AUGUST 2024

City Bidding Book

Washington State

MRSC

CITY BIDDING BOOK: WASHINGTON STATE

ACKNOWLEDGEMENTS

This publication, City *Bidding Book: Washington State* is designed to assist city officials in determining whether competitive bids are required for purchases or when contracting for public works. Special recognition is given to Michael Purdy, principal of the firm Michael E. Purdy Associates, for his assistance in the development of text and appendices on alternative bidding techniques.

DISCLAIMER

The content of this publication is for informational purposes only and is not intended as legal advice, nor as a substitute for the legal advice of an attorney. You should contact your own legal counsel if you have a question regarding your legal rights or any other legal issue.

MRSC MISSION

Trusted guidance and services supporting local government success.

MRSC

OFFICE: 225 Tacoma Ave S., Tacoma, WA 98402

MAIL: 1712 6th Ave, Suite 100, PMB 1330, Tacoma, WA 98405

(206) 625-1300 | (800) 933-6772

www.MRSC.org

Revision History

MRSC does our best to update this publication as needed to reflect new legislation or other relevant information impacting city and town bidding procedures. Below is a summary of significant recent changes. If you are aware of any other sections that you think need to be updated or clarified, please contact mrsc@mrsc.org. To make sure you have the most recent version, please go to mrsc.org/publications.

DATE	SUMMARY
August 2024	**The Bidding Process:** • *Unit Priced (On Call) Public Works Contracts:* Replaced detailed summary with shorter overview, with link to MRSC webpage on Unit Priced (On Call) Public Works Contracts for the most up-to-date information and examples.
July 2024	**Bid Limits That Differ by City Class:** • *Bid Limits for Second Class Cities, Towns, and Code Cities:* Updated bid limits for public works involving multiple crafts, as well as purchases of materials, equipment, and supplies (SHB 1621). Updated additional bid limit references throughout the publication. **Bid Laws That Apply to All Cities and Towns:** • *Architecture and Engineering Services:* Replaced summary with link to MRSC webpage on Professional Architecture & Engineering Service Contracts for most up-to-date information and examples. • *Bidding Laws and Private Party Projects:* Clarified that prevailing wages do not apply if there is no cost to a public agency for a construction project. **The Bidding Process:** • *The Bid Decision:* Added plumbing, elevator, and electrical contractor licenses to public works bidder responsibility criteria (SB 5088). • *Small Works Roster:* Completely new small works roster processes (2SSB 5268). Replaced existing section with link to MRSC's new Small Works Roster Manual (formatted as a series of webpages, not a PDF).

DATE	SUMMARY
December 2020	**Entire Document:** • Complete content review; made a number of clarifications and edits. Added hyperlinks to RCWs, WACs, and other resources. **The First Steps to Take:** • *Purchase or Project:* Preliminary update to reflect changed definition of "ordinary maintenance" (WSR 19-15-119). **Bid Limits That Differ by City Class:** • *First Class Cities:* Increased day labor limits to $75,500 (single craft) and $150,000 (multiple craft) (ESSB 5418). • *Bid Limits for Second Class Cities, Towns, and Code Cities:* Increased public works bid limits to $75,500 (single craft) and $116,155 (multiple craft) (ESSB 5418). **The Bidding Process:** • *The Bid Decision:* New provisions allowing code cities, second class cities, and towns to award projects to the second-lowest bidder if certain criteria are met and amending the bid protest procedures (ESSB 5418). • *Small Works Roster:* Updated small works roster limit to $350,000 and limited public works threshold to $50,000. Cities may waive retainage for roster projects. If estimated cost exceeds $250,000, city must notify all contractors on the roster that bids are being sought (ESSB 5418). • *Job Order Contracting:* Removed 70,000 population threshold; any city may now use job order contracting (SHB 1295). • *Water Pollution Control Facilities*: RCW 70.150.030 et seq. recodified as RCW 70A.140.030 et seq., but no changes made to statutory text (SHB 2246 § 2049). • *Pollution Control Facilities*: Chapter 70.95A RCW now recodified as chapter 70A.210 RCW, but no changes made to statutory text (SHB 2246 §2012).
July 2018	**The Bidding Process:** • *Unit-Priced ("On-Call") Public Works Contracts:* New statutory authority to enter into unit-priced contracts (ESSB 6143). • *The Bid Decision:* Updated lowest responsible bidder requirements to include public works and prevailing wage training/experience requirements (ESSHB 1673).
July 2017	**The Bidding Process:** • *The Bid Decision:* Updated lowest responsible bidder requirements to include a sworn statement that the bidder is not a willful violator of labor laws (SSB 5301).

Contents

Introduction

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

NAVIGATING THIS PUBLICATION

Although relatively few, the statutes governing bidding can be quite complicated. There are different "rules" for bidding public works; for purchasing materials, supplies, and equipment not used in connection with a public work; and for procuring architectural and engineering services.

Also, city classification and population determine what types of projects must be put out for bid, and the dollar threshold at which bidding is required. A number of exceptions and special situations exist, many of which apply to all cities, while some apply only to certain classes of cities. (For simplicity, we will often refer just to "cities." Unless otherwise noted, everything said about cities also applies to towns.)

To use this publication, we suggest that you follow the steps below.

1. Read the section titled *Purchase or Project*. This will help you determine whether you are: (a) dealing with a public works project; (b) purchasing materials, supplies, or equipment unconnected with a public works project; or (c) obtaining a service. This initial determination is important, because the amount a city can spend without going out for bid varies for the different categories of contracts.

2. Next, read the section on *Costs of a Public Works Project or Purchase* so that you know what costs must be included if your project or purchase has to be bid.

3. Then refer to the sections on bid limits. If your city is a first class city, go to the *First Class Cities* section. For all other cities and towns, see the section *Bid Limits for Second Class Cities, Towns, and Code Cities*.

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

4. Review the table of contents. There are additional bidding laws and exceptions to those laws that apply to all cities. One might apply to your project or purchase. Special rules apply to purchasing from other governments.

5. For a discussion of the bidding process, including potential pitfalls, see the section *The Bidding Process*.

The First Steps to Take

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

PURCHASE OR PROJECT

"Public Work" or "Ordinary Maintenance"?

Public works projects must be bid if the cost of the project exceeds a certain amount. RCW 39.04.010 defines the term "public work" for bidding purposes as follows:

> "Public work" means all work, construction, alteration, repair, or improvement **other than ordinary maintenance**, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. (Emphasis added.)

Note that this definition of public work includes construction and repair but excludes ordinary maintenance. But what is "ordinary maintenance"? The public works statute does not define it. However, WAC 296-127-010(7)(b)(ii), which defines "ordinary maintenance" in the context of whether prevailing wages have to be paid as part of the contract, defines it as follows:

> Ordinary maintenance is defined as maintenance work performed by the regular employees of the state or any county, municipality, or political subdivision created by its laws.

If your city does not adopt the prevailing wages definition of "ordinary maintenance" for public works, it should still define the term in its contracting ordinances or policies. This will help contracting staff decide when a contract has to be bid.

For example, replacing a deteriorating bridge or roof would amount to a repair, or perhaps new construction, but not maintenance. Such a project would be a public work both for bidding and prevailing wage purposes.[2] On the other hand, using existing city employees to rod or clean a sewer or clean a roof would involve maintenance not performed by contract. Consequently, this expenditure does not need to be bid, and prevailing wages do not apply.

