

Public Works Contracting

Anna C. Franz
KenisonFranz
(509) 754-2493
afranz@basinlaw.com

Statutory Authority

RCW 87.03.435: “whenever in the construction of the district canal or canals, or other works, or the furnishing of materials therefor, the board of directors shall determine to let a contract or contracts for the doing of the work or the furnishing of the materials, a notice calling for sealed proposals shall be published”

Exceptions: emergencies, single source supplier, special market conditions, small works roster, vendor list

RCW 39.04.010(5) "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. All public works, **including maintenance when performed by contract** shall comply with chapter 39.12 RCW (prevailing wage).

RCW 39.04.010(4) "Municipality" means every...district, or other public agency authorized by law to require the execution of public work, except...irrigation districts, or other districts authorized by law for the reclamation or development of waste or undeveloped lands.

Cost Estimates

Plans, Specifications, and Costs estimates must be prepared and approved by the district board.
RCW 39.04.020

Cost estimates provide the basis for determining methods of letting the contract, e.g., projects with a cost estimate \$350K or less can use the small works roster.

Typically, the estimate is based off previous district projects or prepared by an engineer based on current construction market conditions and technical scope. Third party opinions can inform these estimates including information from potential bidders.

Plans and Specifications

Standard specifications – WSDOT Standard Specifications for Road, Bridge, and Municipal Construction & Local Agency General Special Provisions

AIA Contract Documents for structures are not recommended without modification as they delegate a substantial amount of authority to the architect on behalf of the Owner

There are three basic principles that should help drive the level of detail for preparing the plans and specifications:

Level playing field: The documents should be clear enough so that all bidders are making the same assumptions about the documents and what is required, without relying on bidders to come to their own different conclusions. Since contracts are awarded only based on low bid, the scope, schedule, and terms/conditions must be specified by the district and not left up to individual bidders.

Accountability: The plans and specifications should be clear enough so that the district is able to hold the contractor accountable for getting the project that was intended and needed. Without this level of clarity, it may be difficult to ensure that the contractor performs consistent with the district's expectations and needs.

Permits and codes: The bid documents should be clear enough so that the design complies with all building codes or USBR/funder agency requirements and the project is able to receive the necessary permits from the appropriate authorities.

Project Schedules & Liquidated Damages

The Project Schedule should identify key dates for completion of project phases.

Liquidated damages must be provided for and the amount established in the contract.

The legal standard for liquidated damages is that the amount must be reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. The amount must be a reasonable forecast of the district's actual loss and cannot be a penalty.

Document, document, document: use worksheets to calculate LDs for specific projects, keep construction records to document contractor delays, and either assess damages or grant extensions of time in writing

Project Schedules & Liquidated Damages

Some common factors that often go into establishing the liquidated damage amount include the following:

- Temporary facility costs for the public agency if the project is not completed on time
- Administrative staff costs of managing the project for a longer period of time
- Additional fees paid to the designer (architect/engineer) or a third party construction manager (including USBR) required to provide services for a longer period of time
- Revenue loss for the district if the facility is not completed in a timely manner
- Temporary systems and security for the project (e.g. fire watch)
- District costs for additional storage time for materials or equipment
- Regulatory financial sanctions against the district for failure to meet a deadline

Project Schedules & Liquidated Damages

Negative factors to consider in establishing the liquidated damage amount include the following:

- Don't discourage bidding: Not so high that it either discourages bidders from bidding the project.
- Don't risk higher bids: Not so high that it encourages bidders to submit higher bid prices to mitigate their perceived risk in being potentially assessed the liquidated damage amount.

Bid Solicitations

- Any changes to modify the specifications after advertising but before opening may be done by issuing addenda.
 - *Addenda should be acknowledged by bidders in order to ensure bids are responsive to the modified specifications*
- Poorly drafted specifications can result in conflicts, change orders, and cost overruns
- Consider alternate, additive, and deductive schedules
 - *Specifications should be clear about how an award will be made*
- Supply contracts – consider contacting manufacturers to determine mutually acceptable contract terms and conditions

Pre-Bid Meetings

Whether a pre-bid meeting is appropriate depends on the particular project. If it is a mandatory pre-bid meeting and potential basis for rejecting a bid, the specifications should specifically state that

Danger area if staff or consultants make representations contrary to the specifications during the pre-bid meeting. If, after conducting a pre-bid meeting, changes should be made to the specifications, such change should be issued through a written addenda to all bidders.

