

# Small Works Roster

A Guide for Washington's  
Local Governments



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## **SMALL WORKS ROSTER: A GUIDE FOR WASHINGTON'S LOCAL GOVERNMENTS**

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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 district's legal counsel if you have a question regarding any legal issue.

These guidelines are permissive and discretionary and are applicable to all conservation districts. Where the guidelines indicate possible practices using such terms as "should" or "may," the suggestion is permissive and not mandatory. In addition, districts must also consider their own Board of Supervisors resolutions, policies, and procedures to determine what requirements are truly mandatory for a given contracting scenario. Case law, new regulations, or audit findings for one type of municipal corporation will not necessarily apply to all municipal corporations since enabling statutes may differ.

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# Introduction

Small public works rosters are lists of qualified contractors who can bid for an eligible public works project, as long as the project falls below a certain dollar threshold (currently \$350,000). Rosters are less restrictive and time-consuming than full formal competitive bids.

Some local government types are specifically authorized to use small works rosters by state statute, while others are not and some statutes are silent on the matter.

This manual is intended to help local governments navigate the small works roster process, including:

- Definitions
- Authorized local government types
- Roster procedures & checklists
- Tips for success
- Limited public works projects under \$50,000
- Emergency roster contracts
- And more!

However, many of these authorizations and requirements will be changing effective July 1, 2024, due to [SB 5268](#). This includes designating MRSC Rosters as the statewide roster, expanding roster authorization to all local governments that are authorized to perform public works, and making a number of changes to the roster contracting process. We will be updating this publication once again by July 1, 2024 to reflect the changes.

# Quick Tips for Small Works Roster Success

When considering use of the small works roster (SWR) process, here are some tips for getting started.

**1. Is your project a public works project?**

Check out the [Definitions](#).

**2. If it is a public works project, is it an emergency?**

Check out [Small Works Contracting in an Emergency](#).

**3. If it is a public works project, then what is the estimated cost?**

Check out [Cost Estimates](#), and then use the [Small Works Roster \(SWR\) Contracting Flow Chart](#).

If the estimated cost exceeds \$350,000, you cannot use the SWR process.

If the estimated cost is less than your agency's bid limits (refer to your specific public works statutes), then you do not need to use the SWR process.

**4. Is your agency authorized to use the SWR process?**

Check out [Authorized Agencies](#).

**5. If your agency is authorized to use the SWR process:**

Follow the [Small Works Roster Adoption Submittal and Implementation Checklist](#). Does your agency have its own SWR and/or has it considered a shared SWR with other nearby agencies or contracting with [MRSC Rosters](#)?

Has your agency adopted a SWR Resolution? For sample small works roster resolutions, see the [MRSC Rosters website](#) under the "Public Agencies" tab.

Does your SWR Resolution establish policies and procedures for registering and selecting contractors?

Does your SWR Resolution establish policies and procedures for requesting quotes and for awarding contracts?

**6. Does your agency have policies and procedures in place for administering SWR projects?**

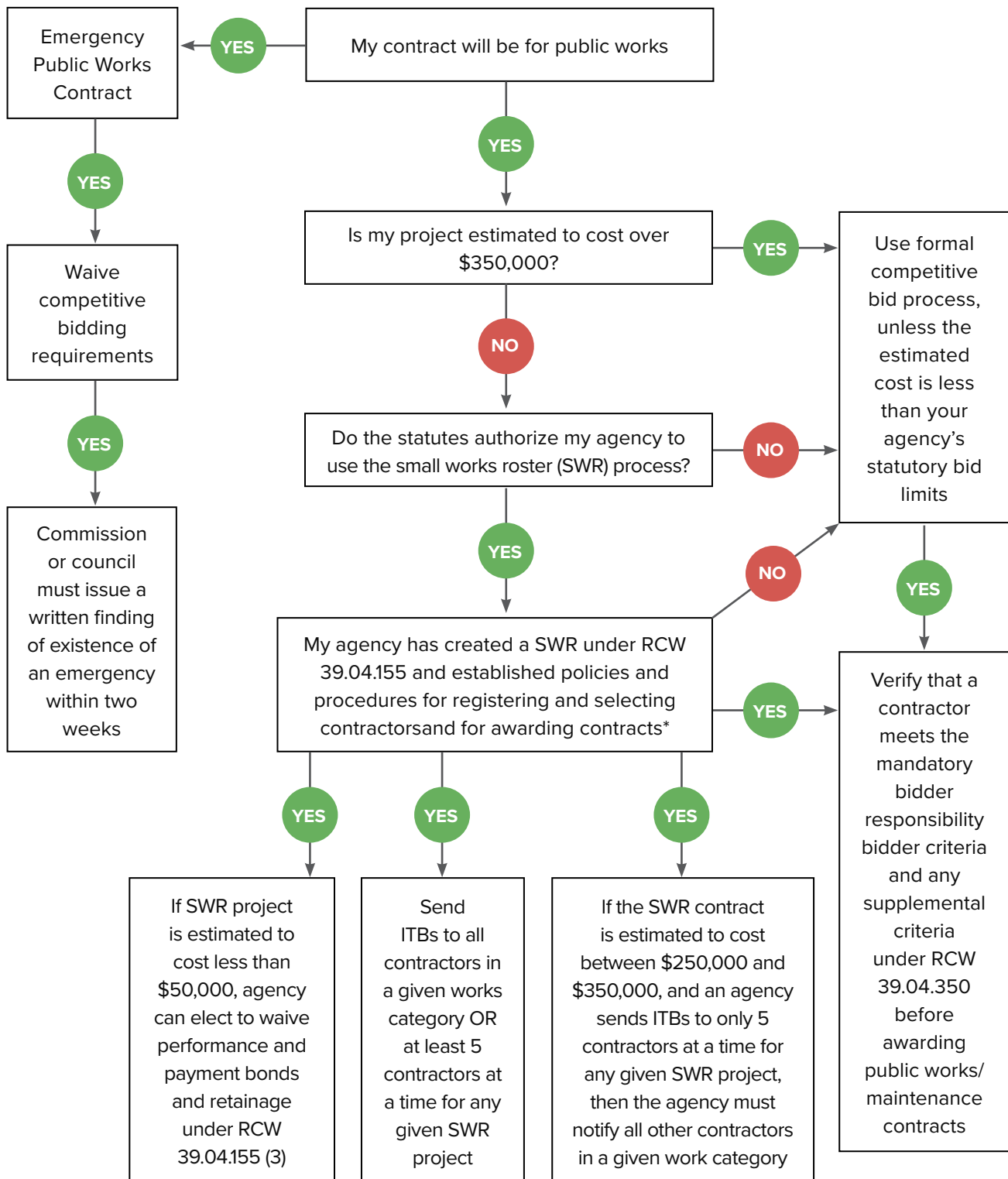
The [SWR Contract Administration Checklist](#) lists steps that may be helpful in developing a SWR process. Sample policy and procedure documents can also be found online on MRSC's webpage [Small Public Works Rosters](#).