However, if instead of using city employees to perform the work, the city contracts out for the repair, the repair work is clearly a public work for prevailing wage purposes and may require bidding. Obviously, if the work does not

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

qualify as "ordinary maintenance," and it will be performed by contract, bids may be required, depending upon the estimated cost of the work.

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

Normally, whether purchases fall into the category of "materials, supplies, and equipment" not used in connection with a public work project or improvement is clear. Stationery, rubber bands, fire trucks, and copy machines come to mind. And, services should also be easy to identify. But, as the questions in the sidebar show, sometimes the situation is ambiguous.

COST OF A PUBLIC WORKS PROJECT OR PURCHASE

Determining the estimated cost of a project or purchase is a crucial first step, since the determination will dictate whether the project must be bid. While an exact cost estimate would clearly be preferred, realistically exactness is seldom possible. The person making the estimate should determine the fair and reasonable value of the work to be performed (or the purchase to be made), given the particular conditions that will be faced and the requirements of the proposed project or purchase.

The cost estimate should reflect the amount the city considers fair and reasonable and that it is willing to pay. Several approaches can be used to make an estimate. The city can consider the actual cost of performance, considering the current cost of labor, equipment, and materials. Obviously, use of this approach requires the estimator have a good working knowledge of construction methods, equipment, and market conditions. A second approach arrives at an estimate by using historical data. The estimator reviews recently-awarded contracts, making adjustments for the proposed project and the current market conditions. A third approach is to combine historical bid data with actual cost data.[3]

In determining the cost of a public works project, all amounts paid for materials, supplies, equipment, and labor on the construction of that project must be included. See RCW 35.22.620(5) and 35.22.630 for first class cities, and RCW 35.23.352(6) for second class cities, towns, and (via RCW 35A.40.200) code cities.

Inclusion of Retail Sales and Use Tax

Normally sales tax applies to every sale of tangible personal property (and some services) to all persons, including cities.[4] So for bid limit purposes, the tax should be included when determining the cost of a public work, or when

Ask MRSC

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

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

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

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

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

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

calculating the cost of materials, supplies, and equipment purchased separately from a public work.

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

1. Labor and services rendered for the building, repairing, or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle owned by a city or town which is used primarily for pedestrian or vehicle traffic. (RCW 82.04.050(10); see also WAC 458-20-171, nicknamed "Rule 171.") Materials used in constructing these projects are not exempt from the sales and use tax.
2. Labor and services for the processing and handling of sand, gravel, and rock taken from city pits and quarries when the material is for publicly-owned road projects. (RCW 82.08.0275 and WAC 458-20-171.)

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

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

Ask MRSC

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

If the city were merely purchasing a number of parking meter heads, which will be stockpiled in a warehouse and used over a period of time to replace defective heads, it would be an equipment purchase. However, if the heads are being purchased in connection with a specific project and the heads would be installed within a short period of time, such as a citywide parking meter replacement/upgrade, it is probably a public work.

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

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

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

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

Bid Limits That Differ by City Class

FIRST CLASS CITIES

Public Works Bid Limits – The Traditional Interpretation

> Note: The basic bid statute applicable to first class cities (RCW 35.22.620) is not clear. There is no helpful court decision or legislative history to help decipher what it means. The following analysis is a "best guess" of what the statute is supposed to mean, even though these conclusions are not necessarily borne out by the statutory language. An alternative reading of the statutes is contained in *Appendix D: First Class City Bid Laws - An Alternative View*.

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

Public Works Projects Bidding Limits

1. In first class cities, competitive bids are required for all public works projects costing over $150,000, if more than a single craft or trade is involved. If only a single craft or trade is involved, bids are required when the cost is over $75,500 (RCW 35.22.620(3)).[5] However, additional restrictions may apply, as noted in paragraph 3 below.

2. In any annual or biennial budget period, city employees are limited in the amount of work they can do on public works projects. This limit is 10% of the public works construction budget, including any supplemental amounts (RCW 35.22.620(2)). This means any project valued in excess of the 10% limit requires competitive bidding.

Remember, however, that this rule must be combined with the specific dollar limits discussed in paragraph 1. When those specific dollar limits are reached, bidding is required, even if the 10% budget limit is not exceeded. The dol-

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

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

lar threshold that determines whether bids are required is the smaller of the amounts in paragraphs 1 or 2. An example may be helpful.

Assume that a first class city has a $6,000,000 public works construction budget. It is planning on doing a multi-trade construction project that will cost $120,000.

Limit in paragraph 1 = $150,000

Paragraph 2 limit: $600,000 (10% of public works construction budget)

They can do the project in-house because the cost does not exceed the smaller of the two amounts.

However, if the city has already done $550,000 of in-house work, then the $120,000 project would put the city over its 10% limit and that project and all successive projects in that budget period would have to be bid through formal competition or let through the use of the city's small public works roster.

3. Whenever a first class city has had public works performed by city employees in any budget period up to the maximum permitted amount for that budget period (the 10% limit), **all remaining public works within that budget period must be contracted through a competitive process**.

Penalties may be applied if cities break the 10% limit. If the employees of any first class city perform public works in excess of the 10% limit, the amount in excess of 10% will be subtracted from the amount of public works otherwise permitted to be performed by city employees during the next budget period. If, after two years from the date of the excess work, the city has failed to reduce the amount of public works performed by its employees, the state will reduce the motor vehicle fuel tax distributions to the city by 20%, retaining the withheld distribution until compliance is demonstrated by the city to the state auditor.

Reporting and Notice Requirements

First class cities may, but are not required to, report to the state auditor yearly, indicating their total public works construction budget, supplemental public works construction budget, total construction costs of public works performed by public employees, and the amount of public works performed by public employees above or below the permissible 10% of the total construction budget (RCW 35.22.620(4)). For cities operating on a biennial budget, the report may reflect activity within the biennial period. First class cities with populations less than 150,000 may report all public works in excess of $5,000 that are not let by contract. Every city that uses its own forces on projects costing more than $25,000 must publish a description and the esti-

mated cost of the project in its official newspaper 15 days before beginning the project (RCW 39.04.020).

Women's and Minority Business Enterprise (WMBE) Requirements

Presumably all contracts entered into by a first class city for any public work or improvement exceeding $10,000 (or $15,000 for water mains) are required to contain the following clause (RCW 35.22.650):

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

However, Initiative 200 (codified as RCW 49.60.400(1)) says that:

> The state [the statute defines "state" to include cities, counties, and other political subdivisions] shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The term "preferential treatment" has not yet been defined. The requirement to grant subcontracts may run afoul of this provision, but the requirement to solicit qualified minority businesses may not.

In addition, some transportation projects funded in whole or in part by the U.S. Department of Transportation may require the city to establish a disadvantaged business enterprise (DBE) program to increase participation by minority businesses. For more information, see the Washington State Department of Transportation's Equal Opportunity – Disadvantaged Business Enterprise webpage.

Minor Exceptions

The cost of water services and metering equipment furnished by any first class city in the course of a water service installation, from the utility-owned main to and including the meter box assembly, is not included in determining the cost of a public work or improvement (RCW 35.22.630).

