

⁵But, see the section on “First Class City Bid Laws – An Alternative View,” at page 8.

⁶This definition is adopted for first class cities by RCW 35.22.620(1) and for code cities, second class cities, and towns by RCW 35.23.352(1).

⁷WAC 296-127-010(7)(b) lists situations under which prevailing wages do not have to be paid. The phrases “not performed by public contract” must be in the definition of “ordinary maintenance,” when prevailing wages are at issue because cities must always pay prevailing wages when they contract, as opposed to using their own workforce. See *City of Spokane v. Department of Labor and Industries*, 100 Wn. App. 805 (2000).

For example, replacing a deteriorating bridge or roof would amount to a repair, or perhaps new construction, but not maintenance. Such a project would be considered to be a public work.⁸ On the other hand, using existing city employees to rod or clean a sewer or clean a roof would involve maintenance and, therefore, would not be a public work. Consequently, this expenditure would not be subject to the public works bid statutes. However, if instead of using city employees to perform the work, the city contracts out for the repair, the repair work is likely deemed a public work, both for bidding and for prevailing wage purposes.⁹ Obviously, if the work does not qualify as “ordinary maintenance,” and it will be performed by contract, bids may be required, depending upon the estimated cost of the work.

Q&A

Is an electrical project “ordinary maintenance” or a “public work”?

It depends. If the project entails providing light bulbs, pump bearing lubrication, and other small maintenance items, then the project is probably ordinary maintenance. However, if items like pumps and motors are being replaced, this project is a public work and should be bid if the cost exceeds the bid limits.

Is sidewalk replacement ordinary maintenance?

Applying the above definition, almost certainly not. Although replacing sidewalks is part of a city’s ongoing maintenance program, it is not done annually. The asset is being replaced, rather than “maintained.”

Is replacement of a carpet ordinary maintenance?

No. A carpet is neither replaced annually nor is it used to maintain the asset, which in this case would be the subflooring, so it would not fall into the ordinary maintenance category.

Is tree trimming a public work?

Tree trimming would probably be considered ordinary maintenance, if performed by city workers. Although this activity may not take place annually, it is necessary either to prevent branches from falling on wires or to prevent damage to the trees in windstorms. This falls into the category of maintaining the asset.

Materials, Supplies, and Equipment Not Used in Connection with a Public Work; Services

At first glance, one would think there would be no trouble figuring out what purchases fall into the category of “materials, supplies, and equipment” not used in connection with a public work project or improvement. Stationery, rubber bands, RCWs, fire trucks, and copy machines come to mind. And, services should also be pretty easy to identify. But, as the following questions show, sometimes the situation is ambiguous.

⁸AGO, December 19, 1923 (Vol. 17. p. 175).

⁹See footnote 6, above.

Q&A

Is the purchase of computer software a purchase of supplies or a purchase of services?

It depends. If the software is "off-the-shelf" (or predominantly so), then it is a purchase of supplies. If the primary or sole cost is for consultant services to customize the program for the city, it is a purchase of services.

Is a new telephone system a public work or an equipment purchase?

Again, it depends. If the acquisition of the telephone system requires installation of cable, conduits, and other devices, it may fall within the definition of the term public work. If, however, the acquisition were merely of hardware, such as telephones, it would probably be considered the purchase of equipment.

Is the purchase of new parking meter heads an equipment purchase or a public work?

If the city were merely purchasing a number of parking meter heads, which will be stockpiled in a warehouse and used over a period of time to replace defective heads, it would be an equipment purchase. However, if the heads are being purchased in connection with a specific project and the heads would be installed within a short period of time, it probably is a public work. Seattle, for example, because it was having theft problems, replaced old parking meter heads citywide with "one-lock, one-key" heads.

Distinguishing between public works and materials, supplies and equipment not used in a public work is important, as different bidding requirements apply to each. Distinguishing between services and public works is important, as acquiring services does not require bids, whereas contracting for public works may.¹⁰

Cost of a Public Works Project or Purchase

Before applying the dollar bidding limits in the following sections, the total cost of each public works project or purchase must be determined. Determining the estimated cost of a project is a crucial first step, since the determination will dictate whether bids must be sought. Making an exact cost estimates would clearly be desirable, but, realistically, exactness is seldom possible. The person making the estimate should determine the fair and reasonable value of the work to be performed (or the purchase to be made), given the particular conditions that will be faced and the requirements of the proposed project or purchase.

The cost estimate should reflect the amount the city considers fair and reasonable and that it is willing to pay for the work or purchase contemplated. Several approaches can be used to make an estimate. The city can consider the actual cost of performance, considering the current cost of labor, equipment, and materials. Obviously, use of this approach requires the estimator have a good working knowledge of construction methods, equipment, and market conditions. A second approach arrives at an estimate by using historical data. The estimator reviews recently-awarded contracts, making adjustments for the proposed project and the current market conditions. A third approach would be to combine historical bid data with actual cost data.¹¹

¹⁰Although acquiring services does not require calling for bids, some services, such as architectural or engineering services, do require the following of special procedures, discussed more fully in the next section.

¹¹This discussion draws upon an internet article titled Guidelines on Preparing Engineer's Estimate, Bid Reviews and Evaluation, prepared by the Federal Highway Administration of the U. S. Department of Transportation (2004).

In determining the cost of a public works project, all amounts paid for materials, supplies, equipment, and labor on the construction of that project must be included.¹²

Q&A

Must volunteer labor, material, or equipment be included in the cost estimate for a public works project?

No. It is not necessary to include an item for which there will be no charge, because there is no cost to the city.

Inclusion of Retail Sales and Use Tax

Normally sales tax applies to every sale of tangible personal property (and some services) to all persons, including cities.¹³ Thus, for bid limit purposes, the tax must be included when determining the cost of a public work, or when calculating the cost of materials, supplies, and equipment purchased separately from a public work.

However, there are some sales and use tax exemptions for certain public works projects. The exemptions include:

1. Labor and services rendered for the building, repairing, or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle owned by a city or town which is used primarily for pedestrian or vehicle traffic.¹⁴ Materials used in constructing these projects are **not** exempt from the sales and use tax.
2. Labor and services for the processing and handling of sand, gravel, and rock taken from city pits and quarries when the material is for publicly-owned road projects.¹⁵

There are no sales and use tax exemptions for any other city purchases.

Q&A

Does the exemption from the sales and use tax for labor and services on a city street project apply if a private contractor does the work?

Yes. It makes no difference, for the purposes of the exemption, whether the city does the work or has it done by someone else.

Practice Tip: When developing the bid documents, it may be useful to group those items which are exempt from the sales and use tax and then, on the line labeled “sales tax,” reference that excluded group, making it clear that all other items are subject to the tax.

¹²RCW 35.22.620(5) and 35.22.630 for first class cities; RCW 35.23.352(5) for second class cities, towns, and code cities.

¹³The basic definitions of items and transactions subject to the retail sales and use tax appear in RCW 82.04.050.

¹⁴RCW 82.04.050(7). See also WAC 458-20-171, nicknamed “Rule 171.”

¹⁵RCW 82.08.0275 and WAC 458-20-171.

Bid Limits That Differ by Class of City

First Class Cities

Public Works Bid Limits – The Traditional Interpretation

Note: The basic bid statute applicable to first class cities is not clear. There is no helpful court decision or legislative history to help decipher what it means. The following analysis is a “best guess” of what the statute is supposed to mean, even though these conclusions are not necessarily borne out by the statutory language. An alternative reading of the statutes is contained in the next section, “First Class City Bid Laws – An Alternative View.”

The statute only requires bidding for public works projects. As mentioned previously, cities need not put service contracts out for bid. And, the statutes do not require first class cities to bid contracts for materials, supplies, or equipment not used in connection with a public works project.

Public Works Projects Bidding Limits

1. In first class cities, competitive bids are required for all public works projects costing over \$90,000, if more than a single craft or trade is involved. If only a single craft or trade is involved, bids are required when the cost is over \$45,000.¹⁶ However, additional restrictions may apply, as noted in paragraphs 3 and 4 below.
2. In any annual or biennial budget period, city employees are limited in the amount of work they can do on public works projects. This limit is ten percent of the public works construction budget, including any supplemental amounts. This means any project valued in excess of the ten-percent limit requires competitive bidding.

¹⁶RCW 35.22.620(3). Neither the state bidding statutes nor the Washington Administrative Code define the terms “craft” or “trade.” Dictionaries do not provide definitions that are operational in this context. For example, The American Heritage Dictionary of the English Language, 3rd edition (Boston: Houghton Mifflin Company, 1992) defines “craft” as “an occupation or trade requiring manual dexterity...” and “trade” as “an occupation, especially one requiring skilled labor; a craft.” A better, working definition for bid law purposes might be:

“Craft” or “trade” means a recognized construction trade or occupation for which minimum wage categories are established by the Department of Labor and Industries of the State of Washington in the locality of the city's projects or purchases.

Remember, however, that this rule must be combined with the specific dollar limits discussed in paragraph 1. When those specific dollar limits are reached, bidding is required, even if the ten-percent budget limit is not exceeded. **The dollar threshold that determines whether bids are required is the smaller of the amounts in paragraphs 1, or 2.** An example may be helpful.

Assume that a first class or code city has a population of 50,000 and a \$600,000 public works construction budget. It is planning on doing a multi-trade construction project that will cost \$80,000.

Ten percent of budget limit is \$60,000 ($\$600,000 \times .10 = \$60,000$)
Limit in paragraph 2 = \$50,000

The project must be put out for bid because the cost exceeds the smaller of the two amounts, \$50,000.

If the construction budget was \$100,000, any project costing over \$10,000 would require bids, since the ten percent limit would produce the effective limit.¹⁷

Once the accumulated cost of all projects performed city labor meets or exceeds the ten percent limit, **all other projects must be put out to bid, regardless of their estimated cost.**

3. Whenever a first class has had public works performed by city employees in any budget period up to the maximum permitted amount for that budget period, **all remaining public works within that budget period must be contracted through the competitive process.**¹⁸

Penalties may be applied if cities break the ten-percent limit. If the employees of any first class city perform public works in excess of the ten percent limit, the amount in excess of ten-percent will be subtracted from the amount of public works otherwise permitted to be performed by city employees during the next budget period.¹⁹ If, after two years from the date of the excess work, the city has failed to reduce the amount of public works performed by its employees, the state will reduce the motor vehicle fuel tax distributions to the city by twenty percent, retaining the withheld distribution until compliance is demonstrated by the city to the state auditor.²⁰

First Class City Bid Laws – An Alternative View

Note: In the previous section, we set out our interpretation of what we believe the legislature intended the bid laws for first class cities to provide. However, this interpretation does not appear to be what the statutes actually say. A strong argument therefore could be made that the bid laws are virtually non-existent for these cities. A conservative approach would be to follow the traditional analysis in the preceding section. The following discussion provides an alternative analysis.²¹

¹⁷RCW 35.22.620(2).

¹⁸Id.

¹⁹Id.

²⁰Id.

²¹This discussion is taken from material in a presentation, "Bidding in Washington Cities and Towns," made by Paul Sullivan, MRSC Legal Consultant, at the Washington Finance Officers Association 1991 Annual Conference.

RCW 35.22.620 is **primarily** a force account²² statute, placing limits on when a city can use its own employees or day labor in the construction of a public works project. RCW 35.22.620(1) states:

A first class city *may* have public works performed by contract pursuant to public notice and call for competitive bids. (Emphasis added).

This language is permissive and does not in itself mandate competitive bidding. The only instance when bids are actually required is when the limits placed on the use of city employees are reached. Paragraph three of subsection (2) says:

Whenever a first class city has had public works performed in any budget period up to the maximum permitted amount for that budget period, all remaining public works within that budget period shall be done by contract pursuant to public notice and call for competitive bids.

While not clear, it appears that the reference to “public works performed in any budget period up to the maximum amount” is to the maximum work (ten percent of the public works construction budget) that may be performed by city forces. That conclusion seems consistent with the other paragraphs of subsection (2), all of which relate to the use of public employees for the performance of public works projects. Subsection (3) of RCW 35.22.620 places additional restrictions on when city forces may be used in performing work. (This is the subsection that gives explicit dollar limits.) No reference is made to competitive bids.

Based on the above analysis, the following conclusions appear warranted under this alternative view: (1) for most projects, competitive bids are not required, although a city may call for them; (2) a city could, in most instances, use city employees for projects, as long as the limits on the use of city forces are not exceeded; and (3) a city may negotiate a contract for a public works project.

The use of city forces is limited both generally (may work on projects costing up to ten percent of the public works construction budget in any budget year) and specifically. For example, in first class cities, city employees may be used for any multiple craft or trade project that does not cost more than \$90,000, and on any single craft or trade project that does not cost more than \$45,000. Once city employees have been used on projects that cost ten percent of the construction budget in any budget period, all projects, regardless of their cost, must be put out for competitive bids.

What's the Background of this Law?

Prior to the passage of Chapter 120, Laws of 1987, RCW 35.22.620 was a fairly short and concise statute, stating that competitive bidding was required for projects costing over \$10,000, except when there was an emergency or when the city utilized the small works roster process. (Then the small works roster procedure was allowed for contracts up to \$100,000.)²³ When RCW 35.22.620 was reenacted and amended in 1987, the legislature added the sections that restricted the use of a city's own employees on public works projects. **However**, in the process of making these additions, the legislature neglected to include language either requiring that contracts above a certain amount be put out for competitive bids, or stating that bids are not required below a certain amount. Perhaps the drafters of the legislation thought that the only alternative that cities had to using their own forces was competitive bidding, and they did not realize that contracting without competitive bidding was also an option.

If an error in logic can be blamed for part of the shortcomings of the statute, we have no idea how the word “may” in the first sentence in subsection (2) was substituted for the word “shall” in the previous statute.

²²To construct projects by “force account” means to use a city's own labor force or day labor.

²³See pages 42-43 for a discussion of small works rosters; small work roster procedures may now be used for projects costing up to \$300,000.

A first class city **may** have public works performed by contract pursuant to public notice and call for competitive bids. (Emphasis added).

In the prior version of the statute, that sentence read:

Any public work or improvement of a first class city **shall be done** by contract pursuant to public notice and call for competitive bids...²⁴

Which Interpretation of the Law Should Cities Follow?

Normally, Municipal Research would argue that, no matter what the legislature intended, cities should follow the law as written. However, in this case, we suggest following the traditional version, given in the prior section. It is truly difficult to imagine that the legislature wanted to remove the competitive bidding requirement for first class cities.²⁵ And, if it had, then why did it not remove the sections on the small works roster and exemptions since they were now superfluous? And, why require cities to seek competitive bids when they exceed the ten-percent limit using their own forces, but not otherwise? This is a confusing law in every way. We have no idea how a court would rule if a city did not bid competitively for projects whose costs exceeded the dollar limits given in RCW 35.22.620(3).

One final caution: if a charter or ordinance provision requires competitive bids, bids would need to be sought, regardless of what interpretation is given RCW 35.22.620.

In the remainder of the publication, we will be assuming that the “traditional interpretation” is the correct one, and that cities are bidding competitively.

Reporting and Notice Requirements

First class cities must report to the state auditor yearly, indicating their total public works construction budget, supplemental public works construction budget, total construction costs of public works performed by public employees, and the amount of public works performed by public employees above or below the permissible ten percent of the total construction budget. For cities operating on a biennial budget, the report is to reflect activity within the biennial period.²⁶ First class cities with populations less than 150,000 must report all public works in excess of \$5,000 that are not let by contract.²⁷ Every city that uses its own forces on projects costing more than \$25,000 must publish a description and the estimated cost of the project in its official newspaper, fifteen days before beginning the project.²⁸

Women’s and Minority Business Enterprise (WMBE) Requirements

Presumably all contracts entered into by a first class city for any public work or improvement **exceeding** \$10,000 (or \$15,000 for water mains) are required to contain the following clause:

²⁴RCW 35.22.620(1), as enacted by chapter 56, 1st ex.s., Laws of 1975, and in effect until July 26, 1987.

²⁵Telephone calls from MRSC to Steve Lundin, former counsel for the Office of Program Research for the Washington State House of Representatives, confirm that there was apparently no intent to eliminate competitive bidding requirements when the 1987 amendments were made.

²⁶RCW 35.22.620(4).

²⁷Id.

²⁸RCW 39.04.020.

Contractor agrees that he shall actively solicit the employment of minority group members. Contractor further agrees that he shall actively solicit bids for the subcontracting of goods or services from qualified minority businesses. Contractor shall furnish evidence of his compliance with these requirements of minority employment and solicitation. Contractor further agrees to consider the grant of subcontracts to said minority bidders on the basis of substantially equal proposals in the light most favorable to said minority businesses. The contractor shall be required to submit evidence of compliance with this section as part of the bid.²⁹

It is doubtful this requirement continues to apply in view of the passage of Initiative 200 in 1998, now codified at RCW 49.60.400(1):

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.³⁰

The term “preferential treatment” has not yet been defined. A strong argument could be made, however, that compliance with RCW 35.22.650 would constitute preferential treatment, especially if city disqualified a bidder for statutory noncompliance.

Minor Exceptions

The cost of water services and metering equipment furnished by any first class city in the course of a water service installation, from the utility-owned main to and including the meter box assembly, is not to be included in determining the cost of a public work or improvement.³¹

RCW 35.22.640 relieves first class cities from the bidding requirements when the public work relates solely to electrical distribution and generating systems on public rights of way or on municipally-owned property.³²

A number of exceptions to the bidding laws apply to all cities in the state, and they will be discussed beginning on page 16.