## Small Works Roster Adoption Submittal and Implementation Checklist

Procedure or Document	Date	By
<b>Roster Adoption Checklist</b>		
<b>Option A – Agency Roster</b>		
We will use our own roster		
Council/commission has adopted a SWR for our agency		
<b>Option B – Shared Roster</b>		
We will share a roster with		
Council/commission has adopted interlocal agreement for a shared SWR. The agreement must identify a lead agency.		
<b>Option C – MRSC Rosters</b>		
We will contract with <a href="#">MRSC Rosters</a>		
Council/commission has approved a contract with <a href="#">MRSC Rosters</a>		
<b>Roster Submittal Checklist (for Option A and B Lead Agency)</b>		
<b>Application Form (Paper or Electronics)</b>		
Contact information, email, telephone, address, and contact person(s)		
Mandatory responsibility criteria per RCW 39.04.350(1)		
Supplemental responsibility criteria per RCW 39.04.350(2), experience, claims history, safety history, etc. (optional)		
<b>Roster Implementation Checklist</b>		
Invitation to Bid (ITB) documents are to be available electronically on <ul style="list-style-type: none"> <li>• Agency website</li> <li>• Service provider website</li> <li>• Other _____</li> </ul>		
ITB documents are to be available in paper form at		
ITB notifications will be via email, telephone, other		
For contracts less than \$250,000, ITBs are sent to all contractors in a given work category <b>or</b> ITBs are sent to only 5 contractors in a given work category		
For contracts greater than \$250,000, ITBs are sent to all contractors in a given work category <b>or</b> ITBs are sent to only 5 contractors in a given work category and all other contractors in the work category are notified via email, US mail, or publication in newspaper		
For contracts less than \$50,000 under the limited public works process, ITBs are sent to at least three (3) contractors in a given work category		
ITB responses will be accepted via email, telephone, mail, other		
Before a SWR contract is awarded, our _____ will check to be sure that the contractor meets all mandatory and supplemental responsibility criteria		

Use not applicable (NA) to mark those items that do not pertain to a given item. Be sure your agency is authorized to use SWR.

## Small Works Roster (SWR) Contracting Flow Chart



\* As an alternative, your agency can subscribe to MRSC Rosters.



## SWR Contract Administration Checklist

Project: \_\_\_\_\_ Contractor: \_\_\_\_\_ Contract Amount: \$ \_\_\_\_\_

	Performed By	Number	Date/Verified
<b>Invitation to Bid (ITB)</b>			
ITB Sent to All Contractors in the _____ Subcategory		See ITB Email or other notice	
Contract Documents Posted at _____		See attached webpage printout	
Addendums _____ & _____ Sent and Posted on _____ & _____		See email or other notice	
Quote Opening Date			
Quotes Reviewed and Award of Contract Recommended			
Commission/Council Approval			
<b>Verification of Low Bidder Minimum Qualifications</b>			
Contractor Registration Number as of Bid Opening Date			
Contractor Unified Business Identifier (UBI #)			
Contractor Industrial Insurance Coverage		Current?	
Contractor Employment Security Department Number			
Contractor State Excise Tax Registration Number			
Contractor Debarred		Yes No	
Contractor Wage Compliance Certificate			
Contractor L&I Training Verification		Physically verify	
Supplemental Criteria Met (If applicable)			
<b>Pre-Construction</b>			
Notice of Award			
Insurance Certificates and Endorsements obtained			
Performance and Payment Bond			
Intents to Pay Prevailing Wages (Contractor and All Subs)			
Options for Retainage Stated or Retainage Bond Posted (if not waived)			
Contract Signed by Contractor			
Contract Signed by Agency			
Contract Effective Date			
Notice to Proceed Issued			
<b>Construction</b>			
Pay Estimate No. 1			
Pay Estimate No. 2			
Pay Estimate No. 3			
Change Orders _____, _____, _____			
Final Pay Estimate			
Punch List Prepared			
Punch List Items Completed			
<b>Contract Closeout</b>			
Affidavits of Prevailing Wages Paid (Contractor and All Subs)			
General _____, Sub. 1 _____, Sub. 2 _____, Sub. 3 _____			
Notice of Completion of Public Works to Dept. of Revenue (>\$35k)			
Dept. of Revenue Certificate of Payment of Excise Taxes (>\$35k)			
Employment Securities Dept. Payroll Tax Liability Release (>\$35k)			
Dept. of L&I Industrial Insurance Web Page Check (>\$35k)			
Engineer's Certificate of Completion			
Legal Notice of Acceptance of Work (Optional)			
Council/Commission Acceptance			
Completion of 45-Day Lien Filing Period from Acceptance			
Release of Liens Filed During 45-Day Acceptance Period (If Any)			
Retainage Released (if applicable; must have all previous items verified)			
Archive Files and As-Built Drawings			

