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Public Works Contracting Best Practices

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PUBLIC WORKS CONTRACTING: BEST PRACTICES

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Author's Note

In one sense, my long career in public contracting was an accident. I almost never started my 43-year career. I was a 25-year-old freshly minted MBA graduate looking for a job but didn't have much experience. I was attracted to public service and so I watched for job openings with government agencies.

One day in the summer of 1979, I visited the personnel office for the City of Seattle on the second floor of the now demolished Municipal Building in downtown Seattle. There was no internet in those days and so I flipped through the legal-sized job announcement flyers, looking for something for which I might meet the minimum qualifications.

I found a job opening for an “executive assistant” with the Board of Public Works Department. That wasn't exactly my image of a job title I wanted for having just completed a graduate degree. As I read further, it got worse. The flyer noted the ordinance title for the position was “assistant secretary.” These titles made the position sound like a lower-level clerical position. As I read the job description, however, it didn't sound like a clerical position. More importantly, I met the minimum qualifications, and the salary was acceptable.

I applied, was interviewed, and was hired for the job that I started on October 23, 1979. The Board of Public Works was a small department with a half-dozen employees who supported the five-member board that consisted of the heads of city departments who managed public works construction projects.

I almost quit after my first day. The first thing my boss did upon my arrival to train me was to hand me a copy of the City of Seattle's standard specifications for public works projects. She told me to read it. It contained lots of detailed technical specification language about sewers and watermains, things I knew nothing about, nor did I have any interest in. I asked myself what I had gotten myself into.

I stuck it out, however. Shortly after my arrival, HUD sent a lengthy letter to the mayor threatening to cut off the city's funding because the Board of Public Works (prior to my arrival) had failed to monitor prevailing wages and many workers had been underpaid, based on an audit HUD conducted. I knew nothing about prevailing wages, but soon learned. I established a monitoring program and built good relationships with HUD officials.

My boss communicated with me and the rest of the staff only with handwritten notes. One day, she handed me a note directing me to revise the Board of Public Works' policies within 30 days. The document was a collection of miscellaneous and disjointed policies, memos, and ordinances with no cohesive organizational structure. It was an impossible assignment especially without any conversation, and that was out of the question.

Before I was held accountable for not revising the policies, one day she called me into her office. This could only be bad news because all communication with her was in writing. Instead, she informed me she would be retiring. I was ecstatic and tried not to show my enthusiasm for this welcome news but received it dispassionately. I stopped my search for a new job I had begun to escape an intolerable situation.

Upon her retirement, the Board of Public Works appointed me as “acting executive secretary,” meaning I was the head of this small department and accountable to the five-member board. I was part of the mayor's cabinet of other department heads and attended his weekly cabinet meetings. I felt like a fish out of water among much older and more experienced managers where I felt like just a kid. I learned, however, from them, and from the unique vantage this unexpected position gave me. It introduced me to the world of political decision-making, legal issues, budgeting, relationships with city council members, and so much more.

I was in this acting position for two years. The board then hired someone else for the permanent position. I was obviously disappointed. Fortunately, my new boss was wonderful, and we established a marvelous working relationship. She was an effective manager and communicator and I learned so much from her.

After she retired, I was appointed to take her place. I worked for the City of Seattle for 21 years until my job became too political, and I sought an escape route. I landed a position at the Seattle Housing Authority as their procurement and contracting manager. Not only did I deal with construction and consultant contracts, but also purchasing of goods, supplies, equipment, and materials. I had a staff of around ten employees.

After five years at the Seattle Housing Authority, I was offered a position at the University of Washington as the contracts manager in their Capital Projects Office, managing all construction and consultant contracts. That position gave me the opportunity to interact with a variety of statewide stakeholders and deal with legislative issues.

After 30 years of working in the public sector, I retired and continued doing consulting and training I had begun in 2005 on a part-time basis.

About a year before the pandemic hit in March 2020, I was diagnosed with stage 4 metastatic prostate cancer, a disease for which there is currently no cure. I have done very limited consulting or training since 2020 and am now focusing on my health and on writing about presidential history and politics at PresidentialHistory.com. This has been a lifelong interest and passion of mine, and I've published two books on presidential history in the last few years.

In 2007, I began writing a [Public Contracting Blog](#) that I continued with until 2015. The information from the blog will remain online as a reference tool. In the blog, I tried to provide current information on trends, laws, and best practices regarding public contracting issues.

For some time, I've wanted to summarize some of the content from my blog and from the training of thousands of public employees I've done over the years. This Guide pulls together information from these strands and from the consulting I've done over the years for more than 100 public, private, and non-profit clients.

It's important for me to be able to pass onto a new generation of procurement and contracting leaders some of what I've learned over my years as both a public employee and consultant. I hope the information in this book will be useful to many.

Mike Purdy
August 17, 2022

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Introduction

This guide is intended to help local governments in Washington State navigate the requirements and common practices in contracting for public works.

Both the Revised Code of Washington (RCW) and the Washington State Administrative Code (WAC) provide requirements and conditions around public work contracting. Some of the requirements are general and others are specific to certain local government types. For information on your government type and how public works laws may apply to you, please visit MRSC's [Find Your Contracting Requirements](#) tool. Your agency's policies and procedures should be consistent with the RCWs and WACs.

Grant-funded projects come with a variety of additional and specific requirements relating to public works contracting with which public agencies receiving grant funding must comply.

An [Appendix: Resources](#) section with links to various laws, regulations, papers, studies, trainings, and public works industry associations has been included at the end of the Guide.

Always consult with your agency's attorneys on public works bidding and contracting concerns.

WHAT IS A PUBLIC WORK?

Public work is defined in state law under [RCW 39.04.010](#). As used in this guide, public works is broadly defined as work, construction, alteration, repair or improvement that is paid for by the local government.

Under [RCW 39.04.010](#), maintenance of physical assets is generally not a public work when performed by contract, but such contracts are subject to prevailing wage requirements. For more information on the definition of public works and whether maintenance is subject to public works bidding and contracting laws, see MRSC's page [Public Works Contracts](#).

SECTION 1: FOUNDATIONS

This section describes what public works contracting programs involve and internal structures that are typically used to plan, bid, contract, and manage public works contracts in the State of Washington.

The information provided in this section may not be required for your agency, but most are widely practiced and generally accepted by oversight and compliance agencies. Consult your attorney.

For the purposes of this guide, a public works contracting “program” refers to the roles, responsibilities and processes you need within your local government to plan, bid, contract, and manage contracts involving public works.

Having a clear and usable contracting program allows your agency to be efficient with your time, ensure consistency in your bidding which in turn reduces questions, confusion, and often leads to more competitive bids which protects taxpayer dollars.

Roles and Responsibilities

We recommend that each local government have a clear workflow with clear roles and responsibilities that ensure each part of your local government knows how a public works project becomes a contract and is managed with integrity and free from conflict of interests.

KEY ORGANIZATIONAL ROLES

Roles recommended for planning and managing public works contracts are listed below with basic definitions. In smaller local governments, multiple roles are often performed by a single individual or by a board/council. It is recommended that your local government maintain a separation of duties between the finance, procurement, signatory, and public works delivery staff. If one person is performing all roles, that may be perceived as a conflict of interest as described later in this section.

- **Planning:** Looks at the current infrastructure and facilities, the state or repair, the needed improvements, or replacements to the physical and built aspects of your local government's facilities.
- **Finance/Funding:** Often part of the overall financial functions for your local government; plans, distributes, and reports on local, state, or federal funds allocated to public works projects.
- **Procurement:** Often responsible for the administration of procurement policies, processes, bidding, contracting methods, and procurement reporting requirements. In many agencies goods, services, and public works procurements are overseen by a central and single group of individuals servicing any type of procurement needed by your agency (also known as a centralized procurement model).
- **Project Management/Construction Management:** Commonly a public works staff member(s) responsible for overseeing the technical removal, improvement, and construction project with in-the-field responsibilities. Sometimes an agency will contract with an outside consultant, such as an architect or engineer, to oversee these tasks.
- **Signatory:** Person or people authorized to sign contracts on behalf of your agency. This often includes the role to authorize expenditures for your agency. Authorization for signatories often comes by ordinance or local rule making process.
- **Contract Compliance:** Ensures contract requirements are adhered to during construction. Common public works contracting requirements that are overseen by compliance staff are prevailing wages, subcontracting, and payment reviews.
- **Reporting:** Documents and reports on a public works project. Commonly there are specific reporting forms or types of reports that need to be filed with various stakeholders such as auditors, funding sources, or finance.
- **Legal Advisor:** Staff attorney or contracted legal counsel who advises the local government regarding legal issues.
- **Elected Officials:** Set policy, tone, and tenor for contracting environment. Elected officials are often the signatories for the local government and help shape and adopt policy.
- **Risk Management:** Advises local government on insurance requirements and bonding protections needed. This role is often local government staff but can also be a contracted third party.



Practice Tip: It is recommended that your agency establish a centralized filing system, naming, and numbering conventions, that all key roles help to define and agree to use.

CENTRALIZATION VS. DECENTRALIZATION

There are three basic models regarding contracting functions within local government:

- **Centralization:** Some agencies have a centralized procurement and contracting group with knowledgeable and specialized staff who manage the specific responsibilities around procurement. Central staff work with others in the agency that need a contract and support the bidding and contracting tasks of public works projects. A centralized procurement model with clear policies and procedures can help to depoliticize procurement and contracting tasks and build efficiency and transparency into the process.
- **Decentralization:** Some agencies do not have dedicated staff available to manage public works construction procurement and contracting functions. The bidding and contracting function falls to operations staff, project and/or construction managers who are then responsible for bidding and compliance along with the technical aspects of delivering a construction project.

One of the risks of a decentralized procurement model is that staff may not necessarily be knowledgeable about all the applicable laws, regulations, and policies. It may also create potential conflicts of interest and involve unfair processes of the procurement and contracting functions.

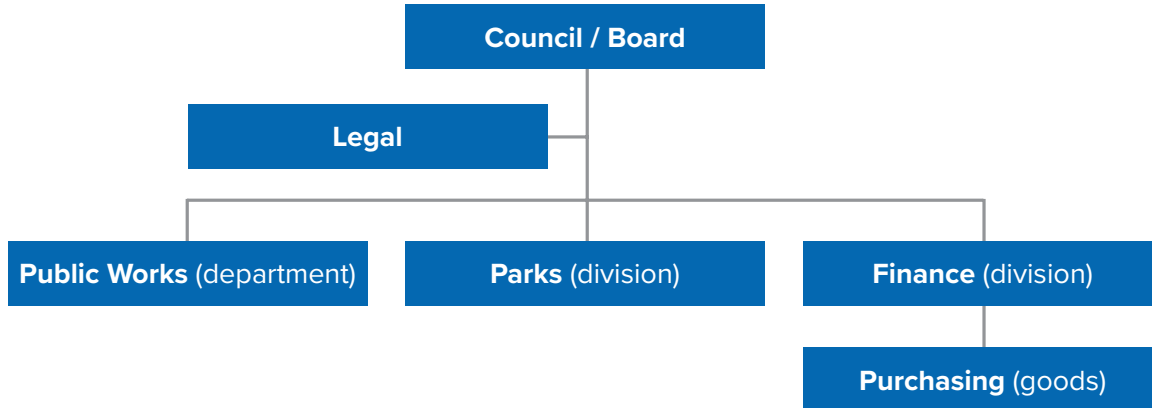
- **Hybrid Model of Centralization and Decentralization:** Some public agencies are a mix of centralization and decentralization procurement models; there may be limited staff available to assist with these specialized functions, but many functions are performed by employees without specialized knowledge in procurement and contracting.



Practice Tip: If your agency has a decentralized or hybrid model, try to encourage specific public works procurement training for those staff who may be assigned procurement roles.

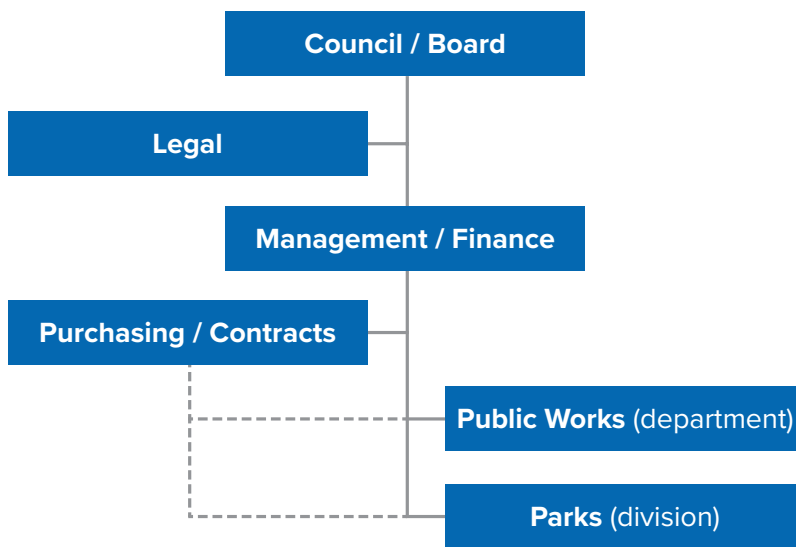
Decentralized Model

Each division or department is responsible for its own procurements and contracts.



Centralized Model

All procurements and contracts are reviewed by a separate purchasing “arm” of the local government that is also typically responsible for maintaining the purchasing and contracting policies.



There are many forms of local government structure and organization. Visual is for demonstration purposes only. This is not legal advice or comment.

INTERNAL CONTROLS AND A CULTURE OF ACCOUNTABILITY

When an agency has separation of duties and trained staff in key roles, it often leads to more fair and consistent public works procurement processes, which in turn often leads to increased number of bidders with more competitive bids.

Policies, processes, and procedures are terms that we refer to as *internal controls* and create organizational accountability. The term “internal controls” is used similarly in the State Auditor’s Office for financial and accounting practices.

For effective internal controls, the goal is to set up workflow, decision making, and processes in such a way as to have consistency from procurement to procurement and minimize or prevent errors from occurring. Effective internal controls facilitate separation of duties and ensure compliance with procurement and contracting laws.

Policies, Processes, and Procedures

The development and adoption of clear written policies, processes, and procedures should help balance the culture of the agency, define roles and responsibilities, and identify how the agency complies with applicable regulations and industry best practices.

In addition to written policies, we recommend local governments use other tools such as:

- **Checklists:** Develop simplified checklists that can help those doing procurement and contracting with knowing what steps to follow. The checklists should follow and be consistent with the written policies and procedures.
- **Standard Templates:** Develop template documents for bid and contract documents including but not limited to advertisement for bids, Instructions to Bidders, Invitation to Bid, Bid Form, General Conditions, and construction contracts. These template documents should follow the requirements and should be electronically protected so they cannot be changed without deliberate action by authorized personnel.
- **Point Person:** Public agencies should designate at least one person to become the resident expert on procurement and contracting.

DEVELOPING EFFECTIVE PROCUREMENT POLICIES, PROCESSES, AND PROCEDURES

Laws are generally broad in scope and do not often provide step-by-step guidance for how to operate.

In developing policies and procedures, it is important that your agency knows and understands the nuances of its authorizing statutes and how you will comply. Additionally, internal policies are often used to clarify ambiguities within existing laws.

State laws allow different practices based on the dollar amount of a public works project and scopes of projects, and agencies should be aware of what applies for specific projects. The [Appendix: Resources](#) section of this document provides links to various applicable laws and regulations that should be reviewed and understood.

Policies and procedures provide the foundation for your public works (construction) procurement and contracting program. However, they only go so far. Most employees will not read and memorize policies and procedures.

Policies and procedures should be supported by standardized procurement and contract templates, forms, and checklists that all help guide agency employees in appropriate workflow and merging the requirements of the law with your agency's local practices.

POTENTIAL OUTLINE FOR POLICIES AND PROCEDURES

Below are suggested topics to be covered in public works policies and procedures:

- General Procurement Guidelines
 - Purpose of Procurement Functions
 - Scope of Procurement Oversight
 - Applicability of Laws and Regulations

- Responsibilities Described
- Approval of Policies
- Approval of Processes and Procedures
- Procurement and Contract Files/Contract Management System
- Public Records

- Definitions

- Expenditure Authority
 - General
 - Documents Authorized to Sign
 - Chief Administrative Officer (or equivalent)
 - Department/Division Directors
 - Managers, Supervisors, and Staff Delegated with Expenditure Authority
 - Invoice Payment Authorization

- Internal Agency Review of Contracts
 - Development of Procedures
 - Procurement Actions Subject to Review
 - Expenditure Authority Amounts
 - Review by Budget Staff
 - Review by Attorneys
 - Review by Risk Management (Insurance and Bonding)

- Contracting Authority
 - Statutory Authority
 - Signature Authorization
 - Funding and Use of Allocations for Public Works
 - Procurement-Related Documents

- Eligibility to Contract with Agency
 - Debarment Status Review
 - Performance Evaluation Program
 - Contractor Bidder Responsibility Requirements
 - Supplemental Bidder Responsibility Criteria

- Contract Duration
 - General Policy
 - Length of Contracts
 - Contract Extensions

- Construction
 - Bids, Qualification Based Selections, Proposals
 - Available Contract Methodologies (and ways to choose)
 - Rosters
 - Invitations to Bid (preparation of bidding documents)
 - Payments
 - Change Orders, Modifications, and Amendments
 - Prevailing Wages and Apprenticeships
 - Subcontracting

Some jurisdictions also include additional policy elements such as social justice, diverse business inclusion, project labor agreements, Americans with Disabilities Act, and sustainability, energy reduction, and green standards.

