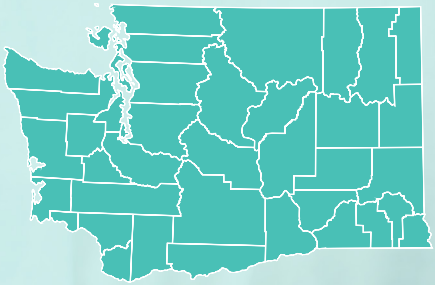
JUNE 2026



County Bidding Book

Washington State



MRSC

COUNTY BIDDING BOOK: WASHINGTON STATE

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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 all content changes over the last three legislative sessions. 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
June 2026	**Initial Considerations** • *"Public Work" or "Ordinary Maintenance"?* Updated to reflect definition of "ordinary maintenance" in WAC 296-127-010(7)(b)(ii). **General Bidding Requirements:** • *Bid Limits for Road & Bridge Projects.* Added new details from chapter 36.77 RCW. • *Architecture and Engineering Services:* Simplified section and added link to MRSC webpage for most up-to-date information and examples. • *Bidding Laws and Private Party Projects.* Added new details and clarification. **Exceptions to the Bidding Laws:** • *Neighborhood "Self-Help" Projects*. Replaced outdated dollar thresholds (HB 1086) and added link to MRSC webpage for full details. • *Water Pollution Control Facilities*. Added more information with link to webpage for full details. • *Solid Waste Facilities & Related Services*. Added new section with link to webpage for full details. • *Pollution Control Facilities*. Simplified description and added link to webpage for full details. **Purchasing from Other Governments and on Other Governments' Contracts:** • *Surplus Property* and *Piggybacking and Intergovernmental Purchases*. Simplified sections and added links to MRSC webpage for most up-to-date information and examples.

DATE	SUMMARY
June 2026 continued	**The Bidding Process:** • *Apprentice Utilization Requirements*. Added new section, with link to MRSC website for full details and examples. • *Determining the Lowest Responsible Bidder*. Removed outdated information and added link to MRSC website for list of current bidder responsibility criteria; HB 1633 modified requirements for naming subcontractors on public works contracts of $1 million or more. • *Small Works Roster*. Removed outdated processes, including discontinued "limited public works process," and added link to updated Small Works Roster Manual. • *Unit Priced ("On Call") Public Works Contracts*. Added new section, with link to MRSC website for full details and examples. • *Alternative Public Works Contracting Procedures*. Removed outdated information and simplified description; added link to MRSC webpage for more detailed information and examples.

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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 the awarding of contracts. This publication is intended to familiarize county officials with competitive bidding requirements and procedures with respect to public works projects and public purchases.

Different rules exist for bidding public works; for purchasing materials, supplies, and equipment not used in connection with a public work; and for procuring services. The first chapter of this publication 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. State law does not require that counties bid for any services, but it does require an advertising and negotiation process when obtaining architectural and engineering services.

Different rules also apply based on the size of your county, and whether your county has established a purchasing department. And certain exemptions from competitive bidding exist that are uniformly applicable to counties of all sizes.

Initial Considerations

First, you need to determine what category the project or purchase falls into: public work; purchase of materials, equipment, and 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.

"PUBLIC WORK" OR "ORDINARY MAINTENANCE"?

Counties in Washington State must use a public bidding process when contracting for public works projects, although they may waive bidding requirements for projects under a certain estimated cost.

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 county 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. [1] On the other hand, using existing county employees to 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 county employees to perform the work, the county 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 qualify as "ordinary maintenance," and it will be performed by contract, bids may be required, depending upon the estimated cost of the work.

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

Ask MRSC

Is an electrical project "ordinary maintenance" or a "public work?"

It depends. If the project entails providing light bulbs, pump bearing lubrication, and other small maintenance items, then the project is probably ordinary maintenance, if performed by county forces. However, if items like pumps and motors are being replaced, this project is a public work.

Is replacement of a carpet ordinary maintenance?

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

Is tree trimming a public work?

Tree trimming is either maintenance or ordinary maintenance, rather than a service. Although this activity may not take place annually, it is necessary either to prevent branches from falling on wires or to prevent damage to the trees in windstorms. This falls into the category of maintaining the asset. If it is done by contract, it is deemed a public work and thus subject to bidding and prevailing wage requirements. Tree removal and trimming in conservation areas or for timber sales are probably not subject to either prevailing wages or bid laws, as such work may be considered silviculture. Call L&I at (360) 902-5335, as the determination in each case is very fact-specific.

MATERIALS, EQUIPMENT, OR SUPPLIES NOT USED IN CONNECTION WITH A PUBLIC WORK

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

SERVICES

State law does not require that counties bid for any services, other than for collection agencies and possibly for the official newspaper. An advertising and negotiation process is required under chapter 39.80 RCW when obtaining architectural and engineering services. This process will be discussed later in this publication.

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

COST OF A PUBLIC WORKS PROJECT OR PURCHASE

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

The cost estimate should reflect the amount the county considers fair and reasonable and that it is willing to pay for the work or purchase contemplated. Several approaches can be used to make an estimate. The county can consider the actual cost of performance, considering the current cost of labor, equipment, and materials. Obviously, use of this approach requires the estimator have a good working knowledge of construction methods, equipment, and market conditions. A second approach arrives at an estimate by using historical data. The estimator reviews recently-awarded contracts, making adjustments for the proposed project and the current market conditions. A third approach would be to combine historical bid data with actual cost data.[2]

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 county, it is a purchase of services that is not subject to bidding requirements.

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

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

2 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).

Cost estimates for public works projects should:

- Include all construction -related work, but not engineering/architectural design fees or inspections;
- Include all phases of the project;
- Include applicable sales and use taxes, except for small works rosters which specifically exclude sales taxes as described later;
- Not include donated labor, materials, supplies, etc.
- Use estimates based on (unit) bid prices from previous public works contracts, not in-house man-hour and material estimates

A public works project should not be divided into smaller projects or segments to avoid competitive bidding requirements. The Washington Court of Appeals has held that a public work project may not be broken down 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.[3] Instead, a county, 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 county must bid each phase of the project even though a given phase may cost less than the bid limit.

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 counties.[4] Thus, for bid limit purposes, the tax must normally 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, the small works roster statutes specifically exclude sales tax, as discussed later.

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

a. 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 county that is used primarily for pedestrian or vehicle traffic.[5] (Materials used in constructing these projects are not exempt from the sales and use tax.)

Ask MRSC

Must volunteer labor or donated 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 county.

3 National Elec. Contractors Ass'n v. City of Bellevue, 1 Wn. App. 81 (1969).

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

5 RCW 82.04.050(10). See also WAC 458-20-171, nicknamed "Rule 171."

b. Labor and services for the processing and handling of sand, gravel, and rock taken from county pits and quarries when the material is for publicly-owned road projects.[6]

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



Practice Tip: When developing the bid documents, it may be useful to group those items that 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.