RCW 35.22.640 relieves first class cities from the bidding requirements when the public work relates solely to electrical distribution and generating systems on public rights of way or on municipally-owned property.[6]

Materials, Supplies and Equipment

Unlike other cities, first class cities are not required to seek competitive bids for the purchase of materials, supplies and equipment not associated with a public work. First class cities may adopt bidding requirements in their charter, local ordinances, or policies.

Services

Bids are not required by statute for the acquisition of services, except for obtaining architectural or engineering services (see the *Architectural and Engineering Services* section).

BID LIMITS FOR SECOND CLASS CITIES, TOWNS, AND CODE CITIES

Depending on the cost, these cities and towns may have to bid contracts for public works, as well as for purchasing materials, supplies, and equipment not used in connection with a public work. The only requirement to bid for services is to select an official newspaper (RCW 35.23.352(8)). Obtaining architectural and engineering services requires adherence to "qualifications-based selection" process (see the *Architectural and Engineering Services* section). A city may require, by ordinance or policy, that bids be sought for services, and it may adopt stricter provisions than those discussed below for bidding on public work projects and purchases.

Public Works

RCW 35.23.352 provides the public works bidding requirements for second class cities, towns, and (via RCW 35A.40.210) all code cities. Bids are required whenever the cost of a public work, including the cost of materials, supplies, and equipment, will exceed $150,000, if more than one craft or trade is involved. If only a single craft or trade is involved, or if the project is one of street signalization or street lighting, bids are required if the cost is greater than $75,500.

Note that there is no "10% of the construction budget" limit on the total amount of work that can be done by city workers as there is for first class cities. If each project's estimated cost is lower than the bidding limits, the

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

city could have its own workers or day laborers do every project. However, second class cities, towns, and code cities must provide a report to the state auditor of the costs of all public works greater than $5,000 that are not let by contract. For any project using city workers that costs more than $25,000, a city must publish a description of the project and its estimated cost in its official newspaper at least 15 days before beginning the work (RCW 39.04.020).

Materials, Supplies, and Equipment

RCW 35.23.352 also provides the bidding requirements for purchases for all second class cities, all towns, and (via RCW 35A.40.210) code cities *under 20,000 population only*. Any second class city, town, or code city with a population under 20,000 that purchases supplies, materials, or equipment costing more than $40,000, which are not to be used in connection with any public work or improvement, must call for bids.

Purchases by code cities with a population of 20,000 or more are (via RCW 35A.40.210) governed by RCW 35.22.620, the first class cities statute, which **does not specify any process for the purchase of materials, supplies and equipment**. Because there are no statutory requirements for code cities with a population of 20,000 or more, the city's ordinances or charter provisions govern those purchases.

When purchasing telecommunications and data processing (computer) equipment or software costing above the bid limit, municipalities may follow a "competitive negotiation" process authorized by RCW 39.04.270 requiring, at a minimum, the following steps:

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

Purchases by Use of Vendor Lists

Advertisement and formal sealed bidding may be dispensed with for purchases below $50,000, if the city legislative authority authorizes, by resolution, use of the uniform procedure set out in RCW 39.04.190 (see RCW 35.23.352(9)). This statute provides that a vendor list may be used to secure telephone or written quotations under certain conditions:

Ask MRSC

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

In general, "no." Even though the city does not intend to circumvent the bid law, it must bid the whole project since the cost is over the bid limits. However, there may be some circumstances in which a city may make a minor contribution. For example, a city might own a piece of equipment that the contractor does not or provide in-house work as a match for a grant. The bid specifications could note that the city would, upon request, lease the equipment to the contractor at a specified rate, presumably lower than would be available on the open market.

- The city must advertise at least twice a year in a newspaper of general circulation that a vendor list (or lists, if cities want to keep different vendor lists for different products) exists and it must solicit names for the list.
- If possible, cities should get at least three quotations to ensure a competitive process and should award the contract to the lowest responsible bidder. (See the section *Determining the Lowest Responsible Bidder*.)
- Immediately after the award, the city must record all bid quotations that it received and make them open to public inspection. This information must also be available to those who inquire by telephone.
- At least every two months, a city using the vendor list process established in RCW 39.04.190 to award contracts must post a list of the contracts awarded (RCW 39.04.200). 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. The list must also state where bid quotations are located and available for public inspection.

Lease with an Option to Purchase

A lease of personal (or real) property with an option to purchase may require competitive bids, depending on the type of property involved and its cost. RCW 35.42.220 requires a call for bids in accordance with RCW 35.23.352, if the cost of the property to be leased exceeds the amount specified in RCW 35.23.352 (currently $40,000).

Since first class cities and code cities over 20,000 population do not have purchase thresholds set by statute, the necessity to call for bids on lease-purchases would need to be evaluated against the purchase bidding thresholds established in their policies.

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

Services

Bids are only required when a second class city or town selects and contracts for the services of its official newspaper (RCW 35.23.352(8)). Although the statutes are not explicit, code cities are not required to seek bids for the selection and contracting for official newspaper services. Obtaining the services of an architect, landscape architect, engineer, or land surveyor does not require bids but does require the use of a negotiation process, discussed in the next chapter (see the section on *Architectural and Engineering Services*).

Special procedures are set out for acquiring solid waste services (RCW 35.21.156). These procedures, however, merely set out an alterna-

Ask MRSC

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

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

tive approach for the selection of a solid waste service provider and are not mandatory.

UNCLASSIFIED, TERRITORIAL CHARTER CITY

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

> We have heretofore, in common with the weight of authority, recognized that, in the absence of constitutional, statutory or charter requirement, authorized state or municipal contracts need not be let under competitive bidding.[7]

Accordingly, unless the territorial charter requires competitive bids, or the city has adopted a local policy requiring them, bids would not be required for either public works or purchases. The State Auditor's Office, however, would anticipate seeing internal controls adequate to safeguard public assets and ensure compliance with the local policies.

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

Exceptions to the Bidding Laws

The statutes contain exceptions to the previously discussed bidding requirements:

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

These exceptions are discussed below.

If you think your project or purchase falls into one of these exceptions: be ready to justify it with specific facts and check with your auditor, finance department, and/or attorney.

BRAND NAME, MONOPOLIES, SOLE SOURCE AND SPECIAL MARKET CONDITIONS

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

Brand Name Bidding

Cities may advertise for bids with a particular brand name in the specification if the responsible officials have exercised their judgment and determined that a certain brand name is of higher quality or is better suited to the municipality's needs. In *Smith v. City of Seattle*, 192 Wash. 64 (1937), the city advertised for bids for incandescent lamps, specifying a particular brand. In a suit brought by a maker of a similar lamp, the court stated that if the officials involved exercised their discretion in determining that a particular brand of lamps was more desirable, the city's procedure was proper in the absence of abuse of discretion or fraud. In this case, the fact that the city had used the specified lamps previously and they had performed satisfactorily provided a rational basis for city authorities to limit the bid advertisement to that specified brand of lamps, and the court found no abuse of discretion.

Ask MRSC

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

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

There is no requirement that bid specifications naming a particular brand also include a phrase such as "or an equal brand."[8]

Monopolies and Sole Source Bidding

But what if specifying a particular brand means that only one bid will be received? RCW 39.04.280(1)(a) authorizes sole source procurement.[9] To use this process, the city council must either apply a previously-adopted written policy or pass a resolution that states "the purchase is clearly and legitimately limited to a single source or supply." If the city council waives the bid requirement through application of a written policy, it must, immediately following the award of the contract, set out the factual basis for the waiver.[10]

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

(a) the city department has conducted a screening process whereby it can justify purchase of a specific product,

(b) it can draft legitimate specifications, to which only one vendor can successfully respond,

(c) the product is available only through one manufacturer (or distributor, and the manufacturer so certifies), which is clearly documented by the city, and

(d) the city documents its reasonable efforts to ensure it is getting the lowest price.[11]

Special Market Conditions – What Are They?