# Definitions

Statutory	Definition
<b>Award</b>	The formal decision by the state or municipality notifying a responsible bidder with the lowest responsive bid of the state or municipality's acceptance of the bid and intent to enter into a contract with the bidder. <a href="#">RCW 39.04.010</a> .
<b>Contract</b>	A contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive bid, or a contract awarded under the small works roster process in <a href="#">RCW 39.04.155</a> .
<b>Municipality</b>	Every city, county, town, port district, district, or other public agency authorized by law to require the execution of public work, except drainage districts, diking districts, diking and drainage improvement districts, drainage improvement districts, diking improvement districts, consolidated diking and drainage improvement districts, consolidated drainage improvement districts, consolidated diking improvement districts, irrigation districts, or other districts authorized by law for the reclamation or development of waste or undeveloped lands.
<b>Responsible Bidder</b>	A contractor who meets the criteria in <a href="#">RCW 39.04.350</a> .
<b>Public Works</b>	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. All public works, including maintenance when performed by contract, shall comply with <a href="#">chapter 39.12 RCW</a> . "Public work" does not include work, construction, alteration, repair, or improvement performed under contracts entered into under <a href="#">RCW 36.102.060(4)</a> or under development agreements entered into under <a href="#">RCW 36.102.060(7)</a> or leases entered into under <a href="#">RCW 36.102.060(8)</a> .
<b>Emergency</b>	For purposes of this section "emergency" means unforeseen circumstances beyond the control of the municipality that either: (a) Present 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. <a href="#">RCW 39.04.280(3)</a> .
Other	Definition
<b>Statutory Bid Limits</b>	Dollar amounts below which neither competitive bids, nor the small works roster process, are required for the purchase of equipment, supplies, or materials or for public works projects. Agencies are to establish internally acceptable procedures at these levels.
<b>Formal Competitive Bids</b>	A competitive process following advertisement in designated legal newspapers and other media for equipment, supplies, material, and public works contracts open to all suppliers, vendors, and contractors, and in which price is the primary basis for consideration and contract award. Typically these solicitations are more rigorous or time-intensive, and likely apply to larger and more complex contracts with higher estimated costs.
<b>Small Works Roster (SWR)</b>	A process through which there is competition for public works contracts following notification to some or all public works contractors who have requested placement on a roster kept by the local government agency.
<b>Invitation to Bid (ITB)</b>	A process through which written or electronic bids are solicited from contractors on an agency's small public works roster for public works contracts in which price is the primary basis for consideration and contract award.
<b>Unit Price Contract</b>	A contract for an unknown number of small public works over a fixed period of time ("indefinite quantity, indefinite frequency"), not associated with one particular project. Work orders are issued for the performance of approved tasks during the period of the contract.
<b>Public Agency Work by Employees</b>	Limits set by the legislature on the amount of public works that can be accomplished using the agency's own work force. Limits are expressed as specific dollar amounts for single or multiple craft projects and/or as percentages of the public works or road fund budgets. The county road fund statutes have specific county forces road construction limits separate from a county's general public work construction limits ( <a href="#">Chapter 36.77 RCW</a> )

# Authorized Agencies

Small works rosters (SWRs) may be used “by state agencies and by any local government that is expressly authorized.” [RCW 39.04.155](#)(1). The initial step in using a small works roster is to determine if your agency is the type of agency that may use a small works roster process.

The following local governments are specifically authorized to use a small works roster process:

- Cities and towns:
  - First class cities: [RCW 35.22.620](#)
  - Second class cities and towns: [RCW 35.23.352](#)
  - Code cities: [RCW 35.23.352](#) (as referenced by [RCW 35A.40.200](#))
- Counties:
  - General authorization: [RCW 36.32.250](#)
  - County with purchasing department: [RCW 36.32.235](#)
  - County roads: [RCW 36.77.075](#)
- Fire protection districts: [RCW 52.14.110](#)
- Housing authorities: [RCW 35.82.076](#)
- Irrigation districts: [RCW 87.03.436](#)
- Metropolitan park districts: [RCW 35.61.135](#)
- Port districts: [RCW 53.08.120](#)
- Public hospital districts: [RCW 70.44.140](#)
- Public utility districts: [RCW 54.04.070](#)
- School districts: [RCW 28A.335.190](#)
- Water-sewer districts: [RCW 57.08.050](#)

In addition, a roster can be used by jurisdictions that do not have bid law requirements for public works projects.

Of course, each agency must also comply with any locally adopted procedures for public works projects. If you are not certain if you can use a small works roster, check with your own legal counsel or the legal consultants at MRSC.

Beginning July 1, 2024, the statutory roster authorization will expand to include all “authorized local governments,” which means “a political subdivision of the state, school district, or special purpose district with public works authority.” See [SB 5268](#).