Materials, Supplies and Equipment

Unlike the state statutes applicable to smaller jurisdictions, the first class city statutes and, by reference, those that govern code cities with a population of 20,000 or more do not require the city to seek competitive bids for the purchase of materials, supplies and equipment not associated with a public work. Nevertheless, bidding requirements could still apply, if there are local requirements. One thus should review charter requirements, local ordinances, and policies to determine whether bids must be sought for such purchases.

²⁹RCW 35.22.650.

³⁰The term “state” is defined to include cities, counties, and other political subdivisions. RCW 49.60.400(7).

³¹RCW 35.22.630.

³²If a city-owned electric utility directly assesses its customers a service installation charge for temporary, permanent, or expanded service, a customer may, with written approval of the utility, hire a qualified, licensed electrical contractor to do the installation instead of using city workers. If the utility denies the customer's request, it must provide the customer with written reasons for the denial. If a customer employs a private electrical contractor for installation work, the contractor is solely responsible for any damage resulting from the installation and the city-owned electrical utility has no liability. RCW 35.22.640.

Services

Bids are not required for the acquisition of services by either first class cities or code cities with a population of 20,000 or more. (However, special procedures must be followed for obtaining architectural or engineering services. See chapter 39.80 RCW .)

Bid Limits for Second Class Cities, Towns, and Code Cities³³

Depending on the cost, these cities and towns may have to seek bids, not only for contracts for public works, but also for purchasing materials, supplies, and equipment not used in connection with a public work. No cities are required by statute to bid for services, with the exceptions of securing an official newspaper³⁴ and obtaining architectural and engineering services.³⁵ Notwithstanding state law, a city may nevertheless require, by ordinance or policy, that bids be sought for services, and it may adopt stricter provisions than those discussed below for bidding on public work projects and purchases.

Public Works

Second class cities, towns, and code cities must call for bids whenever the cost of a public work, including the cost of materials, supplies, and equipment, will exceed \$65,000, if more than one craft or trade is involved. If only a single craft or trade is involved, or if the project is one of street signalization or street lighting, bids must be called for if the cost is greater than \$40,000.³⁶

Note that there is no “ten percent of the construction budget” limit on the total amount of work that can be done by city workers as there is for the larger cities. As long as each project meets the bidding limits, the city could, hypothetically, have its own workers or day laborers do every project. However, second class cities, towns, and code cities must provide a report to the state auditor of the costs of all public works in excess of \$5,000 that are not let by contract.³⁷ For any project using city workers that costs in excess of \$25,000, a city must publish a description of the project and its estimated cost in its official newspaper at least fifteen days before beginning the work.³⁸

Q&A

We are doing a sidewalk project that will cost \$110,000. May we use our staff to perform about \$15,000 of the work and bid the rest?

In general, “no.” Even though the city does not intend to circumvent the bid law, it must bid the whole project since the cost is over the bid limits. However, there may be some circumstances

³³RCW 35A.40.210 requires that code cities follow the provisions of RCW 35.23.352.

³⁴As mentioned previously, chapter 273, Laws of 1994, removed the requirement to bid for services that was previously found in RCW 35.23.352(6). However, the legislature neglected to also amend RCW 35.23.352(7), which requires that bids are required, no matter what the cost, to secure the services of the official newspaper.

³⁵See chapter 39.80 RCW and the discussion on pages 23-25.

³⁶RCW 35.23.352(1). See footnote 16 above concerning the definition of “craft” and “trade.” Code cities follow RCW 35.23.352 pursuant to RCW 35A.40.210.

³⁷RCW 35.23.352(4).

³⁸RCW 39.04.020.

in which a city may make a minor contribution. For example, a city might own a piece of equipment that the contractor does not. The bid specifications could note that the city would, upon request, lease the equipment to the contractor at a specified rate, presumably lower than would be available on the open market.

Materials, Supplies, and Equipment

Any second class city, town, or code city with a population under 20,000 that purchases supplies, materials, or equipment costing more than \$7,500, which are not to be used in connection with any public work or improvement, must call for bids.³⁹ Purchases by code cities with a population of 20,000 or more are governed by RCW 35.22.620;⁴⁰ this referenced statute, though, *does not require bids for the purchase of materials, supplies and equipment*. However, when purchasing telecommunications and data processing (computer) equipment or software costing above that amount, these municipalities may, under a 1996 law, follow a “competitive negotiation” process as an alternative to the bid process.

Recognizing the unique aspects of computer and telecommunication systems, the legislature established an alternative process for making such purchases. RCW 39.04.270, which is available to all municipalities, allows purchases through use of an alternative competitive negotiation process requiring, at a minimum, the following steps:

- A request for proposals (RFP) must be published in a newspaper of general circulation at least 13 days before the last date on which the proposals will be received.
- The RFP must identify significant evaluation factors, including price, and their relative importance.
- The municipality must provide reasonable procedures for technical evaluation of the proposals, identification of qualified sources, and selection for awarding the contract.
- The award must be made to the qualified bidder whose proposal is “most advantageous” to the city. A city may reject all proposals for good cause and request new proposals.

Q&A

We want to purchase a piece of equipment that sells for about \$8,000. However, we will get a trade-in of over \$1,000. Do we need to go out for bid?

Yes. The bid limit is on the gross price, not the net price after a trade.

Purchases by Use of Vendor Lists

Advertisement and formal sealed bidding may be dispensed with for purchases between \$7,500 and \$15,000, if the city legislative authority authorizes, by resolution, use of the uniform procedure set out in RCW 39.04.190.⁴¹ This statute provides that a vendor list may be used to secure telephone or written quotations under certain conditions:

³⁹RCW 35.23.352(6); this provision is made applicable to code cities with a population under 20,000 by RCW 35A.40.210.

⁴⁰RCW 35A.40.210.

⁴¹RCW 35.23.352(8). See Appendix B for a sample resolution establishing vendor lists for telephone quotations.

- The city must advertise at least twice a year in a newspaper of general circulation that a vendor list (or lists, if cities want to keep different vendor lists for different products) exists and it must solicit names for the list.
- If possible, at least three quotations should be secured to ensure a competitive process, with the contract being awarded to the lowest responsible bidder.⁴²
- Immediately after the award, all bid quotations that the city secured must be recorded and made open to public inspection. This information must also be available to those who inquire by telephone.
- At least every two months, a city using vendor lists to award contracts valued at more than \$7,500, but not more than \$15,000, must post a list of contracts awarded. The list must contain the name of the vendor, the amount of the contract, a brief description of items purchased, and the date of the award.⁴³

Q&A

Our city has not received many responses from our advertisement for firms wishing to be on our vendor list. May we contact firms directly?

Yes, a city may directly contact the firms with which it wishes to do business. The city might try advertising in a different or an additional newspaper.

*Lease with an Option to Purchase*⁴⁴

A lease of personal (or real) property with an option to purchase may require competitive bids, depending on the type of property involved and its cost. RCW 35.42.220 requires a call for bids in accordance with RCW 35.23.352, if the cost of the property to be leased exceeds the amount specified in RCW 35.23.352 (currently \$7,500).

The cost is the total value of the item to be leased, not the yearly lease payment. From a practical standpoint, this provision probably means that every lease with an option to purchase must be bid because the limit is so low. A lease of property without an option to purchase does not require a call for bids.

Services

In 1994, the bid statutes for second class cities and towns were amended, and the former requirement that bids be sought when acquiring services was eliminated, with one exception.⁴⁵ Bids are still required when a city selects and contracts for the services of its official newspaper.⁴⁶ Obtaining the services of an architect

⁴²For a discussion of how to determine “the lowest responsible bidder,” see pages 35-37.

⁴³RCW 39.04.200.

⁴⁴Although RCW 35.42.220 does not specifically say that this bid limit on lease-purchases applies only to second class cities, towns, and code, MRSC believes that is the case. First class cities and code cities with a population of 20,000 or over are not required to call for bids for the purchase of equipment. It would make little sense to make them call for bids on purchase of equipment under a lease-purchase plan.

⁴⁵Chapter 273, Laws of 1994.

⁴⁶RCW 35.23.352(7).

or engineer, discussed in the next chapter, does not require bids, but does require use of a negotiation process.

Special procedures are set out for acquiring solid waste services. RCW 35.21.156. These procedures, however, merely set out an **alternative** approach for the selection of a solid waste service provider. Since the collection of solid waste is a service, and bids are not required for services, the alternative approach provided by RCW 35.21.156 need not be followed, and a city may use other means to select and contract with a solid waste service provider.

The Single Unclassified, Territorial Charter City

Only one Washington city, Waitsburg, still operates under a territorial charter. There are relatively few statutes that specifically regulate an unclassified city, and none require competitive bids for public works or purchases. Without specific statutory bidding requirements, the city need not seek competitive bids. Our state supreme court has stated:

We have heretofore, in common with the weight of authority, recognized that, in the absence of constitutional, statutory or charter requirement, authorized state or municipal contracts need not be let under competitive bidding.⁴⁷

Accordingly, unless the territorial charter requires competitive bids, or the city has adopted a local policy requiring them, bids would not be required for either public works or purchases. (From a policy standpoint, though, it would probably be best to seek bids on some projects to assure that the city receives the best possible value.)

⁴⁷*Petschl v. Century 21 Corp.*, 61 Wn.2d 276 (1963); see also *Reiter v. Chapman*, 177 Wash. 392 (1934), *Shaw Disposal Inc. v. Auburn*, 15 Wn. App. 65 (1976), and *Dalton v. Clarke*, 18 Wn.2d 322 (1943)).

Exceptions to the Bidding Laws

The statutes contain exceptions to the previously discussed bidding requirements:

- Cities are not required to advertise for bids when the desired product is clearly and legitimately limited to a single source of supply.
- Bids are not necessary in the event of an emergency.
- Cities may not be required to seek bids if there are “special facilities or market conditions.”
- Pollution control facilities and some neighborhood “self-help” projects may be exempt from bidding requirements.
- Cities may hire the county to do road projects without going out for bids.

These exceptions are discussed below.

If you think your project or purchase falls under one of the exceptions to the bid law, think again. The bid laws are there for a reason – to try to ensure that cities get the best buy for their money. **Many of the projects or purchases that a city might consider to fall within exceptions are in the “gray” area of the law. If there is any doubt, your city should check with its auditor.**

Brand Name Bidding, Monopolies, Sole Source Contracting, and “Special Market Conditions”

Although the issue of specifying a brand name in a bid does not really fit in a section titled “Exceptions,” any discussion of brand names overlaps with sole source purchasing which, in turn, overlaps with monopolies and shades into “special market conditions.”

Brand Name Bidding

Cities may advertise for bids by specifying a particular brand name item as long as the responsible officials have exercised their judgment and determined that a certain brand name is of higher quality or is better suited to the municipality's needs. In *Smith v. City of Seattle*, 192 Wash. 64 (1937), the city advertised for bids for incandescent lamps, specifying a particular brand. In a suit brought by a maker of a similar lamp, the court stated that as long as the officials involved exercised their discretion in determining that a particular brand of lamps was more desirable, the city's procedure was proper in the absence of abuse of discretion or fraud. In this case, the fact that the city had used the specified lamps previously and they had performed satisfactorily provided a rational basis for city authorities to limit the bid advertisement to that specified

brand of lamps, and the court found no abuse of discretion. There is no requirement that bid specifications naming a particular brand also include a phrase such as “or an equal brand.”⁴⁸

Q&A

May we advertise for a particular model of a Chevrolet truck?

Maybe, but you must document very carefully why this particular model meets your city’s needs better than other models. If, for example, you say that you want a particular Chevrolet truck because the rest of your fleet of trucks are Chevrolets and you will be able to exchange parts, and if it then turns out that the models are different enough that many parts are not interchangeable, you will probably get an audit finding. However, if you get bids from a number of different Chevrolet dealers, the auditor may be satisfied. Ask your auditor first.

May a city specify “American-made” in bid specifications?

A city could probably draft specifications that would make it difficult for foreign goods to qualify. However, restricting a bid to “American-made” products may be hard to justify. This type of bid restriction does not relate to any practical justification as a brand name restriction might. In 10 McQuillin, *Municipal Corporations*, §29.49, it is stated:

An advertisement may or may not be deemed to unduly restrict competitive bidding where it required materials and equipment covered in it to be manufactured in a particular state or country.

In addition, from a practical standpoint, this restriction may be difficult to measure and enforce. Many products produced by American firms (automobiles, for example) have an undetermined amount of foreign content. And, many products produced by foreign firms are made, at least partially, in factories in the United States.

Monopolies and Sole Source Bidding

But what if specifying a particular brand means that only one bid will be received? In *Washington Fruit & Produce Co. v. City of Yakima*, 3 Wn.2d 152 (1940), the state supreme court said that cities do not need to go out for bids when the desired product is subject to a natural monopoly and advertising for bids would result in only one bid. In that case, the City of Yakima awarded a contract to a private utility company for the maintenance of overhead electrical street lighting without calling for bids. The resolution adopted by the commissioners recited the fact that the utility company had provided Yakima with electrical service for many years and that it was the only entity then capable of providing the city with that service. Since advertising for bids in such a situation would have been futile, because it would have produced only one bid, the court held that the city did not violate the bidding requirements of its charter by not calling for bids.

Not only is there appellate case authority for purchasing without bids from a sole source, there is now also a statute, RCW 39.04.280(1)(a), that explicitly addresses the practice.⁴⁹ To engage in sole source bidding under this statute, the city council must either apply a previously-adopted written policy or pass a resolution that states “the purchase is clearly and legitimately limited to a single source or supply.” If the city council

⁴⁸AGO 61-62 No. 24.

⁴⁹This section is made applicable to first class by RCW 35.22.620(6) and to towns, second class cities and code cities by RCW 35.23.352(9); however, since first class cities are not required to seek bids for purchases, the applicability of this statute to a first class city is irrelevant.

waives the bid requirement through application of a written policy, it must, immediately following the award of the contract, set out the factual basis for the waiver.

One commentator has noted that the State Auditor's Office will probably notice if your city makes too much use of sole source purchasing. He gives some guidelines for its use. If there is a way to draft the specifications so that more than one respondent will reply, it is not a sole source situation. If, however,

- (a) the city department has conducted a screening process whereby it can justify purchase of a specific product,
- (b) it can draft legitimate specifications, to which only one vendor can successfully respond,
- (c) the product is available only through one manufacturer (or distributor, and the manufacturer so certifies), and
- (d) the vendor certifies that the city is getting the lowest price it offers anyone, it is probably a sole source purchase.⁵⁰

Q&A

May our second class city purchase self-contained breathing apparatus for the fire department without a bid when there is only one supplier in the area whose product meets the standards of the county fire chiefs' association?

Probably. The county fire chiefs want all self-contained breathing apparatus to be standardized because it will be more efficient during mutual aid conditions and will not require new equipment to be purchased when fire departments merge. This seems to be an appropriate application of the sole source bidding exception in RCW 39.04.280. The city should document the facts. The jurisdictions involved should establish an interlocal agreement for the purchases because they might get a better price for a large order.

May a second class city specify in its bid documents that it wants only a rear engine fire truck, when this results in only one responsible bidder?

If the city has valid reasons for wanting a rear engine truck and documents them, it probably can write the specifications to reflect this desire. In fact, if the city is certain that it will receive only one bid, it may make use of the procedures in RCW 39.04.280(1)(a) and dispense with bidding because the supplier is a sole source.

Special Market Conditions – What Are They?

RCW 39.04.280(1)(b) also provides a “special market conditions” waiver from the bidding requirements for purchases of materials, supplies, or equipment by second class cities, towns, and code cities.⁵¹ To use this exemption, a city must pass a resolution stating “the factual basis for the exception.”⁵²

⁵⁰Richard N. Little, Jr., “Selected Problem Areas in Public Bidding,” Legal Notes, Information Bulletin No. 488 (Municipal Research and Services Center), October 1994, p. 6-5.

⁵¹See footnote 33.

⁵²RCW 39.04.280(2)(a).

What are special market conditions? No definition is given in the statutes. Some have suggested that if supplies or used equipment are offered at a very favorable price and will be sold before a city will have a chance to complete the bidding process, there is a special market condition. However, since there have been no court cases or attorney general's opinion on this subject, if a city wishes to invoke "special market conditions" to waive the bidding requirements, the city attorney and the auditor should be consulted.

Auctions

Sometimes a city will find exactly what it needs, at a favorable price, at an auction. Obviously, seeking bids would be impossible in an auction setting. RCW 39.30.045 authorizes a city to acquire supplies, materials, and equipment through an auction conducted by the United States or any agency thereof, an agency of the state of Washington, a municipality or other government agency, or any private party, without bids, if the items to be purchased can be obtained at a competitive price. This authority, it would seem, would allow a city to make a purchase on an internet-based auction service, such as E-bay, as well as through more traditional, in-person auctions.