Links to sample Policies, Processes and Procedures can be found on MRSC's [Procurement Policy Guidelines](#) page.

MAINTAINING INTEGRITY OF ADOPTED DOCUMENTS

Policies, processes, and procedures, not to mention standardized bid and contract documents, can quickly become modified and changed if there is not a deliberate process in place to protect the integrity and consistency of the documents.

The following are some recommended tools to maintain the integrity of your procurement documents:

- **Protect the Documents:** Your agency's standardized and officially adopted documents should not be available generally to agency staff or the public unless the documents are in a PDF format or are password protected in Word that would show all changes to the approved documents.
- **Limit Changes to Documents:** Agencies should limit the number of people authorized to make changes to the official procurement documents. Procurement and contracting staff, or legal counsel, should be the owner of these documents and responsible for maintaining the integrity of the documents.
- **Centralized Storage:** The approved documents should be available in a centralized location on the agency's internal drives or website for review by users.
- **Revision Logs:** Maintain an ongoing log or list available to all within the agency and the public about changes that are made to the standardized and adopted documents over time. The log should include the date of the change, the section number of the change, and a description of the change.



Practice Tip: It is important for agencies to establish a baseline of adopted bid and contract documents based on either a thorough review and editing of the documents or a re-write of the documents. This then becomes the new standard to be used on all public works construction projects.

At least once a year, the agency should review the adopted bid and contract documents and make appropriate changes to keep them current and relevant based on changes in practices, policies, or laws. The documents should also be reviewed for internal consistency. The person responsible for such an annual review should put it on their calendar to ensure it occurs in a timely manner. Often this is done by your legal counsel.

SIGNATURE AUTHORITY

In addition to your local agency bidding thresholds, internally there should be established dollar thresholds identifying what roles are authorized to approve certain procurement and contracting actions and make specific decisions. This is often referred to as “signature authority.”

Along with the expenditure or approval authority, there should be a clear delineation of the responsibilities for review that go along with each approval.

REVIEW OF BID DOCUMENTS

Each public works construction project is unique despite similarities they may have. Before advertising a project, it is important to conduct an internal systematic review of the documents to ensure they are relevant, accurate, and clear. Conducting this quality check can prevent delays in bidding processes and reduce protests.

See [Section 4: Documents](#) for more details on producing these bidding documents.

Contract Management Systems

A “Contract Management System” (CMS) is a set of instructions that details how and where to track bid and award data, place fully executed contracts, record all relevant information, instructions on reporting or other records needed, and perhaps most importantly a way to document all procurement and contract compliance actions taken. A CMS is most often in the form of a software application but can be a written procedure/policy “system.”

An effective contract management system is critical to ensuring that applicable laws, policies, and procedures are implemented consistently.

It is important to adopt a contract management system that has enough flexibility to conform to the agency’s contracting policies and procedures, rather than requiring the agency to change its practices to fit the system.

Software contract management systems can be an effective tool, but like any other tool they require thoughtful and intentional use. Local governments have several general options:

- **Off-the-Shelf Software:** Some agencies buy off-the-shelf contract management software systems that may limit or constrain the agency’s ability to comply with applicable laws and regulations. A good practice is to have the manufacturer demonstrate use.
- **Partial Customization:** Often, software systems will require some customization to make them work effectively with unique requirements or processes. Make sure the contract management system conforms to agency contracting policies and procedures.
- **Build Your Own:** Some agencies build their own contract management system through either employees or information technology consultants.

A contract management system by itself is not enough. The agency must have established clear roles and responsibilities for entering, validating, and reviewing data. Like policies, training employees on the use of a contract management system is an important element of having a solid procurement and contracting practice.

Using software to manage your contracts and to house audits and record keeping protocols can help simplify processes, ensure consistency and compliance, and make reporting much easier.

Training

Public agencies should regularly and systematically provide training to agency employees about procurement policies and procedures to ensure they are consistently implemented.

An effective and regular training program for agency employees is at the heart of ensuring that policies and procedures are implemented and adhered to and that ethical standards expected of agency employees are met.

Without training, laws and policies become just words and a local government is at risk for non-compliance with the law. Regular training is necessary because new employees are always being hired and new situations arise. Training provides the opportunity to discuss how to implement the agency's policies and make appropriate modifications as necessary.



Practice Tip: If your agency has a decentralized or hybrid model, try to encourage specific public works procurement training for those staff who may be assigned procurement roles.

Ethics

Ethics in public works contracting are designed to promote fairness and honesty and protect all parties involved.

At the core of ethical behavior in the public sector is understanding the purpose of public contracting. The primary purpose of public contracting is to protect the public's interests and the public's funds. Public contracting laws, regulations, and policies exist to prevent fraud, collusion, or favoritism in the award of contracts. In the words of one agency, contracting requirements are necessary "to keep contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption, or other factors."¹

A secondary purpose of public contracting is to ensure the work is performed at the lowest price. Public agencies should create an environment and internal controls that promote fair competition without preference for certain contractors. In the words of another agency, "Employees must discharge duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the procurement operation."²

We have heard local government employees make the argument that they are pursuing a particular contracting course of action because it is expedient, efficient, or believe it will result in cost savings. One of the ongoing tensions in public works contracting is between the desire of elected officials, senior management, project and construction managers for expediency, and the interests of procurement, contracting and finance staff more concerned about ensuring compliance with applicable laws and regulations and better public spending.

Public agencies must balance their creativity in completing projects with their obligations to ensure compliance with state, local, and federal funding. Expediency and what makes sense doesn't always equate with legal compliance. Another way to put this is "just because it's logical doesn't necessarily make it legal." Procurement and contracting staff should think carefully and work with others in the agency to accomplish the objectives within the constraints of applicable laws and best practices.

"A fair system of public contracting is not just about efficiency and cost savings. It's about public trust," noted Judy Nadler, a senior fellow in government ethics at Santa Clara University.

There are a variety of ethical regulations that may apply including the following, some of which are listed with links in the [Appendix: Resources](#) section at the end of this book:

- Applicable state laws
- Applicable federal regulations and grant requirements
- Your agency's ethics and conflict of interest policies. If your agency does not have an internal code of ethics for procurement and contracting actions, consider developing such a document.
- Procurement associations codes of ethics

1 California Contracting Code

2 Maricopa County, Arizona, Policy on Ethics in Public Contracting

WHY ETHICS ARE IMPORTANT IN PUBLIC WORKS CONTRACTING

Most of us like to think that we're good people and that we make wise and ethical decisions. So, why do we even have to talk about ethics in public contracting? Isn't it obvious what is and isn't ethical behavior? In one sense, these questions make sense. However, the number of examples of ethical lapses in government contracting can be numerous.

Sometimes, while trying to accomplish project objectives, ethical standards have been known to bend. It is important for public agencies to deliberately build an ethical culture that is driven by clear policies, training, accountability, and by the words and examples of the agency's leadership.

Even in an organizational culture in which ethical behavior is valued, it is important to follow written policies and guidelines. There are always new employees who may have come from the private sector and who may not understand the importance of being transparent and compliant in contracting actions. In addition, there are always new situations that arise that cause us to re-think how to handle a particular issue from an ethical perspective.

Ultimately, appropriate ethical behavior is the responsibility of each employee, but the culture of a local government also impacts how easy or challenging it may be to act ethically.

THE ETHICS OF INTERNAL POLITICS

There is a natural tension in public agencies between the interests of procurement/contracting to follow laws, and project management completing projects. This tension can cause ethical conflicts.

The procurement/contracting function is mostly interested in, and focused on, compliance with applicable regulations; selection processes that are fair and equitable; thorough and appropriate contract negotiations especially for change orders; complete contracts that protect the local government to the maximum extent possible; and obtaining the best value for the agency.

On the other hand, employees responsible for project or construction management may be less concerned about contractual compliance than they are with getting the project built quickly and efficiently. For example, there may be a tendency to accept a change order cost proposal from the contractor if there is money in the budget without evaluating and negotiating the cost. In the interest of accommodating the contractor, staff may inappropriately authorize payment for change order work immediately after change order execution but before the work has been performed. At other times, change orders may be negotiated and authorized that are inconsistent with the rates and markups included in the contract.

Managing the ethics of internal politics can be challenging. The following strategies can help individuals in appropriately managing these tensions:

- **Adopt Clearly Defined Roles and Responsibilities:** As discussed previously, public agencies should clarify the roles and responsibilities of the procurement/contracting function versus those in other departments. There should be clear expectations regarding who is responsible for making what decisions, what information is needed, and what processes must be followed.
- **Evaluate Risks as a Team:** Every decision comes with certain risks. Part of the role of procurement and contracting staff is to provide full information to the appropriate parties about the risks and compliance issues associated with a proposed course of action.

- **Defer Decisions Upward:** Procurement and contracting staff may be asked to take actions or make decisions that are contrary to legal constraints or best practices. If you find yourself in such a position, it is important to elevate the conversation to upper management to make the decision. Sometimes, it may be appropriate for procurement and contracting staff to not sign-off on a particular course of action but request that superiors sign a document when the action to be taken is questionable.
- **Carefully Document:** When internal ethical conflicts arise, document what information you provided to the decision makers and who ultimately made the decision. Maintain an information file that contains this documentation to use in the event of an audit or other investigation to protect yourself. Auditors will take into consideration memos to the file when making reviews.

COMMON ETHICAL ISSUES

Common ethical issues in public works procurement are *conflicts of interest*, *lack of separation of duties*, *perception of discriminatory or unfair treatment*, and *gifts of public funds*. There are others. Real or perceived ethical violations are often the trigger for unplanned audits, protests, or removal of funds, and even more severe consequences such as jail, so it is important to have clear internal controls that are followed each procurement.

CONFLICTS OF INTEREST

Conflicts of interest are often at the heart of ethical situations. For example, a conflict of interest is created if one individual is responsible for conducting the bid process, evaluating bids, awarding contracts, monitoring construction activities, and then authorizing payments to the contractor. As noted by the State Auditor's Office, "The perception of a conflict of interest in a government agency diminishes credibility, erodes public trust, and compromises integrity. A conflict of interest creates the belief that the owner's interests may not be best represented, particularly concerning matters which are in dispute between parties."³

³ SAO Performance Audit on Sound Transit, October 4, 2007

We often learn best from examples. The following are illustrations of conflicts of interest:

- **Elected Officials Hired for Design and Construction Work:** Using federal funds, a small fire protection district had one of its elected commissioners draw plans for a building to house fire trucks. The district also hired a contractor owned by another commissioner to build the building. In the process, the district skirted both consultant and contractor selection requirements and violated conflict of interest laws.
- **Lack of Separation of Duties:** A school district with a small business program did not adequately supervise the program manager. In addition, the district did not separate the functions of small business program from procurement and contracting, thus creating an organizational conflict of interest. The manager was authorized to not only encourage the development and use of small businesses, but to actually award contracts to them, thus making his program look successful. Without checks and balances in place to ensure that procurement laws were followed, there were no guarantees that programmatic objectives would not override regulatory requirements.
- **Board Member Had Financial Interest in Award of Contract:** A school district board member voted to award four public works projects that included a roofing company as a subcontractor. He was an officer of the roofing subcontractor, and his salary included a profit-sharing component. The board member and his roofing company stood to gain financially from his action as a board member. The board member should have disclosed his financial interest in the subcontracting company in a public meeting and not voted on the contract awards.
- **Bids Rejected Due to Conflict-of-Interest Questions:** The commissioners for a public port rejected all bids on a large media services contract after one of the bidders protested the award. The protest was based on the fact that the low bidder's team included a former port commissioner who participated in discussions and plans on the media services contract before resigning from the commission prior to the contract being bid.

GIFTS OF PUBLIC FUNDS

The gift of public funds is prohibited by the State of Washington constitution. It is defined as the giving of gifts or lending of money, property, or an agency's credit to a private third party.

Proper competition and evidence of public benefit in exchange for public money is the requirement to avoid a "gift of public funds." The principle is that the public must benefit from public spending. If it is found that a single person or business is the only benefitting party from spending public money, then it is a violation.

In public works, there could be a gift of public funds if a contractor is given "kickbacks" or extra money for incentive for doing work ahead of schedule, if it was not advertised to all bidders as an incentive. Another example is a contractor taking public property that is demolished or removed from a project, selling the items, and not returning the profit from sale of the items to the project or the local government.

For more information on this issue generally, see MRSC's page on [Gift of Public Funds](#).

STRATEGIES FOR DEALING WITH ETHICAL ISSUES

While ethical decisions should be driven by laws, regulations, policies, and conscience, the following practical strategies help provide a framework to consider in avoiding ethical lapses:

- **Code of Ethics:** Every local government should have a recently reviewed and updated code of ethics or ethics policy specifically related to procurement and contracting issues. The code of ethics should be comprehensive in addressing a wide variety of additional ethical issues. This document provides an important context for expected behavior for employees. In developing and reviewing your code of ethics, compare it with those of other agencies for ideas to include.
- **Avoidance:** It is wise to think twice and discern whether there are ethical issues involved in a procurement or contracting action. Where possible, when confronting various decisions, avoid getting entangled in ethical questions.
- **Transparency:** When a public employee is faced with a potential conflict of interest in the procurement, contracting, or management of a project, one strategy is to be transparent and disclose any potential conflict of interest. Disclosing the conflict of interest and then recusing yourself from the decision-making process is an effective tool to not get embroiled in an ethical nightmare.
- **Formal Disclosure:** Some public agencies have instituted the wise practice of requiring that certain employees in critical decision-making processes file an annual disclosure statement identifying financial interests of the employee and their families regarding organizations and companies with whom they are affiliated or with whom they have a financial interest.
- **Training:** Ethics policies must be communicated to and understood by all employees in your agency. Provide ethics training on at least an annual basis that not only reviews the policies but provides for situational conversations. The training may be conducted by agency staff or an outside consultant.
- **Checks and Balances:** Public agencies need to ensure they have sufficient internal checks and balances in place, not only in their policies, but in practice, to ensure that public contracting is conducted in an ethical, fair, transparent, and honest manner. Failure to provide appropriate management oversight can result in employment termination.

Keys to Making Ethical Decisions

- **Identify the facts.** As a first step in evaluating whether there is a potential ethical issue, it is important to step back and evaluate the situation objectively.
- **Know the laws.** It is important to know the applicable local, state, and federal requirements, but most people don't make it a regular practice to read such requirements so it is important to provide regular training.
- **Use good and collaborative judgment.** Your judgment is important in assessing the best course of action, and it is important to discuss potential ethical issues with other employees and with your supervisor.
- **Consider appearances.** Appearances are critical, often more than the facts. While an action may be legal from an ethical perspective, it may not be advisable due to how it may be perceived by others. Ask yourself whether this decision is likely to instill public confidence or undermine it.

Risks of Ethical Lapses

There can be a variety of consequences when a government employee makes an unwise and unethical decision, including:

- **Bid protests or lawsuits** that cost money, take time, and often delay project schedules.
- **Audit findings** that can hurt future grant applications or bond ratings.
- **Negative media coverage** that can damage public trust and potentially complicate local elected officials' efforts to get re-elected.
- **Disciplinary actions for staff** potentially including suspension without pay, formal reprimands, making a note for the employee's personnel file, or termination.
- **Rendering costs or contracts ineligible for grant funding**, resulting in the agency potentially being required to pay back grant funds and hurting the ability to obtain future grants.
- And even **prison time** for egregious and illegal actions.

SECTION 2: COMPETITION

This section discusses ways in which public works contracting methods create competition. Several methods that are used regularly in public work are discussed, with links to additional resources as appropriate.

Planning and Preparing to Maximize Competition

When local governments are planning a public works project, they should understand competition requirements under local, state, and federal law, as well as the different ways to create competition.

BID LIMITS

Most state or local laws, along with local government policies, should discuss the dollar thresholds at which public works (or contracts) must be competitively bid. These dollar limits are informally called “bid limits.” For more information on the bid limits for different agencies, see MRSC’s [Find Your Contracting Requirements](#) tool.

ENGAGING THE BIDDING COMMUNITY

Prior to advertising and bidding a project, local governments should understand the availability of the contracting community and the capabilities of bidders who are likely to bid. This should involve general advance notifications to bidders to gauge their potential interest in bidding the project and determine if their schedules would likely permit them to bid the project.

In providing notice to bidders, it is important to not provide detailed project information to just a few bidders, but rather to provide a broad public announcement with general project information and get feedback from bidders that may be interested. Providing detailed information to a limited number of bidders may create an unfair competitive advantage.

Early engagement of bidders can help specification writers and designers understand market availability of various products and equipment. Also, pre-bid meetings serve as a valuable tool to assess whether there is concern with the quality of the design documents or whether the bid documents include unreasonable requirements or are confusing.

Contracting Methods

There are a variety of public works contract *types*, *forms*, and *methods* potentially available to local governments in Washington. This section provides a summary of the most common types, forms, and methods, with links to statutes and other resources as appropriate.