If a project is estimated to cost over \$350,000, a formal competitive bid process is required. If a project is estimated to cost \$350,000 or less, an authorized local government may use the SWR process. If the estimated

project cost is below the agency's bid limits, the agency may construct the project (subject to individual agency purchasing policies):

- By use of agency crews (counties have different restrictions for road projects)
- By interlocal agreement with another agency
- By contract with private contractor

Contracting bid limits and day labor limits for selected agencies are shown below:

#### Small Works Competition Thresholds & Contract Requirements

Public Works Category	Threshold	Competition Requirement	Retainage Requirement	Bond Requirement	Intent/Affidavit Requirement
<b>Limited Public Works</b>	< \$50,000	Allows option to select minimum of 3, or notify all on roster category per RCW 39.04.155 (3)	Allows the option to assess risk and determine waiver of retainage per RCW 39.04.155 (2)(f)	Allows waiver of bonds	Under \$2,500 - Allows for combined intent/affidavit forms per RCW 39.12.040  Otherwise, Individual Intent/ Affidavits Required
<b>Small Works</b>	\$50,000 – \$250,000	Allows option to select minimum of 5, or notify all on roster category per RCW 39.04.155 (2)(c)		Allow 10% retainage in lieu of Bond for public works contracts under \$150,000 per RCW 39.08.010	Individual Intent/ Affidavits Required
	\$250,000 – \$350,000	If the option selected is minimum of 5, must also notify the remaining contractors on the appropriate small works roster that quotations on the work are being sought. Notice to the remaining contractors can be made by: (i) Publishing notice in a legal newspaper in general circulation in the area where the work is to be done; (ii) mailing a notice to these contractors; or (iii) sending a notice to these contractors by facsimile or other electronic means, per RCW 39.04.155 (2)(c)		Performance & Payment Bond Required	

# Small Works Rosters

The following section is based on language in [RCW 39.04.155](#). For the purposes of this section, “agency” means either a state agency or an authorized local government.

## EXEMPTION FROM ADVERTISEMENT REQUIREMENTS

Public works projects awarded under SWR and Limited Public Works Projects (LPWP) processes are exempt from the requirement that contracts be awarded after advertisement as provided under [RCW 39.04.010](#).

## BID SPLITTING

The breaking of any project into units, or accomplishing any projects by phases, is prohibited if it is done for the purpose of avoiding the maximum dollar amount of a contract that may be let using the SWR and LPWP processes.

## CREATION OF A SMALL PUBLIC WORKS ROSTER AND ANNUAL ADVERTISEMENTS

[RCW 39.04.155](#) presents uniform provisions for the award of contracts for construction, building, renovation, remodeling, alteration, repair, or improvement of real property that may be used by any local government that is expressly authorized to use these provisions (see [Authorized Agencies and Bid Limits](#)). These provisions may be used in lieu of other procedures (i.e. formal competitive bids) to award contracts for such work with an estimated cost of \$350,000 or less.

- In addition, any local government authorized to award contracts using the SWR process may award contracts with an estimated cost of less than \$50,000 using the limited public works process under [RCW 39.04.155](#)(3) of this section.
- A local government may create a single general small works roster, or may create small works rosters for different specialties or categories of anticipated work. Rosters may make distinctions between contractors based upon different geographic areas served by the contractor.
- Small works rosters are to consist of all responsible contractors who have requested to be on the list and, where required by law, are properly licensed or registered to do work in Washington State.
- A local government may require eligible contractors desiring to be placed on a roster or rosters to keep current records of any applicable licenses, certifications, registrations, bonding, insurance, or other appropriate matters on file with the state agency or local government as a condition of being placed on a roster or rosters.
- Local governments are to publish a notice of the existence of the roster or rosters in a newspaper of general circulation within the jurisdiction and solicit the names of contractors for such roster or rosters. In addition, responsible contractors must be added to an appropriate roster or rosters at any time they submit a written request and necessary records.



## Keeping Your Roster Up-to-Date

After contractors submit an initial application, an agency should require them to update their information yearly. The agency also may want to “purge” contractors that do not respond within a given time frame (say 30-60 days) after the updated information is requested. To avoid undue paperwork, the agency can limit the number of times a year that it sends out the request for updated information to every quarter or semiannually, for those contractors whose anniversary date falls within the past three or six months.

Before awarding a contract, an agency should check to see if the contractors still meet the minimum requirements of [RCW 39.04.350\(1\)](#):

1. (1) Before award of a public works contract, a bidder must meet the following responsibility criteria to be considered a responsible bidder and qualified to be awarded a public works project. The bidder must:
  - (a) At the time of bid submittal, have a certificate of registration in compliance with [chapter 18.27 RCW](#);
  - (b) Have a current state unified business identifier number;
  - (c) If applicable, have industrial insurance coverage for the bidder's employees working in Washington as required in Title [51 RCW](#); an employment security department number as required in [Title 50 RCW](#); and a state excise tax registration number as required in [Title 82 RCW](#); and
  - (d) Not be disqualified from bidding on any public works contract under [RCW 39.06.010](#) or [39.12.065\(3\)](#).
  - (e) If bidding on a public works project subject to the apprenticeship utilization requirements in [RCW 39.04.320](#), not have been found out of compliance by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under [chapter 49.04 RCW](#) for the one-year period immediately preceding the date of the bid solicitation;
  - (f) Have received training on the requirements related to public works and prevailing wage under this chapter and [chapter 39.12 RCW](#).
  - (g) Within the three-year period immediately preceding the date of the bid solicitation, not have been determined by a final and binding citation and notice of assessment issued by the department of labor and industries or through a civil judgment entered by a court of limited or general jurisdiction to have willfully violated, as defined in [RCW 49.48.082](#), any provision of [chapter 49.46](#), [49.48](#), or [49.52 RCW](#).

## Supplemental Criteria for a Small Public Work

[RCW 39.04.350\(3\)](#) allows an agency to establish relevant supplemental bidder responsibility criteria if warranted. Most small public works roster projects do not warrant development and use of supplemental criteria. For more information and sample criteria contact the MRSC Public Works Consultant and/or see the CPARB Suggested Guidelines for Bidder Responsibility. To view the most recent version, see [CPARB's Background and Reference page](#) and click on “Bidder Responsibility Guidelines.”

