

The Bidding Book

for Washington Counties



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The Bidding Process

If a county determines that it must go out for bids, it must follow certain procedures. It must advertise and give proper notice. After bids are opened, the lowest responsible bidder must be identified. The county then contracts with that firm. Each of these steps will be discussed below, along with questions concerning irregularities in the bidding process.

Advertising for Bids

Purchases. RCW 36.32.245 sets out advertising requirements for the purchase of materials, equipment, or supplies in all counties. An advertisement must be published in the county's official newspaper at least 13 days prior to the final date for receiving bids and must state:

- the time and place where bids will be opened;
- the time after which bids will not be received;
- the materials, equipment, supplies, or services to be purchased; and
- that the specifications may be seen at the office of the clerk of the county legislative authority.

Purchases between \$2,500 and \$25,000. Advertisement and formal sealed bidding are not required for purchases estimated to cost between \$2,500 and \$25,000 if the uniform process for vendors outlined in RCW 39.04.190 is followed.⁶³ This statute provides that a vendor list may be used to secure telephone or written quotations, or both, under certain conditions, as follows:

- Counties must advertise at least twice a year in a newspaper of general circulation that vendor lists exist and must solicit names for the lists.
- Counties must establish procedures for securing written or telephone quotations or both from, if possible, at least three different vendors, with the contract being awarded to the lowest responsible bidder.⁶⁴
- Immediately after the award, all bid quotations received 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 county using vendor lists to award contracts valued at more than \$2,500, but not more than \$25,000, 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.⁶⁵

Under \$2,500. For purchases of less than \$2,500, advertisement and formal sealed bidding may be dispensed with upon order of the county legislative authority.

⁶³RCW 36.32.245(3).

⁶⁴For a discussion of how to determine the "lowest responsible bidder," see pages 27-28.

⁶⁵RCW 39.04.200.

Public Works. RCW 36.32.250 sets out the advertising requirements for the public works bidding process in counties. (The special statutes that govern advertising for small works rosters and the limited public works process are discussed on pages 32-34.) Advertisements for bids should contain definite specifications and procedures for bidders to use in estimating their bids. At a minimum, a bid notice for a public work should include the following items:

- 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 done;
- the materials and equipment to be furnished; and
- that specifications for the project may be seen at the office of the clerk of the county legislative authority.

Although not specifically required by the above statutes, we recommend that the advertisement also contain the following:

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

Advertisements are to be published in the county's official newspaper at least 13 days prior to the last date upon which bids will be received. An advertisement is also to be published in a legal newspaper of general circulation in or as near as possible to that part of the county in which the work is to be done, unless the county's official newspaper covers at least 40 percent of the residences in that part of the county.

For public works projects estimated to cost less than \$200,000, a county may use a small works roster process as provided in RCW 39.04.155, instead of the competitive bidding process.⁶⁶

Road Projects. RCW 36.77.020 provides that, if the board of county commissioners determines that the work is to be done by contract, it must advertise the call for bids by publication in the official county paper and also in one trade paper of general circulation in the county, in one issue of each such paper at least once in each week for two consecutive weeks prior to the time set in the call for bids for the opening of bids.

Q&A

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

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

⁶⁶RCW 36.32.250.

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

In general, no. RCW 39.30.040 does allow counties to take any sales tax that a county 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 county require that general contractors on public works projects be union contractors?

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

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

Although there is no legal authority on point, we recommend against such a requirement. Instead, we suggest that a county "strongly urge," in its advertisement, that all bidders attend a pre-bid meeting, when it deems such a meeting necessary. A county 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 should be the contractors' choice. They may still bid on the project without making the field visit. Additionally, a county might lose a potentially low bidder because the bidder could not attend the pre-bid meeting.

May a county 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 county 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 county may not choose a contractor and then negotiate the deductibles. *Hanson Excavating Co. v. Cowlitz County*, 28 Wn. App. 123 (1981).*

May a county 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 county 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 county has to spend. Counties are not allowed to negotiate with bidders. Using the deductible method discussed above is the way to handle budget concerns.