Emergencies

The term "emergency" is defined by statute to mean unforeseen circumstances beyond the control of the municipality that either: (a) presents a real, immediate threat to the proper performance of essential functions; or (b) will likely result in material loss or damage to property, bodily injury, or loss of life, if immediate action is not taken.⁵³

Certain emergency situations justify the letting of a contract without following the bid requirements:

Exceptions are sometimes made to the rule that when so required by statute or charter, municipal contracts must be let under competitive bidding. In case of an emergency, where it is essential to the health, safety, or welfare of the people that immediate action be taken, the requirement may be dispensed with.⁵⁴

RCW 39.04.280(1)(c) specifically authorizes a municipality to waive competitive bidding requirements for purchases "in the event of an emergency." In such a situation, the person designated by the governing body to act in the event of an emergency may declare that an emergency situation exists, waive competitive bidding requirements, and award all necessary contracts on behalf of the city to address the emergency. If the city has not designated a person to act in the event of an emergency, the city council, presumably by resolution or motion, would declare an emergency exists, waive the bidding requirements, and award the contract. If a contract is awarded without competitive bidding due to an emergency, written findings of the existence of an emergency must be made by the governing body or its designee and entered into its record no later than two weeks following the contract's award.

Another statute, RCW 38.52.070(2), authorizes political subdivisions in which major disasters occur (as defined in RCW 38.52.020 and RCW 35.52.010(6) of the Washington Emergency Management Act) to forego statutory competitive bidding requirements. Several first class city charters also provide that the city may forego bidding procedures in the event an emergency exists.⁵⁵

⁵³RCW 39.04.280(3).

⁵⁴McQuillin, *Municipal Corporations* §29.38 (3rd ed.).

⁵⁵Yakima City Charter, Art. VI, Sec. 6; Aberdeen City Charter Sec. 46; Tacoma City Charter, Section 7.11.

Checking with the State Auditor's Office before declaring the emergency is also recommended. If the auditor's office agrees that a particular factual constitutes an emergency situation, that does not guarantee that unhappy contractors will not sue, saying there was no emergency, but it should prevent a possible negative audit finding.

Q&A

Our city water tank has been badly damaged and water pressure is threatened.

This is not a natural disaster, but it is a serious problem that probably constitutes an emergency that will allow the city to ignore the bid laws.

Our pump station needs repairs. Raw sewage is flowing into the lake.

As in the previous case, this probably can be treated as an emergency, particularly with the emphasis these days on programs to improve water quality.

The city council wants to get new streetlights in place for the holiday season, and there is not enough time to go out for bids.

This is not an emergency. The money has been in the budget for months. The council should have made the street department aware that this was a priority item on its work program.

Neighborhood "Self-Help" Projects

Cities and towns may contract with certain groups to do neighborhood improvement projects without regard to the competitive bidding laws. These groups include chambers of commerce, service organizations, community, youth, or athletic associations, or other similar associations located in and providing service to the immediate neighborhood. The contracting association may make park and recreation improvements, install equipment and artwork, and provide maintenance services while being reimbursed by the city or town for its expenses. The consideration received by the city (the improvements, artwork, etc.) must be at least equal to three times the city or town's payment to the association. Payments for all contracts made to neighborhood associations in any year may not exceed \$25,000, or two dollars per resident, whichever is greater.⁵⁶

State or County Construction or Repair of Streets⁵⁷

By passing a resolution, a city council may authorize the county in which it is located to construct, repair, or maintain a city street. The city pays the "actual cost" of the work, with the payment being deposited in the county road fund. The state Department of Transportation may also provide engineering assistance to

⁵⁶RCW 35.21.278.

⁵⁷RCW 47.24.050.

a city on road projects or do the actual construction. The state is reimbursed from the city's share of the motor vehicle excise tax in the motor vehicle fund.⁵⁸ Such agreements with the county or the state do not require competitive bids.

RCW 35.77.020 provides separate and additional authority for cities to enter into agreements with the county in which they are located for all or a specified part of the construction, repair, or maintenance of city streets and bridges.⁵⁹

Q&A

Must the county do all work on city streets if it does any work at all?

No. The language in RCW 47.24.050 states that the city or town may authorize the county “to perform any such construction, repair, or maintenance” (emphasis added). This language is not “all or nothing.” The legislature could have stated “all such construction,” but it chose not to do so.

May the city have the county do street construction under RCW 47.24.050 that will be paid for by a Public Works Trust Fund loan?

Probably not. RCW 43.155.060(4) requires that all work financed by Public Trust Fund loans be put out to bid. This seems to rule out having the county do the work.

May our city contract with a neighboring city to do a \$50,000 street project?

No. RCW 47.24.050 applies only to contracts between cities and counties (and, sometimes, the state). Since this project is over the statutory limit, it must go out for bid. However, your city could, under the Interlocal Cooperation Act (ch. 39.34 RCW), have another city act as its agent in managing the project. This act is discussed more completely beginning on page 27.

Pollution Control Facilities⁶⁰

Chapter 70.95A RCW , relating to pollution control facilities and enacted in 1973, may offer an important exception to bidding requirements. Although the primary emphasis of the chapter relates to financing pollution control facilities, one section may exempt certain projects from bidding requirements that might otherwise apply. RCW 70.95A.090 states in part:

The [pollution control] facilities shall be constructed, reconstructed, and improved . . . in the manner determined by the governing body in its sole discretion and any requirement of competitive bidding, lease performance bonds or other restriction imposed on the procedure for the award of contracts for such purpose . . . is not applicable to any action taken under authority of this chapter.

⁵⁸This statute will require amendment since the motor vehicle excise tax statutes were repealed by the voters as result of the passage of I-695 in November 1999. Although the initiative was found unconstitutional (*Amalgamated Transit Union Local 587 v. The State of Washington*, 142 Wn.2d 183 (2000)), the Legislature repealed the tax provisions by legislative action taken in 2000. See Chapter 1, Laws of 2000, 1st Ex. Sess. As result of the initiative and/or the 2000 legislation, there is no motor vehicle excise monies available to cities and towns.

⁵⁹Any work performed for a first class city by the county under this statute counts against the limit for the amount of work (ten percent of the construction budget) that a city can have done by its own forces. RCW 35.22.620(2). Work done under RCW 47.24.050 does not appear to have this restriction.

⁶⁰See also RCW 70.150.030-.0070 which provides an alternative and additional means by which a city can obtain services to design, finance, construct, own, operate, and maintain water pollution control facilities.

The term “facility” is defined to mean “any land, building, structure, machinery, system, fixture, appurtenance, equipment or any combination thereof . . . which is used or to be used . . . in furtherance of the purpose of abating, controlling, or preventing pollution.”⁶¹ “Pollution” is defined broadly to include water pollution, land pollution, solid waste disposal, thermal pollution, radiation contamination, or noise pollution.⁶²

Although there have not been any relevant appellate court decisions or attorney general opinions on the statute, it would appear that its terms could be used to forgo bidding whenever a city or town constructs or reconstructs a building or structure or acquires fixtures or equipment which will be used for pollution control. Given the broad scope of the statute, this exception to the bid laws could be far-reaching. Cities may be able to build a sewage lagoon, aerate a lake, or purchase a landfill scale, all without going out for bids.

However, in view of the lack of appellate or other authority regarding the chapter's use, cities should use caution in deciding to make use of its provisions. Asking the Department of Ecology to certify that the project is designed to abate, control, and/or prevent pollution would be a judicious step to take before ignoring the bid laws.⁶³

Q&A

May our city utilize the bid law exception in chapter 70.95A RCW to construct an aerator system to reduce the formation of algae in a city lake?

This project appears to fall within the intent of this chapter. The Department of Ecology has in the past accepted the aeration project as eligible under RCW 70.95A.100 and provided a loan to allow the city to construct this project without going out for bids.

May a city use the bid law exception in chapter 70.95A RCW to purchase water filtration equipment for a swimming pool?

The definition section in RCW 70.95A.020 is very broad, but probably not enough to include this pool equipment. The intent of this statutory provision was to provide bid law exceptions for major pollution control devices to help reduce or eliminate water, air, and other resource pollution. This purchase does not appear to fall within that intent.

⁶¹RCW 70.95A.020(2).

⁶²RCW 70.95A.020(3).

⁶³RCW 70.95A.100 describes the procedure.

Bid Laws That Apply to All Cities and Towns

The bid laws that have been previously discussed are unique for the different classes of cities. However, some bid laws are the same for all classes of cities. All cities must secure the services of architects and engineers by a request for qualifications. No cities are allowed to split bids to circumvent the bid limits. In certain situations, cities must call for bids even when work is performed by private developers. Each of these topics is discussed below.

Architectural and Engineering Services

Although there are no requirements that cities bid competitively for services (except for the official newspaper, as noted above on pages 14-15), cities must follow the procedures set out in chapter 39.80 RCW when contracting for architectural and engineering services.⁶⁴

Chapter 39.80 RCW requires that a city publish its need for architectural or engineering services in advance, concisely stating the general scope and nature of the project or work for which services are required.⁶⁵ The notice must also provide the address of a representative of the city who can provide additional details. Compliance with this requirement may be accomplished by either: (1) publishing an announcement each time the service is needed, or (2) announcing generally to the public the city's projected requirements for any category or type of engineering or architectural service.⁶⁶

Cities may advertise for architectural and engineering firms to annually submit a statement of qualifications and performance data. The city then evaluates the qualifications and performance data it has on file along with the information submitted regarding a proposed project. Following the evaluation, the city invites one or more firms to meet with its officials to discuss the project and the relative benefits of various methods of providing the desired services. The city then selects the firm “most highly qualified” to provide the required services from among those firms.⁶⁷ City procedures and guidelines are required to include a plan to ensure that women and minority (WMBE) firms have the maximum opportunity to compete for the contract. The level of WMBE firm participation must be consistent with their availability within the relevant professional

⁶⁴See Contracting for Professional Services, MRSC Information Bulletin No. 485 (Municipal Research and Services Center), April 1994, for more information on these procedures.

⁶⁵RCW 39.80.030.

⁶⁶Id.

⁶⁷RCW 39.80.040.

community.⁶⁸ The price or cost of the service may not be considered by the city when determining which firm is the most highly qualified.⁶⁹

After the most qualified firm has been chosen, the city negotiates a contract with that firm for the services at a price that it determines is fair and reasonable, considering the estimated value of the services to be rendered, as well as the scope and complexity of the project.⁷⁰ If a satisfactory contract cannot be negotiated, the city formally terminates the negotiations with that firm and attempts to negotiate a contract with the next most qualified firm.⁷¹ The process continues until an agreement is reached or the search is terminated.

The process outlined above for the procuring architectural or engineering services may be dispensed with upon a finding by the city that an emergency requires the immediate execution of the work involved.⁷²

Q&A

Does the city have to hire an architectural or engineering firm for the entire year?

No. The city can hire one firm for the entire year, but it can also hire on a project-by-project basis, as long as it follows the procedures in chapter 39.80 RCW for each project.

In its request for qualifications, may a city ask engineering firms for their hourly rates?

No. The most qualified firm must be chosen. Only then can the city discuss the cost of the services. If, during the negotiations, the city finds the price is too high, it can then go on to negotiate with the next most qualified firm.

Must a city follow the procedures in chapter 39.80 RCW when procuring the services of surveyors and landscape architects?

Yes. In RCW 39.80.020(5), "architectural and engineering services" is defined to mean "professional services...within the scope of the general definition of professional practice in chapters 18.08 [architects], 18.43 [engineers and land surveyors], or 18.96 RCW [landscape architects]." (Material in brackets added.) See also AGO 1988 No. 14.

Is a two-year retainer with an engineer prohibited?

It depends. If the city is hiring this person to act as "city engineer" (but not as a city employee) to perform all the engineering work in the city, a two-year contract is probably not allowed. RCW 39.80.40 provides that cities must publish their requirements for professional services and encourage firms to submit qualifications and performance data annually. However, the city need not change engineers every year. The city can continue to hire the same engineer if the city finds that person to be the most qualified.

If the city has a specific project for which it wishes hire an engineer, and if that project will take two years, the city may hire that person for the duration of the project.

⁶⁸See discussion set out at page 11.

⁶⁹See AGO 1988 No. 4.

⁷⁰RCW 39.80.050(1).

⁷¹RCW 39.80.050(2).

⁷²RCW 39.80.060.

Special provision is made for contracting for building engineering systems.⁷³ A city may contract for the design, fabrication, and installation of building engineering systems by using a competitive bidding process or a request for proposals, with those who bid or propose either providing final specifications and a bid price for the work, or by providing final specifications for the work as part of a larger project. In either instance, the final specifications must be approved by “an appropriate design, engineering, and/or public regulatory body.” If these procedures are followed, the requirements of chapter 39.80 RCW, relating to architectural and engineering services, do not apply.

“Bid Splitting” – Breaking a Public Works Project or Purchase of Equipment, Materials, or Supplies into Segments

Municipalities may not break a public works project into separate phases or parts to avoid compliance with bidding statutes. RCW 35.22.620(3), relating to first class cities, and RCW 35.23.352(1), relating to other classes of cities and to towns, both prohibit the division of a project into units of work or classes of work to keep costs below the bidding threshold. **Although the statutes only refer to public works when prohibiting bid splitting, MRSC believes that the prohibition also applies to purchases of materials, equipment, and supplies by second class cities, towns, and code cities.**

The Washington Supreme Court has held that a city cannot break a public work into phases for the purpose of estimating the cost of a public works project, even though those phases are performed at different intervals of time.⁷⁴ Instead, a city, while completing the actual project in phases, must total the cost of all phases of the public work or purchase. If the aggregate cost exceeds the applicable bid limit, the city must bid each phase of the project even though a given phase may cost less than the bid limit.

Bidding Laws and Projects Done by Private Parties

Cities sometimes get involved in projects that involve a private party, maybe a developer or an insurance company. A developer, for example, may make some improvements and dedicate them to the city. Or, a city may undertake some work jointly with a developer. Cities should use the following guidelines for determining whether bid laws need to be followed. If the project is done completely by the developer and then donated to the city, the bid laws do not have to be followed because the developer is not acting as an agent of the city. Also, as a general rule, if the cost of a project involves any city money, then the entire project is subject to the bid laws.⁷⁵

⁷³RCW 39.04.290. The term “building engineering systems” is defined by the statute to mean “those systems where contracts for the systems customarily have been awarded with a requirement that the contractor provide final approved specifications, including fire alarm systems, building sprinkler systems, pneumatic tube systems, extensions of heating, ventilation, or air conditioning control systems, chlorination and chemical feed systems, emergency generator systems, building signage systems, pile foundations, and curtain wall systems.”

⁷⁴*National Electrical Contractors Association, Puget Sound Chapter v. City of Bellevue*, 1 Wn. App. 81 (1969).

⁷⁵RCW 35.21.275 provides one exception: a city may assist a person who owns property abutting a street in improving the street by providing asphalt, concrete, or other supplies or materials. The furnishing of supplies or materials, or the payment of their cost to the property owner and the providing of municipal inspectors and other incidental personnel does not render the street improvements a public work or improvement subject to competitive bidding. The legislative authority must approve any such assistance at a public meeting and maintain a public register setting forth the value, nature, purpose, date and location of the assistance and the name of the beneficiary.

Q&A

If a developer puts in water and sewer lines at her expense and then dedicates them to the city, must she call for bids?

No. Assuming that there is no city money in this project and it is being funded entirely by the developer, then the bids laws do not need to be followed. The fact that the improvements must be built to city specifications does not change the answer. Even if a latecomer agreement is used, the bid laws do not need to be followed.

If an insurance company is going to spend \$200,000 to repair damage to city hall, must the bid laws be followed?

Probably. There is no statute, case law, attorney general opinion, or administrative rule that discusses bid laws and insurance companies. But, there is a rule that discusses prevailing wages and work done by insurance companies. In defining the term "public work," as it applies in chapter 39.12 RCW (the prevailing wage chapter), WAC 296-127-010(7)(a) states, in part:

The term "public work" shall include:

- (l) All work, construction, alteration, enlargement, improvement, repair, and/or demolition... that is executed at the cost of the state of Washington or of any municipality. The source of the funding shall not determine the applicability of the statute, and may include...such sources as those payments made through contracts with insurance companies on behalf of the insured state or municipality. (Emphasis added).

A Department of Labor and Industries memorandum (from Suzanne L. Mayer, Rules Officer, to Prevailing Wage File, p. 1), written at the time the above rule was amended, explains the rule change:

This subsection also provides that payments made by an insurance company as agent for, or on behalf of, a public agency are to be treated comparably to payments made directly by a public agency.

If insurance companies, in funding repairs, are considered to be agents of the city for prevailing wage purposes, they probably would also be considered agents for bid law purposes, and compliance with the bidding statutes would be required.

If a city leases a yet-to-be constructed facility from a private party, must that private party pay prevailing wages for the construction of the facility?

Maybe. If the facility is being constructed by the private party through a contract with the city, under which the city will rent, lease, or purchase the facility after it is completed, and the city's use will be of at least fifty percent of the facility, then prevailing wages must be paid. See RCW 39.04.260.

Purchasing from Other Governments and on Other Governments' Contracts

Federal Government

The authority for cities to purchase from or through the federal government is found in RCW 39.32.070 - 090. The first statute states that cities are authorized to purchase equipment, supplies, materials, and other property, without advertising, giving notice, or inviting bids. RCW 39.32.080 suspends any charter provisions, ordinances, or policies that require bidding when dealing with the federal government. RCW 39.32.090 requires that an ordinance or resolution be passed before any particular purchase is made from the federal government or through a federal government contract.