RCW 39.04.280(1)(b) also provides a "special market conditions" waiver from the bidding requirements for purchases of materials, supplies, or equipment by second class cities, towns, and code cities. To use this exemption, a city must pass a resolution stating "the factual basis for the exception" (RCW 39.04.280(2)).

What are special market conditions? No definition is given in the statutes. Some have suggested that if supplies or used equipment are offered at a very favorable price and will be sold before a city can complete the bidding

Ask MRSC

May a city specify "American-made" in bid specifications?

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

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

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

8 AGO 61-62 No. 24.

9 This section is made applicable to first class by RCW 35.22.620(6) and to towns, second class cities and code cities by RCW 35.23.352(10); however, since first class cities are not required to seek bids for purchases, the applicability of this statute to a first class city is irrelevant.

10 Case law also supports the use of sole source procurement. See *Washington Fruit & Produce Co. v. City of Yakima*, 3 Wn.2d 152 (1940).

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

process, there is a special market condition. This might also apply to situations where there is a business reason to use a specific item, such as compatibility or consistency in operations, maintenance, or procedures. However, since there have been no court cases or attorney general's opinion on this subject, if a city wishes to invoke "special market conditions" to waive the bidding requirements, the city attorney should be consulted.

Auctions

Sometimes a city will find exactly what it needs, at a favorable price, at an auction. Obviously, seeking bids is impossible in an auction setting. RCW 39.30.045 authorizes a city to acquire supplies, materials, and equipment through an auction conducted by the United States or any agency thereof, an agency of the state of Washington, a municipality or other government agency, or any private party, without bids, if the items to be purchased can be obtained at a competitive price. This authority allows a city to make a purchase on an internet-based auction service, such as eBay, as well as through more traditional, in-person auctions as long as it is not a fixed-price marketplace.

For more guidance, see our Competitive Bidding Exemptions page.

EMERGENCIES

RCW 39.04.280(1)(c) specifically authorizes a municipality to waive competitive bidding requirements for purchases "in the event of an emergency." The term "emergency" is defined by statute to mean unforeseen circumstances beyond the control of the municipality that either: (a) presents a real, immediate threat to the proper performance of essential functions; or (b) will likely result in material loss or damage to property, bodily injury, or loss of life, if immediate action is not taken.

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

Another statute, RCW 38.52.070(2), authorizes political subdivisions in which major disasters occur (as defined in RCW 38.52.020 and RCW 38.52.010(9) of the Washington Emergency Management Act) to forego statutory competitive bidding requirements. Several first class city charters also provide that the city may forego bidding procedures in the event an emergency exists.[12]

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

Ask MRSC

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

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

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

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

NEIGHBORHOOD "SELF-HELP" PROJECTS

RCW 35.21.278 says that cities and towns may contract with certain groups to do neighborhood improvement projects without going out to bid. These groups include chambers of commerce, service organizations, community, youth, or athletic associations, or other similar associations located in and providing service to the immediate neighborhood. The contracting association may make park and recreation improvements, install equipment and artwork, and provide maintenance services while being reimbursed by the city or town for its expenses. The consideration received by the city (the improvements, artwork, etc.) must be at least equal to three times the city or town's payment to the association. All payments made by a public entity under the authority of this section for these types of contracts in any one year shall not exceed $25,000 or $2 per resident within the boundaries of the public entity, whichever is greater.

STATE OR COUNTY CONSTRUCTION OR REPAIR OF STREETS

By passing a resolution, a city council may authorize the county in which it is located to construct, repair, or maintain a city street (RCW 47.24.050). The city pays the "actual cost" of the work, with the payment being deposited in the county road fund. The state Department of Transportation may also provide engineering assistance to a city on road projects or do the actual construction. The state is reimbursed from the city's share of the motor vehicle excise tax in the motor vehicle fund.[13] These agreements with the county or the state do not require competitive bids.

RCW 35.77.020 allows cities to enter into agreements with the county in which they are located for all or a specified part of the construction, repair, or maintenance of city streets and bridges.[14]

Ask MRSC

Are the following situations considered emergencies for the purposes of competitive bidding exemptions?

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

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

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

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

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

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

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

14 Any work performed for a first class city by the county under this statute counts against the limit for the amount of work (10% of the construction budget) that a city can have done by its own forces. RCW 35.22.620(2). Work done under RCW 47.24.050 does not appear to have this restriction.

Bid Laws That Apply to All Cities and Towns

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

ARCHITECTURAL AND ENGINEERING SERVICES

Cities must follow the procedures set out in chapter 39.80 RCW when contracting for architectural and engineering services (including landscape architecture and land surveying).

For more information, see our page Professional Architecture & Engineering Service Contracts.

BID SPLITTING

Municipalities may not break a public works project into separate phases or parts to avoid compliance with bidding statutes. RCW 35.22.620(3), relating to first class cities, and RCW 35.23.352(1), relating to other classes of cities and to towns, both prohibit the division of a project into units of work or classes of work to keep costs below the bidding threshold.

The Washington Court of Appeals has held that a city cannot break a public work into phases for the purpose of estimating the cost of a public works project, even though those phases are performed at different intervals of time.[15] Instead, a city, while completing the actual project in phases, must total the cost of all phases of the public work or purchase. If the aggregate cost exceeds the applicable bid limit, the city must bid each phase of the project even though a given phase may cost less than the bid limit.

Although the statutes only refer to public works when prohibiting bid splitting, the State Auditor's Office has expressed that neither projects nor purchases should be artificially split so that the cost of each contract is below the bid threshold. The SAO has also indicated that the entity should not disaggregate purchases solely for the purpose of getting the individual purchases below bidding requirements (bid splitting).

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

Ask MRSC

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

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

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

Probably not. RCW 43.155.060(3) requires that all work financed by Public Trust Fund loans be put out to bid. This seems to rule out having the county do the work.

Is a two-year retainer with an engineer prohibited?

It depends. If the city is hiring this person to act as "city engineer" (but not as a city employee) to perform all the engineering work in the city, a two-year contract is probably not allowed. RCW 39.80.040 provides that cities must publish their requirements for professional services and encourage firms to submit qualifications and performance data annually. However, the city need not change engineers every year. The city can continue to hire the same engineer if the city finds that person to be the most qualified.

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

BIDDING LAWS AND PRIVATE PARTY PROJECTS

Cities sometimes get involved in projects that involve a private party, such as a developer or an insurance company. For example, as part of a project a developer may make some public improvements such as street, sidewalk, water, or sewer improvements and dedicate them to the city.

Generally, if the project is done completely by the developer and then donated to the city, the bid laws do not have to be followed because the city has not contributed any city money and the developer is not acting as an agent of the city. But, if the cost of a project involves any city money, then typically the entire project is subject to the bid laws.[16]

Also to be considered is RCW 39.04.260:

> Any work, construction, alteration, repair, or improvement, other than ordinary maintenance, that the state or a municipality causes to be performed by a private party through a contract to rent, lease, or purchase at least fifty percent of the project by one or more state agencies or municipalities shall comply with chapter 39.12 RCW [prevailing wages].