For more information, see our webpage on Sales Taxes in Public Works Contracts.

Ask MRSC

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

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

6 RCW 82.08.0275 and WAC 458-20-171.

General Bidding Requirements

BID LIMITS FOR ROAD & BRIDGE PROJECTS

Chapter 36.77 RCW governs the construction of county roads and bridges.

Any county may use its own employees for road and bridge projects, as long as the cost does not exceed the following cumulative annual totals:

- **Population of 400,000 or more:** $3.25 million times (1 + last year's motor vehicle fuel tax factor)
- **Population of 150,000 to 399,999:** $1.75 million times (1 + last year's motor vehicle fuel tax factor)
- **Population of 30,000 to 149,999:** $1.25 million times (1 + last year's MVFT factor)
- **Population under 30,000:** $800,000 times (1 + last year's MVFT factor)

See RCW 36.77.065. However, you may not use county employees to perform certain road-related electrical work in excess of $40,000 per project.

If the board of county commissioners determines that any construction should be performed by county forces and the estimated cost of the work exceeds $10,000, the county must publish a brief description of the work to be done and the county road engineer's cost estimate in at least one issue of a newspaper of general circulation in the county. At the completion of construction, the county must publish another brief description in one issue of such newspaper together with an accurate statement of the true and complete cost of the work. Failure to make the required publication shall make each county commissioner individually liable for a $100 fine. See RCW 36.77.070.

Above these thresholds, you must contract with a responsible contractor. For projects below the thresholds in RCW 39.04.152, counties may use a small works roster. See RCW 36.77.075. Above those thresholds, counties must use formal competitive bidding as provided in RCW 36.77.020-.040.

BID LIMITS FOR NON-ROAD PROJECTS

Counties that have not established a purchasing department – RCW 36.32.250:

1. RCW 36.32.250 does not require such counties to contract out for public works projects of any size.[7]

7 In *Assoc. General Contractors v. King County*, 124 Wn.2d 855, 860 (1994), the state supreme court stated with respect to RCW 36.32.250:

2. If a county chooses to enter into a contract for public works, then that contract must be let pursuant to competitive bidding, although the county legislative body may waive the bidding requirements for projects costing less than $40,000.

3. For projects costing $350,000 or less, counties may use a small works roster in lieu of a formal bidding procedure.

Counties that have established a purchasing department – RCW 36.32.235:

1. Counties that establish a purchasing department must competitively bid all public works contracts, with the exception that they may have county employers perform public works projects in any annual or biennial budget period equal to a dollar value not exceeding 10% of the public works construction budget, including any amount in a supplemental public works construction budget, over the budget period.

2. In addition to this percentage limitation, counties with a purchasing department and a population of 400,000 or more may not have public employees perform a public works project in excess of $90,000 for multiple craft or trade projects; $45,000 for single craft or trade projects; $250,000 for multiple craft riverine or storm water projects; or $125,000 for single craft riverine or storm water projects.

3. For projects costing $350,000 or less, counties with a purchasing department may use a small works roster in lieu of a formal bidding procedure.

Reporting and Notice Requirements

Counties that have established a purchasing department must report to the state auditor their total public works construction budget, supplemental public works construction budget, and the total construction costs of public works performed by public employees.[8] Every county that uses its own forces on projects, other than road construction, costing more than $25,000 must publish a description and the estimated cost of the project in its official newspaper 15 days before beginning the project.[9]

WMBE Requirements

According to RCW 36.32.235(13), counties that have established a purchasing department must, whenever possible, invite at least one proposal from a minority or woman contractor. In view of the passage of Initiative 200 in 1998,

8 RCW 36.32.235(11). Although this statute requires this report to the state auditor of "any county which uses public employees to perform public works projects under RCW 36.32.240(1)," the referenced subsection (RCW 36.32.240(1)) merely authorizes counties to establish a purchasing department, and, as noted in the prior footnote, this statute (specifically subsection (2), not (1)) requires such counties to contract out for the performance of all public works. Thus, the only way to make sense of this reporting requirement is to apply it only to counties that establish a purchasing department and are subject to RCW 36.32.235.

9 RCW 39.04.020.

it is not clear that this requirement is enforceable. That initiative, now codified in RCW 49.60.400, states:

> The state[10] 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.

An October 16, 1998 issue paper on Initiative 200 from the Attorney General's office, however, suggests that a court may distinguish such an outreach program, one which merely expands the pool of qualifying participants, from the use of selection goals, which more likely is a form of preferential treatment.

PURCHASING MATERIALS, EQUIPMENT, OR SUPPLIES

According to RCW 36.32.245, county purchases of materials, equipment, or supplies must be done by a competitive bidding process unless certain exemptions apply. However, a county legislative body may, by order, eliminate the bidding requirement for purchases of materials, equipment, or supplies costing less than $10,000.

Purchases by Use of Vendor Lists. Purchases by Use of Vendor Lists. Advertisement and formal sealed bidding may be dispensed with for purchases of materials, equipment, or supplies, valued between $10,000 and $50,000, if the county legislative authority authorizes, by resolution, use of the uniform procedure in RCW 39.04.190.[11]

RCW 39.04.190 provides that a vendor list may be used to secure telephone or written quotations under certain conditions:

- The county must advertise at least twice a year in a newspaper of general circulation that a vendor list (or lists, if counties want to keep different vendor lists for different products) exists and it must solicit names for the list.
- If possible, at least three quotations should be secured to ensure a competitive process, with the contract being awarded to the lowest responsible bidder.
- Immediately after the award, all bid quotations that the county secured must be recorded and made open to public inspection. This information must also be available to those who inquire by telephone.
- At least every two months, a county using vendor lists to award contracts valued at more than $10,000, but not more than $50,000, must post a list of contracts awarded. The list must contain the name of the vendor, the

Ask MRSC

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

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

Can you add vendors to the list at any time, including at the time of quotes?

Yes, if the purpose is to increase competition.

What happens if you only have one vendor for a given widget?

Find at least two more and add them the list! Don't be afraid to use the yellow pages (paper or electronic). Or use a sole source procedure under RCW 39.04.280 if the purchase source is truly unique.

What happens if you only get one quote out of the five RFQs you sent out?

Find out why, if possible. If vendors did not have enough time, extend the time (and don't open the existing quote). If there are no other quotes to be had for love or money, evaluate the single quote to see if it is reasonable, and, if so, accept it.

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

11 RCW 36.32.245(3). For sample small works roster resolutions, see the MRSC Rosters website under the "Public Agencies" tab.

amount of the contract, a brief description of items purchased, and the date of the award.[12]

Purchasing Departments. Counties are authorized by statute to establish a purchasing department.[13] If established, the purchasing department is required to act on behalf of all county departments to:

- Contract on a competitive basis for all public works;
- Enter into leases of personal property on a competitive basis; and
- Purchase all supplies, materials, and equipment on a competitive basis.[14]

The purchasing department is not required to make purchases for the county hospital, or purchases paid from the county road fund or the equipment rental and revolving fund.