Intergovernmental Purchases and Bidding

As noted on preceding pages, RCW 47.24.050 and RCW 35.77.020 provide authority for cities to enter into agreements with the county in which they are located for repair or construction of any or all of the cities' streets or bridges. No bidding requirements apply to such projects. RCW 36.75.200 provides that a county may expend funds for the repair, maintenance, or construction of any bridges within a city if the bridge is essential to continuation of the county road system.

A city may acquire surplus property from another government entity without regard to bid laws. RCW 39.33.010 authorizes such purchases “on such terms and conditions as may be mutually agreed upon by the proper authorities.”

RCW 39.34.080, a section of the Interlocal Cooperation Act, authorizes one public agency to contract with another public agency to perform any function which each agency is authorized by law to perform. Under this statute, one public entity (e.g., the state, a city, a county, a special district, etc.) could act as agent or contractor for one or more public entities.

RCW 39.34.030, another section of the Interlocal Cooperation Act, authorizes cooperative action, including joint purchases, by different governmental entities. An indispensable element in such interlocal contracts is compliance with the purchasing statutes, including the bid law applicable to each public entity that is an ultimate “purchaser” under the agreement.

Must an interlocal agreement be in place before a city may piggyback or buy off another jurisdiction's contract? Based upon the language of the RCW 39.04.030(5)(b), which references piggybacking off

contracts that have been “awarded,” in the past tense, and language from an informal Attorney General memorandum, the answer seems clear that a city can piggyback after the fact. Brian Buchholz , an Assistant Attorney General, wrote in a 2003 memorandum:

Our current interpretation of the law is that, although such an agreement may be a good business practice to ensure compliance with particular bid law requirements, it is not legally necessary to have entered an interlocal agreement prior to utilizing another entity's contract.

. . .

[O]ur interpretation of general local government bidding requirements is that public agencies may subsequently avail themselves of purchase contracts entered by other public agencies if (1) the contract is determined to have been awarded in compliance with all bidding requirements of the agency seeking to purchase, . . . [and] there is no statutory provision prohibiting the purchase.⁷⁶

One of the bidding requirements, the need to provide notice for bids, was altered as to purchases made cooperatively by legislation adopted in 2004.⁷⁷ Instead of requiring notice in each of the jurisdictions seeking to purchase under a cooperative agreement, the notice requirement can be satisfied for all the participating jurisdictions if the jurisdiction awarding the contract meets its own statutory requirements and either posts the bid or solicitation notice on a web site established and maintained for the purpose of posting public notice of bid or proposal solicitations, or provides an access link on the state's web portal to the notice.

Cities frequently use the authority granted in RCW 39.34.030 to make purchases through the Office of State Procurement (OSP) of the Department of General Administration. Cities may be able to realize savings through the OSP's quantity purchasing, although an annual subscription fee is charged to participate. In order to make such purchases, a municipality must enter into a written agreement (an intergovernmental cooperative purchasing agreement) with the state Department of General Administration, a copy of which is filed with the city clerk and the county auditor. (A copy of such a purchasing agreement, including annual subscription fees, appears at the end of this publication as Appendix C.) The OSP then sends to the city lists of contracts that have been entered into by that department with suppliers (vendors) and that the city is eligible to use. These contracts are general in nature and are obtained by the department from the various vendors. The vendors agree to provide the same items to cities under the same terms and conditions as provided to state agencies.

If a city decides to make a purchase under one of the listed contracts, it notifies the department of its intent to do so, and the department sends the city a copy of the particular contract.⁷⁸ The contract contains instructions on the procedures used to make purchases. Under most contracts, the city or town makes the purchase directly from the vendor. In some cases, such as the purchase of motor vehicles, the department requires the purchase to be made through its office.

⁷⁶Memorandum dated April 1, 2003 from Brian Buchholz, Assistant Attorney General, to Corine Pennington, State Auditor's Office Manager. (Language deleted in section quoted due to change in law in 2004.)

⁷⁷Chapter 190, Laws of 2004 (RCW 39.34.030(5)).

⁷⁸Cities may also receive a list of contracts, contract history, current contract information, vendor registration packets, and other miscellaneous information by fax. The number to call to use OSP's “Fax on Demand” program is (360) 902-7400.

Q&A

We “piggybacked” on a county contract to purchase a grader last year, having entered into an interlocal agreement for such a purpose with the county. The county is now going to buy more graders from the same vendor without going out for bids. Can we piggyback on this purchase?

Maybe. If the city (and county) can say in good faith that last year’s purchase was not meant to be a one-time purchase, it might be able to argue that this year’s purchase is covered by last year’s arrangement with the vendor. However, a city may not utilize a piggybacking arrangement as a means to circumvent the bid laws. The safest course here is to solicit new bids.

Does a city have to enter a new interlocal agreement every time it makes a purchase on another city's contract?

A separate agreement must be made with each public agency whose contract the city wishes to purchase from. However, a city can enter an interlocal agreement with another city to cover purchases of many different items. It does not need a separate agreement for each item.

If the city does piggyback off of another jurisdiction's contract, must it file the authorizing interlocal agreement with the county auditor?

RCW 39.34.040 requires that, before the interlocal agreement is effective, it must be filed with the county auditor. Due to 2006 legislation, the agreement may alternatively be listed by subject in the city’s web site or with some other electronically-retrievable public source.

The Bidding Process

If, having reviewed the bidding rules and exceptions in the previous sections, a city determines that it must go out for bids, it must follow certain procedures. It must advertise and give proper notice. After the bids are opened, the lowest, responsible bidder must be identified. The city will contract with that firm. Each of these steps will be discussed below, along with information on alternative processes and questions concerning irregularities in the bidding process.

Advertising for Bids

Second Class Cities, Towns, and Code Cities

RCW 35.23.352(1) sets out the advertising requirements for the public works bidding process in second class cities, towns, and code cities. The special statutes that govern advertising for small works rosters are discussed on pages 42-43. RCW 35.23.352(1) provides, in part:

All such contracts [contracts that require bids] shall be let at public bidding upon publication of notice calling for sealed bids upon the work. The notice shall be published in the official newspaper, or a newspaper of general circulation most likely to bring responsive bids, at least thirteen days prior to the last date upon which bids will be received.⁷⁹ (Material in brackets added).

Purchases of materials, equipment, and supplies not used in connection with a public work by second class cities, towns, and code cities with a population under 20,000 also require advertisement and closed bids, if the cost is over \$7,500 (or \$15,000, if a vendor list is used to get bids by telephone).⁸⁰ The statute does not specify what newspaper must be used, but cities should use the paper or papers that are most likely to be read by potential bidders. The statute also does not state how many days must be allowed between the time the advertisement is placed and the bid opening. However, a city that wishes to receive a number of competitive bids should allow firms a reasonable time to respond, the length depending on the complexity of the bid.

⁷⁹Prior to the passage of chapter 198, Laws of 1993, cities following RCW 35.23.352 had to publish a notice once a week for two consecutive weeks prior to the bid opening date. Although this has been changed to require one notice thirteen days before the bid opening, cities may want to do more than one notice to publicize the project more widely and, in many cases, will want to allow more time for bid submission.

⁸⁰RCW 35.23.352(8) and RCW 39.04.190 as to vendor lists (discussed on pages 13-14). See also RCW 39.04.270 for a “competitive negotiation” process as an alternative to competitive bidding for data processing and telecommunications equipment, software, and services (discussed at page 13).

First Class Cities

The first class city bid statute, RCW 35.22.620, provides that any public work may “be performed by contract pursuant to public notice and call for competitive bids.” The statute does not contain any detailed requirements for public notice. However, first class cities that wish to receive the most competitive bids will want to choose the newspaper that will reach the most contractors and allow enough time for responsive bids to be prepared.

First class cities and code cities with a population of 20,000 or more are not required by statute to advertise or have sealed bids for purchases of equipment, materials, or supplies not used in connection with a public work, but they are usually required to do so by their charters or municipal codes.

Information to Include in the Advertisement

Advertisements for bids should contain definite specifications and procedures for bidders to use in estimating their bids.⁸¹ We recommend that, at a minimum, the bid notice for a public work include the following:

- the time and place where bids will be opened;
- the time after which bids will not be received;
- the character of the work to be performed;
- the materials and equipment to be furnished; and
- where the specifications for the project may be seen.

Although not specifically required by statute, we further recommend that the advertisement also contain the following:

- a statement that a bid bond must accompany the bid, and
- statements that the city retains the right to reject any and all bids and to waive minor irregularities in the bidding process.

Since prevailing wages must be paid on all public works performed by contract,⁸² either the advertisement for bids or the specifications for the project should indicate that the successful bidder will be required to pay prevailing wages for the work to be performed.

Note that bid notices for the purchase of materials, equipment, and supplies not used in connection with a public work do not have to include a requirement for a bid bond (but a bid bond may be a good idea) and may or may not include any reference to contract documents, depending on the kind of purchase.

Questions Addressing Other Considerations

May a city include a preference for local merchants in its advertisement?

In general, no. RCW 39.30.040 (to be discussed on page 36) does allow cities to take any sales tax and business and occupation tax that a city will receive from purchasing supplies, materials, and equipment within its boundaries into consideration when determining the lowest responsible bidder. But, in AGO 61-62 No. 41, the Office of the Attorney General concluded that entities could not establish a policy giving local bidders a preference by reducing their bids by some specified percentage amount in determining the lowest

⁸¹See *Platt Electric Supply Inc. v. City of Seattle*, 16 Wn. App. 265 (1976).

⁸²See RCW 39.12.020 and *City of Spokane v. Department of Labor and Industries*, 100 Wn. App. 805 (2000).

responsible bidder. To do so would “be in the nature of an arbitrary classification for the benefit of a particular group without regard to the merits of any particular case.”

May a city require that general contractors on public works projects be union contractors?

In general, no. The reasoning in AGO 61-62 No. 41 applies here also. The contract should be awarded without regard to union status.

May a city require that all bidders attend a pre-bid meeting?

In its advertisement, a city may “strongly urge” all bidders to attend such a meeting. A city may feel, for example, that in order to make a responsible bid that meets all the specifications, contractors must make a field visit to the site. However, that is the contractors' choice. They may still bid on the project without making the field visit. Additionally, a city might lose a potentially low bidder because the bidder could not attend the pre-bid meeting.

May a city call for bids with deductibles because it fears all bids might be too high?

Yes, if the bid specifications are written correctly. They should state that bidders are to submit an overall bid for the project, and then give the cost of each deductible in case it is necessary to reduce the size of the project. The specifications should clearly indicate that the city reserves the right to accept bids on the entire project or to reduce the size of the project if it is necessary to make it fit the budget. The order in which the deductibles would be exercised should also be in the specifications. Note that the city may not choose a contractor and then negotiate the deductibles. *Hanson Excavating Co. v. Cowlitz County*, 28 Wn. App. 123 (1981).

May a city state in its bid specifications that it “reserves the right to make such alterations in the plans or in the quantities of work as may be considered necessary” in case all bids are over its budget?

No, because the city would have to negotiate the changes with a contractor to see what the firm would be willing to do for the amount of money the city has to spend. Cities are not allowed to negotiate with bidders. Using the deductible method discussed above is the way to handle budget concerns.

May the city modify the bid specifications after advertising?

A city may use addenda to modify the bid specifications. The city should make certain that every person who received a bid packet is notified that there is an addendum. If the time period before the bid opening is short, the addendum should be sent by certified mail. The bid opening may need to be delayed if an addendum is sent out too close to the opening date. It is common practice to have the bidders acknowledge receipt of addenda in their proposals.

May a city prequalify bidders?

Although some statutes applicable to state agencies specifically require or allow prequalification on certain kinds of projects,⁸³ here are no such statutes for municipalities, other than RCW 39.04.155, relating to the development of small works rosters. However, first class and code cities, with their broad home rule powers, would not need such statutory authority unless prequalification would be considered inconsistent with statutory competitive bidding requirements. For other cities, the absence of statutory authority may preclude prequalification. In *Manson Engineering & Construction Co. v. State*, 24 Wn. App. 185 (1979), the court of appeals addressed whether the Department of Transportation could establish prequalification requirements, in addition to those set out in RCW 47.28.070, relating to highway construction projects. The court, in ruling that the department did not have the authority to add additional prequalification

⁸³RCW 47.60.680 requires prequalification for ferry construction and repair contracts. RCW 47.28.070 requires prequalification for highway construction projects. RCW 39.04.155, relating to small works rosters, contemplates development of rosters of “responsible contractors,” and provides that, to be eligible for or remain on a roster, the contractors be required to keep current records of any applicable licenses, certifications, registrations, bonding, insurance, or other appropriate matters.

requirements,⁸⁴ stated:

Prequalification standards, as authorized by RCW 47.28.070, tend to limit the extent of competitive bidding. It is the function of the legislature, not the judiciary or an administrative agency, to circumscribe competitive bidding. When, as in the case at bench, the legislature has already defined those limits, courts will be wary of interpreting the legislatively mandated standards so as to further circumscribe the competitive bidding policy. Accordingly, we are not inclined to view favorably an administrative agency's attempt to extend its authority by asserting prequalification standards in excess of those specifically provided by statute.

The *Manson* court's reasoning may be equally applicable to second class cities and to towns, which do not share the broad home rule authority of first class and code cities.

We note that the 2008 Standard Specifications for Road, Bridge, and Municipal Construction, Section 1-02.1 (including the APWA Supplement provision), authorizes a prequalification procedure. This would not, however, provide sufficient authority for second class cities and towns, when adopting the Standard Specifications, to prequalify bidders.

May a city receive a bid by fax?

RCW 35.23.352(1) requires that second class cities, towns, (and code cities) receive “sealed” bids. Obviously, if a bid comes by fax, it is not sealed. Of course, a contractor could send the bids by fax to an agent and have the agent seal the documents and deliver them to the city.

The statutes do not address the issue of sealed bids for first class cities. However, unsealed bids might be viewed by interested parties in advance of the closing of the bid process and give undue advantage to another bidder. To be safe, all cities should probably require sealed bids for public works projects. Faxed bids might be considered for equipment, supplies, or other standard items.

Our society is in a transition phase concerning accepted methods for transmitting documents. Just as some courts now allow the filing of legal documents to be done by fax, there is little reason to doubt that alternative methods for transferring bid documents will become legally acceptable in the future. Until fax or other electronic transfer of bid documents is statutorily permitted or judicially authorized, it is advisable to require a means of transfer that does not jeopardize the privacy of bid documents or allow any dispute concerning the authenticity of bid documents.

Bid and Performance Bonds

Second Class Cities, Towns, and Code Cities

Bid bonds are required on public works projects to help ensure that a bid has been made in good faith and that the bidder will enter into a contract if his or her bid is accepted. RCW 35.23.352(1) provides that each bid must be accompanied by a bid proposal deposit in the form of a cashier's check, postal money order, or surety bond to the council for a sum of not less than five percent of the bid amount, including sales tax. The statute adds that **“no bid shall be considered unless accompanied by such bid proposal deposit.”** Bid bonds are not required when small works roster procedures are used, however, as those procedures are “in lieu of” the procedures set by RCW 35.23.352, which requires bid bonds.

⁸⁴See also AGO 1993 No. 19, in which the Attorney General addressed the issue of whether institutions of higher learning could require that contractors have an apprenticeship program as a prequalification. The opinion, citing the *Manson* case, said that, absent statutory authority for a prequalification requirement that contractors have an apprentice program, universities and colleges did not have the authority to impose one.

After bids are opened and the contract is awarded to the lowest responsible bidder, as required by RCW 35.23.352, the bid proposal deposits or bid bonds are returned to the unsuccessful bidders. The successful bidder's bid bond or deposit is retained until the bidder enters into a contract with the municipality and furnishes a performance bond in the full amount of the contract price. If the successful bidder fails to enter into a contract with the municipality and does not provide a performance bond within ten days of being notified of the bid's acceptance, the bidder generally is required to forfeit the bid bond or deposit.⁸⁵

First Class Cities

There is no similar statutory requirement of bid bonds for first class cities in RCW 35.22.620, but several charters,⁸⁶ as well as some ordinances, require bid bonds or deposits of five percent of the bid be submitted. Nevertheless, bid bonds are highly recommended.

Performance Bonds for All Cities for All Public Works Contracts

RCW 39.08.010 provides that a municipality must require a performance bond whenever it enters into a public works contract, to ensure that the job will be completed and that all workers, subcontractors, and suppliers will be paid. This performance bond requirement applies to all public works contracts, whether or not let pursuant to competitive bids.

RCW 39.08.015 subjects cities to claims of “laborers, material men, subcontractors, and mechanics,” if city officials fail to obtain the required performance bond. In lieu of a performance bond on contracts of \$35,000 or less, RCW 39.08.010 allows a city, at the option of the contractor, to retain fifty percent of the contract for a period of thirty days after the date of final acceptance. This statute is intended to help small contractors who may have trouble getting a bond.

The Bid Decision

Deciding whom to award the bid to (if, indeed, it is awarded) has a number of components. The bids are opened at the place, date, and time set out in the bid package. If the bid is complicated, city staff may summarize the bids before presenting them to the city council. (Note that in some cities the council has adopted policies and procedures that permit staff to award some bids.⁸⁷ The council, perhaps again with staff assistance, must determine the lowest responsible bidder. Some bids may involve errors, omissions, or other irregularities. Decisions must be made on how to deal with these irregularities.

The award decision, if made in good faith, will not be subject to interference by the courts, unless it is arbitrary or there is an indication of fraud.⁸⁸ However, if the city council awards a contract to a bidder other than the lowest bidder, it should include the reasons for its action in the council minutes or otherwise memorialize them.