- Staff should state or include a statement in the agenda at the pre-bid meeting that nothing said verbally at the meeting is binding and that only the plans and specifications may be relied upon.
- Make a record of questions and answers and issue addendums as appropriate

Responsiveness: Material Irregularities

Responsiveness: Has the bidder submitted a bid that is consistent with the specifications and call for bids?

Material irregularities/variances = would give a bidder a substantial advantage over other bidders if waived

Example: failure to sign a bid has been found to be a substantial variance resulting in an advantage over the other bidders since the bidder could choose not to enter into a contract without forfeiting the bid bond because the bid was unsigned and therefore not enforceable against the bidder

A bid conditioned on changes to the contract or specifications is non-responsive

Responsiveness

Public works contracts that are estimated to cost \$1M+ shall require each bidder to submit a list of subcontractors to be used in specified categories of work, if described, namely heating, ventilation, and air conditioning (HVAC), plumbing, or electrical work, or name themselves; as well as structural steel and rebar installation. RCW 39.30.060.

Bid Calculation Errors – bid documents should provide information of how bid calculations will be reviewed the process for correction/determination, e.g., unit price vs. extended price

No Responses to Bid Solicitation

RCW 87.03.435 2019 Legislation:

At the time and place appointed in the notice for the opening of bids, the sealed proposals shall be opened in public, and as soon as convenient thereafter, the board shall let the work or the contract for the purchase of materials, either in portions or as a whole, to the lowest responsible bidder, or the board may reject any or all bids and readvertise, or may contract using the small works roster process in RCW 39.04.155 or if no bid is received on the first call the board may readvertise and make a second call or shall solicit electronic or written quotations from a minimum of three qualified contractors and shall award the contract to the lowest responsible bidder.

Bidder Responsibility

RCW 39.04.350 provides the statutory responsibility criteria.

Supplemental criteria may be developed by the District but the supplemental criteria, the basis for evaluation, and deadline for appealing a determination must be included in the bid documents.

- Basic supplemental criteria may include such things as no delinquent state taxes, no federal debarment, minimal prevailing wages violations, no excessive claims against retainage and bonds, no public bidding violations, no termination for cause or default, and unwarranted lawsuits with respect to public contracting.
- Additional supplemental criteria may be appropriate based on the scope and complexity of the project, e.g., a contractor must have completed three projects of a similar scope and dollar volume within the past five years.

If the district determines a bidder to not be responsible, it must provide the reasons for the determination in writing so that the bidder may appeal the determination.

First tier subcontractors must also be verified per RCW 39.06.020.

Document the review – checklist available from MRSC

Debarment & Suspension

\$25,000: The federal debarment and suspension checking requirements apply to all vendors, contractors, and consultants (engineers) receiving \$25,000 or more on a federally funded project.

\$1 taints the pot: A project with any federal funding, regardless of how small, will trigger all of the requirements associated with such funding.

www.sam.gov – entity information

L&I Debarred Contractors List

State Auditor Office Resources

Award Challenge

Only injunctive relief is available to stop bid award; monetary damages are not available

RCW 39.04.105 – protesting bidders must submit written notice of protest no later than 2 full business days following bid opening OR no later than 2 full business days following when the public entity provided copies of bids to bidders requesting bids

If bid copies are requested, public entity cannot execute written contract until expiration of two full business days after producing the copies to allow written protest

Failure to protest within 2 business days provided cuts off claims by other bidders

Rejected Awards

RCW 87.03.435(1): If the successful bidder fails to enter into a contract and furnish the necessary bond within 20 days from the award...the contract may then be awarded to the second lowest bidder.

Bid Bonds or Deposits – provides security in the event the contractor refuses to execute the contract

Under Washington law, a bid meeting the specifications is an offer that creates a binding contract once the public entity awards the bid

Duty to mitigate damages – award to second lowest responsible bidder or re-bid project

Prior experience with entity as responsibility criteria

Performance and Payment Bonds

RCW 39.08.010 requires contract bonds to ensure that the work will be completed (performance bond) and all workers, subcontractors, and suppliers will be paid (payment bond).

