

MRSC Position on Mandatory Pre-Bid Conferences & Prequalification of bidders

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February 19, 2003

Pat Mason has asked that I review MRSC's position regarding the ability of a city (or a town or county, I suppose) to require pre-bid conferences and to establish a program for the pre-qualification of bidders. I have reviewed responses we have previously given to such inquires, as well as what we have said in *The Bidding Book*. Although I'll provide a summary of our responses below, I subscribe to the advice we give in *the Bidding Book*.

Here are some excerpts from the *Bidding Book* (page 35):

Mandatory pre-bid meetings. 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 contractor's 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.

Prequalification of bidders. Although some statutes applicable to state agencies require or allow prequalification on certain kinds of projects, there are no such statutes for municipalities. 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 may preclude prequalification. In *Manson Engineering & Construction 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 authority to add prequalification requirements, 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 towns, which do not share the broad home rule powers of first class and code cities.

Mandatory pre-bid meetings

In Inq. No. 99-6739, Chelan, Pat Mason recognizes that this is a difficult issue. He cites *The Manual of Public Bidding in Washington*, noting that the Comptroller General has held that failure to attend the mandatory prebid conference or site inspection does not render the bid non-responsive and that the *Manual* "raises the issue of whether requiring

bidders to attend a mandatory prebid conference may be imposing an impermissible pre-qualification requirement in addition to that allowed by statute. This concern is based in part on *Manson Construction and Engineering Co. v. State*, referenced above.

In Inq. No.98-3565, Shoreline, Marya Silvernale concludes, based upon the discussion from the *New Bidding Book* that failure to attend a pre-bid conference or site inspection "may not be grounds for rejecting a bid proposal as nonresponsive. In your Inq. No. 02-6133, Bellevue, you set out e-mail responses to whether various jurisdictions require pre-bid meetings. The results, it seems to me, are somewhat of a mixed bag. I do note, however, that the Shoreline city attorney takes the position that pre-bid meetings can be strongly encouraged, but they cannot be made mandatory.

I conclude that the cautious approach we take in the *New Bidding Book* is probably (still) the best way to proceed. I think the cautions the court puts out in *Manson Construction* have equal application for pre-bid conferences as they do for prequalification. I fear that mandatory pre-bid conferences may well limit who can bid on a project, thus tainting the bidding process.

Prequalification of bidders

In Inq. No. 01-4751, Seattle, Bob Meinig advises that he could not find any city or county that bars contractors from bidding on public works, although he notes that Tacoma was proposing to add a section to its code for the disqualification of bidders. In Inq. No. 01-2377, Richland, You refer to AGO 1993 No. 19 [also referenced in the *New Bidding Book*] which discusses the authority of a university to impose bidding prequalification and concluding that the university, without a statute, lacked the authority. You conclude, though, that Richland, as a code city, might be able to provide for prequalification.

In Inq. No. 98-3559, Medina, Marya Silvernale concludes that failure to provide "reasonable information appropriate for determining bidder responsibility" might be grounds for rejecting a bid. In Inq. No. 95-2179, Tacoma, Pam James notes that we have little in our files and concludes that use of prequalification "should be carefully considered since competent bidders may be eliminated at the prequalification stage resulting in the loss of truly competitive bidding."

I believe the caution we have noted in our responses and in the *New Bidding Book* is appropriate. That is certainly the case for most counties, towns, and second class cities, who do not have home rule powers, and, I believe, for others as well. The *Manson Construction* case is on point in this regard.

CONCLUSION

I believe the advice we set out in *The New Bidding Book* is appropriate. Obviously some jurisdictions have adopted prequalification and mandatory pre-bid meetings. So be it. I don't think that we should encourage those practices; they are, I suggest, inherently anti-bidding and may not be allowed whether a city is first class, code or not.

The Bidding Book

for Washington Cities and Towns



REPORT NUMBER 52

September 2006

Municipal Research and Services Center

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 with a Population Under 20,000

RCW 35.23.352(1) sets out the advertising requirements for the public works bidding process in second class cities, towns, and code cities with a population under 20,000. 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.⁸⁰ (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).⁸¹ 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.

⁸⁰Prior 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.

⁸¹RCW 35.23.352(8) and RCW 39.04.190 as to vendor lists (discussed on pages 14-15). 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 pages 13-14).

First Class Cities and Code Cities with a Population of 20,000 or More

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 and code cities with a population of 20,000 or more 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.⁸² 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,⁸³ 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.

⁸²See *Platt Electric Supply Inc. v. City of Seattle*, 16 Wn. App. 265 (1976).

⁸³See RCW 39.12.020 and *City of Spokane v. Department of Labor and Industries*, 100 Wn. App. 805 (2000).

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 37) 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 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,⁸⁴ there 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.

⁸⁴RCW 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.

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 requirements,⁸⁵ 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 2006 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 with a population under 20,000 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 and code cities with a population of 20,000 or more. 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 with a Population under 20,000

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

⁸⁵See 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.

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.