Finally, the city must award the bid to the lowest responsible bidder or reject all bids. **It may not negotiate with any of the bidders.** These issues and others are discussed in the questions and answers below.

⁸⁵See the discussion of “bid amount errors” on pages 39-41 for the circumstances under which a bidder may not have to forfeit his bid bond.

⁸⁶For example, see Tacoma City Charter, Art. VII, Sec. 7.11; Seattle City Charter, Art. VII, Sec. 2 and Seattle Municipal Code Sec. 20.04.220.

⁸⁷See, e.g., Seattle Municipal Code Sec. 20.60.110.

⁸⁸See *Chandler v. Otto*, 103 Wn. 2d 268, 275 (1984).

Q&A

May we consider a bid submitted by a contractor who does not have a Washington contractor's license?

Maybe. If a contractor registers before entering into a contract, the conditions of RCW 39.06.010 that require that contracts be executed with registered contractors are met. Note, however RCW 18.27.020 (2) provides that it is a gross misdemeanor for a contractor to submit a bid unless registered with the state. Additionally, RCW 18.27.230 provides for the issuance of an infraction if the contractor is not licensed. RCW 18.27.320 states that an infraction will be dismissed once the contractor registers; dismissal of the infraction would not affect the misdemeanor.

May the bid opening be delayed?

Yes, but the bidders must all be notified. The city should give all bidders the opportunity to withdraw their bids (the postponement might make this project interfere with another contract) or, if they wish, withdraw and resubmit the bid (the cost of some equipment might have changed) before the new bid opening date and time. For long delays, the city should probably just return all bids. Contractors who wish to resubmit may do so before the new date and time.

Must the bid opening occur at a council meeting?

No. Bids must be opened in public at the time and place given in the advertisement, but they do not have to be opened at a council meeting and no councilmembers need be present at the bid opening.

Determining the Lowest Responsible Bidder

RCW 35.23.352 requires that contracts in excess of certain limits be awarded to the lowest responsible bidder for a public works project or for the purchase of materials, equipment, or supplies. Although there is no such specific requirement for first class cities, general competitive bidding principles require it. Also, various city charters require that contracts be awarded to the lowest responsible bidder,⁸⁹ the lowest and best responsible bidder,⁹⁰ the lowest and best bidder,⁹¹ or the lowest most responsible bidder.⁹²

“Responsible” should not be confused with being “responsive.” Responsiveness is determined at the outset of the bid review process. Has the bidder submitted a bid that is consistent with the specifications and call for bids? If the bid is not consistent, it is nonresponsive and should not be considered. A responsive bid, however, may be made by a person or firm that is not responsible, that is, the bidder for a variety of reasons may not be able to perform as required.

The 2007 legislature established in RCW 39.04.350 bidder responsibility criteria that a bidder must meet to be considered a responsible bidder and qualified to be awarded a public works project. Before a city may accept the contractor’s bid, the contractor must:

- be a registered contractor at the time of bid submittal (RCW 18.27.020);
- have a current Unified Business Identifier number;
- have industrial insurance coverage;

⁸⁹Richland City Charter, Art. V, Sec. 5.08; Aberdeen City Charter, Sec. 46.

⁹⁰Tacoma City Charter, Art. VII, Sec. 7.11.

⁹¹Seattle City Charter, Art. VII, Sec. 2.

⁹²Vancouver City Charter, Art. VI, Sec. 6.10.

- have an employment security department number;
- have a state excise tax registration number; and
- have never been disqualified from bidding under RCW 39.06.010 or 39.12.065(3).

RCW 39.04.350 allows cities to adopt relevant supplemental bidder responsibility criteria for a particular project.⁹³ The bidding documents must include the adopted supplemental criteria and:

- a basis for evaluation;
- a deadline for bidder to submit responsibility documentation; and
- a deadline for bidder to appeal a “not responsible” determination.

A potential bidder may request changes to the supplemental criteria, and the city is to evaluate the request. If it agrees to change the criteria, it must issue an addendum.

If a bidder fails to supply information requested concerning responsibility within the time and manner specified in the bid documents, the city may base its determination of responsibility on any available information related to the supplemental criteria, or it may find the bidder not responsible.

If the city determines a bidder to be not responsible, it must provide, in writing, the reasons for the determination. A bidder can appeal the determination within the time period specified in the bidding documents by presenting additional information to the county. The county must consider the additional information before issuing its final determination. If the final determination affirms that the bidder is not responsible, the city may not execute a contract with any other bidder until two business days after the bidder determined to be not responsible has received the final determination.

“Social criteria” may also be taken into account in determining responsibility; for example, compliance with affirmative action requirements formerly was allowed to be a distinguishing characteristic.⁹⁴

Further, compliance with RCW 39.30.060, when applicable, is required for a bid to be considered responsive. That statute specifies that every bidder for a public works contract over \$1,000,000 must submit, with the bid or within one hour of the published bid submittal time, the names of all the subcontractors with whom the bidder will subcontract for heating, ventilation and air conditioning, plumbing, and electrical work. If such a list is not provided, the bid is considered nonresponsive and therefore void. If the general contractor does not plan to use covered subcontractors, it is not required that the bidder do anything to comply with this statute.

To determine the lowest responsible bidder, cities might find it helpful to include a “Statement of Bidder's Qualifications” as part of the bid documents. This statement normally requests both financial and technical experience summaries and a bank reference. **A good rule of thumb to use when considering whether to accept a bid other than the lowest one:** Would a private business determine that this firm would be the best one to satisfactorily complete the project at the lowest cost?

Preferences. RCW 39.30.040 allows (but does not require) cities, in determining the lowest bid, to consider the tax revenues that are generated by a purchase of supplies, materials, and equipment, including those from

⁹³Pursuant to RCW 39.04.350(3), the Capital Projects Advisory Review Board (CPARB) was directed to develop suggested guidelines to assist the state and municipalities in developing supplemental bidder responsibility criteria. See “Suggested Guidelines for Bidder Responsibility” (rev. January 10, 2008) on the CPARB web site at <http://www.ga.wa.gov/cparb/BidderResponsibilityGuidelines.doc>.

⁹⁴*Electrical Contractors v. Pierce County*, 100 Wn.2d 109 (1983). The court held that rejection of bids due to failure to meet published affirmative action guidelines did not present a danger of fraud, collusion, or favoritism; rejection in such an instance would be for “good cause.” Please note, however, after passage of I-200, compliance with affirmative action would no longer be allowed for determining responsibility.

a local sales tax or from a gross receipts business and occupation tax. If a city considers these tax revenues, it must consider the taxes it would receive from suppliers located both within and without its boundaries.

Since most cities that levy business and occupation taxes require all firms doing business in the city to pay the tax, the only tax advantage a local firm might have will be sales tax paid. The bid award must be made to the lowest responsible bidder after the tax revenue has been considered.

Cities may also give preference to products made of recycled materials or to products that may be recycled or reused.⁹⁵ Rather than invoke this preference in an arbitrary manner, the city council should establish a policy that states what percentage preference will be given for various products.⁹⁶

If either of these preferences will be used to determine the lowest bidder, that fact should probably be mentioned in the bid documents. Remember, other “local preferences” favoring local businesses in the award of a contract are not allowed.⁹⁷

Q&A

May our city accept the second lowest bid for a computer contract if the lowest bidder is located quite far away?

The city is concerned that it will not receive as good service from the distant company. This may or may not provide a basis for not accepting the low bid, depending upon the specific circumstances. The city should not just assume that service would be a problem simply because of the bidder’s location. However, if the city reasonably determines, and makes appropriate findings, that the low bidder will not be able to adequately provide the required service, it may reject the low bid. In addition, the alternative, competitive negotiation process provided by RCW 39.04.270 for procurement of computer equipment and software by second class cities, towns, and code cities with a population of under 20,000 provides that “[t]he award shall be made to the qualified bidder whose proposal is most advantageous to the municipality with price and other factors considered.” (Emphasis added.) Ability to service the purchased equipment would probably be one of the factors that a city could consider when awarding a contract under the procedure authorized by this statute.

The lowest bidder is a firm that did not finish a previous contract with the city on time. May we choose a higher bidder?

Probably. A responsible contractor finishes projects in a timely manner. However, if the reasons the contractor was late were beyond its control, the city might have to give it the bid. The problem, of course, is that the city and contractor may have differing views on what happened on the previous contract.

Accepting or Rejecting the Bid

Assuming that there are no bidding irregularities (see next section), the city, after opening the bids, must award the contract to the lowest responsible bidder or reject all bids.

⁹⁵See RCW 35.22.620(10), RCW 35.23.352(11), and RCW 39.30.040.

⁹⁶Richard N. Little, Jr., “Selected Problem Areas in Public Bidding,” Legal Notes, Information Bulletin No. 488 (Municipal Research and Services Center), 1994, p. 6-6. This is just one of the many excellent points made in this article. This section draws heavily upon this article.

⁹⁷See AGO 61-62 No. 41.

But for the exception noted below, **a city may not negotiate** with the bidders once the bids have been submitted and opened. In *Platt Electric Supply, Inc. v. Seattle*, 16 Wn. App. 265 (1976), the City of Seattle invited bids on light bulbs. The advertisement for bids allowed bidders to set their own specifications. Platt submitted the lowest bid and Seattle offered to award the contract to Platt if it would lower its bid. Platt refused. Seattle then negotiated with the fourth lowest bidder out of a field of seven, eventually awarding the contract to that bidder. Seattle's justification was that this bidder had a better warranty and was, therefore, the best bidder. The court of appeals held the contract was void for either of two reasons: (1) the bidding laws were violated when the advertisement for bids allowed the bidders to set their own specifications, and (2) the city had negotiated with a bidder after the bids were submitted and opened. The court observed that both of these practices undermined the competitive bidding process. If bidders were allowed to set their own specifications, bids would not be comparable and there would be no objective criteria on which to award the contract. Negotiations with bidders after bidding has taken place undermines the fairness of the bidding process by not allowing all bidders to submit bids on the contract that is eventually awarded.⁹⁸

Exception. Second class cities, towns, and code cities with a population of under 20,000 are released from the requirements of the bid laws if no responsive bids are received.⁹⁹ They may talk to contractors or suppliers and negotiate with them or they may perform the project using city employees. Although no similar statutory provision is made for first class cities, they would have such authority based on their broad home rule powers.

Q&A

We put a contract for a gas lawnmower for our parks department out to bid. The low bid was for a lawnmower with a diesel engine, and we think that we prefer the diesel engine. May we accept the bid?

No. This bid is not responsive to the bid specifications. If the city wants a lawnmower with a diesel engine, it should reject all bids and re-advertise.

All the bids were higher than we expected. May we negotiate with the lowest responsible bidder?

No. The city must reject all bids; negotiation with bidders is not allowed. The city may want to reduce the scope of the project and advertise again.

Must the council make the award of the contract?

Yes, unless the council has passed an ordinance allowing administrative staff to award contracts. Many municipal codes have provisions that allow administrative staff to make awards for certain kinds of projects under certain dollar limits.

Protest of Contract Award

If the contract is subject to competitive bidding, and the city receives a written protest from a bidder within two full business days following the bid opening, it may not execute a contract with anyone other than the protesting bidder without first providing written notice at least two full business days (excluding Saturdays,

⁹⁸See also *Contractors v. Ellensburg School District*, 96 Wn.2d 806 (1982); *Hanson Excavating v. Cowlitz County*, 28 Wn. App. 123 (1981).

⁹⁹RCW 35.23.352(1).

Sundays, and legal holidays) of its intent to execute the contract.¹⁰⁰

Bidding Irregularities

Errors in Bid Procedures or in Complying with Specifications

A bid must substantially comply with the applicable procedures or specifications if it is to be considered. If it does not, the bid must be rejected. However, an “insubstantial variance” from certain specifications or procedures will not prevent a city from considering a bid. As a general rule, an immaterial or insubstantial variance is one that does not give a bidder a substantial advantage over the other bidders.

- **Example of insubstantial variance:** in *Rhine, Inc. v. Tacoma*, 13 Wn. App. 597 (1975), the court concluded that the late filing of a bid bond was an insubstantial variance that could be waived by the city because it did not give the late bidder an advantage over the others.¹⁰¹
- **Example of substantial variance:** in *AAB Electric v. Stevenson Public School District*, 5 Wn. App. 887 (1971), the court held that the failure to sign a bid was a substantial variance that justified the city's rejecting the low bid. The court noted that this defect would give the bidder who failed to sign the bid an advantage over the other bidders. This bidder could choose not to enter into a contract, if accepted as the low bidder, without having to forfeit his bid bond because his bid was unsigned. The other bidders, who had properly signed their bids, would forfeit their bid bonds if any of their bids were accepted and they failed to enter into a contract.¹⁰²

In a similar vein, the court in *Land Construction v. Snohomish County*, 40 Wn. App. 480 (1985), concluded that a substantial variance existed where a bidder included, as a subcontractor, a women's business enterprise (WBE) that was not certified as required by the specifications. The court saw in this circumstance an advantage over other bidders, because the bidder would have to substitute a certified WBE in order for the county to accept the bid and the bidder could therefore decide not to enter into the contract if it thought the bid too low.

Bid Amount Errors

Bid amount errors are of two types: (1) those that favor a city, where the bidder makes a mistake that causes the bid to be lower than it should be, or (2) those that favor a bidder, where the mistake causes the bid to be higher than it should be. These errors, which are relevant only when they affect the lowest responsible bid, are governed by some general rules, as follows:

- **A bidder is bound by the bid amount.** The courts will not reform (that is, correct) a contract because of an error, even an obvious one, in the amount bid.

¹⁰⁰RCW 39.04.105. While the bill reports prepared for this legislation (chapter 300, Laws of 2003 (ESHB 2056)) indicate that the municipality, if it receives a protest, “may not award the public works contract to anyone other than the protesting bidder without first providing at least two full business days’ notice of the intent to award” the language of the statute provides that the “municipality shall 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 its intent.”

¹⁰¹See also *Gostovich v. City of West Richland*, 75 Wn.2d 583 (1969); *Farmer Construction v. State*, 98 Wn.2d 600 (1983).

¹⁰²In *Farmer Construction v. State*, supra, however, the failure to sign the bid did not invalidate the bid where the bid bond, which made reference to the bid, was signed (and the bid document made reference to the bid bond). See also *Eastside Disposal v. Mercer Island*, 9 Wn. App. 667 (1973).

Example: In *J. J. Welcome & Sons Construction v. State*, 6 Wn. App. 985 (1972), the court refused to reform a contract based on a bid that was \$10,000 short as a result of a mistake made by Western Union in transmitting a telegram, even though the mistake was not noticed until after the bids were opened. The court, at page 990, noted that the state highway commission was statutorily foreclosed from any post-bid opening revision, concluding that:

granting reformatory relief in this instance would open the door in a sensitive area to factual review of bid-letting procedures which would adversely invade the safeguards surrounding the competitive bidding system and the confidence which contractors and the public have in its fairness.

- **A city is not necessarily bound by the bid amount.** In *Red-Samm Mining v. Port of Seattle*, 8 Wn. App. 610 (1973), the low bidder submitted a bid that the port determined was calculated incorrectly and was actually over \$96,000 less than the submitted total. The port refused to award the contract at the higher amount and threatened the bidder with forfeiture of the bid bond if it did not accept the bid award at the lower amount. The bidder elected to accept the contract at the lower amount, but then sued the port, claiming that it entered into the contract at the lower amount under duress. The court rejected the bidder's claim, because it had decided to enter into the contract rather than refusing the award at the lower figure and raising equitable defenses (duress), if the port had sought forfeiture of the bid bond.

Does the Red-Samm case mean that a city, when confronted with an obvious error that favors the bidder, can force the bidder to accept the contract at the correct amount? Probably the best that can be said is that it depends upon the circumstances and how a court might look at the equities of the situation and resolve the apparent inconsistency between the Red-Samm and J.J. Welcome cases.¹⁰³

- **The bidder who submitted the erroneous low bid may withdraw the bid, at the risk of forfeiting the bid bond.** In *Puget Sound Painters v. State*, 45 Wn.2d 819 (1954), the low bidder submitted an erroneous bid as a result of a mistake made in estimating the cost of performing the proposed contract. After the bid was accepted, the bidder immediately realized the mistake and notified the state. The bidder was successful in a suit to recover its bid bond. The court stated that following factors should be considered in determining if a bidder can be relieved of his contractual obligations (and not forfeit the bid bond) after submitting an erroneous low bid:
 - whether the bidder acted in good faith,
 - whether the bidder acted without gross negligence,
 - whether the bidder was reasonably prompt in giving notice of the error in the bid
 - whether the bidder will suffer substantial detriment by forfeiture
 - whether the other party's (i.e., the city's) status has not greatly changed, and
 - relief from forfeiture will cause no substantial hardship on that party.

¹⁰³The 2008 Standard Specifications for Road, Bridge, and Municipal Construction, at Section 1-03.1, provide that the contracting agency “will check” bid proposals “for correctness of extensions of the prices per unit and the total price,” and that “the total of extensions, corrected where necessary, will be used . . . for award purposes and to fix the amount of the contract bond.” The APWA Supplement for this section provides a procedure for a bidder to claim error (presumably other than in adding up the unit prices) after the bids have been opened, and for agency review of the claimed error. If the contracting agency concurs in the claim of error, the bidder is relieved from performing the contract without forfeit of the bid bond.