PUBLIC WORKS CONTRACT TYPES

The contracting “**type**” refers to the cost approach and bidding mode for the project. Below are several common public works contract types, although certain types may be limited to specific situations.

Type	Basic Description	Commonly Used For
Lump Sum (fixed price, stipulated sum)	Contractor bids and agrees to provide specific services for one sum	Buildings, facilities, parks, general structures
Line Item or Unit Price	Contractor bids, and is paid for, the actual quantity of line item and unit price described on the bid form	Roads, bridges, infrastructure (e.g. pipes)

PUBLIC WORKS CONTRACTING FORM(S)

The contracting “**form**” refers to the organizational format, often developed by various industry interest groups. Several common public works contracting forms are listed below for informational purposes. We are not aware of any requirement to use an organizational format. Local governments should think about the work they are contracting and the target audience when deciding to use a pre-developed contracting form or developing one of your own.

MRSC does not endorse any specific industry standard format. All public works contracting forms need to be written/re-written to reflect your local government’s policies, procedures and projects.

Form	Used For	Modification Needed	Websites
Construction Specifications Institute (CSI) MasterFormat	Vertical (building/facility) construction	Heavy	CSResources.org spglobal.com/engineering/en/products/csi-standards.html
American Public Works Association (APWA)	Horizontal (roads, bridges, etc.)	Moderate; generally tied to infrastructure standards (e.g. department of transportation)	Washington.apwa.net
American Institute of Architects (AIA)	Vertical (building/facility) construction	Moderate; generally favors the designer	AIAcontracts.com (also houses MasterSpec)
Engineers Joint Contract Document Committee (EJCDC)	Civil	Moderate (generally, favors the engineer)	ejcdc.org
Consensus Docs	Any	Moderate (generally, favors the contractor)	consensusdocs.org

PUBLIC WORKS CONTRACTING METHODS

Contracting “**method**” refers to the overall approach to bidding and delivering the work. The most common public works contracting methods in the State of Washington are outlined below and discussed in this section.

Method	Dollar Limits	Common Practice
Less Than Bid Limits (see local government statutes)	Variable	Any scope of work
Low Bid/Design-Bid-Build (chapter 39.04 RCW ; also see local government statutes)	N/A	Any scope of work
Small Works Roster (RCW 39.04.155)	\$350,000	Any scope of work
Unit Priced (On-Call)	By statute or local rule	Recurring, ordinary work that is easy to estimate work needed into units
Job Order Contracting (JOC) (RCW 39.10.420-.460)	\$4M per year for most authorized agencies	Most often general commercial work is best, as commercial construction is well represented in the pre-priced books

Method	Dollar Limits	Common Practice
General Contractor/Construction Manager (GC/CM) (RCW 39.10.340-.410)	N/A	Used often when the facility needs to stay in operation during construction and/or the success of the project heavily relies on construction means and methods.
Design Build (RCW 39.10.300-.330)	Projects over \$2M and certain other limited uses	Any scope of work
Energy Savings Performance (chapter 39.35A RCW)	N/A	Any scope of work or improvement that specifically reduces energy, water, or solid waste use
Building Engineered Systems (RCW 39.04.290)	N/A	Fire alarms, building sprinkler systems, pneumatic tube systems, HVAC, or similar
Cooperative Purchasing (chapter 39.34 RCW)	N/A	Scope of third party's projects.
Emergency Public Works (RCW 39.04.280)	N/A	Emergency projects or repairs that can't have been prevented through ongoing maintenance; is generally only used to replace in-kind for unforeseen failures.
Public Works Performed by Agency Staff	By statute	Generally, scopes under collective bargaining agreements with the local government
Volunteer Labor	By statute	Any scope of work, generally used for parks, beaches, trails, or similar.

Less Than Bid Limits

Some public agencies are authorized by state or other laws to not conduct a competitive bidding process for public works construction projects when the estimate for work is less than a specific dollar amount. This amount is often referred to as a “bid limit.” If a project is below the agency bid limit established in applicable law, the agency may hire a contractor without conducting a competitive bid process. The agency still needs to review, negotiate, and evaluate proposed prices before awarding a construction contract.

Low Bid/Design-Bid Build

The “traditional” method of public works contracting is a low bid, design-bid-build method. All public agencies in Washington are allowed to use this method.

Under this model, the local government designs the project with agency staff or contracts with an engineer or architect to design the project (generally using the qualifications-based selection process), then uses a

competitive process to bid the construction project. Low bid public works projects are publicly advertised after detailed bid documents are developed. The bid documents define the commercial terms and the specific requirements/design for the project, both technically and in terms of process the bidders must follow to submit their bids and perform the work.

Price is the determining factor in making the award decision. The theory is that all the bidders are submitting their price to do the exact same work. There are usually no limitations on the size or scope of projects bid and contracted under the Low-Bid method. There is no negotiation typically allowed when using the low bid method and bidders are usually prohibited from conditioning a bid.

State statutes establish specific advertisement and bidding requirements that vary by agency type and project size. These formal bid requirements may be used for any project size.

Good practices for using the low bid method

- Low-Bid method, although widely used, often carries a stigma that bidders do not accurately price the work and that lowest bidders are often not qualified. Many local governments experience changes orders and poor quality of work which is often attributed to the method itself.
- When using the Low-Bid method the following is advised:
 - Review all documents before bidding for clarity, organization, and accurate reflection of current laws and your local government's processes and policies. Do not rely solely on consultants and designers to produce the documents without agency review.
 - Do not reuse contracts. Reusing contracts puts everyone at risk for agreeing to inaccurate and non-compliant requirements, not to mention items unrelated to the project being bid.
 - As a local government, never put or allow language in a contract that you do not understand or do not intend to enforce. If specific language is required by law, funding, or policy, seek clarity from your legal counsel and advocate for plain language.
 - Develop standard forms and use them for each project. E.g., bid forms, subcontractor bid list, bonds, etc. See [Section 4: Documents](#) for more information.
 - Engage potential bidders ahead of completed bid documents to understand the bidding climate, availability, and capacity. Align bidding documents when you can with target bid pool requests.

Small Works Roster

Some agencies in Washington are authorized to use a “small works roster,” in lieu of publicly advertising public works projects, for projects below a particular threshold.

A small works roster may be established comprised of responsible contractors that have expressed an interest in being notified of smaller construction projects as defined in state law. This method still involves competition, and the public works construction project must be awarded to the responsible bidder submitting the lowest responsive bid, but the local government may choose to limit competition to only those contractors who are on a roster.

A local government may maintain their own roster(s) or participate in a roster program administered by another local government or the [MRSC Rosters](#) program.

For more information, refer to MRSC’s web page on [Small Public Works Rosters](#) or MRSC’s [Small Works Roster Manual](#).

Unit Priced (On-Call) Public Works

A unit priced public works contract, sometimes called an “on call” public works contract, is a method that allows specific local government types to contract for an unknown number of smaller, recurring projects of similar work over a fixed period (“indefinite quantity, indefinite frequency”). The award is based on a lowest bid for the cost of **estimated and specified units of work**. Think of infrastructure or seasonal work; bidding out unit prices that can be used, as needed in smaller groupings, throughout the life of a contract.

For more information, see MRSC’s webpage [Unit Priced \(On Call\) Public Works Contracts](#).

Job Order Contracting (JOC)

Job Order Contracting is a project delivery method under [chapter 39.10 RCW](#) in which the contractor is selected through a Request for Proposals process that includes a fee. The contractor agrees to a fixed period, indefinite quantity, delivery order contract which provides for the use of work orders to authorize specific work for small projects. The contractor is selected based on qualifications and their markup (coefficient) of pricing using predetermined unit cost book.

Job order contracts generally can address any type of work but works best in commercial construction and maintenance scopes that are well represented in the pre-priced books. State law regulates the maximum dollar value of a JOC work order and the total contract cost and requires most of the work to be subcontracted.

For more information, see MRSC’s webpage on [Alternative Public Works Contracting Methods](#).

General Contractor/Construction Manager (GC/CM)

General Contractor/Construction Manager, or GC/CM, is allowed to be used by permission under [chapter 39.10 RCW](#). It may also be known by different names, but the concepts are similar: Construction Manager at Risk, CM at Risk, and CMAR.

GC/CM involves the selection of a contractor early in the design process, at a time in the project when the GC/CM’s participation will provide value for the project. The contractor is selected through a Request for Proposals process based on qualifications and experience, an interview, and limited pricing (overhead and profit and general conditions costs to manage the project). The selected GC/CM contractor then works with the designer in providing various preconstruction services such as cost estimating, scheduling, constructability reviews, value engineering, etc. The designer is selected through a separate consultant contracting process with the local government.

For more information, see MRSC’s webpage on [Alternative Public Works Contracting Methods](#).

Design Build

Design Build is allowed to be used by permission in the State of Washington under [chapter 39.10 RCW](#). The local government uses a multi-phase procurement process with a Request for Qualifications and a Request for Proposals to select one firm to both design and build the project.

There is a “traditional” approach under which potential firms propose an actual design and cost for that design and a “progressive” design-build approach under which potential firms are selected on general approach and a fee for designing and constructing the project. In the progressive approach a guaranteed maximum price is set after design is advanced enough to price.

For more information, see MRSC’s webpage on [Alternative Public Works Contracting Methods](#).

Energy Savings Performance

The use of energy savings performance-based contracts is governed by [chapter 39.35A RCW](#). These contracts involve water conservation services, solid waste reduction services, or energy equipment and services. Under these contracts, the contractor performs the work and guarantees a certain percentage of annual energy cost savings, water cost savings, solid waste savings, or benefits achieved through conservation projects under the contract. The projects must be paid for using that savings over time.

Building Engineered Systems

A local government may award a contract, of any value, for the design, fabrication and installation of building engineered systems using a Request for Proposals and a bid price ([RCW 39.04.290](#)). A building engineered system is defined as such things as fire alarm systems, building sprinkler systems, pneumatic tube systems, heating, ventilation and air conditioning, water treatment systems, emergency generators, building signage, pile foundations, curtain wall systems, or similar systems that typically require a specialty firm to design, fabricate and install.

Cooperative Purchasing

Cooperative purchasing is defined as a competitive bidding method in which multiple local governments combine their buying requirements and resources into a single contract and aggregate the volume to get a better price. Cooperative purchasing is typically used for goods and services where it is easier to determine that two or more local governments need the exact same things under relatively the same circumstances. An example is office supplies.

In public works there may be some opportunity to use cooperative purchasing for work such as repair, major maintenance, and equipment like playgrounds.

Emergency Public Works

[RCW 39.04.280\(1\)\(e\)](#) provides uniform exemptions for emergency public works projects. Some agencies also have similar emergency exemptions specifically written into their enabling statutes.

“Emergency” as defined in [RCW 39.04.280\(3\)](#) means any unforeseen circumstances beyond the control of the municipality that either present a real, immediate danger to the proper performance of essential functions, or will likely result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken. This includes declared federal or state disasters, as well as local agency-declared emergencies.

Any emergency contract for which the competitive process is waived should be unanticipated, not able to be prevented through routine maintenance, and used only to repair the failed item in-kind or to protect the public from harm. For more information, see MRSC's webpage on [Competitive Bidding Exemptions](#).

Public Works Performed by Agency Staff

Some types of public agencies are authorized under applicable laws to perform public works construction projects with their own employees and to not publicly bid such work. Dollar thresholds often differ by type of local government and scope of work may be limited by collective bargaining agreement with agency staff. Before local governments use employees to repair, improve, or build new facilities it is important to know what your authorizing legislation and local law permits. For more information, see MRSC's [Find Your Contracting Requirements tool](#).

Volunteer Labor

Some laws permit public works construction projects to be performed, up to certain dollar amounts, using volunteer labor. MRSC has published a one-page information sheet on [Donations and Volunteers for Public Works Projects](#).

SECTION 3: BIDDING

The purpose of this section is to provide the general practices and tips on bidding public works contracts in the “low bid”/design-bid-build method.

Typical Elements of a Public Works Bid/Solicitation Package

Each project/contract you compete may have additional needs, but the primary elements for bidding a public works project are:

- Advertisement
- Plans, designs, and/or drawings that visually depict the work of the project
- Specifications
- Instructions to bidders
- General terms and conditions
 - Funding requirements
- Bid form
- Supplemental bidder responsibility form, if applicable
- Bidder subcontractor list form
 - Inclusion plan (form)

The rest of this section will focus on the bidding process; see [Section 4: Documents](#) for more details on the documents themselves.

Bid Process

A public works bid process requires a number of different steps. Some of these steps are required by state statute, while others may be best practices or established by funding requirements or local laws/policies.

BID ADVERTISEMENT

In order to maximize competition and meet the spirit of “public bid,” bids are advertised in a variety of places and for various lengths of time, depending on the project and the bidding audience you are trying to reach. It is most common to advertise a public works contract for between 3-4 weeks. Local governments are encouraged to set advertising periods based on the size of the project, how many pre-bids or site walks are being offered, and how many requirements are present. Larger or more complex projects may need 6-8 weeks.

For more details on what to include in the bid advertisement documents, see [Section 4: Documents](#).

Where to Advertise

Many local governments have policies on advertising and notification practices for all aspects of government business. The common definition for public works is taken from the context of “publicly advertised” which is a news publication of general circulation in close proximity to the project. It is good practice to advertise in locations that bidders often use. This may be in addition to your local government policies on advertising notification.



Practice Tip: Suggested sites for advertising public works include:

- The local government's official newspaper or other newspaper of general circulation, subject to applicable state laws and local policies
- Local news media websites
- The local government's website
- State bidding advertising boards
- Local construction organization websites
- Plan centers and construction industry support sites
- Diverse business support organizations for those in the construction and public contracting space

The following are some factors to consider in making the decision how long a public works construction project should be advertised for:

- **Laws.** Many local governments in Washington have laws that specify how many days a public works construction project must be advertised for prior to receiving and opening bids, and some agencies may have additional or more stringent requirements in local policy. Some grant funding sources also specify how long a project must be advertised. Research this and know what requirements govern your agency.

- **Project Schedule.** Each project has certain schedule deadlines that need to be met. Bid openings should be scheduled to keep the project schedule on track.
- **Size and Complexity of Project.** Public agencies should pay attention to the size and complexity of the project in making the decision on how long a project should be advertised for. If too little time is provided for bidders to prepare their bids they might not bid or might submit an unreasonably low or high bid due to not having had sufficient time to understand the project. An unreasonably low bid may cause problems during the project and result in unnecessary change orders.
- **Other Projects Bidding at Same Time.** If there are other projects of the same type bidding at the same time, this may limit the number of bidders on a project. It may be a reason to change when the project is advertised or how long the bid documents are available until the bid submission deadline.
- **Target Bid Pool.** It can be valuable to understand the availability of the bid pool to review and prepare bids. If the project is for seasonal work, for example, when will your bid pool be looking to fill up their work for the next season?
- **Addenda.** If multiple and complex addenda are issued for the project to modify the bid documents, it may be a reason to extend the bidding period to allow contractors adequate time to review the bid documents and submit a competitive bid.

POSTING FULL BIDDING DOCUMENT/SOLICITATION PACKAGE

“Posting” bidding documents means to announce, publish, distribute, and/or to put up your construction contract, bid form, and other relevant documents in a place where potential bidders have unrestricted access to them. It is important to make sure your bidding documents (aka solicitation package) are easily accessible and posted in locations that are familiar to bidders.

There are different ways and different formats by which you can post your bidding documents:

- **Hard Copy.** A printed set of all the documents. If the bid documents are to be distributed by hard copy, the advertisement should identify the name and contact information of where the documents may be obtained (either from the local government, designer, or reprographics business). When using a third party such as a reprographics business, it is not uncommon that the bidders are required to provide a deposit (refundable or non-refundable) before being issued a set of bid documents. Keep in mind that, even if the fee is small, this could discourage some bidders and small businesses from participating.
- **Electronically.** If the bid documents are to be distributed electronically (either through the local government’s website, on the website of a third-party vendor, or by email), the advertisement should provide detailed information on how to obtain the documents. When posting electronically it is good to be mindful of how many “clicks” it takes to find and download. Too many steps and it may discourage some bidders and small businesses from participating.
- **Plan Centers.** If the local government intends to distribute the documents to any membership-based plan centers, the advertisement should state which plan centers will have a copy of the documents. Plan centers are often used by subcontractors when evaluating projects and developing their subcontractor bids to submit to general contractors. If using a plan center or third-party host, it is important to ensure that potential contractors are regular subscribers, the notifications are properly being sent, and documents can be printed or downloaded very simply.

It is good practice to view and download the documents from an external perspective and go through the process as a contractor would, to test whether prospective bidders have complete and easy access to the bidding documents.

While it is a good idea to engage the bidding community prior to advertising and bidding a project as discussed in Section 2, such advance notifications should consist of a broad public announcement with general project information. A local government should not provide the full bid documents to any bidders before the public advertisement or roster notice, as that could give certain bidders a competitive advantage and increase the risk of a bid protest from bidders who were not afforded the extra time.

Once the advertisement has been posted, the complete bidding documents should be available immediately. Failure to have documents available on time reduces the effective bidding period, which could potentially violate state laws, result in fewer bidders, and/or result in higher bid prices because bidders do not have sufficient time to understand the project and may increase their prices to cover the additional risks.