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.⁸⁶

First Class Cities and Code Cities with a Population of 20,000 or More

There is no similar statutory requirement of bid bonds for first class cities in RCW 35.22.620, but several charters,⁸⁷ as well as some ordinances, require bid bonds or deposits of five percent of the bid be submitted. Code cities with a population of 20,000 or more, which follow the first class city bid laws, are also not required to ask for bid bonds. 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 \$25,000 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.⁸⁸) 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. 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.

⁸⁶See 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.

⁸⁷For example, see Tacoma City Charter, Art. VII, Sec. 7.11; Seattle City Charter, Art. VII, Sec. 2 and Seattle Municipal Code Sec. 10.48.010.

⁸⁸See, e.g., Seattle Municipal Code Sec. 20.60.110.



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 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 and code cities with a population of 20,000 and over, 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.

In determining who the lowest responsible bidder is, the city council is given relatively little discretion.⁹³ There is no similar provision in the first class city bid statute concerning what city officer or body should award the contract, so charter or ordinance provisions would govern. See also McQuillin, *Municipal*

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.

⁹³RCW 35.23.352, provides in part:

The city council or commission of the city or town shall let the contract to the lowest responsible bidder or shall have power by resolution to reject any or all bids and to make further calls for bids in the same manner as the original call....

Corporations, §29.73a *et seq.* (3rd ed.). 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.⁹⁴ 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.

RCW 43.19.1911 gives criteria that the state must follow in determining the lowest responsible bidder. Although there is no similar statute for cities, these criteria provide useful guidelines:

1. The ability, capacity, and skill of the bidder to perform the contract or provide the service.
2. The character, integrity, reputation, judgment, experience, and efficiency of the bidder.
3. Whether the bidder can perform the contract within the time specified.
4. The quality of performance of previous contracts or services.
5. The previous and existing compliance by the bidder with laws relating to the contract or services.
6. Such other information as may be secured having a bearing on the decision to award the contract.

A city may want to consider a bidder's ability to perform. In determining whether a bidder is able to perform, the city may want to review the bidder's financial resources. A bidder who lacks adequate financing to complete the required work may cause project delay and inconvenience if, for example, because of a failure of finances, the city must seek performance through a performance bond or be required to re-bid the project. A review of the bidder's ratio of assets to liabilities, working capital, cash flow projections, credit ratings, profitability and liquidity may assist in determining whether a particular bidder is financially able to perform.

The ability to comply with a schedule is also a factor in considering responsibility. Does the bidder have an adequate workforce available to perform the work? Is the bidder hampered by strikes? Having adequate facilities, equipment, licenses and permits necessary to perform the required tasks (or not) can also be a factor in determining responsibility. Of course, even though there may not be the present ability to perform, the bidder may be able to do so by the time performance is required. Past performance can be evaluated in determining responsibility.

“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.⁹⁵

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.

⁹⁴See *Chandler v. Otto*, 103 Wn. 2d. 268, 275 91984).

⁹⁵*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.

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 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.⁹⁶ 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.⁹⁷

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.⁹⁸



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.

⁹⁶See RCW 35.22.610(10), RCW 35.23.352(11), and RCW 39.30.040.

⁹⁷Richard 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 upon which this section draws heavily.

⁹⁸See AGO 61-62 No. 41.

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.

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.⁹⁹

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.¹⁰⁰ 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 and code cities with a population 20,000 or over, they would have such authority based on their broad home rule powers.



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.

⁹⁹See also *Contractors v. Ellensburg School District*, 96 Wn.2d 806 (1982); *Hanson Excavating v. Cowlitz County*, 28 Wn. App. 123 (1981).

¹⁰⁰RCW 35.23.352(1).

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 award the contract to anyone other than the protesting bidder without first providing written notice at least two full business days of its intent to execute a contract.¹⁰¹

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.¹⁰²
- **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.¹⁰³

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:

¹⁰¹RCW 39.04.105.

¹⁰²See also *Gostovich v. City of West Richland*, 75 Wn.2d 583 (1969); *Farmer Construction v. State*, 98 Wn.2d 600 (1983).

¹⁰³In *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).

- **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.

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.¹⁰⁴

- **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

¹⁰⁴The 2006 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.

- 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.

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.¹⁰⁵



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? 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 104. Under this Standard Specifications procedure, however, all bid proposals are checked for accuracy in adding up unit prices, prior to the bid award.

¹⁰⁵RCW 35.22.635, 35.23.352, and 39.04.107.

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.¹⁰⁶ These newer, alternative procedures are discussed in the following paragraphs.

Small Works Roster

Small works roster procedures were substantially revised by the 2000 Legislature.¹⁰⁷ Now, when the contract amount for a public works project is \$200,000 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.¹⁰⁸

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.¹⁰⁹

- 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.¹¹⁰

¹⁰⁶Legislation providing for demonstration projects that utilize the design-build concept currently exists. See chapter 39.10 RCW. However, the criteria for cities eligible to participate in such projects are severely restricted, and any contract entered into under the statute's provisions must be entered into by March 1, 2006. The sections of the chapter providing for the demonstration projects are repealed effective July 1, 2007.