No court case involving a unit price error correction under this section of the Standard Specifications has been reported. The courts may not have a problem with this limited error correction mechanism, given that the specifications expressly provide for it, the correction involves only adding up the unit prices, and the procedure applies automatically to all bid proposals.

Any low bidder who claims an error and fails to enter into a contract (even if the bidder is not required to forfeit its bid bond) is prohibited from bidding on the same project, if a subsequent call for bids is made.¹⁰⁴

Q&A

The bidder sent her bid by express mail and it arrived at our post office before the bid opening. However, through someone's error, it was not delivered to city hall until after the bid opening. This bid was lower than the others. May we award the contract to her?

The city can probably waive this bidding irregularity. The bidder took the appropriate steps to have her bid arrive in time, and the delay in the city's receipt of the bid did not give the bidder any advantage over the other bidders.

May a city accept a bid when the bid bond language in the bid varies from the required bid bond language in the call for bids?

The language that the bidder used would have allowed the bidder to put up a smaller bid bond than other bidders under some circumstances. This could be seen as an advantage to that bidder and this irregularity should not be waived.

May the low bidder be allowed to withdraw a bid if he made a mistake in his bid calculation?

As discussed above, in *Puget Sound Painters v. State*, the court held that the bidder could be relieved of his contractual obligations without having to forfeit his bid bond, based on the court's consideration of five factors. From a practical standpoint, it probably makes sense for the city to be lenient when reviewing a situation where an honest error has been made because the bidder, if compelled to execute his contract, may try recouping its losses in other ways, such as through the use of change orders.

A bidder called, saying that she had inadvertently left out the light bar in her bid for a police car. The bids have not yet been opened. May we allow her to amend her bid?

Probably. The test is whether allowing the amendment would give this bidder an advantage in the bidding process. Since she does not know what others bid, she has gained no advantage.

Our town council misread a bid and did not award the bid to the lowest responsible bidder. May we withdraw the acceptance and award the bid to the lowest bidder?

Since there is no legitimate reason for rejecting the lowest bid and accepting a higher one (even by mistake), the acceptance of the bid is probably invalid and should be withdrawn. We cannot guarantee, however, that the town will not incur liability for withdrawing the award. But, if only a few days have passed, probably no damages have been incurred by the bidder that was mistakenly awarded the bid. An analogy may be drawn to the situation where a bidder makes a mistake (see *Puget Sound Painters v. State*) and is allowed to withdraw the bid without penalty.

When we opened the bids for a public works project, we noticed that the high bidder had made an arithmetic error and, after correcting for that error, he is the low bidder. May we reform his bid and award him the contract?

¹⁰⁴RCW 35.22.635, 35.23.352, and 39.04.107.

No, this would not be fair to the other bidders. The city should either ignore this bid and award the contract to the next lowest bidder or reject all bids and start over.

Caveat: If the Standard Specifications were used, a correction in any error in adding up the unit prices may be permissible. See footnote 103X. Under this Standard Specifications procedure, however, all bid proposals are checked for accuracy in adding up unit prices, prior to the bid award.

Alternative Public Works Contracting Processes

While the typical bidding process for public works projects involves the development of specifications, a call for bids, and a contract award to the lowest responsible bidder, there are some more specialized, alternative procedures that have been statutorily added in recent years. For example, all cities may use small works rosters or limited public works project procedures.¹⁰⁵ These newer, alternative procedures are discussed in the following paragraphs.

Small Works Roster

When the contract amount for a public works project is \$300,000 or less, a city may follow the small works roster process for construction of a public work or improvement as an alternative to the general competitive bidding requirements.¹⁰⁶ A small works roster lists contractors who have requested placement on the roster and who, where required, are properly licensed or registered to perform work in this state. RCW 39.04.155(2) describes the procedures that a city must follow if it chooses to use a small works roster.¹⁰⁷

- A city must publish a notice of the existence of its general small works roster or rosters (if the city chooses to have different rosters for different kinds of work) in a newspaper of general circulation, at least once a year, and the city must solicit names of contractors for the roster(s).
- The city council must establish a procedure for securing telephone, electronic, or written bids from the contractors on the roster who have the necessary qualifications to competently complete the particular project.
- Invitations for contractors to submit bids must include an estimate of the scope and nature of the work to be performed and a list of the materials and equipment to be furnished; detailed plans and specifications need not be included in the invitation.
- Quotations may be invited from all appropriate contractors on the appropriate roster.
- Alternatively, quotations may be sought from at least five contractors on the appropriate roster who have indicated the capability of performing the kind of work being sought.¹⁰⁸

¹⁰⁵RCW 39.04.155.

¹⁰⁶See RCW 35.22.620(7) for first class cities, and RCW 35.23.352(3) for second class cities, towns and code cities.

¹⁰⁷See Appendix B for sample resolutions establishing small works roster procedures.

¹⁰⁸If the alternative process is used, the city should distribute the invitations for quotations in a manner that will equitably distribute the opportunity, that is, not favor one contractor over another. If the estimated cost of the work is from \$150,000 to \$300,000 and the city must choose to solicit bids from less than all the appropriate contractors, it must notify the other contractors

- Whenever possible, the city must invite at least one proposal from a minority or woman contractor who must otherwise qualify under this section.¹⁰⁹
- After the bids have been submitted, the city or town must award the contract to the contractor submitting the lowest responsible bid.¹¹⁰
- Immediately after an award is made, all bid quotations submitted must be recorded and made available to the public for inspection, or the bid figures must be supplied in response to telephone inquiries.
- At least once every year, the city must make a list of the contracts awarded available. The lists must contain the name of the contractor, the amount of the contract, a brief description of the public work, and the date of the award.¹¹¹

Small works roster procedures are “in lieu of the procedures” for competitive bids on public works projects. Therefore, specific requirements, such as those relating to advertising for bids or regarding bid deposits, required by RCW 35.23.352(1), are not mandatory for small works roster contracts. Performance bonds are prescribed in RCW 39.08.030, not RCW 35.23.352(1) or RCW 35.22.620; therefore, they are required on small works roster projects, even though bid bonds are not. Since the work will be performed by contract, the requirement to pay prevailing wages remains. Although not required, bid bonds are recommended to ensure that the contractor enters into the contract.

Q&A

Our city has not received many responses from our advertisement for firms wishing to be on our small works roster. May we contact firms directly?

Yes, a city may directly contact the firms and encourage them to submit their names for placement on the city’s small works roster.

Is it true that a city does not need to ask for a bid bond on small works roster projects?

Yes. But, what the statutes allow is not always good business practice. Many cities require bid bonds on small works roster projects to provide compensation for costs incurred in the event that the contractor chosen does not sign a contract.

on the roster that quotations are being sought. Notice may be published, mailed out, or sent by facsimile or other electronic means. The notice requirement only applies if the work is estimated to cost between \$150,000 and \$300,000; there is no similar requirement when the estimated cost is less than \$150,000.

¹⁰⁹RCW 39.04.160. In view of the passage of Initiative 200 in 1998, it is not clear that this requirement is enforceable, as it could be construed as “preferential treatment.” An issue paper from the Attorney General’s office dated October 16, 1998, however, suggests that a court may distinguish such an outreach program, one which merely expands the pool of qualifying participants, from the use of selection goals, one which merely expands the pool of qualifying participants, from the use of selection goals, which more likely is a form of preferential treatment.

¹¹⁰For a discussion of how to determine “the lowest responsible bid,” see pages 35-37.

¹¹¹RCW 39.04.200.

Limited Public Works Process

The “limited public works process” is a type of small works roster process that applies only to contracts estimated to cost less than \$35,000. This process is described in RCW 39.04.155(3) as follows:

- A city must solicit electronic or written quotations from a minimum of three contractors from the appropriate small works roster.
- The city is to award the contract to the lowest responsive bidder, unless there is a compelling reason to reject all bids and cancel the solicitation.
- Quotations are to be made available to public inspection once the contract is awarded, and are to be available by electronic request.
- The city must maintain a list of contracts awarded and contractors contacted during the previous 24 months, including the name of the contractor, the contractor’s registration number, the amount of the contract, a brief description of the type of work performed, and the date the contract was awarded.
- The city may waive the payment and performance bond requirements of chapter 39.08 RCW and the retainage requirements of chapter 60.28 RCW . However, the city retains the right of recovery against the contractor for any payments it makes on the contractor’s behalf.

Performance-Based Contracts for Energy Equipment

Cities may enter into performance-based contracts when contracting for certain water conservation, solid waste reduction, or energy services and equipment. (A “performance-based contract” is a contract that provides for payment only if there are cost savings, if the payment obligation for each contract year is either set as a percentage of the annual cost savings attributable under the contract or guaranteed by the other persons or entities to be less than the annual cost savings attributable under the contract.)¹¹² To acquire such equipment, services or supplies, the city need not follow a competitive bid process. Instead, the city announces its requirements and seeks proposals to meet those requirements. Using evaluation criteria it has established, the city then negotiates with the person or firm that has submitted the “best proposal” according to the criteria.¹¹³ If the city is unable to develop a satisfactory contract with that person or firm, it may select the next best firm and negotiate with it until a contract can be agreed to or the selection process is terminated.¹¹⁴

Job Order Contracting¹¹⁵

A “job order contract” is a contract between a city, with a population of 70,000 or more, and a registered or

¹¹²See RCW 39.35A.020(4).

¹¹³RCW 39.35A.030(2).

¹¹⁴55 Id.

¹¹⁵ This summary is taken from a paper written by Michael Purdy, principal of the firm Michael E Purdy Associates. Mr. Purdy has also provided a more complete discussion of job order contracting, as well as a detailed outline regarding the process, which is set out in Appendix D.

licensed contractor, through which the contractor agrees to provide services of an indefinite quantity for work anticipated to arise over a fixed period of time, not to exceed two years, with an additional one-year option). Job order contracting is a very different process from the traditional design-bid-build method of performing public works projects. Job order contracting provides a method of obtaining construction services for smaller projects through the use of an indefinite quantity delivery order contract over a fixed period of time. Using this method, a city selects a contractor partially based on qualifications provided in response for a request for qualifications, sometimes on an interview, and on the percentage bid for managing each contract. The contractor's bid is known as the contractor's coefficient and is a percentage markup or markdown of the prices included in the identified price book the city intends to use.

The primary advantage to job order contracting is its speed. A city is able to complete smaller projects more quickly than through the traditional method of contracting. Complete plans and specifications are not always required, although they must be sufficiently clear so that a contractor understands the project clearly enough so that he or she can price it. Some criticize job order contracting as being more expensive than would be possible under competitive bidding. Unless extended through legislative action, the job order process is scheduled for repeal on June 30, 2013.¹¹⁶

Additional information regarding job order contracting is set out in Appendix D.

Design Build Procedures

Cities may use design-build procedures to contract for public works.¹¹⁷ Use of design build first requires a request for proposal and an evaluation of qualifications and proposals.¹¹⁸ Unless this process is extended through further legislative action, it will cease to be available June 30, 2013.¹¹⁹

The design-review process allows a city to contract for both the design and construction of a facility valued over ten million dollars or a parking garage, portion of a facility, or other item specified in the contract. The contract is awarded through a competitive process using the public solicitation of proposals for design-build services. The call for proposals must contain a detailed description of the project, the reasons for the design-build procedure, a description of the qualifications required, a description of the process for evaluation of qualifications and proposals, the form of the contract to be awarded, and any other relevant information to the project.¹²⁰ The proposals are to be evaluated by a committee which will choose three to five finalists to submit best and final proposals; the contract will be awarded from these proposals, or all proposals may be rejected.¹²¹ The firm selected is then required to submit a performance and payment bond, while the other finalists are to be paid an honorarium in an amount "sufficient to generate meaningful competition among potential proposers."¹²²

¹¹⁶RCW 43.131.407 - .408.

¹¹⁷RCW 39.10.300 and 39.10.340.

¹¹⁸RCW 39.10.430.

¹¹⁹RCW 43.131.407.

¹²⁰RCW 39.10.430.

¹²¹RCW 39.10.330(2).

¹²²RCW 39.10.430(5).

General Contractor/Construction Manager Procedures¹²³

A general contractor/construction manager is a firm the city selects and with whom it negotiates a maximum allowable construction cost, guaranteed by the firm, that is selected after advertisement and competitive bids. Unless this process is extended through further legislative action, it will cease to be available June 30, 2013.¹²⁴

The firm that is selected provides services during the design phase and acts as the construction manager and general contractor through the construction phase.¹²⁵ The process used for selection of a firm is similar to that used to select a design-build contractor, discussed in the section above. The contractor is selected partially on qualifications, as provided in response to a Request for Proposal, and on the bid the contractor provides; it is also suggested that the city interview the potential contractors in order to make a better-informed decision. The maximum allowable construction cost is negotiated by the city and the firm selected after the scope of the project is determined. That cost is used to set the guaranteed contract cost. Subcontract work requires competitive bids. The contract award may include an incentive clause, not to exceed five percent of the maximum construction cost, to be awarded for savings of either time or cost or both.¹²⁶

Additional information regarding the contractor/construction manager procedures is set out in Appendix D.

Water Pollution Control Facilities

RCW 70.150.030-.070 provides an alternative and additional means by which a city can obtain services to design, finance, construct, own, operate, or maintain water pollution control facilities.

¹²³ The summary of the general manager/construction manager process is taken from a paper written by Michael Purdy, principal of the firm Michael E Purdy Associates. Mr. Purdy has also provided a more complete discussion, as well as a detailed outline regarding the process, which is set out in Appendix D.

¹²⁴ RCW 43.131.407 - .408.

¹²⁵ RCW 39.10.210(6).

¹²⁶ RCW 39.10.350(2).

Other Bidding Issues

Change Orders

Any alteration to a project during construction that is not consistent with the bid specifications upon which the contract was awarded is a “change order.” If, for example, during construction of a building foundation additional excavation work is required to avoid unstable soil conditions, the additional excavation is a result of a change in conditions, and the added cost to the contractor may be covered by a change order. If machinery anchors must be relocated to accommodate a piece of machinery that has been ordered, the relocation is a change order. If, during construction, a building must be redesigned to meet new federal or state standards, such as for access for the handicapped, the redesign and additional work is a change order. Conversely, reductions in work may result in a change order that will provide a credit to the city.

When does the additional work required by a change order require competitive bids? There is no Washington authority on this issue, and the authority from other jurisdictions appears to be split as to the need for competitive bids. However, according to one legal commentator, the “better cases” favor the position that bids are not required when unforeseen extra work becomes necessary under a valid preexisting contract.¹²⁷ In *Home Owners Constructions v. Glen Rock*, 34 NJ 305, 169 A.2d 129, 134 (1961), it is stated, for example:

In the course of a construction contract, bona fide emergencies may well arise and incidental alterations may well be required. When the resulting additional expenditures are reasonable and are conscientiously viewed as being in fulfillment of the original undertaking rather than as departing therefrom, it would clearly be contrary to the public interest to halt the undertaking and call for bidding with respect to the additional work entailed by the emergency or incidental alteration.

Citing the above case, Antieau comments:

Bid requirements should not be construed so strictly as to divest a local government of the power to let extra work required by unanticipated developments in the performance of a construction contract, or to make minor changes and additions after a contract has been awarded. If the local government has no latitude whatever in authorizing changes in materials or small additions when necessary or desirable, the public interest may well be jeopardized. (Citations omitted.)¹²⁸

Antieau, however, does recognize that there must be some limitations placed on change orders not requiring bids:

¹²⁷1A Antieau, *Municipal Corporation Law*, §10.34 at p.10-96; see also McQuillin, *Municipal Corporations*, §29.119.10 (3rd ed.).

¹²⁸*Id.* at page 10-97.

The generally accepted rule is that where a statute requires that a contract for public work shall be let to the lowest responsible bidder, a municipal corporation cannot evade the law by making substantial changes in the contract after it has been award pursuant to the law. Any substantial and material departure from the specifications, beneficial to the successful bidder, in the contract entered into will render it void. ... The general principle has been stated by the Maryland court:

[D]eviations from a contract . . . must be based upon honest, reasonable and intelligent judgment and must not vary so substantially from the original plan as to constitute a new undertaking, where fairness could be secured only by competitive bidding.¹²⁹

As a general rule, a change order should not be used to remedy defective work; competitive bidding should be used in such cases.¹³⁰ However, if the work to remedy the defective work is under a warranty, it probably could be treated as a change order.

Each change order, accordingly, must be reviewed separately to determine whether the proposed work is a substantial change from that contemplated in the bidding process. Does the work constitute a new undertaking or is it consistent with the scope of the original work? Does the work require experience or expertise beyond that required in the original contract? Is the change order the result of defective work? Without better (or any) direction from the Washington courts, each questionable change order should be submitted to the city attorney for review.

Q&A

Our second class city awarded a contract for a public work without going out for bids because the estimated cost was \$39,000, under the \$40,000 threshold for bids. Now the contract requires a change order that will push the cost over \$40,000.

As long as the city estimated the cost of the project in good faith, the change order will not be affected by the bidding statutes. The city should follow its normal procedures for a change order.

Conflict of Interest¹³¹

Municipal contracts that may benefit a municipal officer are severely restricted. RCW 42.23.030 provides, in part:

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.