PRE-BID MEETINGS

Public agencies should schedule a pre-bid meeting to brief prospective bidders on the documents, submittal requirements, project scope, needs, and challenges. The meeting may also include a site visit to help contractors better understand the project and submit more appropriate bids.

Sometimes, when contractors come to a pre-bid meeting, they may not have reviewed the bid documents. Thus, the pre-bid meeting is a good opportunity for the agency to make clear to the contractors key features and constraints about the project.



Practice Tip: For pre-bid meetings:

- Schedule pre-bids when you think it is most convenient for bidders.
- Provide a written agenda to the attendees.
- The agenda should include language that verbal comments made at the meeting will not change the bid documents, and only properly issued addenda will change the bid documents. State this verbally to the attendees also.
- Provide background of the project and describe the technical scope of work.
- Provide an overview of responsibility and supplemental responsibility criteria; as well as any administrative details that may not be familiar such as plan holders registration.
- Describe any unusual details of the project such as restricted access to the site and or use of the site by others.
- Remind bidders of the deadline for them to submit questions about the bid documents as well as the place, format, and deadline to submit bids.
- Remind bidders that their bid price must include all projects costs, including but not limited to bonds, insurance, prevailing wages, overhead, profit, etc.
- Ask bidders if they have any questions to ask.

Site Visits

Site visits can be used to help contractors get a better understanding of the physical nature of a project and often help them prepare bids more accurately. Site visits can be combined with pre-bid meetings or held separately. When holding site visits it is good practice to adhere to the same practice tips for pre-bid meetings.

Mandatory Pre-Bid Meetings/Site Visits

For particularly unique and complex projects, local governments may choose to host a mandatory pre-bid meeting and/or site visit as a condition for contractors to be eligible to bid on a project.

There are differences of opinion about whether it is permissible to require attendance at a mandatory pre-bid meeting. There is no state law specifically authorizing or prohibiting mandatory pre-bid meetings. Some experts argue that mandatory pre-bid meetings are an impermissible method of restricting competition through a pre-qualification process. Others suggest that there is nothing that specifically excludes the use of mandatory pre-bid meetings, but they should be used judiciously. It is uncertain what the outcome of a protest might be in which a contractor is denied the opportunity to submit a bid because they failed to attend a mandatory pre-bid meeting.

Making something mandatory in your bid process adds another requirement that will need to be managed. The more requirements you have, the higher the likelihood of inadvertently restricting your bid pool and/or alienating bidders who cannot attend.



Practice Tip: For mandatory pre-bid meetings/site visits:

- The advertisement and bid documents should state clearly that attendance at a mandatory pre-bid meeting is required in order to submit a bid on the project.
- The time and place of the mandatory pre-bid meeting should be clearly stated in the advertisement and bid documents.
- Consider providing multiple time/date options – potentially including at least one time in the evening or outside normal work hours – for the mandatory pre-bid meeting to accommodate contractor scheduling conflicts and help ensure there is sufficient competition for the project.
- Maintain a sign-in sheet. To ensure contractors attend the entire mandatory pre-bid meeting, consider requiring contractors to also sign out at the end of the meeting. Establish standards for how late is too late for arriving at the meeting or leaving the meeting early.
- Require that a person knowledgeable about the technical aspects of the project attend.

BID RECEIPT

Days to Receive Bids

Most public agencies schedule their bid submittal deadlines and bid openings for mid-week (on Tuesdays, Wednesdays, or Thursdays). Monday or Friday deadlines may reduce the number of bidders since the bidders' staff may be taking vacation time for a long weekend, which may also reduce competition and result in higher costs for the local government. It is wise to avoid receiving and opening bids around major holidays.

Try to schedule bid submittal deadlines and bid openings when there are not a lot of other bid deadlines/ openings by other agencies in the general region. If there are too many bid openings for the same type of work scheduled for one day, bidders may be forced to pick and bid only a limited number of projects. This may result in fewer bids being received by your agency, and thus fewer competitive bids.

Prevent Early Opening of Bids

When bids are submitted to a local government, there is a risk that a bid may simply go through the agency's normal process for opening and routing mail. This may result in a sealed bid accidentally being opened early, compromising the integrity and confidentiality of the bidding process.

Here are some steps that may help ensure that bids are opened at the appropriate time:

- **Bidding Instructions.** Ensure that the agency's bidding instructions are clear about the information that must be identified on the face of the bid envelope.
- **Staff Training.** Provide training to reception and mail room staff responsible for receiving deliveries and mail to the agency. Make sure they understand they should not open mail that is indicated as including a bid inside the envelope. This applies whether a bid is received through a mail delivery service or in person.
- **Notice to Reception Staff.** Work with reception and mailroom staff and provide them with an updated list and schedule of the deadlines for when bids for certain projects are due. Having this list can help alert them to slow down and not open these but to deliver them to the appropriate procurement staff.
- **Managing a Bid Opened Early.** If a bid is accidentally opened early, do not remove the bid from the envelope, but re-seal the envelope immediately. If the bid has already been removed from the envelope, put it back in the envelope and re-seal the envelope. If the envelope is missing, put the bid in another envelope and seal it. Regardless of the circumstances, document on the face of the envelope that the bid was inadvertently opened, along with the date and time you re-sealed it. Initial or sign the statement.

Securing Received Bids

Each local government should have a standard practice of what happens to bids once they've been received, but before they are opened.

- **Secure Location.** Received bids should be stored in a secure and centralized location, not accessible to bidders or the public. Received bids should not be left unattended, especially if the location is less than secure.
- **Forgotten Bids.** Have a standard practice of collecting bids so bids are not forgotten. Some agencies are governed by laws that require a public opening and reading of bids, often on the same day as the bid submittal, so if misplaced bids are discovered late, this can cause a problem. From the perspective of contractors, not reading bids at the time and place announced does not help promote transparency and trust in the bidding process, and can, in some cases lead to bid protests.

There are examples of agencies who have opened bids, only to discover later that there were other bids received on time that didn't make it to the bid opening.

Example 1. A school district received three bids and opened them at the date and time specified. The contracting manager was on vacation, and one bid had been mailed to her and was not discovered until after the bid opening. The postmark on the bid envelope was one week prior to the bid submittal deadline. The forgotten bid was the low bid.

Example 2. Six bids were opened and read for an agency. Within an hour, staff noticed two additional bids that had not been opened. These were opened, and one of them was the low bidder. The firm who was announced as the low bidder after the six bids were received filed a protest arguing they should be awarded the project, or that all bids should be rejected, and the project readvertised.

Questions to ask yourself. Here are some questions to ask should these types of situations arise:

- Is there evidence of when the bid was received?
- Should the low bidder be penalized because of the agency's lack of internal controls?
- Should the public pay more than the low bid due to an internal administrative error?
- What is the likelihood of a bid protest?
- Did any contractor have a competitive advantage not enjoyed by other bidders?

Disclosure of Number of Bids Received

Before bids are opened, some bidders may want to know how many bids you've received for a project and even the names of the bidders who have submitted bids. It is best practice not to disclose this information, nor to have the bid envelopes received visible to the public so they can count how many bids have been received. The reason to keep this information private is that some bidders will change their bid price based on the number of bidders and who has bid. For example, if they know only one other bidder has submitted a bid, they may increase their bid price.

Bid Envelope Protocol

To help ensure that bids are received in an orderly manner, include language in your Instructions to Bidders requiring the bidder to write the project and bidder name on the bid envelope. Staff receiving the bids should ensure the project and bidder name are on each envelope as they are submitted. You should also train staff who receive bids to keep the bids separate by project. Before bids are released to be read, the person who received them should go through the envelopes one by one to make sure they are for the correct project.

Documenting Time of Bid Receipt

The following procedures should be used to document the time a bid is received by a local government:

- **Use a Time Stamp Clock.** The best practice for documenting the date and time for receipt of bids is to use an electronic atomic time clock. Atomic time clocks automatically sync to the current date and time.

Ideally, the time clock will display the time in minutes and seconds since seconds are critical when it comes to receiving bids. If the time clock displays and prints a time including seconds, and the bidding documents state that bids will be received until 2:00 p.m., a bid would be considered late if it was stamped in at 2:00:01 p.m. If, however, the time clock does not display and print seconds, a bid received and stamped in at 2:00 p.m. would still be on time. It would be late once the time clock read 2:01 p.m.

- **Validate Official Time.** On the bid submittal day, validate that the time on the time clock is accurate. Use the website maintained jointly by the U.S. Department of Commerce's National Institute of Standards and Technology (NIST) and its military counterpart, the U.S. Naval Observatory (USNO). The website address is: <https://www.time.gov/>. (If you have an atomic clock, this is not necessary.)
- **Post a Sign Designating the Official Clock.** The best practice is to have a sign notifying bidders that the time clock is the official time for receipt of bids.

Withdrawal and Modification of Bids

After a bidder has submitted a bid, the following are procedures to follow if the bidder wishes to withdraw their bid prior to the bid submission deadline or withdraw their bid and modify it. These procedures should be documented in the bid documents.

- **Request Verbally or in Writing.** A request to withdraw or modify a bid may be received by the local government either verbally or in writing.
- **Identification.** The requester should provide sufficient identification of their identity and that they represent the bidder, or the requester should already be known to staff.
- **Request Received Before Deadline.** A request to withdraw a bid must be received prior to the bid submission deadline.
- **Photocopy Face of Bid Envelope.** The local government should make a photocopy of the face of the bid envelope, ensuring that the bid receipt time shows up on the copy.
- **Bidder Sign Photocopy.** The local government staff should require the bidder to sign the photocopy with the following: "Withdrawn by: [signature, printed name, date, and time]."
- **Agency Retains Photocopy.** The local government should keep the photocopy of the face of the bid envelope.
- **Remove Bid Receipt Stamp.** The local government staff should remove the bid receipt stamp or cross it out from the face of the bid envelope.
- **Return Bid to Bidder With Instructions.** The local government staff should then return the unopened bid to the bidder, notifying the bidder that if they choose to resubmit the bid, it must be received prior to the bid submission deadline and stamped in again with a new date and time stamp.
- **Mailed Bids.** If the bidder has mailed the bid and cannot be present to request a modification to their bid price, they may submit additional information modifying a previously submitted bid if the modification is:
 - Received in writing
 - Signed by an authorized representative of the bidder
 - Received prior to the bid submission deadline
 - In a sealed envelope
 - Clear in stating what prices are being changed



Practice Tips:

- Make sure that someone knowledgeable on bid receipt procedures is at the bid receipt counter continuously at least an hour before the bid submittal deadline and up until the deadline. Staff should be trained on the importance of the bid receipt process.
- Do not accept or read bids that have been submitted after the bid submission deadline.
- Treat all bidders equally and do not give a bidder any advantage other bidders don't have. For example, do not permit private use of offices and conference rooms for a bidder to finalize their bid prices. Do not provide an envelope for a bidder to use in sealing the bid envelope. Do not permit a bidder to use the agency's telephone, computer, fax, or photocopier.
- If the project required attendance at a mandatory pre-bid meeting, the person receiving the bids should only accept bids from bidders whose name shows up on the meeting attendance list.
- Staff should check to make sure the bid envelope has been sealed. Instruct the bidder to seal it if it is not secured. Staff should review the face of the bid envelope to ensure it includes the key information required in the bid documents to be on the envelope.
- Ensure the date and time stamp is clear, that it has been stamped on the envelope, or a piece of paper with the stamp has been securely taped to the envelope.
- Have clear signs indicating where bids are required to be submitted. Avoid posting signs for the bid opening room to avoid confusion and prevent bidders from submitting their bids to the opening room rather than the receiving location.

Last-Minute Bids

Bidders often submit their bids with just minutes or seconds to spare before the bid submission deadline. The major reason this occurs is that bidders are waiting for updated prices from their subcontractors and suppliers.

Subcontractors and suppliers traditionally withhold prices from bidders until very late in order to avoid having bidders "shop" their bids. Bid shopping occurs when a contractor takes a subcontractor or supplier price, then calls another subcontractor or supplier and asks them to beat the price they have just received. Delaying submitting their prices to the contractors until the last minute deprives contractors of sufficient time to shop their bids.

One of the results of this last-minute process is that mistakes often occur in bid pricing. Contractors are faced with making last-minute decisions about what subcontractors and suppliers are the lowest price and whether their bid includes all required work or whether the subcontractors and suppliers have made exclusions to the scope of work.

LATE BIDS

If a bidder attempts to deliver a bid past the bid submission deadline, the local government should not accept the bid. The agency should receive it only to time stamp the face of the bid envelope, make a photocopy of the time stamp and outside of the bid envelope, and immediately return the document unopened to the bidder. The bid should not be opened or read.

Sometimes, however, a bidder may refuse to accept the bid back and insist on leaving it with the agency, in which case it is best not to get into an argument about it with the bidder. The agency should then take the bid, verbally tell the bidder that the bid is non-responsive and will not be opened or considered, not open it, and immediately return it by certified mail, return receipt requested, to the bidder with a letter explaining that the bid was received past the deadline. Before sending the bid back to the bidder, make a photocopy of the face of the bid envelope with the time stamp showing the bid was received late, and keep that as a matter of public record.

Bid Receipt Nightmare

It's 1:58 p.m., just two minutes before bids are due on your sidewalk replacement project. Your front counter staff person has taken a break or gone to pick up supplies in another part of the building and is not present to receive last-minute bids that might be submitted.

A bidder races in the door and is frantic that no one is around to receive and stamp in his bid. The bidder wanders through the hallways and cubicles, looking for someone to receive and time stamp his bid. He finally finds someone, who takes the bid back up to the front counter where the bid is date and time stamped in. But the time stamp reads 2:01 p.m., after the deadline. The bid is opened along with the other bids and the bid is the lowest bid.

Under most circumstances, a bid should not be accepted or read if it is submitted after the deadline. But whether a bid should be accepted in this type of situation depends on the specific facts of the situation. In this case, the local government did not manage the process properly and should have had a staff member available to receive bids until the bid submittal deadline. The bidder was presumably on time. Should the bidder (and the taxpayers) be punished because the agency did not have someone available to timestamp the bid?

BID OPENING

Order of Opening Bids

Unless there are applicable local or state laws or agency policies, bids may be opened in any order, as the order of opening doesn't impact the bidding process or give one bidder an advantage that other bidders don't have. They may be opened in the order in which they were received, alphabetically, or in a random order.

Bid Opening Process

Some state laws require that bids be opened in a public meeting. Even without such a requirement, it is best practice to open bids in a public meeting.

- Have a letter opener to open the envelopes. Consider having one person open the bid envelopes and another read the bid amounts and other information.
- Read each bid before opening the next one.
- Project management or procurement staff should record the bid prices on a bid tabulation form.

Reading the Bids

The best practice is to have a pre-determined script to following in reading the bids. The following should be read or stated during bid opening:

- **Name.** The bidder's business name.
- **Bid Guarantee.** Whether a sufficient bid guarantee has been included with the bid.
- **Addenda.** Whether all addenda have been acknowledged.
- **Bid Amounts.** The dollar amount of the bid (base bid, additives, alternates). The bid opening is not the place for reading unit prices.
- **Note Obvious Irregularities.** The person reading the bids should publicly read and disclose all information present or not present without making any judgment whether the bid is responsive or non-responsive. If a potential irregularity or deficiency is observed, the bid reader should disclose such information and state that all bids will be evaluated after bid opening to determine whether or not each bid is responsive.

Keep track of all the bids after they are read to avoid losing any of the bids.

Opening the Wrong Bid

Let's say you are reading bids, and suddenly you realize that the bid you have just pulled out of an envelope isn't for the project for which you're opening bids. In fact, it isn't even for any of the projects you're opening bids for now, but for a project with a bid submission deadline next week.

Let's assume the following:

- You stop short of reading the wrong bid.
- You don't notice or look at the bid price.
- You don't reveal the name of the bidder.
- The room is full of contractors and agency employees.

Under the circumstances, it is best to be as honest and transparent as possible:

- **Tell the story:** Describe factually to the assembled audience what has just occurred, including the fact that you did not see the bid price.
- **State your intent:** Tell the audience that the bid will be opened and read after the actual bid submission deadline.
- **Re-seal envelope:** With the audience as witnesses, put the bid back into the envelope and re-seal it immediately with tape.
- **Write it down:** Document in writing what has just occurred, with the document signed by agency employees who were present. If you're able to get one or two contractors to sign it as well, that would be helpful. In the event of a challenge or protest, this documentation will be helpful in defending your agency's action to consider the bid that was opened early.

MANAGING BIDS AFTER RECEIPT

Bidders will often want to view the other bids received, particularly the bid and bid guarantee submitted by the low bidder. Prompt disclosure of bids submitted is important to bidders in preserving their rights under state or local regulations or the requirements of the bidding documents for how long they have in which to file a bid protest.

Bids are public records and there are three broad strategies on how to share this information promptly with bidders who make such a request:

- **Review After Bid Opening.** Some agencies permit bidders to examine other bids immediately after bids have been opened and read. Bidders may want to review the bids, especially that of the low bidder to assess whether the low bidder's bid contains any irregularities that might become the subject of a protest. This is a good process that promotes transparency. It is important, however, to carefully control the review of the documents to one bidder at a time, and to keep the documents secure to avoid losing any bid documents and invalidating the entire bid process.
- **Provide Copies.** Some agencies entertain requests for a copy of the bidding documents on a case-by-case basis, agreeing to send a copy of the documents to the requester. Some public agencies require that this

be done through a formal public records request, while others provide the documents upon an informal request. In order to promote transparency of the bid process, the best practice is to provide the documents without requiring a formal public records request.