May a county modify the bid specifications after advertising?

A county may use addenda to modify the bid specifications. The county 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 county prequalify bidders?

*Although some statutes applicable to state agencies specifically require or allow prequalification on certain kinds of projects,⁶⁷ there are no such statutes for municipalities, other than RCW 39.04.155, relating to the development of small works rosters. However, charter counties, with their home rule powers, would not need such statutory authority unless prequalification would be considered inconsistent with statutory competitive bidding requirements. For other counties, 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 requirements,⁶⁸ 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 counties other than charter counties.

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 counties, when adopting the Standard Specifications, to prequalify bidders.

May a county receive a bid by fax?

Although the statutes don't specifically require that bids be sealed, that requirement is strongly implied.

RCW 36.32.245 speaks at subsection (2) of bids being "opened and read in public at the time and place named in the advertisement," and states at subsection (3) that "For advertisement and formal sealed bidding to be dispensed with" (Emphasis added.)

⁶⁷RCW 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.

⁶⁸See 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.

With respect to public works project bidding, RCW 36.32.250 also states twice that bids be "opened."

Obviously, if a bid comes by fax, it is not sealed. 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

Bid bonds are required on public works 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 36.32.250 provides that each bid must be accompanied by a bid proposal deposit in the form of a surety bond, postal money order, cash, cashier's check, or certified check in an amount equal to five percent of the amount of the bid proposed. The statute also provides that **"no bid may be considered for public work unless it is accompanied by a bid deposit."** RCW 36.77.030 imposes the same bid deposit requirements on county road projects.

After bids are opened and the contract is awarded to the lowest responsible bidder as required by RCW 36.32.250, 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 county and furnishes a contractor's performance bond in the full amount of the contract price.

Once the bid is awarded, the bidder who was awarded the contract has 10 days after notice of the award to enter into the contract and submit the required performance bond, or the bid deposit is forfeited and the contract must be awarded to the next lowest bidder.⁶⁹

The Bid Decision

Deciding whom to award the bid to (if it is awarded) has a number of components. The bids are opened at the place, date, and time set out in the bid advertisement. If the bid is complicated, county staff may summarize the bids before presenting them to the board of commissioners or council. (Note that some counties have adopted policies and procedures that permit staff to award some bids.) The board or 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 county 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.

Q&A

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

Yes. Although RCW 18.27.020(2) says that it is a misdemeanor for a contractor to submit a bid unless registered with the state, RCW 18.27.320 states that an infraction will be dismissed once the contractor registers. So, if a contractor registers before entering into

⁶⁹RCW 36.32.250; RCW 36.77.040, for road projects.

a contract, the conditions of RCW 39.06.010 that require that contracts be executed with registered contractors are met.

May the bid opening be delayed?

Yes, but the bidders must all be notified. The county should give all bidders the opportunity to withdraw their bids (the postponement might make this project interfere with another contract) or, if they wish, to 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 county 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 meeting of the county legislative body?

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 legislative body meeting and no commissioners or councilmembers need be present at the bid opening.

Determining the Lowest Responsible Bidder

RCW 36.32.245 and .250 require that contracts requiring competitive bidding be awarded to the lowest responsible bidder for a public works project or for the purchase of materials, equipment, or supplies. In determining who is the lowest responsible bidder, a county is given relatively little discretion. The courts will not interfere with an award decision made in good faith, unless it is arbitrary or there is an indication of fraud. However, if a county awards a contract to a bidder other than the lowest bidder, it should include the reasons for its action in the board minutes or otherwise memorialize them.

“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; the bidder, for a variety of reasons, may not be able to perform as required.

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, either 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. 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.

RCW 43.19.1911 gives criteria that the state must follow in determining the lowest responsible bidder. Although there is no similar statute for counties, 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.

To determine the lowest responsible bidder, counties 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) counties, 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. If a county considers these tax revenues, it must consider the taxes it would receive from suppliers located both within and without its boundaries. The bid award must be made to the lowest responsible bidder after the tax revenue has been considered.