RCW 87.03.435 requires that the bonds be for at least 25% of the contract price; recommendation is full price of the contract and separate payment and performance bonds

RCW 87.03.435 does not distinguish between public works contracts or supply contracts for public works; additional bidder education may be warranted for suppliers not used to public works bidding

Best practice is to use a required form to avoid complicated surety requirements for making claims

Check with your risk analyst regarding acceptability of sureties and recommended forms

On contracts of \$150k or less, the contractor may request that the public entity retain 10% of the contract for a period of 30 days after the date of final acceptance or until receipt of the necessary releases, whichever is later

On contracts under 5K, retainage or performance bonds are not required by RCW 39.04.152.

Guarantee and Warranty

Guarantee/Warranty: The Contractor is to guarantee the satisfactory operation and performance of the facilities constructed under these Contract Documents for a period of **two years** following **completion of the project and acceptance by the District**. This two-year guarantee and indemnification period shall not relieve the Contractor from liability for any defects appearing after the two-year period and shall not operate to limit or preclude in any way the District's rights to bring suit within the applicable statute of limitations.

Duty: Any faults or deficiencies resulting from the Contractor's workmanship or from materials supplied by the Contractor are to be promptly corrected by the Contractor **at no expense** to the District. The Contractor shall indemnify and hold the District harmless from any costs and liabilities encountered in remedying such defects.

Self Help in Event of Default: If the Contractor fails to promptly correct faults or deficiencies or fails to perform the work in accordance with the Contract Documents, the District, may, after seven days written notice to the Contractor, correct or remedy any such deficiency, by contract or otherwise, and **charge the cost to the Contractor**. In the event of such faults or deficiencies, the two-year warranty period will begin again on all work within the Contract following completion of the corrective action.

Damages: In the event the Contractor breaches this Contract by nonperformance, or by incomplete performance, or by defective performance, the District, shall be entitled to recover damages from the Contractor calculated on the basis of the cost of completing the work under the Contract promised by the Contractor or the cost of repairing defective work. If omissions or defects cannot be remedied except at unwarranted expense as determined by the District, in its sole and exclusive judgment, then the District shall be entitled to recover damages from the Contractor calculated on the basis of the difference between the value of the work if it had been performed in accordance with the Contract and the value of the work as it was actually performed.

Indemnity

The Contractor shall defend, indemnify and hold the District, its officers, officials, employees, and volunteers harmless from any and all claims, injuries, damages, losses, or suits including attorney fees, arising out of or in connection with the performance of this Agreement, except for injuries and damages caused by the sole negligence of the District.

RCW 4.24.115 – limitation on indemnity; indemnitor only responsible for their own negligence

Title 51 RCW immunity waiver: It is further specifically and expressly understood that the indemnification provided herein constitutes the Contractor's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

Insurance

Check with risk adjuster/insurance broker for preferred coverage forms, limits, and insurer ratings

Coverages for public works contracting typically include:

- Commercial General
- Automobile
- Workers' Comp (as required by WISHA)
- Builders Risk

Require the contractor to provide original certificates and the amendatory endorsements including additional insured endorsements before commencement of work

Limitations of Liability

CONTRACTOR'S LIABILITY FOR ANY LOSS OR DAMAGE ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM THIS CONTRACT, OR FROM THE PERFORMANCE OR BREACH THEREOF, OR FROM THE DESIGN, DEVELOPMENT, MANUFACTURE, SALE, DELIVERY, RESALE, REPAIR, OR USE OF ANY GOODS COVERED BY OR FURNISHED UNDER THIS CONTRACT SHALL IN NO CASE EXCEED THE ORDER PRICE ALLOCABLE TO THE GOODS, OR PART THEREOF, OR SERVICE WHICH GIVES RISE TO THE CLAIM.