- **Scan and Distribute.** Some public agencies make it a practice after bid opening to scan all the bids received and either post them to the agency's website, provide them to a third-party electronic bid distribution service, or email all bidders with the information. This is a relatively easy process, maintains the security of the bids, and gives timely access to the bids to anyone interested.

BID TABULATION

In addition to the actual bids, bidders are often interested in the bid tabulation summary of all bids received. This document reflects the bid prices as read at the bid opening. It is possible these prices may be adjusted if there are mathematical errors on any of the bids.

If you have a unit price bid, it is important that you check the math for all the bidders to ensure they have accurately multiplied their proposed unit prices by the estimated quantities, and that they have accurately added up the unit price extensions. Bid documents should give public agencies the right (and obligation) to make mathematical corrections of any such errors. After all the bids have been checked for accuracy (errors may change the order of bidders from the numbers read during the bid opening), a local government should issue a final and corrected bid tabulation to the bidders.

BID EVALUATION

Bid evaluation is the process used to determine the lowest responsive bid from a responsible bidder and who is eligible for Award.

After bids have been received and opened, local governments should go through a methodical process to determine if each item and number presented on the bid is clear, whether the bids are complete, and if the lowest bidder is a responsible bidder.



Practice Tip: The terms “responsive bid” and “responsible bidder” can cause some confusion. Some agencies inappropriately include language in the bid documents that notes the intent of the agency to award the project to the “lowest responsive and responsible bidder.” This type of language blurs the important distinction between responsiveness and responsibility.

Responsiveness relates to a bid, while **responsibility relates to a bidder**. To be responsive, a bid must comply with the requirements of the bid documents. To be responsible, a bidder must meet the minimum requirements to bid on a public works project and have a history of performing similar work. In other words, a bidder is never responsive or non-responsive. It is their bid that is responsive or non-responsive.

The bid document language should state that the agency will award to the “responsible bidder with the lowest responsive bid,” or something similar.

REASONS FOR NON-RESPONSIVE BIDS

After bid opening, the agency should evaluate bids to determine if any of the bids are non-responsive, meaning they did not respond to the requirements of the bid documents. Common reasons for non-responsive bids include the following:

- **Bid Submission Location.** Was the bid submitted at the correct location identified in the bid documents?
- **Timeliness of Bid Submission.** Was the bid submitted by the deadline established in the bid documents?
- **Signed Bid Form.** Was the bid form signed by an authorized representative of the bidder? It is generally best to have a self-certifying bid form, in which the company agrees that whoever has signed the bid form is authorized to do so.
- **Bid Guarantee.** Was a bid bond or other authorized bid guarantee in the appropriate amount submitted with the bid? (For more information, see the next section.)
- **Bid Prices.** Does the bid include a bid price for all items identified on the bid form?
- **Bid Form Blanks.** Were all blanks on the bid form filled out completely?
- **Addenda.** Were all addenda acknowledged as being received?
- **Bid Exclusions.** Did the bid include any exclusions or conditions different from the requirements of the bid documents?
- **Required Documents Submitted.** Unless required by a grant funding source or specific laws, it is the best practice for public agencies to limit what is required to be submitted with the bid. This allows bidders to concentrate on developing a competitive bid price, often a challenge in the last-minute receipt of subcontractor bids and the development of a final bid price to the agency. Limiting the submissions with the bid reduces the number and type of irregularities that may arise that may result in a non-responsive bid.
 - Limit bid submissions to the Bid Form, Bid Guarantee, and forms required by state law or grant funding provisions. Consider changing your local policy if other documents required with bid submission.

- Do not require the following items to be submitted with the bid: evidence of insurance, bidder’s checklist, documentation of bidders’ qualifications/experience, proposed project schedule, product specification sheets, non-collusion affidavit (include this certification on the bid form), copy of addenda issued (only require acknowledgment), other forms.

Once responsive bids have been identified, the local government must determine the lowest responsive bid. The decision should be based on the total of the base bid and the combination of any other bids items (alternates, additives, deductives, unit prices, or similar) required to be priced on the Bid Form for which the local government chooses to exercise and award.

For instance, some local governments incorrectly base the award decision on just the base bid (even though additive bid items are awarded) or the base bid and all additive bid items (even though not all additives are awarded). These practices violate competitive bidding laws that require award to the low bidder.

The order of who is the low bidder may vary depending on which additives are awarded, as illustrated in the chart below.

	Bidder 1	Bidder 2	Bidder 3
Base Bid	\$100,000	\$102,000	\$105,000
Additive 1	\$20,000	\$15,000	\$13,000
Additive 2	\$6,000	\$5,000	\$3,000
Low bidder for base bid only	X		
Low bidder for base bid + additive 1		X	
Low bidder for base bid + additive 2	X		
Low bidder for base bid + both additives			X

The local government’s award decision should be a budgetary decision of how to get the most project built for the money available. For instance, it is inappropriate for a local government to manipulate which additives to award in order to obtain one bidder instead of another. Some owners prioritize the additives ahead of time for this reason, but the downside to such prioritization is that it can limit options for what may be best for the project based on the available funding. Some grant-funded provisions may require that additives be prioritized.

After making an evaluation and award, it is inappropriate for a local government to later include additional additive items by change order, if in so doing it would change the order of who the low bidder would have been. Such an action would likely result in an audit finding.

BID GUARANTEES/BID BONDS

Bid guarantees – often in the form of bid bonds – serve multiple purposes and are often required by law or a grant funding agency.

When a bidder submits a bid bond, it represents the guarantee of a bonding company or surety that the bidder, if awarded the contract, will execute the contract. In making this guarantee, the surety has screened the financial capability of the bidder and determined they represent a reasonable risk. By requiring a bid bond, it also discourages bidders from submitting frivolous bids because there are financial consequences for a bidder's failure to execute a contract awarded to them. Finally, the bid bond compensates the agency for a higher bid price if the low bidder fails to execute a contract after award or if the agency has to rebid the project.

Bid bonds are typically provided free by the surety to the contractor in recognition there is no guarantee the bidder will be the low bidder and awarded the project. Bonding companies make their money by charging contractors for the payment and performance bonds.

Bid Bond Amount. The amount required for a bid bond is generally regulated by state law or funding source. The most typical amount for a bid bond is 5% of the amount of the bid.

However, there are two restrictions on the 5% amount of a bid bond that are often not readily apparent upon a quick review of the bid bond:

- First, some bid bonds are written for 5% of the amount of the bid price but include an additional caveat that the amount shall not exceed a specific dollar amount. Thus, it is important for public agencies to review bid bonds after bid opening to make sure that any specific dollar amount limitation is sufficient to equal 5% of the amount of the bid.
- Second, some bid bonds are not for the full 5% of the amount of the bid. In these cases, the language of the bid bond is such that the amount is up to 5% of the amount of the bid, but not to exceed the difference between the low bid and the amount of the bid that the contract is eventually awarded for.

For example, if the low bid was \$100,000, the bid guarantee amount would be \$5,000. Let's say the low bidder failed to execute the contract with the agency after award, and the agency was required to award to the next lowest bid price at \$103,000. Under the terms of the language included in some bid bonds, the surety would only be required to pay \$3,000, not \$5,000 to the local government, since the \$3,000 represents the difference between the second-lowest bid (which was eventually awarded the contract) and the original low bid.

Authorized Sureties

Sureties that provide bid bonds to public agencies should be authorized to do so by being included on the state insurance commissioner's list and authorized to do business in Washington, and have the current required rating in [A.M. Best's Key Rating Guide](#). Your bid documents should specify the standards your agency expects for the bonding company providing bid bonds on your public works construction projects.

Checklist

The following is a short checklist of key items to review when receiving bid bonds:

Has your agency been named as the Obligee or protected party on the bid bond?

Is the correct project name and number on the bid bond?

Is the bid bond for 5% of the total amount of the bid that could be awarded without any restrictions on the amount?

Has the bid bond been signed by both the surety and contractor? Without both signatures, the bond may not be enforceable with the surety.

Is the bid bond accompanied by an up-to-date signed Power of Attorney?

Is the surety authorized to do business in the state?

Other Types of Bid Guarantees: While bid bonds are the most common form of bid guarantee used on public construction projects, other forms of guarantee may be authorized. These include:

- Cashier's checks,
- Certified checks,
- Money orders, and/or
- Cash

Check your enabling legislation or the terms of any grant funded agreement to determine what are acceptable forms of a bid guarantee.

One of the risks of these alternate forms of a bid guarantee is that, unlike a bid bond, a surety has not conducted a financial review of the contractor, so the local government does not have an independent source to determine the contractor's financial stability. This may also affect the surety's willingness to provide the required payment and performance bonds if the bidder is awarded the contract.

BID IRREGULARITIES

Many bids have irregularities in how the bidder has completed the documents or in the submission process. Not all irregularities make a bid non-responsive. The determination of whether an irregularity makes a bid responsive or non-responsive is a case-by-case determination and is dependent on the specific facts relating to the bid and the language of the bid documents. It's important to involve the agency's attorney in making these determinations and in assessing how defensible a particular position is to a protest or lawsuit.

The following guidelines may help in determining whether a bid is non-responsive or responsive:

- **Material Irregularities.** Materiality can also be thought of as “substantive.” A local government must reject bids with material irregularities as non-responsive and must not consider the non-responsive bids further. Material irregularities are significant and give a competitive advantage or benefit to one bidder that is not provided to other bidders. A material irregularity could be failing to include all the required forms or attachments to a bid, failing to sign a form, or a bid containing illegible items.

According to one court case, "The test as to the materiality of a variance is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders."⁴

- **Immaterial Irregularities.** A bid with an immaterial irregularity may be deemed responsive or rejected as non-responsive, at the discretion of the local government. Bids with irregularities that are immaterial are those that are minor and do not give a competitive advantage or benefit to one bidder over others. An “immaterial irregularity” might be something like a bidder abbreviating the name of the project. While it is an irregularity, you can still determine the name of the bidder, the price of the bid, etc.

BID CALCULATION ERRORS

For unit price bids, bid documents should allow the agency to make mathematical corrections of all the bids after bid opening. The unit price (typically the basis for the contractor's bid) should take precedence over the multiplication of the unit price times the estimated quantities, and the agency's summation of the unit price extensions should take precedence over the contractor's summation of the items.

In the event such corrections are made, the bidder who may have been identified as the low bidder at bid opening may no longer be the low bidder. Likewise, a bidder who was not the low bidder may become the low bidder after the corrections have been made.

A revised bid tabulation from the one prepared at bid opening should be issued after the mathematical corrections have been made.

MISSING BID PRICES

Bid documents should require that bidders bid on all prices on the bid form, including but not limited to additives, alternates, deductive, and bid items. Generally, a bid would be declared non-responsive if a bid price is omitted as an agency cannot equitably compare bid prices to determine which contractor is the low bidder.

⁴ *Gostovich vs. City of West Richland*, WA, March 1969, quoting *Duffy v. Village of Princeton* 240 Minn. 9 60 N.W.2d 27, 29 (1953)

- **Zero Bid Price.** If a bidder fills out the bid form for a specific price by writing “Zero,” “\$0.00,” for “No Charge,” it can be argued that they have submitted a bid price of zero and their bid is responsive.
- **No Bid Price.** If a bidder fills out the bid form for a specific price by writing “No Bid,” “N/A,” or leaves the item blank, these responses will demonstrate that the bidder has not bid on what was required, and their bid should be declared non-responsive and not be considered further.

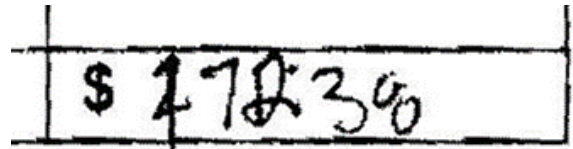
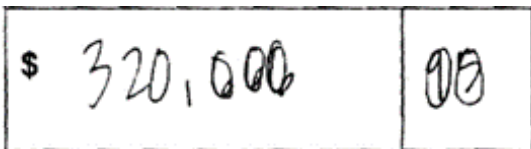
CONFLICT BETWEEN NUMBERS AND WORDS

Generally speaking, local governments should require bidders to provide bid prices using numbers only. Bidders should not be required to spell out the numbers using words (such as “seventy-five thousand five hundred dollars”), which is an antiquated practice and can lead to potential bid errors, especially since bidders are often rushing to complete the bid documents at the last minute and are likely not accustomed to writing out large numbers. However, some granting agencies may require bid prices in words.

If your agency requests bid prices be submitted in both numbers and words, make sure that you have a statement in your bid documents addressing which takes precedence in the event of a conflict. Without such language, it can lead to bid protests that are difficult to manage. For agencies who request bid prices in both numbers and words, most of them note that in the event of a conflict, the price in words will take precedence.

ILLEGIBLE BID PRICES

If the bidder’s bid price in numbers cannot be read (and no price in words is required), bid documents should state the agency reserves the right to reject such bids as non-responsive. The following are examples from bids of handwriting that is difficult to decipher:



BID IS TOO LOW

After opening bids, it may become apparent that the low bidder’s bid price is unreasonably low, and much lower than the estimate of the next lowest bidder. Such a bid price should be a concern of a local government because it could mean the contractor will request multiple change orders to make up for their low price or that there could be project delays, poor quality of work, or insufficient qualified labor to complete the project.

If the low bidder with an unreasonably low bid does not submit a claim of error to withdraw their bid, it is a good practice for a local government to meet with the bidder and discuss topics such as:

- **Scope of Work.** Get a sense of the bidder’s understanding of the scope of work, and whether it’s consistent with the contract documents.
- **Project Estimates.** Ask the bidder to describe how they estimated the project and to share their bid preparation documents with the agency. Include language in the bid documents that would require the

bidder to provide these documents at a meeting after bid opening. Failure of the bidder to provide such documents upon request could result in the agency declaring the bid non-responsive.

- **Bid Guarantee.** Inform the bidder that their bid guarantee may only be claimed by the agency if the bidder is awarded the project but fails to execute the contract. Some bidders do not understand this and may insist on following through with the project, despite their low price, out of a fear of losing their bid guarantee.
- **Bid Withdrawal.** The local government may try to convince the bidder to withdraw their bid, rather than risk almost certain financial losses and a problem project. If the deadline for filing a claim of error has passed, the agency has the discretion to extend the deadline in a case like this.

UNBALANCED BIDS

An unbalanced bid occurs when a bidder bids a significantly higher price on some bid items and compensates for those prices by bidding significantly lower prices on other items, and yet remains the low bidder. Typically, unbalanced bids occur on unit price contracts, although there may be unbalancing that occurs with additive and alternative bids as well. If any bid item prices are excessively unbalanced (either above or below the amount of a reasonable bid) to the agency’s potential detriment, your bid documents should provide that such a bid may be rejected as non-responsive.

The following chart illustrates what an unbalanced bid might look like for specific bid items:⁵

Item Description	Engineer's Estimate	Bidder A	Bidder B
Unclassified excavation 30,000 CY	\$9.50 / \$285,000	\$10.00 / \$300,000	\$0.01 / \$300
Embankment Barrow 10,000 CY	\$5.00 / \$50,000	\$4.50 / \$45,000	\$25.00 / \$250,000
Bid Price	\$335,000	\$345,000	\$250,300

Bidders who unbalance their bid prices do so because they either see errors in the estimated quantities on the bid form or they believe the quantities will not be as estimated on the bid form. A bidder is gambling that the quantities for a unit price that is high will be much greater than the estimated quantities on the bid form, and that the quantities for an unreasonably low unit price bid will be much less than the estimated quantities on the bid form.

If the bidder’s assumptions are correct, the local government will end up paying significantly more for the project based on excessively high unit prices. Of course, if the bidder’s assumptions are incorrect, they could lose money on the project. Anytime a bidder loses money on a project, the project frequently encounters significant problems, change orders, delays, and quality problems.

⁵ Chart by John P. Ahlers from his blog on April 6, 2011 and used with permission. <https://www.acslawyers.com/claims/unbalanced-bids-and-unbalanced-schedules-of-value-hidden-dangers-for-contractors-and-owners/>

CONDITIONED OR QUALIFIED BIDS

A conditioned or qualified bid occurs when a bidder indicates their bid is not based on the bid documents but includes erasures, alterations, changes, modifications, additions, deletions, or items not called for in the bid form and bid documents.

The following are examples of a conditioned or qualified bid:

- **Bid Form.** A bidder submits their bid prices using a letter instead of using the required bid form, or a bidder adds language to the bid form or crosses out language on the bid form.
- **Scope of Work.** A bidder changes the scope of work by bidding a number and listing the items that are not included. In other words, the bidder does not bid as specified. Likewise, a bid is conditioned or qualified if a bidder submits bid prices for work that was not requested.
- **Bid Documents.** A bidder adds requirements or conditions to their bid price, the scope of work, schedule, or other conditions. A bidder may not exclude anything in their bid that is required by the bid documents.

A bid that is qualified or conditioned is probably a non-responsive bid if it impacts the price or a bidder's understanding of the project. Failure to declare such a bid non-responsive may result in a bid protest from the second low bidder. A low bidder whose bid is found to be non-responsive because they have conditioned or qualified the bid may appeal such a determination to the agency.