Purchasing Agents. If a county establishes a purchasing department, the county legislative body must appoint a county purchasing agent to head that department. The person appointed as purchasing agent must have previous experience as a purchasing agent and must be bonded. The county legislative body may establish a central storeroom or storerooms from which supplies and equipment may be issued "upon proper requisition by department heads." The purchasing agent is responsible for maintaining perpetual inventories of supplies and equipment and must make at least yearly reports to the board regarding that inventory.[15]

Road Maintenance Materials. When calling for competitive bids for the purchase of road maintenance materials, a county may award contracts "to multiple bidders for the same commodity when the bid specifications provide for the factor of haul distance to be included in the determination of which vendor is truly the lowest price to the county." The county may re-advertise for additional bidders and vendors "if it deems it necessary in the public interest."[16]

Purchasing Preference for Products Made from Recycled Materials or Products That May Be Recycled or Reused. To increase the purchase of recycled products, counties are allowed to establish a purchasing preference for products made from recycled materials or products that may be recycled or reused.[17] If a county wishes to give a preference to recycled products, the bid solicitation must give a notice of that intent.[18]

Acquisition of Electronic Data Processing and Telecommunications Systems. RCW 39.04.270 authorizes local governments to use a "competitive ne-

12 RCW 39.04.200.
13 RCW 36.32.240(1).
14 RCW 36.32.240(2).
15 RCW 36.32.260.
16 RCW 36.32.256.
17 RCW 36.32.245(5); RCW 43.19A.005.
18 RCW 43.19A.080 describes what that notice must contain.

gotiation" process as an alternative to the competitive bid process, if required, when purchasing (and installing) electronic data processing or telecommunications equipment, software, or services.

For more information and examples, see our webpage Purchasing Materials, Equipment, and Supplies.

Leases of Personal Property. Counties with a purchasing department are required to enter into all leases of personal property on a competitive basis, following the normal competitive bidding procedures for purchase contracts.

Counties without a purchasing department are not required by statute to competitively bid operating leases, but bidding the lease as a purchase contract might be required under local policy and is also recommended for lease-to-own contracts and leases with an option to purchase.

For more information, see our webpage Purchasing Materials, Equipment, and Supplies.

Leases of Real Property. There are no competitive bidding requirements for leases of real property.

COUNTY ROAD CONSTRUCTION – CHAPTER 36.77 RCW

Counties may use their own employees ("county forces") to construct or improve county roads if the costs annually total no more than the limits set by statute. The limits are expressed in terms of "road construction project costs," which are defined in RCW 36.77.065(1)(b). The limits on the use of county forces are set out in RCW 36.77.065, and they vary based on the size of the county.

- For counties with a population of 400,000 or more: $3,250,000, plus that amount multiplied by the previous year's county motor vehicle fuel tax distribution factor, as provided for in RCW 46.68.124(5).
- For counties with a population of 150,000 or more, but less than 400,000: $1,750,000, plus that amount multiplied by the previous year's county motor vehicle fuel tax distribution factor, as provided for in RCW 46.68.124(5).
- For counties with a population of 30,000 or more, but less than 150,000: $1,250,000 plus that amount multiplied by the previous year's county motor vehicle fuel tax distribution factor, as provided for in RCW 46.68.124(5).
- For counties with a population of less than 30,000: $800,000 plus that amount multiplied by the previous year's county motor vehicle fuel tax distribution factor, as provided for in RCW 46.68.124(5).

However, you may not use county employees to perform certain road-related electrical work in excess of $40,000 per project; see RCW 36.77.065(7).

Ask MRSC

Must the county hire an architectural or engineering firm for the entire year?

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

May a county ask engineering firms for their hourly rates in its requests for qualifications?

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

When county road construction is performed by county forces and the estimated cost of the work exceeds $10,000, the county must publish in the county's official newspaper the estimated cost of the project and a description of the work to be done. At the completion of the construction, a similar brief description and the true and complete cost must be published again in the county's official newspaper. Failure to make the required publication shall make each county commissioner individually liable for a $100 fine.[19]

In lieu of the procedures in chapter 36.77 RCW for awarding contracts for road projects, a county may use the small works roster process.[20]

ARCHITECTURE & ENGINEERING SERVICES

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

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

PUBLIC DEFENDER SERVICES

There is no required procedure for contracting for public defender services. However, a county must adopt standards for delivery of public defense services under RCW 10.101.030 and the state supreme court Standards for Indigent Defense.

PRINTING, BINDING, AND STATIONERY WORK

All county printing, binding, and stationery work must be performed within the state. All requests for proposals and advertisements for competitive bidding must notify prospective bidders of the in-state requirement.[21] Certain exceptions to this requirement are set out in RCW 43.19.748.

COLLECTION CONTRACTS

Public Debts. RCW 19.16.500 authorizes counties to enter into written contracts with licensed collection agencies for the purpose of collecting public debts owed by any person, including any restitution being collected on behalf of a crime victim.

Superior court clerks may contract separately with collection agencies licensed under chapter 19.16 RCW for the collection of unpaid court-ordered legal financial obligations, or they may use county collection services. Superior court contracts with collection agencies must be awarded by competitive

19 RCW 36.77.070.
20 RCW 36.77.075.
21 RCW 43.19.748.

bidding.[22] Factors that a court clerk is to consider in awarding a collection contract include but are not limited to: (1) a collection agency's history and reputation in the community; and (2) the agency's access to a local database that may increase the efficiency of its collections. Contracts may specify the scope of work, compensation for services, and other charges deemed appropriate.

OFFICIAL COUNTY NEWSPAPER

A county legislative authority must select an official county newspaper at its first meeting in April of each year.[23] If two or more legal newspapers are qualified, then the contract must be competitively bid following the process outlined in RCW 36.72.075.

PERFORMANCE-BASED CONTRACTS FOR ENERGY EQUIPMENT

Counties may enter into performance-based contracts when contracting for certain energy equipment and services without following a competitive bidding process. See RCW 39.35A.020.

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.

"Energy equipment and services" is defined to mean equipment and services that are expected, upon installation, to reduce the energy use or energy cost of an existing building or facility. Instead of a competitive bidding process, the county announces its requirements and seeks proposals to meet those requirements. Using evaluation criteria it has established, the county then negotiates with the person or firm that has submitted the "best proposal" according to the criteria. If the county 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.

BIDDING LAWS AND PRIVATE PARTY PROJECTS

Counties 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 road or utility improvements and dedicate them to the county.

Generally, if the project is done completely by the developer and then donated to the county, the bid laws do not have to be followed because the county has not contributed any county money and the developer is not acting as an

22 RCW 36.18.190

23 RCW 36.72.075.

Ask MRSC

If an insurance company is going to spend $200,000 to repair damage to the county courthouse, 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 county for prevailing wage purposes, they probably would also be considered agents for bid law purposes, and compliance with the bidding statutes would be required.

agent of the county. But, if the cost of a project involves any county money, then typically the entire project is subject to the bid laws.