Limitations of Liability

NOTWITHSTANDING ANYTHING IN THIS CONTRACT TO THE CONTRARY, CONTRACTOR WILL NOT BE LIABLE FOR ANY SPECIAL DAMAGES, INDIRECT DAMAGES, INCIDENTAL DAMAGES, CONSEQUENTIAL DAMAGES, LOSS OF PROFITS, LOSS OF REVENUES, OR LOSS OF USE OF ANY PROPERTY OR CAPITAL OF PURCHASER OR ANY THIRD PARTY, EVEN IF THE POSSIBILITY OF SUCH DAMAGES HAS BEEN DISCLOSED TO CONTRACTOR IN ADVANCE OR COULD HAVE BEEN REASONABLY FORESEEN BY CONTRACTOR. THESE EXCLUSIONS OF TYPES OF DAMAGES AND LIMITATION ON THE AMOUNT OF DAMAGES SHALL APPLY REGARDLESS OF THE THEORY OF LIABILITY, WHETHER BASED ON CONTRACT, INDEMNITY, WARRANTY, TORT, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER THEORY. THESE EXCLUSIONS OF DAMAGES SHALL BE DEEMED INDEPENDENT OF, AND SHALL SURVIVE, ANY FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY UNDER THE TERMS OF THE CONTRACT.

Sales Taxes, Tariffs, Escalation Clauses

Provide location of project for purposes of calculating sales tax

Provide for reimbursement of tax and consider inclusion of tariffs

Can provide escalation clauses that address cost adjustments for fluctuations in the cost of raw material (steel, etc.) or other elements of the Project.

- Specify eligible items
- Tie price to an external index so that it can be calculated/verified

Government Contracting – Taxes

Include in specifications if project involves federal facilities operated and maintained by irrigation district

WAC 458-20-17001(1) Special business and occupation tax applications and special sales/use tax applications pertain for prime and subcontractors who perform certain construction, installation, and improvements to real property of or for the United States, its instrumentalities, or a county or city housing authority created pursuant to chapter 35.82 RCW. These specific construction activities are excluded from the definition of "sale at retail" under RCW 82.04.050. All other sales to the United States, its agencies or instrumentalities are taxable as retail sales or wholesale sales, as appropriate.

Change Orders

Major area of audit findings

No statutes on point

Auditor's Standard: change orders are only allowable if the additional work is within the bid upon scope of the project

Appropriate uses of Change Orders

Unforeseen conditions

Design errors, deficiencies, or defects

Increased quantities

Cardinal Changes are not appropriate

Planned as a separate project

Work unrelated to original scope of work

Change Orders

Change order should be final – cut off future claims for same work:

The Contractor agrees that any change in the Contract Amount or Contract Time provided in this Change Order are full and complete compensation to the Contractor for the change(s) to the work, deleted work, modified work, direct or indirect impact on the Contractor's schedule, and for any equitable adjustment or time extension to which the Contractor may be entitled for this Change Order, pursuant to the Contract between the Owner and Contractor.

Prevailing Wages

RCW 39.12.020: “the hourly wages to be paid to laborers, workers, or mechanics, upon all public works...shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed”

RCW 39.04.010(3): "Municipality" means every city, county, town, port district, district, or other public agency authorized by law to require the execution of public work, except [drainage districts], [diking districts], irrigation districts, or other districts authorized by law for the reclamation or development of waste or undeveloped lands.

Prevailing Wages

WAC 296-127-030: Irrigation district exemption.

Contracts awarded by irrigation districts for the reclamation or development of waste or undeveloped lands are not covered by the prevailing wage law, pursuant to RCW 39.04.010. Any work, construction alteration, repair or improvement that is not solely for the reclamation or development of waste or undeveloped land is covered by the prevailing wage laws and therefore subject to all the laws and regulations contained in and adopted pursuant to chapter 39.12 RCW.

But caution if using federal grant funds that require Davis-Bacon Act compliance.

Prevailing Wages

2019 Legislation – Increased penalties and extended filing period for complaints of prevailing wage violations

Previous penalty = greater of \$1k or 20% of total prevailing wage violation found on contract

ESSB 5035 penalty = greater of \$5k or 50% of total prevailing wage violation found on contract

Previous period of 30 days after acceptance of public works project was extended to 60 days

L&I may investigate and recover unpaid wages within 2 years from the acceptance of a public work

Small Works Roster

Be careful if federal funding requires competitive bidding process

New Legislation in 2023 (SSSB 5268)

Limited Public Works < 50k (RCW 39.04.155) eliminated and replaced by Direct Contracting

Encourages use of state wide small works roster hosted by MRSC

Roster contractors must state whether they meet the definition of women and minority-owned business, veteran-owned business, or small business