“Municipal officer” is defined in RCW 42.23.020(2) as:

¹²⁹1A Antieau, *Municipal Corporation Law*, §10.34, at p. 10-98, citing *Hann v. Board of Education of Wicomico County*, 200 Md. 49, 87 A.2d 846, 849 (1952).

¹³⁰McQuillin, *Municipal Corporations*, §29.40 (3rd ed.).

¹³¹Knowing the Territory: Basic Legal Guidelines for Municipal Officers, Report No. 47 (Municipal Research and Services Center), November 2007, contains a detailed analysis of the conflict of interest statutes regarding public contracts at pp. 11-16.

[A]ll elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer.

There are some exceptions. City officials may have contracts with the city as long as the dollar amount is not more than \$1,500 a month. Further, officials and employees of second class cities, towns, and noncharter code cities with a population of less than ten thousand may exceed the \$1,500 a month figure as long as the total value of contracts during the year is not more than \$18,000.¹³² Importantly, for larger cities, those with a population of 10,000 or more, their officials may not have any contract interest with the city. Some conditional exemptions are also made for “remote” interests, for example, for the ordinary employment of a municipal officer by a contractor for fixed salary or wages.

Any contract made in violation of RCW 42.23.030 is void, and any officer who violates RCW 42.23.030 is subject to a civil penalty of \$500 and his or her office may be subject to forfeiture.¹³³

Results of Violation of Bid Statutes

A violation of statutory bidding requirements may have a number of consequences. First, a contract made in violation of such requirements, or those of a city charter or ordinance, is illegal and void.¹³⁴ Nevertheless, a city may have to pay for the reasonable value of a partially performed contract that is voided for violation of bid law, where there is no bad faith or fraud.¹³⁵

Second, a violation of bid law has consequences for the municipal officer under whom or under whose supervision the contract was made. RCW 39.30.020 provides that the officer is liable for a penalty of not less than \$300 if the violation of bid law was “wilful and intentional,” and that, further, the officer may be held liable for the consequential damages to the city resulting from the violation. The definition of “municipal officer,” for purposes of the penalties in RCW 39.30.020, is that contained in RCW 42.23.020(2), above, for conflicts of interest.

If the officer, in a criminal action against him or her, is found to have intentionally violated bid law, he or she immediately forfeits his or her office. RCW 39.30.020.

¹³²RCW 42.23.030(6).

¹³³RCW 42.23.050.

¹³⁴*Platt Electric Supply v. Seattle*, 16 Wn. App. 265 (1976). Please note, if the low bid is to be challenged, the challenge must be brought before the contract is signed. *BBG Group v. Monroe*, 96 Wn. App. 517 (1999). After the contract is signed, the challenging party no longer has standing to challenge the bid award.

¹³⁵*Edwards v. City of Renton*, 67 Wn.2d 598 (1965).

Appendix A

Cost of Project or Purchase at Which Competitive Bids Are Required
by Statute

Cost of Project or Purchase at Which Competitive Bids Are Required by Statute

	First Class Cities	Second Class Cities and Towns	Code Cities	
	Over 150,000 Population		Population of 20,000 or More ^a	Population Less than 20,000
Public Work Projects				
Single craft or trade ^e	Over \$45,000 ^a	Over \$40,000	Over \$40,000	Over \$40,000
Multiple craft or trade	Over \$90,000	Over \$65,000	Over \$65,000	Over \$65,000
Small Works Roster				
All projects	Over \$300,000	Over \$300,000	Over \$300,000	Over \$300,000
Purchases^b				
Supplies, material, equipment	Bids not required ^c	Over \$7,500	Bids not required ^c	Over \$7,500
If informal telephone quotation system is adopted for purchases of supplies, materials, etc.	Bids not required ^c	Over \$15,000	Bids not required ^c	Over \$15,000
Services ^d	Bids not required ^c	Bids not required ^c	Bids not required ^c	Bids not required ^c

^a Additional limits are placed on first class cities: projects costing 10 percent or less of a city's public works construction budget may be performed by city forces (other limits still apply); once public works have been performed by city forces up to maximum level, all subsequent projects require competitive bids. See pages xxx, in which the argument is made that these cities, under current law, do not have to bid any public works contracts.

^b RCW 39.04.270 provides for a competitive negotiation process, as an alternative to bidding, for computer and telecommunications equipment, software, and services; certain exemptions are provided for by RCW 39.04.280.

^c Competitive bids, if not statutorily required, may still be required by ordinance or charter.

^d Contracts for architectural or engineering services must follow the procedures set out in chapter 39.80 RCW.

^e If the public work project is for street signalization or street lighting, it is treated as a single craft or trade project for bidding purposes.

Appendix B

Model Small Works Roster Resolution

MODEL SMALL WORKS ROSTER RESOLUTION

[governing body] = council, board, commission, etc.

[name of agency] = name of city, county, district, authority

[type of agency] = city , county, district, authority

[executive officer] = mayor, chairman, manager, etc.

Agency	RCW Cites
Counties and County Roads	RCW 36.32.235 RCW 36.32.250 RCW 36.77.075
First Class Cities	RCW 35.22.620
Code Cities , Second Class Cities and Towns	RCW 35.23.352
Community and Technical Colleges	RCW 28B.50.330
Fire Protection Districts	RCW 52.14.110
Higher Education	RCW 28B.10.350
Housing Authorities	RCW 35.82.076
Port Districts	RCW 53.08.120 RCW 53.08.135
Public Hospital Districts	RCW 70.44.140
Public Utility Districts	RCW 54.04.070 & RCW 54.04.082
School Districts	RCW 28A.335.190
Water-Sewer Districts	RCW 57.08.050

A RESOLUTION OF THE [governing body] OF [name of agency], WASHINGTON, ON THE SUBJECT OF ESTABLISHING A SMALL WORKS ROSTER PROCESS TO AWARD PUBLIC WORKS CONTRACTS.

WHEREAS, in order to be able to implement small works roster processes of RCW 39.04.155, the [type of agency] is required by law to adopt a resolution establishing specific procedures;

NOW, THEREFORE, THE [governing body] OF [name of agency], WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

Section 1. Resolution No. _____ is hereby repealed.

Section 2. The following small works roster procedures are established for use by the [type of agency] pursuant to [RCW cite-see table] and RCW 39.04.155.

1. **Cost.** The [type of agency] need not comply with formal sealed bidding procedures for the construction, building, renovation, remodeling, alteration, repair, or improvement of real property where the estimated cost does not exceed Three Hundred Thousand Dollars (\$300,000.00), or the current statutory limit in RCW 39.04.155, which includes the costs of labor, material, equipment and sales and/or use taxes as applicable. Instead, the [type of agency] may use the small works roster procedures for public works projects as set forth herein. The breaking of any project into units or accomplishing any projects by phases is prohibited if it is done for the purpose of avoiding the maximum dollar amount of a contract that may be let using the small works roster process
2. **Number of Rosters.** The [type of agency] may create a single general small works roster, or may create a small works roster for different specialties or categories of anticipated work. Said small works rosters may make distinctions between contractors based upon different geographic areas served by the contractor.
3. **Contractors on Small Works Roster(s).** The small works roster(s) shall consist of all responsible contractors who have requested to be on the roster(s), and where required by law are properly licensed or registered to perform such work in this state. Contractors desiring to be placed on a roster or rosters must keep current records of any applicable licenses, certifications, registrations, bonding, insurance, or other appropriate matters on file with the [type of agency] as a condition of being placed on a roster or rosters.
4. **Publication.** At least once a year, the [type of agency] shall publish in a newspaper of general circulation within the jurisdiction a notice of the existence of the roster or rosters and solicit the names of contractors for such roster or rosters. Responsible contractors shall be added to an appropriate roster or rosters at any time that they submit a written request and necessary records. The [type of agency] may require master contracts to be signed that become effective when a specific award is made using a small works roster. An interlocal contract or agreement between [name of agency] and other local governments establishing a small works roster or rosters to be used by the parties to the agreement or contract must clearly identify the lead entity that is responsible for implementing the small works roster provisions.
5. **Electronic Rosters.** In addition to paper and/or electronic rosters kept on file in the appropriate department, the [type of agency] may also use that state wide electronic database developed and maintained by the Municipal Research and Services Center of Washington (MRSC Rosters).
6. **Telephone or Written Quotations.** The [type of agency] shall obtain telephone, written or electronic quotations for public works contracts 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, as defined in RCW 39.04.010 and RCW 39.04.350, as follows:
 - a) A contract awarded from a small works roster need not be advertised. Invitations for quotations shall include an estimate of the scope and nature of the work to be performed as well as materials and equipment to be furnished. However, detailed plans and specifications need not be included in the invitation. This paragraph does not eliminate other

requirements for architectural or engineering approvals as to quality and compliance with building codes.

b) Quotations may be invited from all appropriate contractors on the appropriate small works roster. As an alternative, quotations may be invited from at least five contractors on the appropriate small works roster who have indicated the capability of performing the kind of work being contracted, in a manner that will equitably distribute the opportunity among the contractors on the appropriate roster.

If the estimated cost of the work is from one hundred fifty thousand dollars (\$150,000) to three hundred thousand dollars (\$300,000), the [type of agency] may choose to solicit bids from less than all the appropriate contractors on the appropriate small works roster but must also notify the remaining contractors on the appropriate small works roster that quotations on the work are being sought. The [type of agency] has the sole option of determining whether this notice to the remaining contractors is made by:

- (i) publishing notice in a legal newspaper in general circulation in the area where the work is to be done;
- (ii) mailing a notice to these contractors; or
- (iii) sending a notice to these contractors by facsimile or other electronic means.

c) For purposes of this resolution, "equitably distribute" means that the [type of agency] may not favor certain contractors on the appropriate small works roster over other contractors on the appropriate small works roster who perform similar services. At the time bids are solicited, the [type of agency] representative shall not inform a contractor of the terms or amount of any other contractor's bid for the same project;

d) A written record shall be made by the [type of agency] representative of each contractor's bid on the project and of any conditions imposed on the bid. Immediately after an award is made, the bid quotations obtained shall be recorded, open to public inspection, and available by telephone inquiry.

7. **Limited Public Works Process.** If a work, construction, alteration, repair, or improvement project is estimated to cost less than thirty-five thousand dollars (\$35,000), the [type of agency] may award such a contract using the limited public works process provided under RCW 39.04.155(3). For limited public works project, the [type of agency] will solicit electronic or written quotations from a minimum of three contractors from the appropriate small works roster and shall award the contract to the lowest responsible bidder, as defined under RCW 39.04.010 and RCW 39.04.350. After an award is made, the quotations shall be open to public inspection and available by electronic request.

For limited public works projects, the [type of agency] may waive the payment and performance bond requirements of chapter 39.08 RCW and the retainage requirements of chapter 60.28 RCW, thereby assuming the liability for the contractor's nonpayment of laborers, mechanics, subcontractors, materialmen, suppliers, and taxes imposed under Title 82 RCW that may be due from the contractor for the limited public works project. However, the [type of agency] shall have the right of recovery against the contractor for any payments made on the contractor's behalf.

The [type of agency] shall maintain a list of the contractors contacted and the contracts awarded during the previous twenty-four (24) months under the limited public works process, including the name of the contractor, the contractor's registration number, the amount of the contract, a brief description of the type of work performed, and the date the contract was awarded.

8. **Small Business Incentives** (RCW 39.04.155(5))

An agency may use the limited public works process of RCW 39.04.155(3) to solicit and award small works roster contracts to small businesses that are registered contractors with gross revenues under one million dollars annually as reported on their federal tax return. An agency may adopt additional procedures to encourage small businesses that are registered contractors with gross revenues under two hundred fifty thousand dollars (\$250,000) annually as reported on their federal tax returns to submit quotations or bids on small works roster contracts.

9. **Determining Lowest Responsible Bidder.** The [governing body] shall award the contract for the public works project to the lowest responsible bidder provided that, whenever there is a reason to believe that the lowest acceptable bid is not the best price obtainable, all bids may be rejected and the [governing body] may call for new bids. A responsible bidder will be a contractor who meets the mandatory requirements of RCW 39.04.350(1) and any supplemental bidder responsibility criteria established for the project under RCW 39.04.350 (2).

10. **Award.** All of the telephone bids or quotations shall be collected and presented at the same time to the [governing body] for consideration, determination of the lowest responsible bidder, and award of the contract.

OR [If the governing body delegates the authority to award bids of certain amount(s) to an officer of the agency.]

10. **Award.** The [executive officer] or his designee shall present all telephone quotations/bids and recommendation for award of the contract to the lowest responsible bidder to the [governing body]. However, for public works projects under \$ _____, the [executive officer] shall have the authority to award public works contracts without [governing body] approval, provided that the [governing body] shall ratify the [executive officer]'s approval at the next scheduled [governing body] meeting by means of the consent agenda. For public works projects over \$ _____, the [governing body] shall award all public works contracts by resolution.

PASSED this ____ day of _____, 20__ and signed in authentication of its passage this ____ day of _____, 20__.

[executive officer]

ATTEST:

APPROVED AS TO FORM:

[type of agency]

CLERK

ATTORNEY

Appendix C

A Sample Intergovernmental Cooperative Purchasing Agreement



State of Washington
DEPARTMENT OF GENERAL ADMINISTRATION
Office of State Procurement

Rm. 201 General Administration Building, P.O. Box 41017 • Olympia, Washington 98504-1017 • (360) 902-7400
<http://www.ga.wa.gov>

STATE OF WASHINGTON
INTERGOVERNMENTAL COOPERATIVE
PURCHASING AGREEMENT FOR
POLITICAL SUBDIVISIONS

Pursuant to Chapter 39.34 RCW and to other provisions of law, the State of Washington, Department of General Administration, Office of State Procurement, Purchasing and Contract Administration, (hereinafter called the "Office of State Procurement" or "OSP"), and the following named municipal corporation or political subdivision of the State of Washington, or political subdivision of another state, _____ (hereinafter called the "political subdivision") hereby enter into this Intergovernmental Purchasing Agreement (hereinafter called the "Agreement"), the purpose of which is for undertaking governmental purchasing activity that each party is authorized by law to perform, upon the following terms and conditions:

- (1) The Office of State Procurement, in contracting for the purchase of goods and services according to the laws and regulations governing purchases by and on behalf of the State of Washington, agrees to contract on behalf of the political subdivision, to the extent permitted by law and agreed upon by both parties. The political subdivision accepts responsibility for compliance with any additional laws and regulations governing purchases by or on behalf of the political subdivision.
- (2) The Office of State Procurement shall comply with its statutory requirements regarding notice for bids or proposals for goods or services subject to this Agreement, and shall either post the bid or solicitation notice on a web site established and maintained by OSP for the purposes of posting public notice of bid or proposal solicitations, or shall provide an access link on the State of Washington's web portal to the notice.
- (3) When the Office of the State Procurement has entered into a contractual agreement for the purchase of goods or services on behalf of political subdivision(s), the political subdivision may purchase goods and services covered by the contract on the same terms and conditions as the State of Washington. Purchases by the political subdivision may be made by a purchase order issued by the political subdivision to the state contractor. The political subdivision accepts full responsibility for payment for any goods and services it purchases under contracts negotiated by OSP with private vendors or items it purchases directly from OSP.
- (4) The political subdivision reserves the right to contract independently for the purchase of any particular class of goods or services, with or without notice being given to OSP.
- (5) This Agreement shall be effective on the later of the two signature dates appearing below, and shall continue in force until canceled in writing by either party.

**Intergovernmental Cooperative
Purchasing Agreement for
Political Subdivisions**

Page 2

- (6) In the event that either the Office of the State Procurement or the political subdivision is abolished, this Agreement shall continue in operation as to any public agency succeeding to the powers and duties of the abolished party, except as canceled or modified by operation of law.
- (7) The political subdivision agrees to use only contracts available to the political subdivisions, and only in accordance with those contract terms and conditions. The political subdivision further agrees that all purchases from OSP contracts will be made only for the direct use of the political subdivision's programs and will not be made on behalf of other jurisdictions (political subdivisions).
- (8) The Office of State Procurement is required by statute to recover the costs of administration of its contracts. The Subscription Fee Schedule illustrates the fee structure which is based on the total organization budget. This subscription fee is due upon subscribing for the first year of membership and by January 31 of each year thereafter. Subscription term is January through December. The political subdivision agrees to pay the annual subscription fee as a part of this Agreement.
- (9) OSP may from time to time make changes to this table in either the expense categories or fees, which will be effective with the very next subscription period.

Subscription Fee Schedule

Initial in box	Expenses of more than	Expenses of less than	Annual Fee
	\$0.00	\$3,000,000	\$200.00
	\$3,000,001	\$7,500,000	\$500.00
	\$7,500,001	\$21,000,000	\$900.00
	\$21,000,001	\$30,000,000	\$1000.00
	\$30,000,001	\$68,000,000	\$2000.00
	\$68,000,001	\$90,000,000	\$3000.00
	\$90,000,001	\$150,000,000	\$4000.00
	\$150,000,001	and over	\$5000.00

- (10) The State Auditors' most recently published Local Government Comparative Statistics report will be used as the authoritative document to resolve any issues regarding total expenses. Where a political subdivision is not reported separately in that document, the most recently approved budget will be used.