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].

Counties should consider the following when reviewing whether bidding laws and prevailing wages may be required:

- Who owns the land
- Who pays for the project, and
- 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 county 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 county building located in the county park are needed. This is a publicly owned building located on county 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 county. Once the project is complete, the building will be fully owned by the county.

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.

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

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

If a county 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 county, under which the county will rent, lease, or purchase the facility after it is completed, and the county's use will be of at least 50 percent of the facility, then prevailing wages must be paid. See RCW 39.04.260. This would not, however, be considered a public works project that must be bid out.

Exceptions to the Bidding Laws

State statutes contain a number of exceptions and exemptions to the previously discussed bidding requirements. Many of 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.

MONOPOLIES AND SOLE SOURCE BIDDING

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

RCW 39.04.280(1)(a) explicitly authorizes the practice of purchasing from a single source. To avoid the bidding process and purchase from a single source under this statute, the county legislative authority 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 county legislative authority waives the bid requirement through application of a written policy, it must, immediately following the award of the contract, set out the factual basis for the waiver.

One commentator has noted that the State Auditor's Office will probably notice if your county makes too much use of sole source purchasing. He gives some guidelines for its use.[24] It is not a sole source situation if there is a way to draft specifications where more than one respondent will reply. If, however,

(a) the county has conducted a screening process whereby it can justify purchase of a specific product;

24 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.

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

(c) the product is available only through one manufacturer (or distributor, and the manufacturer so certifies); and

(d) the vendor certifies that the county is getting the lowest price it offers anyone, it probably qualifies as a sole source purchase.

Possible sole source purchase rationales:

- Licenses, copyrighted, or patented product or service that no other vendor provides.
- Existing county equipment, inventory, custom-built information system, custom-built data inventory system, or similar product or program.
- Compatibility with existing goods, equipment, or services and no reasonable alternatives or substitutes exist.

Sole source examples:

- Installation of water system security equipment.
- Proprietary, customized software.
- Maintenance/repair of radio equipment and repeater site.
- Stun guns (tasers), where certification is needed on a given brand.

SPECIAL MARKET CONDITIONS

RCW 39.04.280(1)(b) also provides a "special facilities or market conditions" exception from the bidding requirements for purchases of materials, supplies, or equipment.

What are special market conditions? No definition is given in RCW 39.04.280. Some have suggested that, if supplies or used equipment are offered at a very favorable price and will be sold before a county has a chance to complete the bidding process, that constitutes a special market condition. However, because there are no court decisions or attorney general opinions on this subject, if a county wishes to invoke "special market conditions" to waive the bidding requirements, the county prosecutor and regional auditor should be consulted.

BRAND NAME BIDDING

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." Counties may advertise for bids by specifying a particular brand name item as long as the responsible officials have

Ask MRSC

May we advertise for a particular model of a Chevrolet truck?
Maybe, but y
ou must document very carefully why this particular model meets your county'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 could get an audit finding. However, if you get bids from a number of different Chevrolet dealers, the state auditor may be satisfied. Ask your regional auditor first.

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

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

determined that a certain brand name is of higher quality or is better suited to the county's needs. In *Smith v. City of Seattle*, 192 Wash. 64 (1937), the city advertised for bids for incandescent lamps, specifying a particular brand. In a suit brought by a maker of a similar lamp, the court stated that as long as the public officials involved exercised their discretion in determining that a particular brand of lamps was more desirable, the city's procedure was proper in the absence of abuse of discretion or fraud. In this case, the fact that the city had used the specified lamps previously and they had performed satisfactorily provided a rational basis for city authorities to limit the bid advertisement to that specified brand of lamps, and the court found no abuse of discretion. There is no requirement that bid specifications naming a particular brand also include a phrase such as "or an equal brand."[25]

EMERGENCIES

The waiver of competitive bidding requirements in the event of an emergency applies both to purchases and to public works projects. The term "emergency" is defined by RCW 39.04.280(3) to mean unforeseen circumstances beyond the control of the county 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."

In an emergency situation, the person designated by the county legislative authority to act on its behalf 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 county to address the emergency. If a contract is awarded without competitive bidding due to an emergency, the county legislative authority or its designee must make written findings of the existence of an emergency and enter them "of record" no later than two weeks following the contract's award.[26]

But, what if the county legislative authority has not designated anybody to act to waive competitive bidding requirements in the event of an emergency? If there is time to act, the county legislative authority should meet and designate somebody. Or, if there is not time to act, the official in charge of making purchases or of contracting for public works should probably make the waiver decision. If the emergency is of a severity to invoke the county's emergency management plan adopted under RCW 38.52.070(1), that plan should be followed.

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(6))

Ask MRSC

May the county purchase equipment off of eBay?

Yes, this would seem to fit within the statutory authorization to purchase through an auction conducted by a private party.

25 AGO 61-62 No. 24 ("A school district calling for bids prior to letting a contract can specify an item by brand name or name of manufacturer without an additional clause inviting bids on similar items of equal quality and serviceability if the public officials have not drafted the specifications arbitrarily and capriciously and are acting in good faith.")

26 RCW 39.04.280(2)(b).

to forego statutory competitive bidding requirements. Checking with the state auditor's office before declaring an emergency is also recommended.

AUCTIONS

Sometimes a county will find exactly what it needs for a favorable price at an auction. Obviously, seeking bids would be impossible in an auction setting. RCW 39.30.045 authorizes a county to acquire supplies, materials, and equipment through an auction conducted by the federal government, a state agency, 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.

NEIGHBORHOOD "SELF-HELP" PROJECTS

RCW 35.21.278 allows counties to contract with community service groups to design, install, improve, or maintain parks and certain other community projects without competitive bidding and to reimburse the community service groups for their expenses. These are sometimes known as "neighborhood self-help projects."

For more information, including eligible projects, dollar limitations, examples of community service groups, and examples of neighborhood self-help contract documents, see our webpage on Competitive Bidding Exemptions.

WATER POLLUTION CONTROL FACILITIES

As an alternative to normal bidding processes, counties can use an optional "competitive negotiation" process for water pollution control facilities under RCW 70A.140.040.

This applies to contracts with a service provider to design, finance, construct, own, operate, or maintain water pollution control facilities by which services are provided to the agency.

Before entering into a service agreement under this statute, the Department of Ecology must review the proposed agreement to ensure consistency with state laws.

For more information, see our webpage on Competitive Bidding Exemptions.

SOLID WASTE FACILITIES & RELATED SERVICES

As an alternative to normal bidding processes, counties can use an optional "competitive negotiation" process for solid waste facilities and related services under RCW 36.58.090.

This applies to contracts for the design, construction, or operation of, or other services related to, the systems, plants, sites, or other facilities for solid waste handling. The statute also has certain additional limitations.

Ask MRSC

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

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

May a county 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.