Office of Minority and Women's Business Enterprises must be provided notice of the existence 2019 c 434 § 5 of the roster

Small Works Roster

SWR can be used for any public work with an estimated cost of \$350K or less excluding sales tax

SWR or agreement for a SWR must be adopted by resolution

May not break larger projects into smaller pieces to qualify for SWR

Solicitation must be sent to ALL contractors on the applicable roster for contractors in the applicable geographical area. (Previous ability to select just 5 contractors has been eliminated)

Minimum requirements for soliciting a quote through SWR: estimate for SOW including nature of work to be performed and materials and equipment to be furnished; detailed plans and specs are not required at solicitation

Templates for bid forms and small works contracts are available from DES

Small Works Roster – Direct Contracting

SSSB 5268 establishes an optional direct contracting process for projects \$150K or less

Using the direct contracting method, a district can select one contractor from the List of Businesses (“project-specific roster” or “applicable roster”) for the project type/work category, send an Invitation to Direct Contract directly to the next identified contractor (using rotation as described below), and attempt to agree on an award amount.

To use direct contracting, your district needs procedures describing how you will rotate between different contractors or document efforts to use different contractors for different projects, how award amounts will be determined (including the negotiation process if needed), *and* a business utilization plan for awarding contracts to small businesses and businesses owned by minorities, women, and veterans (RCW 39.04.152(4)(b)).

Small Works Roster – Direct Contracting

SSSB 5268 establishes an optional direct contracting process for projects \$150K or less

If there are six (6) or more small contractors on the List of Businesses (project-specific roster): You must negotiate/direct contract with one of those small businesses, and you must rotate through the small business contractors for different contracts. This is the “rule of six.” See RCW 39.04.152(4)(b)(i).

If there are five (5) or fewer small contractors on the List of Businesses (project-specific roster): You may negotiate/direct contract with any contractor on the project-specific roster and are not required to contract with a small business. To avoid repeatedly awarding contracts to the same contractor, you still need to use rotation. See RCW 39.04.152(4)(b)(ii) and (4)(b)(iv).

Annually, a state agency or authorized local government must publish a list of small works contracts awarded and contractors contacted for direct negotiation pursuant to RCW 39.04.200.

Small Works Roster

Small Works Roster Process Checklist

This checklist outlines the procedural steps required for public agencies in Washington State to use a small works roster process (either competitive bidding or direct contracting) under [RCW 39.04.151-152](#).

It is designed primarily for public agencies that use the MRSC Rosters statewide small works roster platform, but agencies that maintain their own rosters can still use this checklist for general guidance.

Use this checklist in conjunction with MRSC's [Small Works Roster Manual](#), and always consult your agency's specific procurement policies and procedures.