Counties may also give preference to products made of recycled materials or to products that may be recycled or reused.⁷⁰ Rather than invoke this preference in an arbitrary manner, the county board should establish a policy that states what percentage preference will be given for various products.

If either of these preferences will be used to determine the lowest bidder, that fact should be mentioned in the bid documents. Remember, other "local preferences" favoring local businesses in the award of a contract are not allowed.⁷¹

Q&A

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

The county 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 county should not just assume that service would be a problem simply because of the bidder's location. However, if the county 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 municipalities 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." Ability to service the purchased equipment would probably be one of the factors that a county could consider when awarding a contract under the procedure authorized by this legislation.

The lowest bidder is a firm that did not finish a previous contract with the county 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 county might have to give it the bid. The problem, of course, is that the county and contractor may have differing views on what happened on the previous contract.

⁷⁰RCW 36.32.245(6).

⁷¹See AGO 61-62, No. 41.

Accepting or Rejecting the Bid

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

Except as noted below, a county 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.

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 county 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 county must reject all bids. The county may want to reduce the scope of the project and advertise again.

Protest of Contract Award

If the contract is subject to competitive bidding, and the county 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 at least two full business days' written notice of its intent to execute a contract.⁷²

⁷² RCW 39.04.105.

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 county 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 of appeals 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.⁷³
- **Example of substantial variance:** in *AAB Electric v. Stevenson Public School District*, 5 Wn. App. 887 (1971), the court of appeals 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.⁷⁴

Bid Amount Errors

Bid amount errors are of two types: (1) those that favor a county, where the bidder makes a mistake that causes the bid to be lower than it should be; and (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 (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 of appeals 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 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 county 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

⁷³See also *Gostovich v. City of West Richland*, 75 Wn.2d 583 (1969); *Farmer Construction v. State*, 98 Wn.2d 600 (1983).

⁷⁴In *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).

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 county, 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.

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 state supreme court stated that the following factors should be considered in determining if a bidder can be relieved of his contractual obligations without forfeiting 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 county's) status has not greatly changed, and
- relief from forfeiture will cause no substantial hardship on that party.⁷⁵

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.⁷⁶

Q&A

A 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 the county courthouse until after the bid opening. This bid was lower than the others. May we award the contract to her?

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

May a county 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, consequently, should not be waived.

⁷⁵45 Wn.2d at 823.

⁷⁶RCW 36.32.250.

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 county 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 to recoup its losses in other ways, such as change orders.*

A bidder called, saying that she had inadvertently left out the light bar in her bid for a new sheriff's 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 board 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 county will not incur liability for withdrawing the award. But, if only a few days have passed, the bidder mistakenly awarded the bid probably incurred no damages. 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 county 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 for Road, Bridge, and Municipal Construction* is used, a correction in any error in adding up the unit prices may be permissible. 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 Procedures

State law provides a number of alternative public works contracting procedures, some that are available to all counties and others that are available only to the largest counties.

Small Works Roster

As an alternative to the general competitive bidding procedures, any county may follow the uniform small works roster process for construction of a public work or improvement, including road projects, with an estimated cost of \$200,000 or less.⁷⁷ 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.

⁷⁷RCW 35.32.250; RCW 35.77.075.

RCW 39.04.155(2) describes the procedures to be followed if a county chooses to use a small works roster:⁷⁸

- A county must publish a notice of the existence of its general small works roster or rosters (if it chooses to have different rosters for different kinds of work) in a newspaper of general circulation at least once a year, and must solicit the names of contractors for the roster(s).
- The county legislative authority or purchasing department 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.⁷⁹
- Whenever possible, the county must invite at least one proposal from a minority or woman contractor who must otherwise qualify under this section.⁸⁰
- After the bids have been submitted, the county must award the contract to the contractor submitting the lowest responsible bid.⁸¹
- 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 every two months, the county must post a list of contracts awarded. The list must contain, for each contract, the name of the contractor, the amount of the contract, a brief description of the public work, and the date of the award.⁸²

Small works roster procedures are "an alternative" to competitive bid requirements for public works projects in RCW 36.32.250. Therefore, specific requirements, such as those relating to advertising for bids or regarding bid deposits do not apply to small works roster contracts. Performance bonds are prescribed in RCW 39.08.030, not RCW 36.32.250; therefore, they are required on small works roster projects, even though bid bonds are not. Since the projects are public works and will be performed by contract, the

⁷⁸See Appendices A for sample resolutions establishing small works roster procedures.