For more information, see our webpage on Competitive Bidding Exemptions.

POLLUTION CONTROL FACILITIES

RCW 70A.210.110 provides counties with a broad competitive bidding exemption that can be used for the construction or improvement of pollution control facilities. This statute waives any competitive bidding requirements and allows the governing body in its sole discretion to determine how to award the contract.

RCW 70A.210.020 defines "pollution" broadly to include any form of environmental pollution, including but not limited to:

- Water pollution
- Air pollution
- Land pollution
- Solid waste disposal
- Thermal pollution
- Radiation contamination
- Noise pollution

The statute also defines "facility" very broadly.

While this statute appears to be far-reaching, counties should use caution before proceeding and ask the Department of Ecology to certify that the facility is indeed designed to abate, control, and/or prevent pollution.

For more information, see our webpage on Competitive Bidding Exemptions.

Ask MRSC

Must the contract off of which the county piggybacks indicate that it would be available for use by other public entities?

Although a 2003 attorney general memorandum dated April 1, 2003 from Brian Buchholz, Assistant Attorney General, to Corine Pennington, State Auditor's Office Manager, indicated that public agencies may avail themselves of purchase contracts entered into by other public agencies if, among other things, the original contract was awarded with terms indicating that it would be available for use by other public agencies, compliance with the 2004 amendment to RCW 39.34.030 quoted above should now be considered as all that is necessary for a valid piggybacking arrangement.

Must both agencies in a purchasing interlocal agreementpiggybacking arrangement have the same purchasing (bid) limits?

Some larger agencies do not have statutory bid limits and may not have the same requirement to competitively bid purchases as do smaller agencies, No. RCW 39.34.030(5)(b) recognizes that public agencies have varying bidding requirements where it provides thatMRSC feels that the language in RCW 39.34.030(5)(b) that says "...any statutory obligation to provide notice for bids or proposals that applies to the public agencies involved is satisfied if the public agency or group of public agencies that awarded the bid, proposal, or contract complied with its own statutory requirements ..." (Emphasis added.) covers this instance as well.

Purchasing From Other Governments and on Other Governments' Contracts

SURPLUS PROPERTY

Counties may sell, transfer, exchange, lease, or otherwise dispose of any real or personal property or property rights to another government entity without regard to bid laws. For more information, see our webpage on Surplus County Property.

PIGGYBACKING AND INTERGOVERNMENTAL PURCHASES

In addition, a county may use another public agency's active contract for purchases of products, services, or public works, a process known as "piggybacking." The "host" agency can include other local governments, the State of Washington, federally recognized tribes, or public purchasing cooperatives. Counties may also purchase from the federal government without following bid laws. For more information on these processes, see our webpage Intergovernmental Procurement and 'Piggybacking'.

CITY STREET PROJECTS

RCW 47.24.050 and RCW 35.77.020 provide authority for counties to enter into agreements with cities located within their boundaries for the maintenance, repair, or construction of any or all of the cities' streets or bridges. No bidding requirements apply to such projects. Counties may expend funds from the county road fund for this purpose.[27] However, RCW 35.77.030 qualifies this authority to do work on city streets by requiring that all "construction work" performed by a county on city streets pursuant to RCW 35.77.020 through 35.77.040 that exceeds $10,000 must be done by contract after competitive bidding unless "it appears that bids are unobtainable or that the lowest bid exceeds the amount for which such construction can be done by means other than contract." Since RCW 35.77.020 authorizes counties to do "construction, repair, and maintenance" on city streets, it appears that the bidding requirement in RCW 35.77.030 for "construction work" in excess of $10,000 means that bidding requirement does not apply to repair or maintenance of city streets.

RCW 36.75.200 authorizes a county to use its funds for repairing, maintaining, or constructing any bridges within a city if the bridge is essential to continuation of the county road system.

27 RCW 35.77.030.

The Bidding Process

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

ADVERTISING FOR BIDS

Purchases. RCW 36.32.245 sets out advertising requirements for the purchase of materials, equipment, or supplies in all counties.[28] An advertisement must be published in the county's official newspaper at least 13 days prior to the final date for receiving bids and must state:

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

Purchases between $10,000 and $50,000. Advertisement and formal sealed bidding are not required for purchases estimated to cost between $10,000 and $50,000 if the uniform process for vendors outlined in RCW 39.04.190 is followed.[29] This statute provides that a vendor list may be used to secure telephone or written quotations, or both, under certain conditions, as follows:

- Counties must advertise at least twice a year in a newspaper of general circulation that vendor lists exist and must solicit names for the lists.
- Counties must establish procedures for securing written or telephone quotations or both from, if possible, at least three different vendors, with the contract being awarded to the lowest responsible bidder.[30]
- Immediately after the award, all bid quotations received must be recorded and made open to public inspection. This information must also be available to those who inquire by telephone.

28 RCW 36.32.245 provides that these requirements do not apply to "performance-based contracts, as defined in RCW 39.35A.020(4), that are negotiated under chapter 39.35A RCW; or contracts and purchases for the printing of election ballots, voting machine labels, and all other election material containing the names of candidates and ballot titles."

29 RCW 36.32.245(3).

30 For a discussion of how to determine the "lowest responsible bidder," see pages 30-32.

- At least every two months, a county using vendor lists to award contracts valued at more than $10,000, but not more than $50,000, must post a list of contracts awarded. The list must contain the name of the vendor, the amount of the contract, a brief description of items purchased, and the date of the award.[31]

Under $10,000. For purchases of less than $10,000, advertisement and formal sealed bidding may be dispensed with upon order of the county legislative authority.

Public Works. RCW 36.32.235 sets out the advertising requirements for the public works bidding process in counties that have a purchasing department, and RCW 36.32.250 sets out those same requirements for all other counties. Advertisements for bids should contain definite specifications and procedures for bidders to use in estimating their bids. At a minimum, a bid notice for a public work should include the following items:

- the time and place where bids will be opened;
- the time after which bids will not be received;
- the character of the work to be done;
- the materials and equipment to be furnished: and
- that specifications for the project may be seen at the office of the clerk of the county legislative authority.

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

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

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

For small works projects below the thresholds in RCW 39.04.152, a county may use a small works roster process.

Road Projects. RCW 36.77.020 provides that, if the board of county commissioners determines that the work is to be done by contract, it must advertise the call for bids by publication in the official county paper and also in one trade paper of general circulation in the county, in one issue of each such

31 RCW 39.04.200.

paper at least once in each week for two consecutive weeks prior to the time set in the call for bids for the opening of bids.

BID AND PERFORMANCE BONDS

Bid bonds are required on public works to help ensure that a bid has been made in good faith and that the bidder will enter into a contract if his or her bid is accepted. RCW 36.32.250 and RCW 36.32.235(5) (applicable to counties with a purchasing department) provide that each bid must be accompanied by a bid proposal deposit in the form of a surety bond, postal money order, cash, cashier's check, or certified check in an amount equal to 5% of the amount of the bid proposed. The statutes also provide that "no bid may be considered for public work unless it is accompanied by a bid deposit." RCW 36.77.030 imposes the same bid deposit requirements on county road projects.