Preparing Your Small Works Project	
<p>Confirm Policies and Procedures. Even public agencies that use MRSC Rosters must have adopted a resolution or ordinance authorizing the use of a small works roster as well as policies and procedures for use. If you intend to use direct contracting, make sure your local policies authorize the use of direct contracting and address business utilization and rotation as discussed later.</p>	<input type="checkbox"/>
<p>Define Project Scope. Clearly define the project scope, nature of the work, any deliverables, and performance requirements. Full plans and specifications are not required, but it is important to fully discuss the scope so that any bidder can understand the project needs and requirements. For more information, see our webpage Planning a Small Works Roster Project, including our Scope Development Worksheet.</p>	<input type="checkbox"/>
<p>Develop Project Estimate. Using your allocated budget, professionally developed estimate, or your own staff estimates, develop a project estimate to indicate how much you anticipate spending on the project. The statute requires an estimate, and the best practice is to vet your budget and make sure it reflects a relevant scope of work and potential effort. Obtain necessary budget approvals before proceeding.</p>	<input type="checkbox"/>
<p>Select Procurement Process. Determine whether you will be using competitive bidding or (if applicable) direct contracting. Enter your project information and intended procurement process in the MRSC Rosters portal.</p>	<input type="checkbox"/>
<p>Prepare Invitation/Solicitation Document. Prepare a clear and comprehensive solicitation document – invitation to bid, invitation to quote, or invitation to direct contract, as applicable. Make sure the solicitation includes:</p> <ul style="list-style-type: none"> • Scope of work (specifications, descriptions, drawings, or similar information necessary to describe the work) • Submission requirements, including use of a bid form if applicable • Applicable procurement dates (questions, addenda, due dates, etc.) • Contract terms and conditions (contract form) 	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
<p>Generate Project-Specific Roster. Using the MRSC Rosters platform, log in and generate a project-specific roster (list of businesses), selecting the project type and work category that most closely relate to the primary scope of your project. If the generated list appears to be viable, select "solicit businesses." This indicates that you are taking the project-specific roster to your bidding environment outside the MRSC Rosters platform to conduct the solicitation and bidding process.</p>	<input type="checkbox"/>
<p>For Competitive Bids: All small works roster projects with an estimated cost of \$150,000 or more, excluding sales tax, must follow the competitive bid process. Projects with an estimated cost of less than \$150,000 may also (optionally) use the competitive bid process, depending on local policy. For more information, see our webpage Competitive Bidding for Small Works Contracts.</p>	
<p>Send Invitation to Bid. Send the invitation to bid to ALL those businesses listed on the project-specific roster through an "invite only" process in accordance with local policies and procedures. Small Works invitations are NOT publicly advertised. Actual solicitation, bid submission/receipt, and award happen outside of MRSC Rosters.</p>	<input type="checkbox"/>
<p>Issue Addenda. Issue any necessary addenda to address changes, questions, or clarifications. Distribute addenda to all businesses on your project-specific roster or to all "plan holders" depending on your procedures.</p>	<input type="checkbox"/>
<p>Receive Bids. Receive bids in accordance with your agency's established processes, including submission deadline, format, and delivery method. If your agency uses electronic bidding, this is typically facilitated through your electronic bidding application.</p>	<input type="checkbox"/>
<p>Open Bids. Open the bids in accordance with local policy and document all bids by developing a bid tabulation. Public bid openings are not required by statute for small works projects, so public agencies have some flexibility.</p>	<input type="checkbox"/>
<p>Determine Lowest Responsive Bid from Responsible Bidder. Determine the lowest responsive bid from a responsible bidder (see RCW 39.04.350). To be listed on MRSC Rosters, a business must be properly licensed by LNI, but no other bidder responsibility requirements are checked. Public agencies need to perform a bidder responsibility check before awarding any public works project, including small works.</p>	<input type="checkbox"/>

Vendor Lists

RCW 87.03.437(1): Irrigation Districts may by resolution adopt a policy to waive formal sealed bidding procedures for purchases of any materials, supplies, or equipment for an amount set by the board not to exceed \$50k for each purchase. (used to be \$10k)

RCW 87.03.437(2): authorizes vendor lists up to \$50k

Piggy Backing

Chapter 39.34 RCW authorizes irrigation districts to make purchases using another public entity's (host entity) purchasing contract

The entities must sign an interlocal agreement meeting the requirements of Chapter 39.34 RCW

The host entity must comply with its statutory contracting requirements and post the solicitation online

Local Governments may also piggyback on State purchasing contracts administered by the Department of Enterprise Services and federal contracts administered by the General Services Administration

Competitive Bidding Exemptions

Emergencies: RCW 87.03.435(3)(b): In the case of an emergency when the public interest or property of the district would suffer material injury or damage by delay, upon resolution of the board of directors or proclamation of an official designated by the board to act for the board during such emergencies. The resolution or proclamation shall declare the existence of the emergency and recite the facts constituting the emergency

Sole Source and Special Market Conditions: RCW 87.03.435(3)(c): To purchases which are clearly and legitimately limited to a single source of supply or to purchases involving special facilities, services, or market conditions, in which instances the purchase price may be best established by direct negotiation.

Retainage

RCW 60.28.011 requires public agencies to withhold up to 5% of the value of a public improvement contract as retainage until the project is completed and the contract is accepted.