⁷⁹If the alternative process is used, the county 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, the county must notify the other contractors on the roster that quotations are being sought. Notice may be published, mailed out, or sent by fax or other electronic means. RCW 39.04.155(2)(c).

⁸⁰RCW 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 October 16, 1998 issue paper from the Attorney General's office, 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, which more likely is a form of preferential treatment.

⁸¹For a discussion of how to determine "the lowest responsible bid," see pages 27-28.

⁸²RCW 39.04.200.

requirement to pay prevailing wages remains. Although not required, bid bonds are recommended to ensure that the contractor enters into the contract.

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 county must solicit electronic or written quotations from a minimum of three contractors from the appropriate small works roster.
- The county 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 county 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 county may waive the payment and performance bond requirements of chapter 39.08 RCW and the retainage requirements of chapter 60.28 RCW. However, the county retains the right of recovery against the contractor for any payments it makes on the contractor’s behalf.

Job Order Contracts

A “job order contract” is a contract between a county with a population of more than 450,000 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.⁸³ Use of job order contracts is 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, if a qualifying county recognizes that over the course of a year it may need the services of an electrician to install lighting at various county facilities, rather than seeking bids on a case-by-case basis, it 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 county 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.”⁸⁴ The contracts are awarded through the application of evaluation factors to the proposals received in response to a request for proposals. Unless extended through legislative action, the job order process is scheduled for repeal on July 1, 2007.⁸⁵

Design-Build and General Contractor/Construction Manager Procedures

Counties with a population of over 450,000 may also use design-build or general contractor/construction manager contracting procedures outlined in chapter 39.10 RCW for projects valued over \$10 million and

⁸³RCW 39.10.020(2), (4) and 39.10.130.

⁸⁴RCW 39.10.030.

⁸⁵RCW 39.10.902.

meeting one of three criteria.⁸⁶

A design-build procedure means a contract between a county and another party in which the other party agrees to both design and build a facility or part of a facility. Contracts for design-build services are awarded through a competitive process, following the procedures set out in RCW 39.10.051.

A general contractor/construction manager procedure is a multi-step competitive process to award a contract for a public facility that meets certain criteria to a single firm to provide services during the design phase and to act both as construction manager and general contractor during the construction phase. Using the process outlined in RCW 39.10.061(4), a county selects a firm and negotiates a maximum allowable construction cost to be guaranteed.

Agreements Relating to Water Pollution Control and Solid Waste Handling Facilities

RCW 36.32.265 provides that the competitive bidding requirements for purchases and public works projects do not apply if a county contracts under the procedures in RCW 70.150.040 for constructing or developing water pollution control facilities or for providing water pollution control services under RCW 70.150.040, or under the procedures in RCW 36.58.090 for constructing or developing solid waste handling facilities or for providing solid waste handling services.

RCW 70.150.040 establishes a competitive negotiation procedure for counties to contract with service providers for the design, financing, construction, ownership, operation, and/or maintenance of water pollution control facilities. That procedure also provides for Department of Ecology review and comment before any such agreement is entered into by a county.

RCW 36.58.090 offers an alternative, competitive negotiation procedure, involving either requests for proposals or requests for qualifications, for contracting “with one or more vendors for one or more of the design, construction, or operation of, or other service related to, the solid waste handling systems, plants, sites, or other facilities.” However, this process is available to construct a publicly-owned facility only when the facility is either: (1) privately-operated under a contract of at least five years’ duration; or (2) “an integral part of a solid waste processing facility located on the same site.”

⁸⁶RCW 39.10.020(2); RCW 39.10.051(1), (2); RCW 39.10.061(1), (2).