- [RCW 39.04.155](#)(2)(a) allows agencies to establish “master” contracts with one or many contractors that become effective when a specific award is made using a small works roster. The master contract would have general and special conditions, with the scope and dollar amounts added at the time of contracting. These contracts are usually for maintenance or smaller repair projects.

## **SOLICITATIONS UNDER SMALL WORKS ROSTER CONTRACT PROCEDURES**

- A local government is to establish procedures for securing telephone, written, or electronic quotations from contractors on an appropriate small works roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder, as defined in [RCW 39.04.010](#).
- Invitations to bid (ITBs) shall include an estimate of the scope and nature of the work to be performed, as well as materials and equipment to be furnished.
- However, detailed plans and specifications need not be included in the invitation. This subsection does not eliminate other requirements for architectural or engineering approvals as to quality and compliance with building codes.

## **PRACTICAL CONSIDERATIONS**

1. An ideal scenario using the flexibility granted by the SWR statutes is to post the bidding/contract documents on the agency’s website or on a service provider’s website (such as Builders Exchange, Daily Journal of Commerce, etc.) and send a short email to all contractors in the appropriate SWR category asking them to look at the online documents and submit an electronic, written, or faxed quote by a given date and time.
2. Notifications and postings should emphasize that bids will be accepted only from contractors on the agency’s small works roster.
3. Then it should be decided when the contractor must be on the roster for his/her bid to be considered. Some agencies accept a contractor’s bid if they are on the roster by the bid due date. Other agencies will only accept a bid if the contractor is on the SWR at the time that the notification is sent out.
4. Sealed bids are not required. Agencies are required to establish procedures for obtaining telephone, written, or electronic quotations.
5. All of the bids should be collected and presented at the same time to the appropriate agency person(s) for consideration, determination of the lowest responsible bidder, and award of the contract.
6. Statutory requirements for advertising for a public works project in formal bid processes (typically 13 days in advance of bid opening) do not apply to a small works roster or limited public works process. Advertising is not required. However, depending on the complexity of the project, 7 to 14 days (or longer) should be allowed for contractors to submit a proposal so that they have adequate time to properly research the specifications.
7. ITBs may be sent to all contractors in the appropriate small works roster category. As an alternative, quotations may be invited from at least five contractors on the appropriate small works roster who have indicated the capability of performing the kind of work being contracted, in a manner that will equitably distribute the

opportunity among the contractors on the appropriate roster. "Equitably distribute" means that an agency soliciting quotes may not favor certain contractors over other contractors who perform similar services.

8. However, if the estimated cost of the work is from \$250,000 to \$350,000, an agency that chooses to solicit bids from less than all the appropriate contractors on the appropriate small works roster must also notify the remaining contractors on the roster that quotations on the work are being sought. At the agency's sole option, it can accomplish this notice by: publishing notice in a legal newspaper of general circulation in the area where the work is to be done; mailing a notice to these contractors; or sending a notice to these contractors by email or other electronic means. If a contractor is not on an original (short) solicitation list and hears about a project that is estimated at more than \$250,000 through the notification process above, the agency is obligated to accept his/her bid.
9. Immediately after an award is made, the bid quotations obtained shall be recorded, open to public inspection, and available by telephone or electronic inquiry.

# Limited Public Works Projects Under \$50,000

- An authorized local government may award a contract for work, construction, alteration, repair, or improvement projects estimated to cost less than \$50,000 using the limited public works project (LPWP) process provided under [RCW 39.04.155](#).
- For LPWPs, an agency is to solicit electronic or written quotations from a minimum of three contractors from the appropriate small works roster and must award the contract to the lowest responsible bidder as defined under [RCW 39.04.350](#).
- An agency is to attempt to distribute opportunities for LPWPs equitably among contractors willing to perform in the geographic area of the work.
- After an award is made, the quotations must be open to public inspection and available by electronic request.
- An agency is to maintain a list of the contractors contacted and the contracts awarded during the previous 24 months under the LPWP process, including the name of the contractor, the contractor's registration number, the amount of the contract, a brief description of the type of work performed, and the date the contract was awarded.
- For LPWPs, an agency may waive the payment and performance bond requirements of [chapter 39.08 RCW](#) and the retainage requirements of chapter [60.28 RCW](#), thereby assuming the liability for the contractor's nonpayment of laborers, mechanics, subcontractors, material persons, suppliers, and taxes imposed under [Title 82 RCW](#) that may be due from the contractor for the LPWP.
- However, the agency has the right of recovery against the contractor for any payments made on the contractor's behalf.

## SMALL BUSINESS INCENTIVES

- An agency may use the limited public works process of [RCW 39.04.155\(3\)](#) to solicit and award small works roster contracts to minibusinesses and microbusinesses as defined in [RCW 39.26.010](#) that are registered contractors.

## PRACTICAL CONSIDERATIONS

1. If an agency contacts five firms on its small works roster, but receives less than five quotes, it is acceptable to award to the contractor with the lowest of those quotes received.
2. Bid guarantees are not required for SWR projects, but may be desirable for larger projects as the firm with the low quote may refuse the work after the bids of the other contractors are known, or fail to put reasonable effort into the bid preparation.
3. A small works roster does not eliminate the need for contract documents, performance and payment bond, contract, specifications, etc., unless the agency is using the LPWP process provided under [RCW 39.04.155\(3\)](#). The option to waive retainage for any project under the small works roster was granted in 2019. Agencies have the right of recovery against the contractor for payments made on behalf of the contractor.