**Intergovernmental Cooperative
Purchasing Agreement for
Political Subdivisions**

Page 3

- (11) In addition to established contracts, custom contracting and procurement services are available for a predetermined fee. These include development of contracts and/or single requisitions that meet specific needs. The cost for these optional services, typically a flat fee, is established at the time of request.
- (12) It is not the intention of the parties, nor shall this Agreement be interpreted, to create a separate legal entity for the performance of this Agreement. Instead, the Office of State Procurement shall be responsible for administering this Agreement.
- (13) Political subdivisions shall be responsible for filing a copy of this agreement with its county auditor's office or the auditor's office in Thurston County, Washington.
- (14) By its signature below, the Office of State Procurement confirms it approves of this Agreement as required by RCW 39.34.050 and it is authorized to enter into this Agreement pursuant to RCW 39.34.080. Similarly, by its signature below, the political subdivision confirms it is authorized to enter into this Agreement pursuant to RCW 39.34.080.

Please return by mail with payment to: State of Washington
PAF-Pol/Subs Fund 425 04 20 000214
303 General Administration Bldg.
P.O. Box 41008
Olympia, WA 98504-1008

**Intergovernmental Cooperative
Purchasing Agreement for
Political Subdivisions**

Page 4

OSP has assigned you customer number, _____. Please provide this number when ordering from contracts or communicating with OSP. (Completed by OSP, will be returned to you in executed copy)

Organization contact information:

Contact Person (To whom contract documents and related communications are to be mailed or faxed).

Name: _____

Address: _____

City, St. Zip _____

Phone Number: _____

Federal Id #: _____

FAX Number: _____

Email Address: _____

The undersigned understands and agrees to the terms and conditions of this agreement.

Political Subdivision Authorized Signature: Applicant must provide an authorized signature.

Name: _____

Address: _____

Phone Number: _____

Date: _____

Office of State Procurement Authorized Signature:

Name: _____

Date: _____

Appendix D

Alternative Public Works Contracting Procedures

Alternative Public Works Contracting Procedures (Chapter 39.10 RCW)

Prepared by Michael E. Purdy, Principal, Michael E. Purdy Associates, www.mpurdy.com

A Basic Introduction to Job Order Contracting in the State of Washington

Job Order Contracting (JOC) is one of three alternative public works project delivery models authorized for use by public agencies in the State of Washington under chapter 39.10 RCW. JOC is a very different process from the traditional Design-Bid-Build method of performing public works projects.

What is JOC? Job Order Contracting is a method of obtaining construction services for smaller projects through the use of an indefinite quantity delivery order contract over a fixed period of time. Prices for each work order are based on an established price book.

Selection of the Job Order Contractor: Under the JOC method, a public agency selects a contractor partially based on qualifications in response to a Request for Qualifications (RFQ), partially based on the results of an interview (not required by state law, but an effective tool and used by most agencies), and partially based on their percentage bid for managing each project. This bid is known as the contractor's coefficient and is a percentage markup or markdown off of the prices included in the identified price book that the public agency plans to use.

Advantages of Using JOC: One of the primary advantages of using JOC is speed. It enables the public agency to complete smaller projects more quickly than is possible through the traditional Design-Bid-Build approach. Complete plans and specifications are not always required. The plans and specifications must be sufficient for any permitting, for ensuring that the contractor understands the project clearly enough so they can price it based on the price book, and for providing the owner with a tool to ensure that the project meets the owner's expectations.

Disadvantages of Using JOC: One of the criticisms of how JOC has been used in the State of Washington is that public agencies frequently end up paying more for a project than if the project had been subject to competitive bidding. Because the cost for each project or Work Order is negotiated between the owner and the contractor using the price book, JOC requires a public owner who is very familiar with the terms of the price book and comfortable with negotiating prices with a contractor. The owner must ensure that the contractor has identified the correct line items in the price book and that the quantities proposed are reasonable for the project.

Agencies Authorized to Use JOC: Not all public agencies in the State of Washington are authorized to use JOC. RCW 39.10.420 lists the types of entities that may use JOC:

- Department of General Administration
- University of Washington
- Washington State University
- Cities with a population greater than 70,000
- Counties with a population greater than 450,000
- Port districts with more than \$15 million of revenue
- Public utility districts with more than \$23 million of revenue
- All school districts
- State ferry system

JOC Thresholds: A public agency may have no more than two Job Order Contracts at any one time. Each contract is limited to a maximum of \$4 million of work orders in a contract year. Each work order is limited to \$300,000, except that each agency using JOC may execute two work orders up to \$350,000 in a contract year. The JOC contract is a two year contract, with the option for the owner to extend it for one additional year. At least 90% of the work under the Job Order Contract must be subcontracted.

A Basic Introduction to Design-Build Contracting in the State of Washington

RFQ – COMPETITIVE PROCESS

- Advertisement: Publish notice of RFQ in legal newspaper.
- Content of RFQ:
 - Describe project: General description of project with sufficient information so proposers can submit qualifications.
 - Why use design-build: Reasons for using design-build.
 - Qualifications needed: Description of qualifications to be required of proposers.
 - Evaluation and Selection Process: Description of selection process to be used in evaluating qualifications and finalists' proposals, including evaluation factors and weighting of factors.
 - **RFQ:**
 - Cost or price-related factors may not be used in the RFQ phase.
 - Evaluation Factors:
 - Technical qualifications, such as specialized experience and technical competence
 - Capability to perform
 - Past performance of the proposers' team, including the A/E and construction members
 - Other appropriate factors.
 - **RFP:**
 - Evaluation factors from RFQ:
 - Technical qualifications, such as specialized experience and technical competence
 - Capability to perform
 - Past performance of the proposers' team, including the A/E and construction members
 - Other appropriate factors.
 - Additional evaluation factors:
 - Technical approach design concept
 - Alternative evaluation factor: If 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.
 - Proposal price
 - Ability of professional personnel
 - Past performance on similar projects
 - Ability to meet time and budget requirements
 - Ability to provide a performance and payment bond
 - Recent, current, and projected workloads of firm
 - Location of firm.
 - Contract to be used: The form of the contract to be awarded.

- Honorarium: The amount to be paid to finalists submitting responsive proposals and who are not awarded a design-build contract.
 - Sufficient amount to generate meaningful competition among potential proposers.
 - Public body to consider the level of effort required to meet the selection criteria.
- Schedule: The schedule for the procurement process and the project.
- Other: Other information relevant to the project.

EVALUATE RFQs

- Committee: Establish evaluation committee
- Evaluate based on criteria: Evaluate responses to the RFQ based on factors, weighting, and process in RFQ
- Maximum number of finalists: Select no more than 5 finalists to submit proposals

ISSUE RFP TO FINALISTS

- Content of RFP:
 - Describe project: Description of the project including programmatic, performance, and technical requirements and specifications
 - Describe functional issues: Functional and operational elements
 - Square Footage: Minimum and maximum net and gross areas of any building
 - Drawings: Preliminary engineering and architectural drawings (at discretion of public body)
 - Budget: Target budget for design-build portion of the project

EVALUATE RFPs

- Committee: Establish evaluation committee
- Evaluation procedure: Select evaluation procedure from two options below.
Must identify in the RFQ which procedure will be used.
 - Option A:
 - Evaluation: Evaluate proposals based on factors, weighting, and process identified in the RFQ
 - Best and Final Proposals: May request best and final proposals from finalists
 - Negotiation: Negotiate with firm with highest scored proposal
 - If unable to successfully negotiate, may suspend or terminate negotiations and negotiate with next highest scored firm.
 - Option B:
 - Award based on lowest price: If 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.
 - Problems with Option B:
 - Owner doesn't know at time of RFQ if all finalists can produce a sufficient design.
 - Technical approach design concept appears to be the only thing that owner wouldn't ask finalists to submit.
 - Does not appear to enable owner to take into account non-design factors, weighting, and process identified in the RFQ relative to the RFP.
 - Perhaps the RFQ should outline the two options and state that the decision will be made in the RFP as to whether all the finalists are capable of producing a

good design. This is really the only reasonable way to approach it, and is somewhat supported by RCW 39.10.330 (1)(d)(ii).

A Basic Introduction to GC/CM Contracting in the State of Washington

General Contractor/Construction Manager (GC/CM) is one of three alternative public works project delivery models authorized for use by public agencies in the State of Washington under chapter 39.10 RCW. GC/CM is a very different process from the traditional Design-Bid-Build method of performing public works projects.

Selection of GC/CM: Under the GC/CM method, a public agency selects the contractor early on in the design process, usually no later than the end of the schematic design phase. The contractor is selected partially based on qualifications in response to a Request for Proposals (RFP), partially based on the results of an interview (not required by state law, but an effective tool and used by most agencies), and partially based on their bid for limited costs for the project. Contractors submit a bid price for their Percent Fee (overhead and profit) and a fixed amount for specified general conditions work.

Advantages of Using GC/CM: One of the primary advantages of using a GC/CM is that the contractor is on board early on in the process to assist and partner with the public agency with various preconstruction services, ranging from cost estimating to scheduling to constructability reviews. The GC/CM is viewed as a key partner in working with the designer and the public agency. Because the contractor enters into a contract early on with the public agency, the contractor becomes very familiar with the project and helps to shape it. This is very different from the traditional Design-Bid-Build model where a contractor may have just a few weeks to review all of the plans and specifications, figure out what the project is about, and then submit a bid. Because the GC/CM is selected early on in the process and has the opportunity to understand the project from the beginning, there is an expectation that there will be fewer change orders under GC/CM contracting, unless, of course, the owner adds scope of work to the project.

Approval Required to Use GC/CM: Use of the GC/CM method of contracting requires a public agency with considerable experience in negotiating and managing complex projects. In fact, in order for a public agency in the state to use GC/CM contracting, the project or the agency must be approved in advance by a statewide committee of industry stakeholders. The Project Review Committee (PRC) is appointed by the Capital Projects Advisory Review Board (CPARB) whose members are primarily appointed by the Governor from various segments of the public construction industry (owners, contractors, subcontractors, unions, sureties, MWBEs).

If a public agency is experienced in the use of GC/CM, they may apply to become a certified public owner that authorizes them to enter into any GC/CM project for three years without further review by the PRC. If, on the other hand, the agency has not successfully completed at least one GC/CM project, but they have sufficient and experienced staff or consultants to help them manage the project, and the project is an appropriate candidate for the use of GC/CM, they may apply for permission to use the GC/CM process for a particular project.

GC/CM Works Best for Larger Projects: Typically, GC/CM contracting is only used for larger projects – those over \$10 million, but with approval of the PRC and agency could use GC/CM for a smaller project.

Preconstruction Services Contract: After the public agency has selected the GC/CM, they enter into a preconstruction services contracts with the contractor to assist with estimating, scheduling, constructability reviews, equipment selection, etc.

Negotiation of the MACC: When the construction documents (plans and specifications) are 90% complete, the owner and the contractor may begin negotiations for the construction cost of the project. The MACC, plus the items bid by the contractor (Percent Fee and Specified General Conditions costs) are added together to equal what is known as the Total Contract Cost. Once the Maximum Allowable Construction Cost (MACC) has been negotiated, a GC/CM contract for construction of the project is executed.

Subcontract Bidding: After execution of a GC/CM contract, the GC/CM is responsible for competitively bidding each of the various subcontract bid packages for the work through a public advertisement. The GC/CM must select the low bidder for each of these bid packages, provided they have submitted a responsive bid. The GC/CM may, under certain circumstances, bid to self-perform some of this work, but in no case may the GC/CM perform more than 30% of the MACC.

Managing Costs: In the event that the total dollar amount of all the subcontract bid packages as bid equal more than the amount of the negotiated MACC, the contractor is at risk for this shortfall. If, on the other hand, the amount of the subcontract bid packages is less than the negotiated MACC, those savings accrue to the owner.

In managing a GC/CM contract, there are a number of cost components to the Total Contract Cost that must be clearly defined by the public agency in order to avoid paying more than is necessary or paying double for some services.

“Non-Traditional” Public Works Contracts

Introduction

In the “traditional design-bid-build” contracting method described in the preceding chapters, a municipality causes a public works project to be designed by an architect or engineer, solicits bids or quotes from interested contractors, awards the contract to the lowest responsible and responsive bidder, and then the contractor build the project according o the plans and specifications provided by the municipality.

Advantages to the “traditional design-bid-build” contracting method include:

- Established way of doing things
- Suitable for competitive bidding
- A/E directly works for owner
- Extensive litigation has resulted in well established legal precedents
- Insurance and bonding are well defined

Disadvantages include:

- Two contracts for owner to manage
 - Disagreements go through owner
 - Owner bears design adequacy risk
- All parties have different agendas/objectives
- Initial low bid doesn’t result in final best value
- Bids over budget presents most difficulties in reducing costs / creates significant delay
- No contractor involvement in design
- Slowest project delivery
- Most litigious delivery process

Because of these disadvantages, and because there are some instances where factors other than the lowest price may be more important, the Legislature has authorized municipalities in Washington State to use other “non-traditional” contracting methods, as described in this Chapter.

Performance Based Contracts for Energy Equipment (Chapter 35A RCW)

Municipalities may enter into performance-based contracts when contracting for certain energy services and equipment. (A “performance-based contract” is a contract that provides for payment only if there are cost savings. 116 “Energy equipment and services” is defined to mean equipment and services that are expected, upon installation, to reduce the energy use or energy cost of an existing building or facility.117) To acquire such equipment, services or supplies, the municipality need not follow a competitive bid process. Instead, the municipality announces its requirements and seeks proposals to meet those requirements. Using evaluation criteria it has established, the municipality then negotiates with the person or firm that has submitted the “best proposal” according to the criteria.118 If the municipality is unable to develop a satisfactory contract with that person or firm, it may select the next best firm and negotiate with it until a contract can be agreed to or the selection process is terminated.119

Acquisition of Electronic Data Processing and Telecommunications Systems (RCW 39.04.270)

RCW 39.04.270 authorizes local governments to use a “competitive negotiation” process as an alternative to the competitive bid process when purchasing (and installing) telecommunications, data processing (computer) equipment or software. This alternative process requires, at a minimum the following steps:

- A request for proposal shall be prepared and submitted to an adequate number of qualified sources, as determined by the municipality in its discretion, to permit reasonable competition consistent with the requirements of the procurement.

- Notice of the request for the proposal must be published in a newspaper of general circulation in the municipality at least thirteen days before the last date upon which proposals will be received.
- The request for proposal shall identify significant evaluation factors, including price, and their relative importance.
- The municipality shall provide reasonable procedures for technical evaluation of the proposals received, identification of qualified sources, and selection for awarding the contract.
- The award shall be made to the qualified bidder whose proposal is most advantageous to the municipality with price and other factors considered. The municipality may reject any and all proposals for good cause and request new proposals.

Alternative Public Works Contracting Procedures (Chapter 39.10 RCW)

Job Order Contracting

Job Order Contracting (JOC) is a method of obtaining construction services for smaller projects through the use of an indefinite quantity delivery order contract over a fixed period of time. Prices for each work order are based on an established price book. Under the JOC method, a municipality selects a contractor partially based on qualifications in response to a Request for Qualifications (RFQ), partially based on the results of an interview (not required by state law, but an effective tool and used by most agencies), and partially based on their percentage bid for managing each project. This bid is known as the contractor's coefficient and is a percentage markup or markdown off of the prices included in the identified price book that the municipality plans to use.

Not all public agencies in the State of Washington are authorized to use JOC. RCW 39.10.420 lists the types of entities that may use JOC:

- Department of General Administration
- University of Washington
- Washington State University
- Cities with a population greater than 70,000
- Counties with a population greater than 450,000
- Port districts with more than \$15 million of revenue
- Public utility districts with more than \$23 million of revenue
- All school districts
- State ferry system

Design-Build Contracting

Under the design-build method, a municipality selects one firm to both design and construct a public works project. The total project cost must be over \$10 million, but this method may be used for parking garages and preengineered metal buildings or prefabricated modular buildings regardless of cost. It is used for projects where design and construction activities, technologies, or schedule to be used are highly specialized. Project design is repetitive in nature and is an incidental part of the installation or construction, and regular interaction with and feedback from facilities users and operators during design is not critical.

Approval by the Project Review Committee is required, and agency must demonstrate successful management of at least one design-build project within the last 5 years. A request for proposal (RFP) process is used, with the RFP containing the project description and evaluation factors and weighting, among other things. An evaluation committee selects finalists and then asks for best and final proposals from the finalists, who receive an honorarium.

General Contractor/Construction Manager Contracting

Under the GC/CM method, a municipality selects a contractor early on in the design process, usually no later than the end of the schematic design phase. The contractor is selected partially based on qualifications in response to a Request for Proposals (RFP), partially based on the results of an interview (not required by state law, but an effective tool and used by most agencies), and partially based on their bid for limited costs for the project. Contractors submit a bid price for their Percent Fee (overhead and profit) and a fixed amount for specified general conditions work.

One of the primary advantages of using a GC/CM is that the contractor is on board early on in the process to assist and partner with the municipality with various preconstruction services, ranging from cost estimating to scheduling to constructability reviews. The GC/CM is viewed as a key partner in working with the designer and the public agency. Because the contractor enters into a contract early on with the public agency, the contractor becomes very familiar with the project and helps to shape it.

In order for a municipality in the state to use GC/CM contracting, the project or the agency must be approved in advance by the Project Review Committee (PRC), appointed by the Capital Projects Advisory Review Board (CPARB). Typically, GC/CM contracting is only used for larger projects – those over \$10 million, but with approval of the PRC, a municipality could use GC/CM for a smaller project.