Cities should consider the following when reviewing whether bidding laws and prevailing wages may be required: 1) who owns the land, 2) who pays for the project, and 3) who owns the project when it is completed.

For example, in cases where a developer installs public improvements at their own cost through the development process, the developer is not required to pay prevailing wages. However, once a municipality agrees to contribute funds or impact fee revenue, there is a contractual element which could trigger RCW 39.04.260.

In another example, some repairs to a city building located in the city park are needed. This is a publicly owned building located on city land. However, there is a private association that will make the repairs to the building and there will be no direct cost or expense to the city. Once the project is complete, the building will be fully owned by the city.

Based on this set of facts, there is no "cost" to the public agency for the work. This type of private funding does not meet the definition of "public work" in RCW 39.04.010, so it is not subject to competitive bidding requirements and it does not trigger a prevailing wage requirement of any kind.

Ask MRSC

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

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

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

This project could be monitored to ensure appropriate building code considerations, etc. are met, but there would be no legal requirement to pay prevailing wage rates or file Intent/Affidavit/certified payroll report forms.

Ask MRSC

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

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

The term "public work" shall include:

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

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

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

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

Purchasing from Other Governments & "Piggybacking"

FEDERAL GOVERNMENT

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

INTERGOVERNMENTAL PURCHASES AND BIDDING

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

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

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

RCW 39.34.030, another section of the Interlocal Cooperation Act, authorizes cooperative action, including joint purchases, by different governmental entities. An advantage to using this process is that, as long as the lead agency awarded the contract following its own statutory requirements, a public agency has an opportunity to piggyback on that process even if it is different from their own.

Must an interlocal agreement be in place before a city may piggyback or buy off another jurisdiction's contract? Based upon the language of the RCW 39.34.030(5)(b), which references piggybacking off contracts that have been "awarded," in the past tense, and language from an informal Attorney General

Ask MRSC

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

Maybe. If the facility is being constructed by the private party through a contract with the city, under which the city will rent, lease, or purchase the facility after it is completed, and the city's use will be of at least 50% of the facility, then prevailing wages must be paid. See RCW 39.04.260.

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

RCW 39.34.040 requires that, before the interlocal agreement is effective, it must either be filed with the county auditor or listed by subject on the city's website or other electronically retrievable public source.

memorandum, the answer seems clear that a city can piggyback after the fact. Brian Buchholz, an Assistant Attorney General, wrote in a 2003 memorandum:

> Our current interpretation of the law is that, although such an agreement may be a good business practice to ensure compliance with particular bid law requirements, it is not legally necessary to have entered an interlocal agreement prior to utilizing another entity's contract.[17]

Cities may also use the authority granted in RCW 39.34.030 to make purchases through state contracts.[18] A city does this by signing a Master Contracts Usage Agreement (MCUA) with the Department of Enterprise Services (DES). The DES Master Contracts Usage Agreement webpage provides information and instructions for entering into an MCUA with the state and for making purchases with the state contract; it explains:

> The Master Contracts Usage Agreement (MCUA) is a one-time agreement necessary to meet statutory requirements allowing qualifying organizations to use Washington State master contracts. Cooperative purchasing through state contracts provides organizations that have agreed to terms and conditions the opportunity to save millions of dollars annually by pooling resources to leverage the market through volume discounts. Authorized organizations are provided access to over 1,500 vendors suppling goods and services to meet all the business needs of their organization at no cost.

If a city decides to make a purchase under one of the listed contracts, the city identifies a vendor on the contract it wishes to use. The city contacts the vendor citing the contract number and name and gives the vendor the city's DES customer number.[19] The contract contains instructions on the procedures used to make purchases. Under most contracts, the city or town makes the purchase directly from the vendor. In some cases, such as the purchase of motor vehicles, the department requires the purchase to be made through its office.

Ask MRSC

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

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

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

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

17 Memorandum dated April 1, 2003 from Brian Buchholz, Assistant Attorney General, to Corine Pennington, State Auditor's Office Manager.

18 See also RCW 39.26.050(1):

> In addition to the powers and duties provided in chapter 43.19 RCW, the department [of Enterprise Services] shall make available goods and services to support state agencies, and may enter into agreements with any other local or federal governmental agency or entity or a public benefit nonprofit organization, in compliance with RCW 39.34.055, and any tribes located in the state, to furnish such products and services as deemed appropriate by both parties.

19 Cities may also receive more information by contacting DES at (360) 407-2210 or MCUA@des.wa.gov.

The Bidding Process

When a city goes 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. And the city is generally required to contract with that company. Each of these steps will be discussed below, along with information on alternative processes and questions concerning irregularities in the bidding process.

ADVERTISING FOR BIDS

Second Class Cities, Towns, and Code Cities

RCW 35.23.352(1) sets out the advertising requirements for the public works bidding process in second class cities, towns, and code cities. It requires (in part) that:

> All such 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.

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 sealed bids, if the cost is over $40,000 (or $50,000, if a vendor list is used – see the *Purchases by Use of Vendor Lists* section).

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.

Advertising for small works rosters is discussed in the *Small Works Roster* section.

First Class Cities

The first class city bid statute, RCW 35.22.620, does not contain any detailed requirements for public notice. MRSC recommends that cities choose the newspaper that will reach the most contractors and allow enough time for responsive bids to be prepared.

First class cities 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 may be 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.[20] We recommend that the bid notice for a public work include at least 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 also recommend that the advertisement contain the following:

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

Since prevailing wages must be paid on all public works performed by contract,[21] the advertisement for bids as well as the specifications and the subsequent contract for the project should indicate that the successful bidder will be required to pay prevailing wages for the work to be performed.

Bid bonds are not required by statute for the purchase of materials, equipment, and supplies not used in connection with a public work. Your city may decide to require a bid bond. There is also no statutory requirement to include a reference to contract documents. But, you may want to include your boilerplate contract to avoid drawn-out discussions about contract terms.

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

21 See 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?

No, there is no statutory authority to do so. In AGO 61-62 No. 41, 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?

No, but 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, in which case the city might consider holding more than one pre-bid meeting in order to accommodate various contractors' schedules.

May a city call for bids with additives and/or deductibles to allow for a change in the project scope?

Yes, if the bid specifications are written to specifically allow for them. They should state that bidders are to submit an overall bid for the project, and then give the cost of each addition or deductible in case the city decides to revise the size of the project. The specifications should clearly indicate that the city reserves the right to accept bids on the base project or to revise the size of the project if it is necessary to make it fit the budget. The order in which the additives or deductibles would be exercised should also be identified in the specifications. The city may not choose a contractor and then negotiate changes. See *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 identify in the bid where and how addenda will be available to bidders. If the time period before the bid opening is short and an addendum is sent out too close to the opening date, the bid opening may need to be delayed. It

is common practice to have the bidders acknowledge receipt of addenda in their proposals.

May a city prequalify bidders?

There is no statutory authority for cities to prequalify bidders except under RCW 39.04.152, 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.

In *Manson Engineering & Construction Co. v. State*, 24 Wn. App. 185 (1979), the court of appeals ruled that the Department of Transportation did not have the authority to add additional prequalification requirements.