# Shared Small Works Rosters

The statutes allow agencies to share rosters between multiple agencies. The small works roster process applies to shared rosters the same as for individual rosters, but agencies may choose to share a roster in order to reduce the operational costs of maintaining a roster and have access to a broader pool of contractors.

There are two ways to share a small public works roster: entering into an interlocal contract or using a roster service provider.

## INTERLOCAL CONTRACT

A large city or county may make its SWR available to other nearby agencies. Note that [RCW 39.04.155\(2\)](#) (b) requires that agencies entering into an interlocal contract must “clearly identify the lead entity that is responsible for implementing the provisions of this subsection.” In other words, the lead entity is the agency that will be posting the annual legal notice and maintaining the roster. For example, Vancouver had been the lead agency for an interlocal shared roster with Clark County and a number of agencies in Clark County.

## ROSTER SERVICE PROVIDER

An agency also has an option of joining a roster service provider who will maintain their roster. For example, [MRSC Rosters](#) is a shared small public works and consultant roster online database for Washington agencies to join. [MRSC Rosters](#) posts the annual legal notice on behalf of all participating agencies and maintains the roster.

In the above approaches, either the lead agency or service provider takes the initial responsibility for ensuring that contractors on the roster meet the minimum qualifications of [RCW 39.04.350\(1\)](#). When a partnering or subscribing agency selects a contractor from a shared roster, it must verify that a contractor meets the mandatory (and any supplemental) responsibility criteria of [RCW 39.04.350](#) before awarding the contract.



# Guarantees, Bonds and Retainage

## BID BONDS (AKA BID GUARANTEES)

A bid bond is used to discourage bidders from failing to enter into a contract if it is awarded to them. The awarded bidder forfeits the guarantee amount should they decline to enter into a contract. Unlike performance and payment bonds, which are required uniformly of all agencies for all public works contracts, bid bond requirements are set in an agency's enabling statutes, many of which do not require a bid bond. For cities and counties, for example:

- [RCW 35.23.352\(1\)](#) says (for code cities and second class cities and towns): "Each bid shall be accompanied by a bid proposal deposit in the form of a cashier's check, postal money order, or surety bond to the council or commission for a sum of not less than five percent of the amount of the bid, and no bid shall be considered unless accompanied by such bid proposal deposit."
- [RCW 36.32.250](#) says (for counties): "No bid may be considered for public work unless it is accompanied by a bid deposit in the form of a surety bond, postal money order, cash, cashier's check, or certified check in an amount equal to five percent of the amount of the bid proposed."
- First class cities do not have a direct requirement for bid bonds in their statutes ([RCW 35.22.620](#)), but almost all cities require them.
- Port districts, in [RCW 53.08.130](#), are required to request a five percent proposal deposit, as are water/sewer districts in [RCW 57.08.050](#).
- School districts and fire districts have no apparent bid bond requirement.

The State Auditor's Office (SAO) has confirmed that bid bonds are not required for SWR contracts but in such cases would expect to see bid bond requirements defined in policy.

## RETAINAGE AND PERFORMANCE BONDS

Retainage is that amount of money withheld from a contractor for a public improvement or work until completion and/or acceptance of the contract. A performance bond is a guarantee by a surety that the contractor, or the surety itself, will complete a project. Similarly, a surety is to guarantee payment of laborers, materialmen, etc., under the contract.

For public works projects outside of the small works roster, a local government must withhold retainage and must also have a contractor's performance and payment bond on file. For public works contracts under \$50,000, the retainage and bond requirements may be waived completely under the limited public works process in [RCW 39.04.155\(3\)](#). For public works contracts of \$350,000 or less, retainage may be waived completely under the SWR process in [RCW 39.04.155\(2\)\(f\)](#).

If retainage is withheld at the option of the agency, [RCW 60.28.011](#) shall govern.

When a bond cannot be waived in the SWR process, it is because [RCW 39.08.010](#) requires municipal governments to call for a performance and payment bond. The bond is to be issued by a surety company licensed to do business in Washington. It is to be conditioned on the contractor's performance of all the

provisions of the contract and payment of all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work. State agencies (DOR, L&I, ESD) have no direct claim against the bond.

- The penalty for failure to call for a performance and payment bond ([RCW 39.08.015](#)) is that the municipal corporation is liable to the persons mentioned in [RCW 39.08.010](#) to the full extent and for the full amount of all such debts so contracted by such contractor.
- Required performance and payment bonds are normally furnished on agency supplied forms. This form, or any proposed substitute form, should be reviewed by the agency's legal counsel and risk manager before the contract is signed.
- [RCW 39.08.010](#) states that on contracts of \$150,000 or less – at the option of the contractor – the agency may, in lieu of a performance and payment bond, retain 10% of the contract amount for a period of 30 days after date of final acceptance, or until receipt of all necessary releases from the Department of Revenue and the Department of Labor and Industries and settlement of any liens filed under [chapter 60.28 RCW](#), whichever is later. When this is applied to a SWR contract, retainage becomes necessary. Retainage cannot be waived if this option to waive the bond is used.
- [RCW 39.08.030](#) provides that the performance and payment bond will be in the amount of 100 percent of the contract amount, except that cities and towns may, by ordinance, fix and determine the amount of the bond. However, the bond set by ordinance cannot be for less than 25 percent of the contract amount.
- [RCW 39.08.030](#) also provides that anyone who has a claim against the bond must file such a claim within 30 days from, and after, the completion of the contract with an acceptance of the work by the affirmative action of the board, council, commission, officer, or body acting for the agency.