TIE BIDS

A tie bid occurs when two or more bidders bid the exact same bid price. While it is very rare for tie bids to occur on public works construction projects, it is nevertheless a good practice to include language in the bid documents describing how the agency will decide which bidder will be awarded the project.

The first thing to do is assess whether there are any applicable requirements that would control how to determine the successful bidder. These requirements may include applicable state laws that apply to your type of local government, any grant requirements, any applicable procurement and contracting policies for your agency, and any provisions in your bid documents such as responsibility criteria applied to each bidder.

In the absence of any requirements or policies, the best strategy for deciding is to flip a coin or use some other method of chance. Establish a written procedure in your bid documents of who will flip the coin, who will call it, etc. This helps reduce the risk of a protest.

BIDDER RESPONSIBILITY

Once an agency has determined which bids are responsive, it must determine whether the lowest responsive bid was submitted by a responsible bidder.

In Washington, [RCW 39.04.350](#) establishes the mandatory bidder responsibility criteria for public works contracts. The bidder responsibility criteria, supporting documentation and deadlines, and appeal process should also be included in the bid documents. For more information on the bidder responsibility criteria and how to verify responsible bidder status, see MRSC's webpage [Bidding and Awarding a Public Works Contract](#).

Supplemental Responsible Bidder Criteria

Washington state law also allows local governments to adopt additional relevant responsible bidder criteria for individual projects that go above and beyond the mandatory state bidder responsibility requirements. Many local agencies have developed supplemental criteria on two levels:

- A basic level that 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.
- A secondary level whose criteria relate to the nature of a specific project. For example, an agency may require that a contractor must have completed three projects of a similar scope and dollar volume within the past five years.

These criteria and associated evaluation methods must be provided in the bid documents. However, local agencies should be aware that supplemental bidder responsibility criteria can limit the number of bidders (potentially increasing the price of the bids) and impact whether the low bidder is eligible to be awarded a project. Make sure any supplemental bidder responsibility criteria are relevant for the project and type of work.



Practice Tip: Agencies should *not* require bidders to submit documentation of their responsibility along with the bid. Requiring bidders to submit information about their responsibility increases the administrative barriers, increases the risk of a bid being non-responsive by failing to fill out all of this information, and may reduce the number of bidders. Most of the mandatory bidder responsibility criteria may be verified online after the lowest bid is identified, and documentation for any supplemental bidder responsibility criteria may be requested at that time.

BID PROTESTS

A bid protest is a formal and written challenge, made by a bidder, of the bidding process, a determination made by a local government on a bidding matter, and/or the award/intent to award. A bid protest can wreak havoc on a project's schedule and cause significant delays and added costs, especially if the protester takes their concern to court.

But there can also be value in bid protests. They provide a relatively low-cost forum for concerned contractors to raise their concerns about the bidding process, keep the procurement process open and transparent, and increase confidence in the integrity of the process among contractors and the general public. In addition, protest decisions provide guidance for future procurements.

Avoiding Bid Protests

There are several strategies a local government may use to avoid or reduce the likelihood of receiving bid protests. These include the following:

- **Develop Clear Bid Documents.** The best deterrent to bid protests is to ensure the bid documents and bid processes are clear and simple. Sometimes protests will be filed even if the bidding documents are clear, as businesses seek to have a proposed award to their competition tossed out.

- **Review Bid Documents Internally.** It is a good practice for local governments to have an internal review process for bid documents prior to advertising to eliminate ambiguities. Developing an internal quality control procedure to review the bid documents may help reduce the number of bid protests and combat potential change orders.
- **Standardize Forms.** Using standardized and well-reviewed instructions to bidders and bid form can help reduce bid protests.
- **Identify High Risks.** Agencies should identify issues that are likely to result in a bid protest and develop a plan to reduce those risks.
- **Limit Submissions with the Bid.** Agencies should limit the number of forms and documents that must be submitted with a bid. The more that is required, the higher the likelihood that a bidder will fail to submit what is required and a bid protest or appeal, or both, may ensue.

Evaluate the Facts

Bid protests may have substance or they may be frivolous. When a bid protest is filed, it is important to carefully evaluate not only the specific facts and situation relating to the protest, but also whether the protester followed the right process. Recognize that if you accept a bid protest and declare the low bid non-responsive, you may have an appeal from the bidder whose bid you have rejected. It's important to objectively evaluate protests and weigh the risks of specific actions you might take. Involve your agency's attorney in responding to bid protests.

Recognize the High Stakes

Emotions often run high when a contract award is involved. A bid protester desperately wants the project, while the low bidder believes they are entitled to the award. Provide a fair forum for bidders to state their cases.

- **Provide a Debrief Meeting for the Protester.** Some agencies respond to bid protests in writing after having only read the bid protest letter and investigated the facts. The best practice, however, is to provide a meeting for the protester to have the opportunity to personally make their case to the local government.
- **Include All Parties in the Meeting.** The best practice with bid protests is to invite the protester and the firm whose bid is being protested to a meeting to discuss the protest. While this isn't a formal hearing, it should be conducted with some basic ground rules.
- **Protocol for the Meeting.** The following protocol can help guide how an agency should conduct the meeting:
 - **Make the Case.** Provide the protester with the opportunity to verbally state the reasons why they believe their protest is valid and why they should be awarded the contract and not their competitor.
 - **Ask Questions.** Ask the protester the hard questions about their protest.
 - **Listen to the Other Side.** Provide the low bidder (whose bid is being protested) with the opportunity to state why the bid protest is without merit, and why they should be awarded the contract.
 - **More Questions.** Ask the low bidder the hard questions about points of the protest that may have merit.
 - **Communicate Understanding and Empathy.** Communicate clearly that you have understood the positions of the protester and the low bidder, whether you agree with them or not. Feelings matter in bid protests. If a protester feels that their concerns have been carefully listened to and addressed, even if the final decision doesn't support the protest, the protester may choose to not take the protest to the next level (obtaining a temporary restraining order from the courts). By creating an open, transparent, and deliberative process, the issues related to the protest can be sorted out. Agencies

should treat both parties fairly and ask critical questions of each. Protesters want to be treated fairly and to feel that their concerns have been seriously considered.

- **Keep an Open Mind.** Bring all the issues related to the protest into the open and keep an open mind.
- **Avoid Court.** By treating both parties to a bid protest with respect, fairness, and dignity as you pursue the facts, it can help prevent parties from escalating the issue into a lawsuit. If the low bidder and protester both feel they have been treated fairly, regardless of the final decision, you can significantly reduce the likelihood that one of the parties will take the issue to court.

Bid Protest Policies

The following questions can help agencies in managing bid protests:

- Does your agency have clear protest policies that are fair?
- Are your protest policies consistent with best practices?
- Are your bid protest policies in compliance with any state or grant requirements?
- Do you communicate your protest policies in your bid documents?
- What are your agency's practices and procedures on how to investigate and respond to bid protests? It's a good idea to involve your attorney if you receive a bid protest, especially if the bid protest letter has come from the protester's attorney.

PREQUALIFICATION

In some instances, a local government may want to have contractors participate in a pre-qualification or a pre-determination of eligibility process to allow only the most experienced contractors to compete for a specific project. Most local governments are not authorized to prequalify contractors.⁶ For those that are authorized to prequalify contractors, the criteria used to evaluate qualifications must be relevant to the work, clear, objective, and not overly restrictive of the bidding pool of contractors.

In prequalification, the screening of contractors occurs prior to bidding and restricts bidding to only contractors that are pre-determined to be eligible to compete.

CLAIM OF ERROR

After bid opening, a bidder may discover that they have made an error in their bid, especially as they compared their bid price to those of the other bidders. A bidder may submit a claim of error, requesting to be relieved of their liability for the bid.

There are generally two types of claims of errors:

- **Clerical or administrative errors** where the bidder added up something incorrectly or transposed a number. The courts have generally ruled that public agencies must accept a claim of error that is based on a clerical or administrative error.

⁶ Generally, only the following three entities or entity types are authorized to prequalify certain contractors: Washington State Department of Transportation ([RCW 47.28.070](#)), Public Utility Districts for electrical work ([RCW 54.04.085](#)) and Cities or Towns owning an electrical utility for electrical work ([RCW 35.92.350](#)).

- **Errors of judgment** where the bidder did not understand what was involved in the project. Local agencies are generally not required to accept a claim or error based on an error of judgment. However, if a bidder is requesting to withdraw, it is probably a good idea to let them off the hook regardless of the reason. If the bidder is set to lose money and forced to start the project, they may be looking for change order opportunities to compensate for the error. In addition, if they did not understand the project when bidding it, they may have problems understanding what needs to be done to perform the work.

An agency's bid documents should clearly state the deadline for submitting a claim of error – for example, requiring the claim to be submitted by the close of business the day after the bid submission deadline, or within 24 hours of the bid submission deadline.

Agencies should require in the bid documents that a bidder claiming error must submit original worksheets, spreadsheets, subcontract bids, and other documentation demonstrating the nature and dollar amount of the error, how it occurred, along with a letter explaining how to interpret the bid preparation documents. The letter should request the agency to accept the claim of error and relieve the contractor of their obligation and liability for their bid.

Accepting a Claim of Error

If the local government accepts the claim of error, the bid would no longer be considered. Even if the bidder would still be the low bidder with the corrected price after the claim of error, the bid may no longer be considered, as negotiation of bid prices is not permitted on a competitively bid public works project. If the local government decides to re-bid the project, [RCW 39.04.107](#) prohibits a low bidder who claims error from submitting any further bids on the same project.

Award and Contract Execution

After the lowest responsive bid is determined and the bidder is determined to be responsible, the local government needs to have a two-phase process to award a public works construction project: (1) award and (2) execution.

Contract Award

Before your agency signs the public works construction contract, a local government issues a Notice of Award. This communicates to the contractor what bonds and insurance documentation are needed for the project.

Prior to signing the contract, a local government should:

- Receive, review, and approve payment and performance bonds from the contractor.
- Receive, review, and approve insurance documentation from the contractor that is consistent with the contract requirements.
- Obtain written authorization from the contractor noting how the contractor wants retainage to be handled.

For more information on these topics, see [Section 5: Implementing a Public Works Contract](#).

Contract Execution

Once it is time to sign the contract, the contractor should always sign the contract first. After the contractor has signed, the local government should review the contract to ensure the contractor has not made any changes. If the local government signs the contract first, the contractor may change provisions in the contract, putting the validity of the contract in question.

The contract should be clear as to the effective date of the contract. Some agencies have language filled in at the beginning of the contract noting a specific effective date. This date usually implies that both the contractor and agency have signed the contract on the same day, which is unlikely.

Another option may be to note that the contract is effective as of the last signature date of the contract. In this case, there should be a place after each signature for the signer to enter the date the contract is signed.

No work should be allowed by a contractor until there is an executed contract. Likewise, an agency should not pay a contractor prior to an executed contract.

NOTICE TO PROCEED

Upon contract execution by both the contractor and agency, the agency should identify in writing the contractual start date for the project. This date is important for holding the contractor accountable for meeting the completion schedule of the contract. This date is sometimes identified as the execution date of the contract. The best practice is to identify this date in a Notice to Proceed letter to the contractor that should include the following elements:

- Authorizes the contractor to begin work on the project.
- Identifies the date on which the contractor is expected to begin work.

- Specifies the number of days (working or calendar) the contractor is allowed to reach substantial completion.
- Identifies the calculated substantial completion date. The following website can help in calculating the required substantial completion date if calendar days are used, recognizing the agency will need to subtract one day from the result in order to account for the actual day of the Notice to Proceed: <http://www.timeanddate.com/date/dateadd.html>
- Identifies the agency's main contact (project manager or construction manager) the contractor should contact if they have any questions.

AWARD REVOCATION

At times, an agency may revoke an award before the contract has been executed. Potential reasons why include, but are not limited to, the contractor failing to execute the contract or providing the required bonds and evidence of insurance, a protest being filed by another bidder, or a change in direction or funding for the project.

Electronic Bidding

Electronic bidding means a method of receiving bids digitally or electronically and can include a variety of approaches from using email to using software applications. Electronic bidding, while a more accepted practice since 2019, still has challenges to consider.

- **Legal Authority.** Does your state or local laws permit electronic bidding? Some laws permit it for goods, services, and construction, while others prohibit it altogether or restrict it to certain procurements.
- **Bid Guarantee.** If you require a bid guarantee (bid bond, cashier's check, certified check) as part of the bid submittal, how does electronic bidding address bid guarantees? What about other attachments or required submissions with the bid form?
- **Signature.** Is an electronic signature binding? If using email and signed bid forms are scanned or copied, do you collect the original signatures later?
- **Conditioned Bids.** If using a software application, does it allow bidders to qualify or condition their bid or submit alternative bid prices if requested?
- **Bid Form.** If using a software application, how easy is it for a local government to set up a bid form, especially for complex bid forms with schedules, unit prices, additives, alternates, allowances, and sales tax (if applicable)?
- **Integrity.** What security tools can local government use to prevent manipulation of bid prices by a hacker, bidder, or the local government? What about lost emails or server/firewall malfunctions? This should be addressed in your bidding documents.
- **Disclosure.** What security features does the software have to ensure that bid amounts are secure and not reviewed or evaluated prior to the bid submission deadline?
- **Transparency.** How are bids "opened"? Does this occur in a public setting? How does the system promote transparency of the bid process?
- **Cost.** If using a software application, who pays for the use of the system? Regardless of who pays directly, ultimately the local government will pay for the service, even if it means that the bidder simply includes the cost of using the system in their bid price.
- **Tested by Time.** If using a software application, how long has the system been in use, and what is its track record on security issues?
- **Ease of Use.** When looking at electronic bidding approaches, you should consider how easy it will be for contractors to use. Will contractors need specialty training to submit bids? Will electronic bidding reduce the number of bidders and have a corresponding increase in bid prices?
- **Size of Bidding Pool.** Will using an electronic approach encourage a larger bid pool or deter contractors?
- **Internal Processes.** Will electronic bidding processes add administrative burden? Maybe just shift from physical management of bids? How will you make the change? Can your local government shift processes easily or will it be a struggle? Does an electronic bidding approach constrain other processes within your organization? What about the increased technology?

SECTION 4: DOCUMENTS

This section outlines the different components of bid and contract documents and provides a high-level summary of some of the topics that should be addressed in each of the component documents. Each local government is responsible for ensuring that bidding documents and contracts, specifications, plans, and similar conform with your local government finance and procurements process, authority, local laws, and funding requirements. This information is not legal advice and agencies should consult with their attorneys to develop appropriate bid and contract documents.

Components of Bid and Contract Documents

Documents should reflect your local government's process, policies, project requirements and what type of work you are bidding, but generally the following are typical elements of bidding and contract documents for public works.

- Bidding Information and Forms
 - Advertisement for Bid, Invitation to Bid, or Similar
 - Instructions for Bidders/Bidder's Checklist
 - Bid Form
 - Bid Bond Form
 - Addenda
 - Bidder's Subcontractor's List Form

- Contract

- General Conditions

- Specifications (technical)

- Plans

- Contract Forms
 - Change Order Form
 - Subcontracting Form
 - Wage Rates
 - Permits
 - RFI Form

Bidding Information and Forms

Often public works contracts have a document or several documents that contain critical information a contractor needs to bid. The following are common bidding information and forms for public works contracts. It is important to be clear and comprehensive in preparing your bidding information documents.

ADVERTISEMENT FOR BIDS

An advertisement for bids serves two primary purposes. First, it constitutes the required legal notice to inform the bidding community that the local government is seeking bids for the project. Second, the advertisement is an important marketing tool for the local government to reach contractors to interest them in submitting a bid. The more bids that are received, the higher the likelihood the local government will receive competitive bids that will be within the local government's budget.

The following is an outline of some of the common subjects that should be addressed in an advertisement for bids for a public works construction project:

- **Project Title:** In naming a public works construction project, the title should be descriptive of the type of work to be performed and the location at which it will be performed. If the project title is unclear or obscure, it may discourage some bidders from reviewing the bid documents to assess whether to even submit a bid.
- **Project Description:** Like the project title, the project description is an important marketing tool for a local government to encourage appropriate bidders to submit bids. The project description should be long enough that it reflects the nature of the work, but short enough that it does not discourage bidders from reading it. The purpose is to provide enough information to help bidders decide whether to review the bid documents and potentially submit a bid.
- **Bid Submission Deadline:** The advertisement should clearly specify the date and time deadline for submitting a bid, as well as the location to which bids should be delivered. For instance, "Bids must be received at [location] no later than 2:00 PM Pacific Standard Time on [date], as read on the bid clock."

Submission of bids is often a last minute (or second) affair, so it's important the language in your bid documents describes the deadline precisely to avoid any confusion. For instance, it should be clear whether a bid stamped in at exactly 2:00 PM is on time or late.

- **Pre-Bid Meeting:** If there is a pre-bid meeting for the project, the advertisement should specify the date and place for the meeting, and whether attendance at the meeting is encouraged or mandatory. For guidance on pre-bid meetings, see [Section 3: Bidding](#).
- **Cost Estimate:** There is no requirement that the cost estimate for the project be included in the advertisement, except that some grant funding agencies may require it. There are three approaches to handling disclosure of the cost estimate for the construction work that may be developed by local government staff, by the designer, or by an independently hired cost estimator:
 - **Disclose Exact Cost Estimate:** Some agencies include the exact estimate for the construction costs in the advertisement. Other agencies chose not to do so out of a concern that bidders will submit their bid prices consistent with the estimate, even though the bidder's cost may be less. In a heated construction market where there is a lot of work, this may be more of a risk to disclose the exact estimate.