The *Manson* court's reasoning may be equally applicable to second class cities and to towns, to prohibit them from imposing prequalification requirements.

Because of this, we do not think that the 2020 Standard Specifications for Road, Bridge, and Municipal Construction, Section 1-02.1 (including the APWA Supplement provision), which authorizes a prequalification procedure, provides sufficient authority for second class cities and towns, when adopting the Standard Specifications, to prequalify bidders.

May a city receive a bid electronically?

RCW 35.23.352(1) requires that second class cities, towns, (and code cities) receive "sealed" bids. Unless the city has established a secure means of "sealing" electronic bids, typically through an electronic bidding system developed by an outside vendor, then an electronic bid would *not* be considered sealed. Of course, a contractor could send the bids by email, for example, to an agent and have the agent sign and seal the documents and deliver them to the city.

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

If a contract is to be awarded through the small works roster procedures, then written or electronic quotations are permitted.

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 electronic transfer of bid documents is statutorily permitted or judicially authorized, it is advisable to require a means of transfer that does not jeopardize the

privacy of bid documents or allow any dispute concerning the authenticity of bid documents.

BID AND PERFORMANCE BONDS

Second Class Cities, Towns, and Code Cities

Bid bonds are required on public works projects to help ensure that 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 5% of the bid amount, including sales tax. The statute adds that **"no bid shall be considered unless accompanied by such bid proposal deposit."** Bid bonds are not required when small works roster procedures are used, however, as those procedures are "in lieu of" the procedures set by RCW 35.23.352, which requires bid bonds.

After bids are opened and the contract is awarded, the bid proposal deposits or bid bonds are returned to the unsuccessful bidders. The successful bidder's bid bond or deposit is kept 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.[22]

First Class Cities

There is no similar statutory requirement of bid bonds for first class cities in RCW 35.22.620, but several charters,[23] as well as some ordinances, require bid bonds or deposits. Each city should determine those contracts for which they it will require a deposit.

Performance Bonds for All Cities for All Public Works Contracts

RCW 39.08.010 requires a municipality to have contractors post a performance bond whenever it enters into any public works contract, to ensure that the job will be completed and that all workers, subcontractors, and suppliers will be paid. Prevailing wage claims have priority if there are multiple claims on retainage.

If city officials fail to obtain the required performance bond, RCW 39.08.015 makes the city liable for claims of "laborers, material men, subcontractors, and mechanics." For contracts of $150,000 or less, RCW 39.08.010 allows a city, at the option of the contractor, to retain 10% of the contract for a period of 30

22 See the *Bid Amount Errors* section for circumstances under which a bidder may not have to forfeit the bid bond.

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

Ask MRSC

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

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

May the bid opening be delayed?

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

days after the date of final acceptance instead of the contractor providing a performance bond. This statute is intended to help small contractors who may have trouble getting a bond.

However, bonds are required on any project funded in whole or in part by federal transportation funds, as RCW 60.28.011 prohibits public agencies from withholding retainage on such projects. The bond replaces the protections otherwise provided through retainage.

THE BID DECISION

Deciding whom to award the bid to has several components. The bids are opened at the place, date, and time set out in the bid package. The council may have adopted policies and procedures that permit staff to award some bids or that authorize staff to summarize the bids before presenting them to council. The city must determine the lowest responsible bidder. Some bids may involve errors, omissions, or other irregularities. Your purchasing code or policy should tell you how to deal with these irregularities.

The award decision will not be subject to interference by the courts if it is made in good faith, unless it is arbitrary or there is an indication of fraud.[24] If the city council awards a contract to a bidder other than the lowest bidder, it should include the reasons for its action in the council minutes or otherwise memorialize them.

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

Determining the Lowest Responsible Bidder

For those projects and purchases requiring competitive bidding, cities must typically award the contract to the lowest responsible bidder.[25]

"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.

RCW 39.04.350 establishes the bidder responsibility requirements that a bidder must meet to be considered a responsible bidder and be qualified to be awarded a public works project. Before a city may accept the contractor's bid, the contractor must:

Ask MRSC

Must the bid opening occur at a council meeting?

No. Bids must be opened 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. It is suggested that bids be opened in public.

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

25 Some first class cities may use slightly different language in their charters, such as the "lowest and best" bidder.

- be a registered contractor at the time of bid submittal (RCW 18.27.020) and – for plumbing, elevator, and electrical contractors – have a valid license;
- have a current Unified Business Identifier (UBI) number;
- have industrial insurance/workers' comp coverage;
- have an Employment Security Department account;
- have a state excise tax registration number;
- not be disqualified from bidding under RCW 39.06.010 or 39.12.065(3);
- not have any apprenticeship violations, if applicable;
- certify through a sworn statement that they are not a willful violator of labor laws in reference to RCW 49.48.082; and
- Have received training, provided by the Department of Labor and Industries or a provider whose curriculum has been approved by L&I, on the requirements related to public works and prevailing wages. However, bidders that have completed three or more public works projects and maintained a valid business license in Washington for at least three years are exempt from this requirement.

RCW 39.04.350 allows cities to adopt relevant supplemental bidder responsibility criteria for a particular project. This statute also directs the state Capital Projects Advisory Review Board (CPARB) to develop suggested guidelines to assist the state and municipalities in developing supplemental bidder responsibility criteria. See the *Bidder Responsibility Guidelines* on CPARB's Background and Reference webpage.

In 2012 the state legislature adopted legislation (RCW 39.26.160) setting out criteria for determining responsibility by state agencies:

(a) The ability, capacity, and skill of the bidder to perform the contract or provide the service required;

(b) The character, integrity, reputation, judgment, experience, and efficiency of the bidder;

(c) Whether the bidder can perform the contract within the time specified;

(d) The quality of performance of previous contracts or services;

(e) The previous and existing compliance by the bidder with laws relating to the contract or services; and

(f) Such other information as may be secured having a bearing on the decision to award the contract.

Although cities are already required to get the sworn statement in (f) above as part of bidder responsibility criteria in RCW 39.04.350, if cities wanted to

use the other listed criteria, they would need to adopt them as supplemental criteria for a specific project.

If the city adopts supplemental criteria, the bidding documents must include the adopted supplemental criteria and:

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

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

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

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

Also, compliance with RCW 39.30.060, may be 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 must name itself for the work.

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 information to assist in verifying the mandatory responsible bidder criteria and potentially some of the supplemental criteria that may be required.

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. Cities may award a

Ask MRSC

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." 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.

contract to the bidder submitting the lowest bid *before taxes are applied*, if they have given notice of the intent to do so before bids are submitted.

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 (see RCW 35.22.620(10), RCW 35.23.352(12), and RCW 39.30.040). 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.

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.[26]

However, if during any bidding process for public works in which a bid is received from a nonresident contractor, from a state that is identified in the Department of Enterprise Services survey as providing an in-state contractor advantage (percentage bid preference), the state or local agency must provide a comparable *disadvantage* to the bid of that nonresident contractor. This does *not* apply if the contractor has an office located in Washington (RCW 39.04.380).

Accepting or Rejecting the Bid

If 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.

Other than the exception noted below, **a city may not negotiate** with the bidders once the bids have been submitted and opened.

Exception. Second class cities, towns, and code cities with a population under 20,000 are released from the requirements of the bid laws if no responsive bids are received (RCW 35.23.352(1)). 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 or code cities over 20,000 population, it is likely that they would have such authority based on their broad home rule powers.