# Sales Tax Issues

Sales taxes apply to every sale of tangible personal property (and some services) to all persons, including local governments. For purposes of determining whether a purchase or project exceeds an agency's bid limits, sales tax must be included when determining the cost of a public work, or when calculating the cost of materials, supplies, and equipment purchased separately from a public work. However, there are some sales and use tax exemptions for certain public works projects. The exemptions include:

- 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. Materials used in constructing these projects, however, are not exempt from the sales and use tax. [RCW 82.04.050\(8\)](#).
- Labor and services for the processing and handling of sand, gravel, and rock taken from city and/or county pits and quarries when the material is for public road projects. [RCW 82.08.0275](#).

For almost all local government public works contracts, the sales and use tax issue boils down to this:

*Does the contractor include sales and use taxes, as applicable, in his/her unit prices or lump sum bid or does the agency include a line item in the contract for sales tax, either on the whole amount or on items not included in the exemptions?*

## PRACTICAL CONSIDERATIONS

1. When developing contract documents, it may be useful, in the bid proposal (bid item listing), to group together those items that are subject to sales tax. Then, in a separate line item labeled "sales tax," reference that group, making it clear that in all other bid items, sales and use taxes, as applicable, are to be included in the unit price or lump sum bid.
2. If an agency furnishes materials to a contractor for use in public works contract, it either must have paid applicable sales tax on the items furnished, or must specifically instruct the contractor to pay use taxes on the items.
3. Labor and services in the construction of a pedestrian pathway in a park are probably not exempt from sales and use tax. [RCW 82.04.050\(7\)](#) does exempt any "street, place, road... easement, right of way... which is used or to be used primarily for foot or vehicular traffic." However, the Department of Revenue believes that any such path or sidewalk must be in the street right-of-way to qualify for the exemption. Similarly, unless a public parking lot is used for mass transit, it is not exempt.
4. The Department of Revenue has a very good online discussion of taxes due on public roads construction at <https://dor.wa.gov/education/industry-guides/construction/public-road-construction>.

# Prevailing Wages

Payment of prevailing wages under [chapter 39.12 RCW](#) in Washington State applies to all public works contracts accomplished through competitive bidding or the small works roster. It also applies to smaller public works contracts for which a contractor was chosen following a process deemed acceptable by the agency, and to maintenance contracts of any nature and for any amount.

## PREVAILING WAGE PRINCIPLES

- Contractor must be told in advance that prevailing wages must be paid to all employees who work on the contract.
- Prevailing wages in effect for the contract must be included in the contract documents.
- Contractor must file a Statement of Intent to Pay Prevailing Wages with the Industrial Statistician of the Department of Labor and Industries (L&I). The agency must have a copy of the L&I-approved Statement of Intent before it can make any payments under the contract.
- After completion of the contract, the contractor must file an Affidavit of Wages Paid with L&I's Industrial Statistician. The agency must have a copy of the L&I-approved Affidavit before it can release the contract retainage. L&I has automated this process so that Intents and Affidavits can be filed online and an agency can be notified automatically if desired. An agency can check the contractor's filing status online at any time.
- For contracts under \$2,500, [RCW 39.12.040](#) and [WAC 296-127-050](#) provide that the Statement and Affidavit (no fees) may be combined and payment made by the agency without prior L&I approval. For contracts under \$35,000, a different combined form (for which fees are required) can be used.
- If a contract's funding includes both state and federal funds, both sets of prevailing wage rates and reporting requirements must be met. The higher of the two wage rates must be paid.

# Small Works Contracting in an Emergency

Competitive bidding is not required when an emergency exists; however, in making emergency contracts, an agency should strive for the highest level of competition that is practical under the circumstances.

## WASHINGTON STATE STATUTES

Two types of emergencies are envisioned in the statutes: declared (federal or state) disasters under [chapter 38.52 RCW](#) and emergencies (agency declared) under [RCW 39.04.280](#). When a federal or state declaration of emergency is made, a local agency should pass a resolution acknowledging the federal or state declaration and invoking [RCW 39.04.280](#).

In 1998, [RCW 39.04.280](#) was added to [chapter 39.04 RCW](#). This RCW provides uniform exemptions to municipal competitive bidding requirements when awarding contracts for public works and purchases. Note that statutes governing a specific type of municipality may also include other exemptions from competitive bidding requirements.

An emergency is defined, uniformly for all classes and types of municipalities, as unforeseen circumstances beyond the control of the municipality that either: (1) present a real, immediate threat to the proper performance of essential functions; or (2) will likely result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken.

Competitive bidding procedures for public works contracts may be waived under the above circumstances by adopting either a resolution at the time of contracting, or by written policies beforehand. A resolution must state the factual basis for the exception. If written policies are used to waive competitive bidding requirements, the contract and the factual basis for the exception must be recorded and open to public inspection immediately after the contract is awarded.

Note the following related questions:

### **Do you need to get bids before they start?**

No, although it is a good idea to get agreement as to a general plan of work before the contractor starts. Material sources and costs should be identified, so there are no surprises when the bills are due. If time allows, unit prices for completed major blocks of work should be negotiated and sales tax issues, if any, should be identified.

### **Should you have a contract in place beforehand?**

Try to have a standard, short form, contract readily available. However, a fully executed contract is not needed before the contractor starts work.

### **Do you need a performance and payment bond?**

Yes, just as soon as you can get one unless waived following a statutory exemption.



**How soon do you need a certificate of insurance naming the agency as additional insured?**

Practically speaking, as soon as the contractor's insurance carrier can get it to you.

**How much insurance do you need?**

If your agency does not have standard insurance requirements, Section 1-07.18 (APWA Supplement) of the Standard Specifications can be used.

**Do prevailing wages apply?**

Yes!