- **Disclose a Cost Estimate Range:** Because of the concerns of disclosing an exact cost estimate, some agencies choose to provide only a range of the estimate to mitigate against contractors bidding exactly to the estimate. The value of the range is that it gives potential bidders a sense of whether the general size of the project is something they are interested in pursuing.
 - **Provide No Estimate:** Other agencies, because of the risks associated with providing the estimate or a range of the estimate have chosen to not provide any estimate in the advertisement. However, the cost estimate is a public record and must be disclosed upon a formal public records request and consistent with state law.
- **Availability of Bid Documents:** The advertisement should describe how an interested bidder can obtain a copy of the bid documents to review (hard copies, electronically, or third-party hosts/plan centers).
 - **Bid Guarantee:** Your bidding documents must specify the type of bid guarantee that is required, consistent with state law and local policies (often in the amount of 5% of the total of the bid that could be awarded). It is a best practice to provide a bid guarantee form.
 - **Funding Source:** If the project is grant-funded, especially if federal funds are involved, your bidding documents should specify these outside funding sources and any additional contracting requirements.
 - **Contact Information and Deadline for Questions:** The advertisement should note the deadline for bidders to submit questions about the project, and the name and contact information of the person to whom questions should be directed.

INSTRUCTIONS TO BIDDERS

The Instructions to Bidders outlines the expectations for the bid process. It is an important tool to guide the bidding process and to prevent unnecessary bid protests or rejection of bids as non-responsive.



Practice Tip: In addition to the Instructions to Bidders, it is a good idea to create a separate Bidder’s Checklist (based on and consistent with the Instructions to Bidders) to help a bidder prepare their bid for submittal.

The Instructions to Bidders should be clear about how the local government intends to review bids and respond to certain bid irregularities.

Unfortunately, not all language in Instructions to Bidders is sufficiently clear. Consider the following real-life example:

Improperly completed information, irregularities in security deposit, may be cause not to open the Bid Form envelope and declare the bid invalid or informal.

Let’s evaluate this statement and identify some of the problems with it.

- **Timing:** Whether the bid contains “improperly completed information” or irregularities in the security deposit (more generally known as a bid deposit or bid guaranty) won’t be known until after you open the sealed bid envelope. As written, this language sets up an impossible situation.

- **Informal or Immaterial:** Bids are not declared "informal." Immaterial irregularities in a bid may be waived by a local government as an informality. Thus, the more accurate language would be to not to discuss the bid being "invalid or informal," but whether any irregularity is material or immaterial and whether the bid is responsive or non-responsive. Material irregularities (those that give a competitive advantage or benefit to one bidder not enjoyed by other bidders) must be rejected as non-responsive.
- **Double Negative:** The sentence contains a double negative that requires the local government to not declare irregular bids as non-responsive. Here's how it reads: "Improperly completed information...may be cause not to...declare the bid invalid or informal." This is an unintended consequence of less than clear and careful drafting of the sentence.

Sections of Instructions to Bidders

The following are descriptions of some of the key sections that should be included in the Instructions to Bidders document:

- **Examination of Site and Requirements:** This section should include language in which the bidders agree they have carefully examined the project site and carefully read the requirements of the bid documents.
- **Use of the Bid Form:** The local government should provide a structured and standardized bid form and require bidders to use it in submitting their bid.
- **Complete the Bid Form:** The document should require bidders to complete the bid form by filling in all blanks, signing the form, initialing corrections, and acknowledging receipt of addenda.
- **Initials on Bid Form:** The Instructions to Bidders should establish expectations for who may initial for last minute changes to the bid prices prior to submitting the bid to the local government. Bidders receive updated and new prices from subcontractors and suppliers up until minutes or seconds before the local government's bid deadline. As the bidder's office communicates those changes to their employee at the bid submittal site, that individual must then make appropriate changes to the bid form, often crossing out one number and writing in the revised dollar amount instead.

Frequently, the Instructions to Bidders notes that "the person signing a bid must initial each change appearing on the bid form." Requiring the person who signed the original Bid Form to also initial any changes on the Bid Form can create a logistical challenge for many bidders. It may result in a protest to a bid if the person delivering the bid (not the signer of the bid) made the last-minute corrections and modifications to the Bid Form based on telephone instructions received from the bidder's office. It is best practice to leave it up to the bidder to determine who may initial for documenting a change. Consider using language similar to the following: "An authorized representative of the bidder must initial each change appearing on the Bid Form."

- **Sealed Bid:** Require bidders to submit their bid in a sealed envelope.
- **Bid Submission Deadline:** This section should reference the bid submission deadline in the Advertisement for Bids, specifying that sealed bids must be submitted to the local government no later than that deadline and at the location noted in the Advertisement for Bids. Put bidders on notice that the local government will not accept bids submitted past the deadline. Identify the clock in the local government's office that is the official clock for determining whether a bid has been submitted prior to the deadline.
- **Method of Bid Submission:** The bid documents should specify whether bids are to be submitted via a hard copy, through some means of electronic submission, or both.

- **Withdrawal and Modification of Bid:** Prior to the bid submission deadline, describe the process by which a bidder may withdraw a bid, modify it, and resubmit it. For more information on this process, see [Section 3: Bidding](#).
- **Bid Validity Period:** Include a statement indicating how long the bidder agrees to hold their bid price as valid after bid opening until award. Ideally, this should be the length of time it will take for your local government to review bids and award the contract. The more days you require the bidders to maintain their bid prices after bid opening, potentially the higher the bid prices will be. This occurs because the bidder does not have contractual agreements with their subcontractors or suppliers until they are awarded a contract by your local government. There is the risk subcontractors and suppliers may increase their bid prices making it harder for the bidder to guarantee their bid price. Bidders may include a larger contingency in their bid price for a longer bid guarantee period. Thus, for example, a bidder may include a higher contingency if they are required to guarantee their bid price for 120 days versus only guaranteeing their bid price for 30 days.
- **Pre-Bid Meeting:** If a pre-bid meeting has been scheduled, this section should direct the bidders to the date and time of the meeting as specified in the Advertisement for Bids.
- **Bid Guarantee:** The Instructions to Bidders should describe the acceptable forms of a bid guarantee, the amount or percentage, and that bids not accompanied by an appropriate bid guarantee may be rejected as non-responsive.
- **Bid Evaluation Process:** Include language addressing non-responsive bids, multiple bids submitted by the same contractor, unbalanced bids, and tied bids. For more information on these topics, see [Section 3: Bidding](#).
- **Waiving Immaterial Irregularities:** Include language that the local government may waive immaterial irregularities in the bid as an informality. Material irregularities may not be waived, but such bids will be declared non-responsive. For more information on these topics, see [Section 3: Bidding](#).
- **Correcting Bid Prices:** Include language that the local government will check the math on all unit price contracts to ensure the estimated quantities multiplied by the unit price is accurate, and the summation of the extended unit price amounts is accurate. This section should note these mathematical corrections will constitute the new bid amounts. For more information on these topics, see [Section 3: Bidding](#).
- **Claim of Error:** Describe the process for a bidder to submit a claim of error after bid opening for a mistake they have made in their bid price. Include the deadline for submitting a claim of error, the documentation to be submitted for review by the local government, and that acceptance of a claim of error effectively permits the contractor to withdraw their bid and be relieved of their obligation for the bid. For more information on these topics, see [Section 3: Bidding](#).
- **Bidder Responsibility:** Describe how the local government will evaluate the responsibility of the low bidder, and when the low bidder and other bidders will need to submit documentation demonstrating they meet established responsibility criteria included in the bid documents. For more information on these topics, see [Section 3: Bidding](#).
- **Contract Award and Execution:** In this section, describe the length of time after award the bidder has to sign the contract and provide the required payment and performance bonds and evidence of insurance. Note that failure to execute the contract within the specified time may result in the local government collecting the amount of the bid guarantee. For more information on these topics, see [Section 3: Bidding](#).

BID FORM

The bid form should be clear regarding the different types of prices that may be requested and could include base bid (lump sum), unit prices, additives, deductives, alternates, and/or bid allowances.

When using multiple types of bid pricing, be sure to be very clear on what is included and how you will evaluate each item. Lack of clarity on this portion of the bid form can lead to non-responsive bids and/or bid protests.

Definitions

A **lump sum** (base bid) is the total amount, or single value, of a bid. The lump sum represents all costs for the project, including taxes and all other bid amounts, if any.

A **unit price** is a bid item that represents the cost of a particular scope of work, good, material, or equipment that will be paid as the bid item is used and cost incurred. A unit price can have several calculation options like per hour, per linear foot, or similar. A unit price includes fixed cost, overhead, labor, material, and tax, to use the bid item.

An **additive bid** is an additional bid item(s) or body of work the local government may award if there is sufficient funding for it. The scope of work for an additive comprises work that isn't critical for the project, but which allows the local government to bring the bid amounts within budget without having to re-advertise the project. In other words, the project could be completed without the additive work being performed.

A **deductive bid** is a bid item identified to be removed, or deducted, from the project and award in case the base bid is over the budget amount.

An **alternate bid** requests a price for an alternate material or method of construction that is different from what is included in the base bid.

For alternate bids, it is important to note in the Instructions to Bidders and on the Bid Form that your local government wants the bidders to provide the differential price between the cost included in the base bid and the cost to provide the Alternate Bid work. If you don't specify that you want the differential price, you may get bidders submitting bids on an unequal basis. Some will interpret that you want the differential price, while others may include the complete price of the Alternate Bid, thereby double charging for the work (some cost in the base bid and all costs in the Alternate Bid).

Sometimes, a local government may choose to include a **bid allowance** for an item of work that is difficult for contractors to price because of unknown risks. Without the use of a bid allowance, bidders may choose to not bid the project because of the risk, to bid high to cover for the unknown risk, or to bid low hoping the risk doesn't materialize. The use of a bid allowance helps equalize the bidding pool. Agencies should use bid allowances sparingly as it essentially removes the item from competitive bidding. The work covered by a bid allowance is typically paid by the local government to the contractor based on actual costs (time and materials) and thus requires the local government to maintain a system to monitor and track the expenses for the contractor performing the work.

Prices in Words vs. Numbers

It is a best practice to only request bid prices in numbers and not words. However, if the bid form requests both words and numbers, it should specify which will prevail in the event of a conflict. The most common practice is for words to prevail over numbers.

Estimated Quantities

This section should describe that any quantities for unit items in a bid are estimates only for the purposes of bid comparison, that the local government does not guarantee the quantities, and the local government will only pay the contractor based on actual quantities, and not the estimated quantities.

Miscellaneous Costs

The Instructions to Bidders should require the bidders to include in their bid price the cost for performing the entire work described in the bid documents including, but not limited to, labor, equipment, materials, filing fees, insurance, bonds, overhead and profit.

No Bidder-Proposed Alternates

The bid form should not include an option for alternate bid items to be proposed by bidders as local government needs to be able to compare bid prices on an equal basis to determine the low bidder.

Certifications

The bid form should include various certifications including, but not limited to, the bidder affirming they have read and understand the bid documents. Consider combining different forms that require separate signatures into the bid form section relating to various certifications.

Signature

The bid form should:

- Require the bidder to sign the bid form.
- Require, where possible, that the signature on the bid form is the only signature (other than on a bid bond) that the bidder needs.

Differential Bid Price for Alternates

If the local government is requesting alternate prices, the bid form should be clear that the bidder is to include the differential price between the work in the alternate and the work included in the base bid.

Bid Allowance Price

The bid form should include the dollar amount of any bid allowance included by the local government. The following chart shows a potential structure for how the bid allowance might show up on a unit-price bid form:

#	Unit Description	Estimated Quantities	Unit of Measure	Unit Price	Unit Price Extension
1	Asphalt Paving	100	SY		
2	Concrete Paving	250	SY		
3	Allowance for removal of contaminated soil				\$25,000.00
Total Bid Amount					

ADDENDA

It is not uncommon in public works procurement that during the course of your bidding period it becomes necessary to modify the bidding documents or terms of the contract. There are many reasons why these changes need to occur. The local government needs to answer all questions and clarify terms and conditions so that bids come in as easily to be compared as possible. However, all changes, clarifications, questions and responses need to be provided to all bidders or plan holders to ensure all bidders have a “level bidding field.”

An addendum is a document issued by the local government to amend the bid documents issued for a particular project by either adding, clarifying, or deleting material from the bid documents. Multiple addendums are referred to as “addenda.” Addenda are binding as though the modifications had been issued when the documents were originally sent out.

Broadly, there are three main methods of communicating changes in addenda:

- **Narrative Description:** This method includes a narrative description of what language (and in what specific sections) is being changed by an addendum. It follows a pattern something like the following: “Section 123 is changed to read as follows:_____.” This method requires the bidders to go to the bid documents and compare the original language with the revised language in the addendum. Because bidders are not well-known for carefully reading the bid documents, this way of describing changes has its shortcomings.
- **Replacement Documents:** If there are multiple changes in any document or page, under this method, the addendum re-issues the applicable document or page. This method also required the bidders to go to the bid documents and compare the original language with the revised language in the newly issued documents. It is in the local government’s best interests to help facilitate clarity among the bidders regarding what constitutes the revised bid documents.
- **Track Changes:** Under this method of communicating changes to the bid documents, the local government issues the change using the track changes feature where additional language is underlined and deleted language is crossed out. The benefit of using this method, either for a sentence, paragraph, page, or document is it enables the bidders to visually and clearly see what the original language was and what it has been changed to. It also provides a structured format for the local government to ensure the change is being communicated based on bid document language.

Information-Only Content

Sometimes, addenda are used to communicate to bidders information that does not specifically change the bid documents. Including certain information in addenda, however, provides a clear method for disseminating the information to bidders. For example, if the local government wants to send all bidders a list of attendees at the pre-bid meeting, this could be communicated via an addendum. However, it is important that the language of the addendum makes it clear that such information does not change the bidding documents but is issued as a matter of convenience for bidders.

Distribution of Addenda

The following are key issues to consider in distributing addenda to bidders:

- **Notify All Bidders:** Review your procedures to ensure that all potential bidders are notified of changes.
- **Make it the Bidder's Responsibility:** If your local government posts changes to your website or to a third-party website, consider placing the responsibility on the bidders to check the website prior to submitting a bid. This can help avoid a dispute where a bidder claims they didn't know about the addenda.
- **Verify Addenda Sent:** Have a method to verify that addenda notification has been sent to all potential bidders.
- **Check Software Notification:** Test and verify that software upgrades are working properly and that all bidders are being notified of addenda.

Timeliness of Issuing Addenda

Bidders need to receive any addenda in sufficient time to review it and make appropriate changes in their bid price.

Some specifications state a number of days prior to the bid submission deadline beyond which the local government may not issue addenda. Generally, this practice may negatively constrain the local government and disrupt the project schedule. Instead, the decision of whether to issue addenda without extending the bid submission deadline should be a case-by-case decision based on the nature of the changes in the addenda and how much time bidders may need to read and understand it and make appropriate changes to their bid prices.

For grant-funded projects, follow any grant requirements for approval of addenda and for the latest time when addenda may be issued before the bid submission deadline.

BIDDER'S SUBCONTRACTOR LIST

Public works contracts that are expected to cost \$1 million or more 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. See [RCW 39.30.060](#).

CONTRACT

It is a good practice to assess what form of contract is may be most appropriate for the scope and size of the work and how your local government manages the work.

Some agencies use a longer version of a construction contract that incorporates the provisions that are typically included in a General Conditions document that describes overall management of the project. This type of contract can be harder to manage and does not make as clear what the important and project-specific items are in the contract, but for more complex projects this may be the best form.

There is another form, a shorter version of the contract. In a short version of the contract, the following are some of the key subjects to be addressed:

- Project name and number.
- Introductory paragraph naming the parties to the contract.
- A clear and complete, detailed scope of work.
- Contractor's agreement to perform the work specified in the contract documents and bear all expenses necessary to complete the work.
- Reference the component portions of the contract documents, including the plans and specifications, the dates associated with each of these documents, and a listing of the addenda issued for the project with the date of each.
- Contract amount including breakdown of additives, alternates, bid allowances, sales tax (if applicable).
- Required substantial completion date and number of days allowed for contractor to complete the work.
- Daily liquidated damage amount for contractor's failure to reach the required substantial completion date in a timely manner.
- A description whether there are local government furnished materials that the contractor is responsible for installing.
- Signature block for authorized signature for both local government and contractor.
- Other legal provisions as identified by your local government's attorney.

Use of Purchase Order for Public Works Projects

A purchase order is a contractual agreement and is sometimes used for public works construction projects. However, purchase orders generally have contractual provisions more appropriate for the purchase of goods, supplies, materials, and equipment. Such provisions do not adequately protect a local government when contracting for the complexities and risks of a construction project. Additional provisions may be added to the purchase order or appropriate documents attached as referenced documents that do protect the local government on a construction project.