In addition, effective July 28, 2019 code cities, second class cities, and towns may award projects to the second-lowest bidder if both of the following conditions are met (RCW 35.23.352(2)):

- The city issues a written finding that the lowest bidder has delivered a project to the city within the last three years which was late, over budget,

Ask MRSC

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

For code cities, second class cities, and towns: Yes, as long as the previous incident is recorded and managed in compliance with RCW 35.23.352(2) and (14).

For first class cities, 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 award to the low bidder. The problem, of course, is that the city and contractor may have differing views on what happened on the previous contract.

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.

26 See AGO 61-62 No. 41.

or did not meet specifications, and the city does not find in writing that the bidder has shown how they would improve their performance to be likely to meet project specifications; and

- The second-lowest bid is within 5% of the lowest bid and meets the same criteria as the lowest bidder.

Any city/town that awards a contract to the second-lowest bidder under those criteria must make an annual report to the state Department of Commerce including the total number of bids awarded to certified minority or women contractors and describing how notice was provided to potential certified minority or women contractors (RCW 35.23.352(14)).

Protest of Contract Award

Cities should anticipate bid protests and have procedures in place for handling them. For all competitively bid projects, a new provision effective July 28, 2019 requires the city, within two business days of the bid opening, to provide copies of the bids it received if requested by a bidder (RCW 39.04.105).

The agency may not award the contract during this two-day window, and if bid copies are requested by a bidder, the agency must wait at least two full business days after providing copies before awarding the contract. (A "business day" does not include intermediate Saturdays, Sundays, or legal holidays.)

If a written protest is submitted within (a) two full business days following the bid opening, or (b) two full business days following when the municipality provided copies of the bids to those bidders requesting them, the agency may not execute a contract for the project with anyone other than the protesting bidder without first providing at least two full business days' written notice of its intent to execute a contract for the project.

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. Generally, 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.[27]

27 See also *Gostovich v. City of West Richland*, 75 Wn.2d 583 (1969); *Farmer Con-*

Ask MRSC

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.

- 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.[28]
- 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.

A bidder is bound by the bid amount. The courts will not change a contract because of an error, even an obvious one, in the amount bid. For 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.

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 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.

Ask MRSC

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.

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struction v. State, 98 Wn.2d 600 (1983).

28 In *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).

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.[29]

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 the following factors should be considered in determining if a bidder can be relieved of his contractual obligations (and not forfeit the bid bond) after submitting an erroneous low bid:

- whether the bidder acted in good faith,
- whether the bidder acted without gross negligence,
- whether the bidder was reasonably prompt in giving notice of the error in the bid,
- whether the bidder will suffer substantial detriment by forfeiture,
- whether the other party's (i.e., the city's) status has not greatly changed, and
- relief from forfeiture will cause no substantial hardship on that party.

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 (see RCW 35.22.635, 35.23.352, and 39.04.107).

Ask MRSC

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

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.

29 The 2020 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." 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.

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

SMALL WORKS ROSTER

When the contract amount for a public works project is $350,000 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. If the estimated cost exceeds $350,000, formal competitive bids are required. For more information, see our Small Works Roster Manual. (Note that the Small Works Roster Manual is now formatted as a series of webpages, not a PDF publication. We no longer offer a PDF copy of the manual.)

UNIT-PRICED ("ON-CALL") PUBLIC WORKS CONTRACTS

All cities and towns are authorized to use competitively bid "unit priced" public works contracts, also known as "on call" public works contracts. See RCW 35.22.620(11) for first class cities and RCW 35.23.352(13) for all other cities and towns (referenced via RCW 35A.40.210 for code cities).

While traditional public works contracts are awarded for specific projects/scopes with a specific total dollar value, a unit-priced contract is not associated with a specific project, does not guarantee any amount of work, and does not establish a total dollar value (although the contract value may be capped at a certain level over the life of the contract).

Instead, the agency agrees to pay defined unit prices for certain types of anticipated, but unplanned, work or trades over a certain time period ("indefinite quantity, indefinite frequency"). This allows cities and towns to contract for multiple or recurring small public works projects over time without having to bid each project separately, which can save the agency time and money, especially for projects that may arise at the last minute.

The prices for different tasks may be based on various units – tons, square feet, linear feet, cubic yards, hours, quantity of items, lump sum per task, etc.

For more information on this topic, see our webpage on Unit Priced (On Call) Public Works Contracts.

Ask MRSC

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.

PERFORMANCE-BASED CONTRACTS FOR ENERGY EQUIPMENT

Cities may enter into performance-based contracts when contracting for certain water conservation, solid waste reduction, or energy services and equipment.

A "performance-based contract" is a contract that provides for payment only if there are cost savings, if the payment obligation for each contract year is either set as a percentage of the annual cost savings attributable under the contract or guaranteed by the other persons or entities to be less than the annual cost savings attributable under the contract (see RCW 39.35A.020(4)).

To acquire 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 (RCW 39.35A.030). 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.

JOB ORDER CONTRACTING

A "job order contract" is a contract between a city 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, not to exceed two years, with an additional one-year option.

Job order contracting is a very different process from the traditional design-bid-build method of performing public works projects. Job order contracting provides a method of obtaining construction services for smaller projects using an indefinite quantity delivery order contract over a fixed time period. Using this method, a city selects a contractor based on the evaluation factors established in the request for proposals (RFP), which must include price and the ability of the proposer to perform the job order contract. The contractor's bid is known as the contractor's coefficient and is a percentage markup or markdown of the prices included in the identified price book the city intends to use.

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

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

Ask MRSC

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. Under this Standard Specifications procedure, all bid proposals are checked for accuracy in adding up unit prices, prior to the bid award (see Standard Specifications for Road, Bridge, and Municipal Construction, Section 1-03.1).

DESIGN-BUILD PROCEDURES

Cities may use design-build procedures to contract for public works (RCW 39.10.300). The design-review process allows a city to contract for both the design and construction of (a) a facility valued over $2 million, (b) a parking garage, regardless of cost, and (c) construction or erection of portable facilities, preengineered metal buildings, or not more than 10 prefabricated modular buildings per installation site, regardless of cost.

The contract is awarded through a competitive process starting with the public solicitation of qualifications for design-build services. The request for qualifications must contain a general 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, and any other relevant information to the project (RCW 39.10.330).

Up to five finalists will be asked to submit proposals, to be evaluated by a committee that may either award the contract from these proposals or reject all proposals. The firm selected is then required to submit a performance and payment bond, while the other finalists are paid an honorarium in an amount "sufficient to generate meaningful competition among potential proposers."

Additional information regarding the design-build procedures is set out in *Appendix C*.

GENERAL CONTRACTOR/CONSTRUCTION MANAGER PROCEDURES

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, selected after advertisement and competitive bids.

The firm that is selected provides services during the design phase and acts as the construction manager and general contractor through the construction phase (RCW 39.10.210(7)). The process used for selection of a firm is similar to that used to select a design-build contractor, discussed in the section above (RCW 39.10.350). The contractor is selected partially on qualifications, as provided in response to a request for proposals, and on the bid the contractor provides; the city may add an interview process.