**When do you tell the contractor prevailing wages need to be paid and how much need to be paid?**

Before the contractor starts work. Download prevailing wages for anticipated worker classifications from the L&I website.

**Can the contractor start work without an approved Intent to Pay prevailing wages?**

Yes, but they can't be paid until your agency receives an approved Intent to Pay form from L&I.

**Do you need to withhold retainage?**

Yes, unless waived following a statutory exception.

**Do you need to notify the Department of Revenue, Employment Security Department, and Industrial Insurance Division?**

You need to send a Notice of Completion (NOC) to all three agencies if the contract is over \$35,000. Use the most current version of the NOC.

**What action, and when, does your council/commission/board need to take in regard to this project?**

[RCW 39.04.280\(2\)\(b\)](#) says:

If an emergency exists, the person or persons designated by the governing body of the municipality to act in the event of an emergency may declare an emergency situation exists, waive competitive bidding requirements, and award all necessary contracts on behalf of the municipality to address the emergency situation. If a contract is awarded without competitive bidding due to an emergency, a written finding of the existence of an emergency must be made by the governing body or its designee, and duly entered of record, no later than two weeks following the award of the contract.

Local officials, by resolution, make a local proclamation or declaration of emergency to authorize use of local resources, the expenditure of local funds, and to waive the usual bidding process for goods and services.

# Small Public Works Projects Below Bid Limits

For projects less than a local government's bid limits, there is no requirement to seek multiple quotes, but most agencies do so anyway – down to some practical limit, which varies by agency. Kirkland, for example, allows informal (single) bids for projects less than \$7,500, as does Woodland. Certainly, for projects less than \$2,500, all but the most conservative agencies should allow their staff to simply call up someone, get a quick written or documented telephone bid, and, if the bid is reasonable, tell them to go do the work.

## Bid Limit Numbers

Competitive Bids	Over \$350K
Small Public Works Roster (SWR) Bids	\$350K or less
Bid Limit	See agency statutes
Practical No Bid Limit	Under \$10K? \$20K?
Really Practical No Bid Limit	Under \$2,500
Intents and affidavits required for all contracts, regardless of size.	

The above discussion covers only the methods of getting bids or quotes. The two statutory allowances for not requiring performance and payment bonds are shown in the table below.

## Retainage/Bonding/Closeout for Projects Less Than \$35K

<a href="#">RCW 39.04.155</a> (3) Limited Public Works Project – Can waive Retainage and/or P/P Bonds*	Under \$50K
<a href="#">RCW 39.08.010</a> Waive P/P Bonds and Hold 10% Retainage until 30 days after completion**	Under \$150K
Notices of Completion to DOR, L&I, ESD are not required	Under \$35K

\*Must have and use SWR

\*\*At contractor's option

# Cost Estimates

Before a project is advertised, or quotes sought under SWR processes, an engineer's (cost) estimate is needed. For larger projects this needs to be by a registered professional engineer. For smaller projects, an estimate by knowledgeable staff will suffice. For really small projects a tradesperson's estimate may suffice. Note that [RCW 39.04.020](#) requires that "plans, specifications, or both thereof and an estimate of the cost of such work to be made and filed in the office of the director, supervisor, commissioner, trustee, board, or agency."

[RCW 39.04.040](#) requires that "work to be done shall be executed in accordance with such plans and specifications unless supplemental plans and specifications of the alterations to be made therein shall be made and filed in the office where the original plans and specifications are filed."

For bidding purposes, cost estimates should include all construction related work, but not engineering/architectural design fees, contract administration costs, and construction inspection/testing.

Also note these statutes:

[RCW 39.04.050](#) Contents of original estimates.

Original estimates shall show in detail the estimated cost of the work; the estimated quantities of each class of work; the estimated unit cost for each class; the estimated total cost for each class; the time limit, allowed for the completion of the work and the estimated dates of commencement and completion.

[RCW 39.04.060](#) Supplemental estimates.

Supplemental estimates shall show the estimated increase or decrease in the total quantities of each class, in the unit cost of each class, in the total cost for each class and in the total cost of the work as shown by the original estimate, together with any change in the time limit and in the estimated dates of commencing and completing the work.

Following bid opening and award, the total contract price becomes the new theoretical project cost, but is itself subject to change. The final contract price paid reflects differences between estimated and actual quantities, added features, contractor claims, and unforeseen conditions.

# Public Works Contracting Summaries

## FORMAL COMPETITIVE BIDS

Also known as “Design-Bid-Build.”

- Over \$350,000 (but can be for smaller projects)
- Formal advertisement
- Bid guarantees
- Sealed bids
- Public bid opening
- Formal award
- P/P bonds required
- Retainage required
- Payment of prevailing wages

## SMALL WORKS ROSTER (SWR) PROJECTS

- \$350,000 or less
- No advertisement required, just notice to SWR
- Bid guarantees optional
- Electronic, faxed, or telephone quotes allowed
- Informal bid opening(s)
- Award can be delegated
- P/P bonds required (waivers available)
- Retainage can be waived
- Payment of prevailing wages

## LIMITED PUBLIC WORKS PROJECTS (LPWP)

- Under \$50,000
- No advertisement required, just notice to SWR
- Bid guarantees optional

- Electronic, faxed, or telephone quotes allowed
- Informal quote opening(s)
- Award can be delegated
- P/P bonds can be waived
- Retainage can be waived
- Payment of prevailing wages

## **BELOW BID LIMITS**

- Under agency's bid limits
- No SWR required
- No advertisement required
- Bid guarantees optional
- Electronic, faxed, or telephone quotes allowed
- Informal bid opening(s)
- Award can be delegated
- Payment of prevailing wages
- P/P bonds and retainage may be waived following available statutory allowance


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