After bids are opened and the contract is awarded to the lowest responsible bidder as required by RCW 36.32.250 and RCW 36.32.235(6), the bid proposal deposits or bid bonds are returned to the unsuccessful bidders. The successful bidder's bid bond or deposit is retained until the bidder enters into a contract with the county and furnishes a contractor's performance bond in the full amount of the contract price.

Once the bid is awarded, the bidder who was awarded the contract has 10 days after notice of the award to enter into the contract and submit the required performance bond, or the bid deposit is forfeited and the contract must be awarded to the next lowest bidder.[32]

RCW 39.08.010 provides that a county must require a performance bond whenever it enters into a public works contract, to ensure that the job will be completed and that all workers, subcontractors, and suppliers will be paid.[33] This performance bond requirement applies to all public works contracts, whether or not let pursuant to competitive bids.

RCW 39.08.015 subjects counties to claims of "laborers, material men, subcontractors, and mechanics," if county officials fail to obtain the required performance bond. In lieu of a performance bond on all contracts of $150,000 or less, RCW 39.08.010 allows a county, at the option of the contractor, to retain 10% of the contract for a period of 30 days after the date of final acceptance. Prevailing wage claims have priority if there are multiple claims on retainage. This statute is intended to help small contractors who may have trouble getting a bond.

32 RCW 36.32.250 and RCW 36.32.235(7); RCW 36.77.040, for road projects.

33 RCW 60.28.011(1)(b) prohibits public agencies, including counties, from withholding retainage on highway or road projects funded in whole or in part by federal transportation funds. Counties must rely in such contracts upon the contractor's bond in the event of claims or unpaid taxes.

Ask MRSC

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

No. RCW 39.04.350(1) says: (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. (Emphasis added.)

May the bid opening be delayed?

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

Must the bid opening occur at a meeting of the county legislative body?

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

APPRENTICE UTILIZATION REQUIREMENTS

For larger public works contracts, all counties in Washington must require contractors to perform at least 15% of labor hours using apprentices enrolled in state-approved apprenticeship programs.

These requirements for large public works projects are phased in as follows:

Timeframe	Apprentice utilization required for all projects estimated to cost:
July 1, 2024-June 30, 2026	$2 million or more
July 1, 2026-June 30, 2028	$1.5 million or more
July 1, 2028 and after	$1 million or more

However, counties are authorized to reduce these requirements for individual contracts if the 15% goal is unattainable for one of the reasons specified in state law.

Counties are responsible for incorporating the apprentice utilization requirements into their bidding documents, reviewing and approving any required Apprentice Utilization Plans submitted by bidders/contractors, monitoring compliance, reviewing and adjusting (reducing) the requirements if needed, and assessing any monetary incentives for contractors who reach the 15% goal or penalties for contractor noncompliance.

For more information, see our webpage Apprentice Utilization Requirements for Public Works Contracts.

THE BID DECISION

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

A county must award the bid to the lowest responsible bidder or reject all bids. A county may not negotiate with any of the bidders.

The award decision, if made in good faith, will not be subject to interference by the courts, unless it is arbitrary or there is an indication of fraud.[34] However,

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

Ask MRSC

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

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

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

In general, no. RCW 39.30.040 does allow counties to take any sales tax that a county will receive from purchasing supplies, materials, and equipment within its boundaries into consideration when determining the lowest responsible bidder. But, in AGO 61-62 No. 41, the Office of the Attorney General concluded that entities could not establish a policy giving local bidders a preference by reducing their bids by some specified percentage amount in determining the lowest responsible bidder. To do so would "be in the nature of an arbitrary classification for the benefit of a particular group without regard to the merits of any particular case."

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

No, not in our opinion. The reasoning in AGO 61-62 No. 41, discussed in the above question, applies here also. The contract should be awarded without regard to union status.

if the board of county commissioners or the county 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.

DETERMINING THE LOWEST RESPONSIBLE BIDDER

RCW 36.32.235, .245, and .250 require that contracts requiring competitive bidding be awarded to the lowest responsible bidder for a public works project or for the purchase of materials, equipment, or supplies. In determining who the lowest responsible bidder is, a county is given relatively little discretion. The courts will not interfere with an award decision made in good faith, unless it is arbitrary or there is an indication of fraud. However, if a county awards a contract to a bidder other than the lowest bidder, it should include the reasons for its action in the board minutes or otherwise memorialize them.

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

For public works contracts, RCW 39.04.350 provides the list of mandatory bidder responsibility criteria that a bidder must meet to be qualified to be awarded a public works contract.

In addition to the mandatory bidder responsibility criteria, RCW 39.04.350(3) allows agencies to adopt relevant "supplemental" bidder responsibility criteria for individual projects.

For more information on mandatory and supplemental bidder responsibility, see our webpage Bidding and Awarding a Public Works Contract.

For projects with an estimated cost of $1 million or more, compliance with RCW 39.30.060 is also required for a bid to be considered responsive. By the bid submittal deadline, each bidder must submit a list of all licensed subcontractors for HVAC, plumbing, or electrical work—including proof of license—that the bidder will contract with. Any errors that the public agency identifies in the proof of licensing information must be corrected by the bidder within 48 hours of submission. In addition, within 48 hours after the bid submittal deadline, the bidder must submit a list of all subcontractors for structural steel installation and rebar installation. If the bidder does not plan to use subcontractors, it must name itself for the covered work (as long as the bidder is properly licensed).

To determine the lowest responsible bidder, cities might find it helpful to include a "Statement of Bidder's Qualifications" as part of the bid documents. This statement normally requests both financial and technical experience summaries and a bank reference. A good rule of thumb to use when considering

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

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

May a county call for bids with deductible or additive alternatives because it fears all bids might be too high?

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

whether to accept a bid other than the lowest one: would a private business determine that this firm would be the best one to satisfactorily complete the project at the lowest cost?

Preferences. RCW 39.30.040 allows (but does not require) counties, in determining the lowest bid, to consider the tax revenues that are generated by a purchase of supplies, materials, and equipment. "Tax revenues" are defined by that statute to mean a local sales tax that the supplier would pay to the local government and business and occupation taxes imposed by the local government that are measured by gross receipts of the supplier from the sale, the latter of which counties do not have the authority to impose. If a county considers these sales tax revenues, it must consider the taxes it would receive from suppliers located both within and without its boundaries. Counties may award a contract to the bidder submitting the lowest bid before taxes are applied, provided that a notice of the intent to do so is given before bids are submitted.

Counties may also give preference to products made of recycled materials or to products that may be recycled or reused.[35] Rather than invoke this preference in an arbitrary manner, the county board should establish a policy that states what percentage preference will be given for various products.