¹⁰⁷Chapter 138, Laws of 2000.

¹⁰⁸See RCW 35.22.620(7) for first class cities and code cities with a population of 20,000 or more, and RCW 35.23.352(3) for second class cities and towns and code cities with a population of less than 20,000.

¹⁰⁹See Appendix B for sample resolutions establishing small works roster procedures.

¹¹⁰If 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 \$100,000 to \$200,000 and the city must choose to solicit bids from less than all the appropriate contractors, it must notify the other contractors on the roster that quotations are being sought. Notice may be published, mailed out, or sent by facsimile or other electronic

- Whenever possible, the city must invite at least one proposal from a minority or woman contractor who must otherwise qualify under this section.¹¹¹
- After the bids have been submitted, the city or town must award the contract to the contractor submitting the lowest responsible bid.¹¹²
- 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.¹¹³

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.



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.

means. The notice requirement only applies if the work is estimated to cost between \$100,000 and \$200,000; there is no similar requirement when the estimated cost is less than \$100,000.

¹¹¹RCW 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.

¹¹²For a discussion of how to determine “the lowest responsible bid,” see pages 35-37.

¹¹³RCW 39.04.200.

Limited Public Works Projects Process¹¹⁴

Legislation was adopted in 2001¹¹⁵ to provide an alternative to the small works roster procedures for “limited public works projects,” that is, projects for construction, alteration, repair, or improvement of real property costing less than \$35,000. The city may contract for such projects without use of a small works roster or the advertisement for bids, if certain steps are followed. The city must solicit either electronic or written quotations from a minimum of three contractors listed on an appropriate small works roster and award the contract to the lowest responsible bidder. After the award, the quotations reviewed must be open to public inspection and available by electronic request.

In making the contract award, the city should attempt to distribute the opportunities for contracts to contractors willing to perform the work within the geographic area. The city is required to maintain a list of the contractors that were contacted and the contracts awarded under the process during the previous twenty-four month period. Performance and payment bonds, as well as retainage requirements, are waived for limited public works projects. If the city is required to pay a subcontractor, laborer, mechanic, supplier or material man on the contractor's behalf, it may recover its payment from the contractor.

Performance-Based Contracts for Energy Equipment

Cities 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 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.¹¹⁸ 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.¹¹⁹

Job Order Contracts

A “job order contract” is a contract between a city, with a population of 70,000 or more, and a registered or 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.¹²⁰ Use of job order contracts are designed to reduce the total lead time for and the cost of the required work through the use of unit pricing and work orders. For example,

¹¹⁴RCW 39.04.155(3).

¹¹⁵Chapter 284, Laws of 2001.

¹¹⁶See RCW 39.35A.020(4).

¹¹⁷See RCW 39.35A.020(1).

¹¹⁸RCW 39.35A.030(2).

¹¹⁹55 Id.

¹²⁰RCW 39.10.020(4) and 39.10.130.

if the city recognizes that over the course of a year it may need the services of an electrician to install lighting at various city facilities, rather than seeking bids on a case-by-case basis, the city might obtain a job order contract with an electrician and then, when a specific need arises, issue a work order to the electrician to have the work performed. Before a city can use job order contract procedures, following public notification and a hearing, it must determine that the use will “serve the public interest by providing a substantial fiscal benefit.”¹²¹ The contracts are awarded through the application of evaluation factors to the proposals received in response to a request for proposals.¹²² Unless extended through legislative action, the job order process is scheduled for repeal on July 1, 2007.¹²³

Design Build and General Contractor/Construction Manager Procedures

Cities with a population over 70,000 may use design-build and general contractor/construction manager procedures to contract for public works.¹²⁴ Use of either procedure first requires public notification, a public hearing, and review to determine whether the use of such procedures will serve the public interest by providing a substantial fiscal benefit.¹²⁵ Unless these processes are extended through further legislative action, they will cease to be available July 1, 2007.

The design-review process allows a city to contract for both the design and construction of a facility, 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.¹²⁶ 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.¹²⁷ The firm selected is then required to submit a performance and payment bond, while the other finalists are to paid an honorarium in an amount “sufficient to generate meaningful competition among potential proposers.”¹²⁸

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, which is selected after advertisement and competitive bids. The firm provides services during the design phase and acts as the construction manager and general contractor through the construction phase.¹²⁹ The process used for selection of a firm is similar to that used to select a design-build contractor, discussed in the above paragraph. 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

¹²¹RCW 39.10.030.

¹²²See RCW 39.10.130.

¹²³RCW 39.10.902.

¹²⁴RCW 39.10.051 and 39.10.061.

¹²⁵RCW 39.10.030.

¹²⁶RCW 39.10.051(4).

¹²⁷RCW 39.10.051(5)-(6).

¹²⁸RCW 39.10.051(6).

¹²⁹RCW 39.10.061(1).

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.¹³⁰

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.

¹³⁰RCW 39.10.061(8).