The maximum allowable construction cost is negotiated by the city and the firm selected after the scope of the project is determined. That cost is used to set the guaranteed contract cost. Subcontract work requires competitive bids. The contract award may include an incentive clause, not to exceed 5% of the maximum construction cost, to be awarded for savings of either time or cost or both.

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

Ask MRSC

Our second class city awarded a contract for a single-craft public work without going out for bids because the estimated cost was $72,000, under the $75,500 threshold for bids. Now the contract requires a change order that will push the cost over $75,500. Does this create a bidding issue?

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

WATER POLLUTION CONTROL FACILITIES

RCW 70A.140.030 - .070 (formerly 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.

POLLUTION CONTROL FACILITIES

Chapter 70A.210 RCW (formerly chapter 70.95A RCW), relating to pollution control facilities, may offer an important exception to bidding requirements. Although the primary emphasis of the chapter relates to financing pollution control facilities, one section may exempt certain projects from bidding requirements that might otherwise apply. RCW 70A.210.110 states in part:

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

Definitions are provided in RCW 70A.210.020. The term "facility" is defined to mean "any land, building, structure, machinery, system, fixture, appurtenance, equipment or any combination thereof... which is used or to be used... in furtherance of the purpose of abating, controlling, or preventing pollution." "Pollution" is defined broadly to include water pollution, land pollution, solid waste disposal, thermal pollution, radiation contamination, or noise pollution.

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

However, in view of the lack of appellate or other authority regarding the chapter's use, cities should use caution in deciding to make use of its provisions. Asking the Department of Ecology to certify that the project is designed to abate, control, and/or prevent pollution would be a judicious step to take before ignoring the bid laws. (RCW 70A.210.120 describes the procedure.)

Ask MRSC

May our city utilize the bid law exception in chapter 70A.210 RCW to construct an aerator system to reduce the formation of algae in a city lake?

This project appears to fall within the intent of this chapter. The Department of Ecology has in the past accepted the aeration project as eligible under RCW 70A.210.120 (formerly RCW 70.95A.100) and provided a loan to allow the city to construct this project without going out for bids.

May a city use the bid law exception in chapter 70A.210 RCW to purchase water filtration equipment for a swimming pool?

The definition section in RCW 70A.210.020 is very broad, but probably not enough to include this pool equipment. The intent of this statutory provision was to provide bid law exceptions for major pollution control devices to help reduce or eliminate water, air, and other resource pollution. This purchase does not appear to fall within that intent.

Other Bidding Issues

CHANGE ORDERS

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

When does the additional work required by a change order require competitive bids? There is no Washington authority on this issue, and the authority from other jurisdictions appears to be split as to the need for competitive bids. However, according to one legal commentator, the "better cases" favor the position that bids are not required when unforeseen extra work becomes necessary under a valid preexisting contract.[30] In *Home Owners Constructions v. Glen Rock*, 34 NJ 305, 169 A.2d 129, 134 (1961), the court stated:

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

Citing the above case, Antieau comments:

> Bid requirements should not be construed so strictly as to divest a local government of the power to let extra work required by unanticipated developments in the performance of a construction contract, or to make minor changes and additions after a contract has been awarded. If the local government has no latitude whatever in authorizing changes in materials or small additions when necessary or desirable, the public interest may well be jeopardized. (Citations omitted.)[31]

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

30 1A Antieau, *Municipal Corporation Law*, §10.34 at p.10-96; see also McQuillin, *Municipal Corporations*, §29.119.10

31 Id. at page 10-97.

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

> [D]eviations from a contract... must be based upon honest, reasonable and intelligent judgment and must not vary so substantially from the original plan as to constitute a new undertaking, where fairness could be secured only by competitive bidding.[32]

Generally, a change order should not be used to remedy defective work; competitive bidding should be used in such cases.[33] However, if the work to remedy the defective work is under a warranty, it probably could be treated as a change order.

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

Additionally, the State Auditor's Office has created a Best Practices for Change Orders document.

CONFLICT OF INTEREST

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

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

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

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

32 1A Antieau, Municipal Corporation Law, §10.34, at p. 10-98, citing *Hann v. Board of Education of Wicomico County*, 200 Md. 49, 87 A.2d 846, 849 (1952).

33 McQuillin, *Municipal Corporations*, §29.40.

Washington courts have looked at the term "beneficial interest" over the years. They have held that a city could not contract with a company that supplied rock, when the owner was the city's public works commissioner.[34]

On the other hand, they have held that a city councilmember who was an unpaid board member of a nonprofit agency did not have a beneficial interest in the agency and could vote on city funding of that agency.[35]

There are exceptions to the rule. And, the statute defines remote interests that must be disclosed but that do not prevent the city from contracting. Each of these depends on the size of your city or town and other specific facts. So, you should always check with your attorney to see whether those exceptions apply.

Any contract made in violation of RCW 42.23.030 is void, and any officer who violates that statute is subject to a civil penalty of $500 and his or her office may be subject to forfeiture (RCW 42.23.050).

Results of Violation of Bid Statutes

A violation of statutory bidding requirements may have several consequences. First, a contract made in violation of such requirements, or those of a city charter or ordinance, is illegal and void.[36] Nevertheless, a city may have to pay for the reasonable value of a partially performed contract that is voided for violation of bid law, where there is no bad faith or fraud.[37]

Second, a violation of bid law has consequences for the municipal officer under whom or under whose supervision the contract was made. RCW 39.30.020 provides that the officer is liable for a penalty of not less than $300 if the violation of bid law was "willful and intentional," and that, further, the officer may be held liable for the consequential damages to the city resulting from the violation. And, RCW 42.23.050 requires a person who violates chapter 42.23 RCW to pay a $500 fine to the city in addition to other civil or criminal penalties.

If the officer, in a criminal action against him or her, is found to have intentionally violated bid law, he or she immediately forfeits his or her office (see RCW 39.30.020 and RCW 42.23.050).

34 *City of Raymond v. Runyon*, 93 Wn. App. 127 (1998).

35 *Barry v. Johns*, 92 Wn. App. 865, 920 P.2d 222 (1996).

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

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

Appendices

The resources linked below, provide further information and reading related to city bidding processes. Click on the document titles to view these resources.

A. MRSC BID THRESHOLDS FOR PUBLIC WORKS PROJECTS

This matrix shows the bid thresholds, small works roster thresholds, and limits for work by agency employees for all classes of cities and towns, as well as many other local governments in Washington.

B. MRSC BID THRESHOLDS FOR PURCHASES

This matrix shows the thresholds for quotes, vendor lists, and formal competitive bids for all classes of cities and towns, as well as many other local governments in Washington.

C. NON-TRADITIONAL PUBLIC WORKS CONTRACTS

This document, prepared by Mike Purdy, provides a brief introduction to the three alternative public works project delivery methods authorized in Washington: (1) job order contracting, (2) design-build contracting, and (3) general contractor/construction manager (GC/GM) contracting.

D. FIRST CLASS CITY BID LAWS – AN ALTERNATIVE VIEW

This document briefly addresses the ambiguity within the first class city bidding statute, RCW 35.22.620, as well as the history of the current law.

1.800.933.6772

MRSC@MRSC.org

MRSC.org

facebook.com/MRSCWA

linkedin.com/company/mrsc

@MRSC_WA

OFFICE 225 Tacoma Ave S., Tacoma, WA 98405
MAILING 1712 6th Ave, Suite 100, PMB 1330, Tacoma, WA 98405

MRSC

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