If either of these preferences will be used to determine the lowest bidder, that fact should be mentioned in the bid documents. Remember, other "local preferences" favoring local businesses in the award of a contract are not allowed.[36]

RCW 39.04.380 provides that, in any public work bidding process in which a bid is received from a nonresident contractor from a state that is identified by the Department of Enterprise Services 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 requirement does not apply if the contractor has an office located in Washington State. It also does not apply to small works roster projects, projects exempt from competitive bidding under RCW 39.04.280, or any other procurement exempt from competitive bidding.

ACCEPTING OR REJECTING THE BID

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

A county may not negotiate with the bidders once the bids have been submitted and opened. In *Platt Electric Supply, Inc. v. Seattle*, 16 Wn. App. 265 (1976), the City of Seattle invited bids on light bulbs. The advertisement for bids allowed bidders to set their own specifications. Platt submitted the lowest bid and Seattle offered to award the contract to Platt if it would lower its bid. Platt refused. Seattle then negotiated with the fourth lowest bidder out of a field of

35 RCW 36.32.245(6); RCW 36.32.235(16).

36 See AGO 61-62, No. 41.

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May a county modify the bid specifications after advertising?

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

May a county receive a bid electronically?

As technology continues to evolve, more public agencies have begun using or expressed interest in electronic bidding. For current information on this topic, including legal authority and practice tips, see our webpage Electronic Bidding Basics.

seven, eventually awarding the contract to that bidder. Seattle's justification was that this bidder had a better warranty and was, therefore, the best bidder. The court of appeals held the contract was void for either of two reasons: (1) the bidding laws were violated when the advertisement for bids allowed the bidders to set their own specifications, and (2) the city had negotiated with a bidder after the bids were submitted and opened. The court observed that both of these practices undermined the competitive bidding process. If bidders were allowed to set their own specifications, bids would not be comparable and there would be no objective criteria on which to award the contract. Negotiations with bidders after bidding has taken place undermines the fairness of the bidding process by not allowing all bidders to submit bids on the contract that is eventually awarded.[37]

PROTEST OF CONTRACT AWARD

If the contract is subject to competitive bidding, and the county receives a written protest from a bidder within two full business days following the bid opening, it may not execute a contract 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.[38] Saturdays, Sundays, and legal holidays are not counted.

Beyond that, there are no statutory requirements. If a county does not have any procedure regarding bid protests, it should allow a bidder to protest the award to the appropriate official or body, who can then make a determination whether the protest is valid. If the county rejects the protest, the objecting bidder, to preserve the protest, must bring suit for injunctive relief in superior court before the agency and the low bidder sign the contract.[39]

BIDDING IRREGULARITIES

Errors in Bid Procedures or in Complying with Specifications

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

- **Example of insubstantial variance:** in *Rhine, Inc. v. Tacoma*, 13 Wn. App. 597 (1975), the court of appeals concluded that the late filing of a bid bond

37 See also *Contractors v. Ellensburg School District*, 96 Wn.2d 806, 812 (1982); *Hanson Excavating v. Cowlitz County*, 28 Wn. App. 123, 126 (1981).

38 RCW 39.04.105. The contract is executed when it is signed, not when it is awarded. *BBG Group, LLC v. City of Monroe*, 96 Wn. App. 517, 520 (1999).

39 *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172 Wn. App. 193, 204 (2012); BBG Group, LLC v. City of Monroe, 96 Wn. App. 517, 521 (1999).

Ask MRSC

May a county prequalify bidders?

Although some statutes applicable to state agencies specifically require or allow prequalification on certain kinds of projects (RCW 47.60.680; 47.28.070), there are no such statutes for municipalities, other than RCW 39.04.151-.152, relating to the development of small works rosters. However, charter counties, with their home rule powers, would not need such statutory authority unless prequalification would be considered inconsistent with statutory competitive bidding requirements. For other counties, the absence of statutory authority may preclude prequalification. In *Manson Engineering & Construction Co. v. State*, 24 Wn. App. 185 (1979), the court of appeals addressed whether the Department of Transportation could establish prequalification requirements, in addition to those set out in RCW 47.28.070, relating to highway construction projects. The court, in ruling that the department did not have the authority to add additional prequalification requirements, stated:

Prequalification standards, as authorized by RCW 47.28.070, tend to limit the extent of competitive bidding. It is the function of the legislature, not the judiciary or an administrative agency, to circumscribe competitive bidding. When, as in the case at bench, the legislature has already defined those limits, courts will be wary of interpreting the legislatively mandated standards so as to further circumscribe the competitive bidding policy. Accordingly, we are not inclined

was an insubstantial variance that could be waived by the city because it did not give the late bidder an advantage over the others.[40]

- **Example of substantial variance:** in *AAB Electric v. Stevenson Public School District*, 5 Wn. App. 887 (1971), the court of appeals held that the failure to sign a bid was a substantial variance that justified the city's rejecting the low bid. The court noted that this defect would give the bidder who failed to sign the bid an advantage over the other bidders. This bidder could choose not to enter into a contract, if accepted as the low bidder, without having to forfeit his bid bond because his bid was unsigned. The other bidders, who had properly signed their bids, would forfeit their bid bonds if any of their bids were accepted and they failed to enter into a contract.[41]

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 theits bid was bid too low.

Bid Amount Errors

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

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

> granting reformatory relief in this instance would open the door in a sensitive area to factual review of bidletting procedures which would adversely invade the safeguards surrounding the competitive bidding

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

41 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).

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to view favorably an administrative agency's attempt to extend its authority by asserting prequalification standards in excess of those specifically provided by statute.

24 Wn. App. at 190. See also AGO 1993 No. 19, in which the Attorney General addressed the issue of whether institutions of higher learning could require that contractors have an apprenticeship program as a prequalification. The opinion, citing the Manson case, said that, absent statutory authority for a prequalification requirement that contractors have an apprentice program, universities and colleges did not have the authority to impose one. The Manson court's reasoning may be equally applicable to counties other than charter counties.

We note that the 2012 Standard Specifications for Road, Bridge, and Municipal Construction, Section 1-02.1 (including the APWA Supplement provision), authorizes a prequalification procedure. This would not, however, provide sufficient authority for counties, when adopting the Standard Specifications, to prequalify bidders.

system and the confidence which contractors and the public have in its fairness.

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

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

The bidder who submitted the erroneous low bid may withdraw the bid, at the risk of forfeiting the bid bond. In *Puget Sound Painters v. State*, 45 Wn.2d 819 (1954), the low bidder submitted an erroneous bid as a result of a mistake made in estimating the cost of performing the proposed contract. After the bid was accepted, the bidder immediately realized the mistake and notified the state. The bidder was successful in a suit to recover its bid bond. The state supreme court stated that the following factors should be considered in determining if a bidder can be relieved of his contractual obligations without forfeiting the bid bond, after submitting an erroneous low bid:

- Whether the bidder acted in good faith,
- Whether the bidder acted without gross negligence,
- Whether the bidder was reasonably prompt in giving notice of the error in the bid,
- Whether the bidder will suffer substantial detriment by forfeiture,
- Whether the other party's (i.e., the county's) status has not greatly changed, and relief from forfeiture will cause no substantial hardship on that party.[42]

However, the courts have also held that "there are certain types of mistakes, such as underestimating the cost of labor and materials, which are purely judgmental and never entitle a bidder to equitable relief." *Peter Kiewit Sons' Co. v. Wash. State Dep't of Transp.*, 30 Wn. App. 424, 431 (1981).