Form of retainage is chosen by contractor:

- Public fund

- Private interest-bearing account

- Private escrow account

Contractor may opt to submit a retainage bond; public entity should establish surety requirements and provide a form

The district may also reduce or waive small works roster contract retainage requirements if stated in the solicitation, however, the district will be primarily liable for any claims subject to its right to recover against the contractor

Retainage Claims

Retainage establishes a trust fund for the benefit of:

- (1) claims of any person arising under the contract (employees & sub-K)
- (2) state of Washington for taxes, increases, and penalties imposed under Titles 50 (unemployment compensation), 51 (industrial insurance), and 82 (excise tax) RCW

Notice of Lien must be given within 45 days of completion

Form is set forth in RCW 39.08.030

All liens must be foreclosed in superior court within 4 months or the public entity must release the retainage to the contractor

Retainage Closeout

If no claims are made, public entities must release the retainage to the contractor between 45 and 60 days after the completion of all contract work (Prompt Pay Act)

District should receive the following releases from State Agencies prior to releasing the retainage

- Department of Revenue – Certificate of Payment of State Excise Taxes by Public Works Contractor

- Employment Security Department - Certificate of Payment of Contribution, Penalties & Interest on Public Works Contract

- Employment Security Department of Labor and Industries

- Labor and Industries – Approved Statements of Intent to Pay Prevailing Wages and Affidavits of Wages Paid

Contractor Defaults

Follow contract provisions regarding notices of breach and cure periods

Involve the surety sooner rather than later

- The surety might provide financial backing to the defaulting contractor to finish the work.
- The surety might hire and pay a new contractor.
- The surety may pay the district for the costs to complete the project. In this scenario the district would hire a new contractor by bidding the remaining work.

Audit Findings

Negative publicity for a district in the form of front page news that elected officials and staff would prefer to avoid.

Political fallout including officials being defeated for re-election

Personnel actions including disciplinary warnings, suspension, and termination.

New requirements Establishment of new and often cumbersome requirements for all procurements and contracts.

Grant funding Disapproval of future grant funding applications or having to pay back previously received grant funds.

Bond ratings Lower bond ratings that increase the cost of financing operations and capital improvements.

The auditor will return Review of the district's operations the following year to determine if corrections have been made.

1. What type of procurement is this?

Not sure? Click the question mark next to each procurement type for definitions and examples.

- Public works** ?
- Acquisition of electronic data processing or telecommunications equipment, software, or services** ?
- Purchase of materials, equipment, or supplies not connected with a public works contract** ?
- Professional architecture & engineering (A&E) services, including landscape architecture and surveying** ?
- Personal services (consultants)** ?
- Purchased services** ?

NEXT

Agency Specific Guidance

mrsc.org/research-tools/contracting-requirements

**Municipal Research and Services Center
Statutory Checklist for Local Government
Public Works Contracting in Washington State**

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Disclaimer

This checklist is intended solely for local governments in Washington State and for contracts utilizing the traditional design-bid build contracting method. Not every possible statute affecting public works contracting is listed herein. Use of this checklist is not a substitute for review of a public works contract and associated paperwork by an agency's legal staff.

Public Works Or Other

[39.04.010](#) Definitions.

(4) "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. All public works, including maintenance when performed by contract shall comply with chapter [39.12](#) RCW. "Public work" does not include work, construction, alteration, repair, or improvement performed under contracts entered into under RCW [36.102.060](#)(4) or under development agreements entered into under RCW [36.102.060](#)(7) or leases entered into under RCW [36.102.060](#)(8).

Plans, Specifications and Estimates

Yes <input type="checkbox"/> N/A <input type="checkbox"/>	<p>39.04.020 Plans and specifications -- Estimates -- Publication -- Emergencies.</p> <p>1. Plans, specifications and estimates (PSE) to be done and filed with the governing body. As appropriate, PSE to be approved by the governing body.</p> <p>2. If project is over \$25K, then agency must advertise if it is doing work with its own forces or contracting w/o SPWR or competitive bids</p>
Yes <input type="checkbox"/> N/A <input type="checkbox"/>	<p>39.04.040 Work to be executed according to plans -- Supplemental plans.</p> <p>PSE changes are to be filed as well.</p>
Yes <input type="checkbox"/> N/A <input type="checkbox"/>	<p>39.04.050 Contents of original estimates.</p> <p>Original estimates shall show in detail the estimated cost of the work; the estimated quantities of each class of work; the estimated unit cost for each class; the estimated total cost for each class; the time limit, allowed for the completion of the work and the estimated dates of commencement and completion.</p>

MRSC Statutory Checklist for Local Government

JUNE 2023



Public Works Contracting Best Practices

MRSC Public Works Contracting Best Practices