Ask MRSC

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

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

42 45 Wn.2d at 823.

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.[43]

Caveat: If the *Standard Specifications for Road, Bridge, and Municipal Construction* is used, a correction in any error in adding up the unit prices may be permissible. Under this *Standard Specifications* procedure, however, all bid proposals are checked for accuracy in adding up unit prices, prior to the bid award. See *Standard Specifications*, Section 1-03.1. The APWA Supplement for this section provides a procedure for a bidder to claim error (presumably other than in adding up the unit prices) after the bids have been opened, and for agency review of the claimed error. If the contracting agency concurs in the claim of error, the bidder is relieved from performing the contract without forfeit of the bid bond.

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

SMALL WORKS ROSTER

When the contract amount for a public works project is below the thresholds in RCW 39.04.152, a county may follow the small works roster process for construction of a public work or improvement as an alternative to the general competitive bidding requirements. 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

Counties with a purchasing department are specifically authorized to use competitively bid "unit priced" public works contracts, also known as "on call" public works contracts. See RCW 36.32.235(9).

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 counties with a purchasing department to contract for multiple or recurring small public works projects over time

43 RCW 36.32.250.

Ask MRSC

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

It depends. If the county has adopted supplemental criteria under RCW 39.04.350(2) for the project, then a bidder must meet all the criteria to be considered responsible. (Note that if your county has not adopted supplemental criteria for the project, then it can apply only the mandatory criteria in RCW 39.04.350(1), which do not include the bidder's performance on previous projects.) Assuming those supplemental criteria require information on the performance of similar projects, then the contractor's failure to finish a previous contract with the county would be a basis for determining the low bidder to not be a responsible bidder and thus for rejecting this low bidder's bid. Of course, there may have been reasons for not completing the prior project that were beyond the bidder's control. So, the county should have adopted a process for appealing the determination that the bidder is not responsible, under which the bidder can present additional information and challenge that determination.

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

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

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.

Practice Tip: There is no similar authorization in RCW 36.32.250 for counties *without* a purchasing department; any county without a purchasing department should seek the advice of its prosecuting attorney if it wishes to use unit priced contracts.

ALTERNATIVE PUBLIC WORKS CONTRACTING PROCEDURES

Most local governments typically use the traditional "design-bid-build" contracting method for public works projects, in which a project is broken into two distinct contracts. First, the agency solicits for and contracts with an architect or engineer or does the work in-house to design the project. Once the design is complete, the agency then solicits bids from contractors to build the project according to the plans and specifications.

However, chapter 39.10 RCW provides counties with three "alternative" forms of public works contracting that can be useful in certain situations.

Practice Tip: A brief summary follows; for more information and examples related to design-build, GC/CM, and job order contracting, see our webpage on Alternative Public Works Contracting Methods.

Design-Build Contracting

Under the design-build process, a county contracts with a single firm to both design and construct the project, instead of separating it into two different contracts. This can be helpful for certain larger, hard-to-define projects.

General Contractor/Construction Manager (GC/CM)

Under the GC/CM process, a county selects a contractor early in the design process so they can participate in project development for projects with complex scheduling, phasing, or coordination, such as an occupied site that must continue to operate during construction. The selected GC/CM then partners with the agency and designer on various preconstruction activities

Ask MRSC

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

No. The county must reject all bids. The county may want to reduce the scope of the project and advertise again.

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

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

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

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

and serves as the general contractor and construction manager during the construction phase.

Job Order Contracting (JOC)

Under the JOC process, counties enter into one contract that can be used for multiple, small, time-sensitive projects requiring little or no design. As projects arise, the county prices the work based on an established price book. This helps reduce time-consuming and costly aspects seen in the traditional "design-bid-build" process, which requires separate contracting actions for each small project.

JOC is different than unit priced contracts, as job order contracts generally have a much wider scope, have a more rigorous solicitation process, and require most of the work to be subcontracted, which makes it less suitable for smaller agencies or small public works projects.

Ask MRSC

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

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

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

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

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

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

Other Bidding Issues

CHANGE ORDERS

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

When does the additional work required by a change order require competitive bids? There is no Washington authority on this issue. The generally accepted rule is that where a statute requires that a contract for public work shall be let to the lowest responsible bidder, a municipal corporation cannot evade the law by making substantial changes in the contract after it has been award pursuant to the law. The state auditor's office supposedly has set a 10% threshold for audit purposes; changes orders that are more than 10% of the original contract amount will receive additional audit review. The state auditor's office will look at various factors with respect to change orders:

- The legitimacy of the reasons for the change;
- Whether the reasons for the change were unforeseen at the time the contract was made;
- The timing of the change in context of work being performed;
- Whether the contract contains clauses authorizing modifications and meaning of specific clauses; and
- The extent of the change relative to the original contract.

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. Other issues to consider include:

- 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?

Ask MRSC

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

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

Our county awarded a contract for a public work without going out for bids because the estimated cost was under the threshold for bids. Now the contract requires a change order that will push the cost over the threshold.

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

MRSC recommends that counties adopt policies to guide the consideration and approval of change orders in public works contracts. Such polices can address the following:

- Who has change order approval authority?
- Is there a dollar figure or percentage of the original contract amount that can be authorized for a change order, or over which approval by a higher authority is necessary?

Also see the State Auditor's Office Best Practices for Change Orders.

CONFLICT OF INTEREST[44]

Municipal contracts that may benefit a municipal officer under whose authority the contract is entered into 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.

There is a limited exception to the above prohibition for officers in counties with a population of less than 125,000. Officers who are subject to the prohibition in those counties may have a financial interest in contracts made under their supervision as long as the amount received under such contract or contracts does not exceed $1,500 in a calendar month.[45]

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

RESULTS OF VIOLATION OF BID STATUTES

A violation of statutory bidding requirements may have a number of consequences. First, a contract made in violation of such requirements, or those of a county charter or ordinance, is illegal and void. Nevertheless, a county may

44 MRSC's Knowing the Territory publication contains a detailed analysis of the conflict of interest statutes regarding public contracts at pp. 8-12.

45 RCW 42.23.030(6).

have to pay for the reasonable value of a partiallyperformed contract that is voided for violation of bid law, where there is no bad faith or fraud.

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 county resulting from the violation.

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

The definition of "municipal officer," for purposes of the penalties in RCW 39.30.020, is that contained in RCW 42.23.020(2), above, for conflicts of interest.

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