GENERAL CONDITIONS

Often referred to as the "front-end" or Division 0 and 1, the General Conditions document describes how the project will be managed during construction and includes important contractual provisions.

The following is an outline of some of the subjects that are often addressed in a General Conditions document:

General Provisions

- Definitions
- Order of Precedence (in the event of a conflict between component elements of the contract documents)
- Execution and intent

Bid Procedures and Conditions

- Responsiveness and responsibility
- Estimated Quantities
- Allowances
- Line Items
- Examination of the Bid Documents and the Project Site
- Form and Style of Bid
- Addenda
- Bid Guarantee
- Bid Submittal Process and Items to Include
- Modification or withdrawal procedures
- Alternates, Additives and Deductive
- Public Bid Opening
- Bid Evaluation Process
- Irregular Bids
- Disqualification of Bidders

Award of the Contract

- Consideration of Bids
- Award of the Contract (process)
- Required Documents to Establish the Execution Date
- Failure to Execute the Contract
- Return of the Bid Guarantee
- Protests

Non-discrimination In Contracting and Employment

Insurance and Bonds

- Contractor's Liability Insurance and Coverage Amounts
- Insurance Coverage Certificates and Endorsements
- Payment and Performance Bonds
- Builder's Risk Insurance
- Subcontractors (insurance requirements)

Subcontracting

- Request to subcontract/sublet
- Flow-down provisions
- Subcontractor responsibility
- Subcontractor management
- Tracking and Reporting
- Diverse Business Inclusion

Time and Schedule

- Progress and Completion
- Progress Schedule
- Substantial Completion
- Local Government's Right to Suspend the Work for Convenience
- Local Government's Right to Stop the Work for Cause
- Delay
- Notice to Local government of Labor Disputes
- Damages for Failure to Achieve Timely Completion (e.g. Liquidated Damages)

Specifications, Drawings, and Other Documents

- Discrepancies and Contract Document Review
- Project Record
- Shop Drawings
- Organization of Specifications
- Ownership and Use of Drawings, Specifications, and Other Documents

Performance

- Control of the Work
- Authority of the Owner’s Representative(s) and any authorities having jurisdiction (inspections, observations, etc.)
- Submittals
- Contractor Control and Supervision
- Permits, Fees, and Notices
- Patents and Royalties
- Prevailing Wages
- Hours of Labor
 - Apprenticeship (if applicable/required)
- Nondiscrimination
- Safety
- Operations, Material Handling, and Storage Areas
- Prior Notice of Excavation
- Unforeseen Physical Conditions/Differing Site Conditions
- Protection of Existing Structures, Equipment, Vegetation, Utilities, and Improvements
- Layout of Work
- Material and Equipment
- Availability and Use of Utility Services
- Tests and Inspections, general
- Correction of Nonconforming Work
- Clean Up
- Access to Work
- Other Contracts
- Warranty
 - Construction (standard of care)
 - After Completion
- Indemnification

Payments and Completion

- Contract Sum

- Schedule of Values
- Application for Payment
- Progress Payments
- Payments Withheld
- Retainage and Bond Claim Rights
- Payments to Subcontractors
- Substantial Completion
- Prior Occupancy
- Final Completion, Acceptance, and Payment

Changes

- Change in the Work
- Change in the Contract Sum
 - Equitable Adjustments/entitlements
- Change in the Contract Time

Claims and Dispute Resolution

- Claims Procedure
- Alternative Dispute Resolution
- Claims Audits

Termination of the Work

- Termination by Local Government for Cause
- Termination by Local Government for Convenience

Miscellaneous Provisions

- Governing Law
- Successors and Assigns
- Meaning of Words
- Rights and Remedies
- Contractor Registration
- Time Computations
- Records Retention

- Third-Party Agreements
- Antitrust Assignments
- Headings and Captions

Amendments to General Conditions

Project specific amendments or changes to the General Conditions go by a variety of names including special provisions, special conditions, supplemental conditions, supplementary conditions, modifications to General Conditions.

The purpose of a separate document that amends the General Conditions is to maintain the standard General Conditions and not require local government staff and contractors to re-read the General Conditions for each project to identify what may have changed. It also makes it easier to ensure that changes to the General Conditions for one project are not accidentally carried over to another project.

TECHNICAL SPECIFICATIONS

Specifications, or technical specifications, are the narrative descriptions to the contractor on how to construct a project; as well as what to use in construction. It depends on the type of work and other factors such as permitting requirements. Technical specifications should describe the work of the project in detail, so the contractor understands what materials, products, and equipment to use, how to perform the work and the standard of performance both the constructed and installed elements of the project is required.

Development and Review of Specifications

Technical specifications for a public works construction project may be developed either by local government staff or by outside consultants, usually an architect or engineer.

It is important for the local government to review the drawings and specifications prepared by outside architects and engineers to ensure they are clear and reflect the local government's objectives and project requirements. If the local government is developing its own drawings and specifications, it is important to review these documents for internal consistency, clarity, meeting objectives, and fairness in the bidding process.

Advantages of Clear Specifications

Spending the time before bidding to ensure that the scope of work and requirements are clear helps ensure that all bidders can submit realistic bids, and that the low bidder will be successful on the project. Clear contract documents are also important for holding the contractor accountable for performing the work without unnecessary change orders. The clarity and completeness of the technical specifications and drawings helps drive the extent and nature of change orders:

- **Same Assumptions:** Bidders may bid based on different assumptions if the documents are not complete, thus negatively impacting the integrity of the public bidding process.
- **More Work Competitively Bid:** Significant change order amounts that are necessary because of faulty specifications increases the dollar amount of work that is not competitively established, since all change orders are negotiated.

- **Defining Project Objectives:** Without clear specifications, the local government may not meet its project objectives since they are not defined in detail.
- **Disputes and Litigation:** Unclear or incomplete specifications may lead to potential disputes and litigation during the bidding process and during construction.

Design versus Performance Specifications

Generally, there are two broad categories of specifications: design and performance. In a design specification, the contractor is directed to comply with specific details and directions. Failure to construct the project in accordance with the specifications puts the contractor at risk for not complying with the design specifications.

However, if the contractor follows the design specifications and there are defects or insufficiencies in the design, the contractor is not liable. This concept is embedded in a well-established court case that was ruled on by the United State Supreme Court in 1918 ⁷. It is known as the [Spearin Doctrine](#). Here is a relevant excerpt from the court's decision where the court ruled that:

if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, to inform themselves of the requirements of the work, ... and to assume responsibility for the work until completion and acceptance.

With a performance specification, on the other hand, the details are left up to the contractor as long as their method for completing the work meets certain outlined performance requirements. The contractor is liable for failure to construct the project meeting the performance requirements.

Proprietary and Sole Source Products

In designing a project, the architect or engineer may occasionally require the use of a specific product as a sole source, or a few products as limited source. There are many reasons why such specificity is necessary, including ensuring the product is consistent with other products used in the local government's systems.

Limiting competition for products embedded in a public works specification should be carefully documented in writing to ensure that the product is, in fact, a sole source. The justification for a sole source product should describe the research that was conducted to locate other products that meet the local government's needs and the reasons why limiting competition to a specific product is necessary.

The risk exposure to a local government for using sole source products in a specification comes from manufacturers of other products or from an auditor who may argue that the local government is not getting the cheapest price for the product in the project.

Specialty Reports and Studies

Often specialty reports and studies are included as part of the broader specifications. For example, the specification may include a geotechnical report with the results of soil borings documenting the condition of the soil.

⁷ *United States v. Spearin*, 248 U.S. 132

PLANS

Depending on the scope, scale, and nature of a public works project, bidding documents may need to include technical plans graphically depicting the work. Plans are usually prepared by licensed professionals hired under a separate professional services contract to prepare plans and specification for a public works project.

CONTRACT MANAGEMENT FORMS AND INFORMATION

Depending on how your local government intends to manage a public works contract during construction, it is common to attach administration/management forms/cover pages to your contract documents. Some typical contract management forms are:

- Change Order Form
- Request to sublet/subcontract contract form and/or request to remove a subcontractor
- Prevailing Wage Rates
- Request for Information Form
- Permits

Developing Bid and Contract Documents

Clear and complete bid and contract documents are foundational for success in managing public works construction projects. These documents must comply with applicable laws and regulations as well as reflect the local government's practices and values. Do not allow any provisions in your contracts that you do not understand or do not intend to enforce. If legal or funding requirements are not clear to you, spend time prior to bidding with your attorney or consultant writing provisions in the simplest and clearest way possible.

Some local governments use previously adopted bid and contract documents from either another public agency local government, from an industry association, or as prepared by the architect or engineer. Other agencies develop their own set of template bid and contract documents.

Regardless, it is important that the documents used are appropriate for your local government type and culture, that they protect your local government, and that they are in compliance with applicable laws. You should involve your attorney in this process and/or hire a consultant to help you evaluate, adapt, or develop your own bid and contract documents.

In developing bid and contract documents, the following are some key principles to keep in mind:

- **Define Common Terms:** Commonly used and significant bidding and contractual terms should be clearly defined to ensure consistent meaning of those terms throughout the documents. Often, defined terms are capitalized, and the definitions section of the documents should note that capitalized terms are defined terms. If the documents include abbreviations or acronyms, it is important to spell them out at least once or have them included in a definitions section.
- **Use Headings:** Use headings for most paragraphs to improve the readability and usefulness of the documents. Without such headings, bid and contract documents often become too cumbersome to understand and effectively use.
- **Use Headers and Footers:** Use headers and/or footers to tie the documents together. The reader should know what section of the bid and contract documents a particular page is in. Common elements of headers and/or footers include the section number of the document, title of the document, and page number, expressed in a "page x of y" format.
- **Maintain Project Name Consistency:** The project name should be consistent between the plans and specifications and within different sections of the specifications. The project name should be the same name as appears in the actual contract signed by both parties. Project name consistency is important in the event of a contractual dispute about the contractor's responsibilities.
- **Write in Active Voice:** In writing or reviewing technical specifications or scopes of work for a construction project, ensure it is written in active voice and not passive voice. The active voice is clearer in placing responsibility on the contractor to perform the work, while the passive voice leaves some ambiguity about who is responsible for the work. For example, the passive "concrete pavers shall be placed" is more ambiguous about who is responsible for performing the work than is the active voice of "the contractor shall place the concrete pavers."
- **Maintain Internal Consistency and Avoid Repetition:** In developing bid and contract documents, it is important to ensure internal consistency of the various provisions. Each subject matter should be addressed just once in the documents. This is important to avoid writing conflicting statements that create

ambiguity about the local government's intent. In order to avoid repetition, it is important to have a crisp and concise organizational structure for the documents.

- **Provide Clarity:** The bid and contract documents should be clear and simple to bidders, the local government, and outside parties.
- **Keep Technical Specifications Technical:** Sometimes, architects and engineers include in the technical specifications (scope of work) subject matter that the local government has already addressed in standardized documents such as the General Conditions or Contract. Such designer-generated provisions often end up being in conflict with the standardized practices of the local government.
 - **Review Each Project:** Review project specifications for each project prior to advertising to ensure the technical specifications do not include repetitive or contradictory information to what is included in the local government's standard contract provisions.
 - **Hold Designer Accountable:** Educate your architects and engineers, and contractually hold them responsible for developing technical specifications that do not address bidding and procedural issues about how the local government operates and that are included in the local government's standard bid and contract documents.
- **Make Contractor Responsible:** Sometimes, architects and engineers include language in the technical specifications noting that a particular subcontractor, supplier, installer, or manufacturer is responsible for a particular body of work. While this language may be convenient for the reader, and while it may reflect who will actually perform certain segments of work, it risks diluting the contractor's legal responsibility for the entire project and their management of subcontractors and suppliers. In other words, the contract is between the local government and the contractor who is legally responsible for performing the entire project regardless of what other parties they contract with to perform certain elements of work.

A local government can review the technical specifications to ensure such language is not included. However, this is time-consuming and there is the potential that some language may be missed. A more reliable strategy is to include language in the documents (General Conditions) along the following lines:

Any references included in the contract documents that purport to address the responsibilities of work by crafts and specialty or trade contractors or subcontractors, are included only for the convenience in preparing and reading the contract documents, and do not in any way limit the full responsibility of the contractor to provide a complete installation and be responsible for all of the work under the contract.

- **Think About Disputes:** The bid and contract documents should be developed with potential disputes in mind. In other words, they should cover worst case scenarios as a tool to best protect the local government's interests.

Format and Structures of Contract Documents

There are a variety of potential structures for organizing bid and contract documents, developed by various industry groups or public agencies. The desired form may vary depending on the type of work and the target audience. For more information on these public works contracting forms, see [Section 2: Competition](#).

Training

Local government staff and contractors need to be educated on the standardized and adopted bid and contract documents. Without a working knowledge of the documents to govern the actual management of public works construction projects, the local government effectively has no procedures. Thus, regular training of both project and construction management staff as well as of contractors is important to ensure smooth public works construction projects.

SECTION 5: IMPLEMENTING A PUBLIC WORKS CONTRACT

This section discusses best practices for awarding and administering a public works contract. There could be various roles that contracting staff could take during construction. This section explains some common elements of public works contract administration.

Award

After the apparent lowest responsive bid from a responsible bidder is identified, the local government will need to notify the bidder and request any required bond(s) and insurance.

PAYMENT AND PERFORMANCE BONDS

A **payment bond** is the guarantee of a surety, in the event the contractor fails to pay subcontractors, suppliers, and construction workers, that the bonding company will make payment to these parties for work performed.

A **performance bond** is the agreement of the surety that the contractor will faithfully perform and complete the project in accordance with the contract documents.

By providing a payment bond and performance bond, the surety agrees to all the provisions of the contract documents including the contract amount, scope of work, time of performance, terms and conditions, and warranty period.



Practice Tip: Washington state law requires the contractor to provide bonding to ensure their performance of the work and the payment of subcontractors and suppliers. Bonding can be provided as two separate bonds, one for payment and one for performance, or one combined payment and performance bond. Local rules often require bonding to cover 100% of the contract amount. See [chapter 39.08 RCW](#). The cost to bond a project is typically a small percentage of the estimated contract value and typically is not impacted by the need to provide one or two bonds. Talk with your legal counsel as to the form and approach for bonding that is required and sufficient for your local government type and projects.

Payment and performance bonds should be received, reviewed, and approved by the agency prior to the agency signing the contract. The agency picks up liability as soon as the contract is signed, and it is important that the legal protections of the bonds be in place from the moment of contract execution.

If a local government fails to obtain the required bonds, it may represent a violation of applicable laws. In addition, the failure to obtain the bonds may result in an audit finding that comes with a host of negative consequences.

The contract award amount, and thus the amount of the bonds, should include any additives or alternate bid amounts that are exercised at award and included as part of the contract amount.

Bonds and Change Orders

The best practice is to include language in both the bonds and the contract documents in which the amount of the bond will automatically increase with each change order without obtaining additional approvals from the surety.

Some agencies require the surety to approve each change order to increase the amount of the bonds, while others require surety approval only for each change order over a specified amount or percentage. Neither of these options is advisable as both cause delay in executing the change orders and the project schedule.

Signs of a Troubled Contractor

There are a number of clues that indicate a contractor may be under financial stress. The surety that issued the performance bond for the project can be an important ally for the local government when there are performance issues with the contractor.

The bonding company, by issuing the performance bond, has agreed to stand behind the contractor and guaranty to the local government that the contractor will successfully perform the project in accordance with the contract documents. Local governments that are experiencing performance problems with a contractor should make it a practice to notify the bonding company so they can work with the contractor to resolve the performance issues.

Performance issues may include, but are not limited to poor workmanship, inadequate resources committed to the project (labor, equipment, materials), poor schedule management, inquiries or claims from subcontractors and suppliers complaining they have not been paid by the contractor, or default.

Enforcing a Performance Bond

If the contractor defaults on the project or the agency terminates the contract, it is appropriate for the agency to contact the surety to collect on the bond so that unfinished work can be performed. There are three basic options for how the surety may choose to fulfill its performance obligations under the performance bond:

- 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 local government for the costs to complete the project. In this scenario the agency would hire a new contractor by bidding the remaining work.

If the contractor is not performing and your agency decides to terminate the contract, it is important to follow the termination notification requirements in the contract. This typically includes a written notice to the contractor with a copy of the termination notice to the surety.

Failure to follow these requirements may compromise your ability to collect from the performance bond. The surety can argue that your failure to notify them in a timely manner and in writing compromised their ability to mitigate their potential losses on the project. Stay in close communication with the surety as contractor performance problems are developing as they can apply pressure on the contractor or provide financial resources to assist the contractor before you have to terminate the contract for non-performance.

Release of Bond

Some contractors request that public agencies release the payment bond and performance bond after work has been completed. However, it is preferable to allow the terms of the bonds to determine their enforceability. For example, releasing the bonds prior to the end of the warranty period eliminates the payment and

performance protections during this period of time. In addition, if there are any outstanding issues related to the bonds, releasing them may eliminate the protections afforded by them.

Likewise, it is not advisable to return the bonds to the contractor as they are a matter of public record. If the contractor needs evidence for their surety that the work has been completed, provide them with a copy of the notice of final acceptance with a statement that the warranty period may still be in effect.

Checklist

The following is a short checklist of key items to review when receiving payment bonds and performance bonds:

Has your agency been named as the Obligee or protected party on the bonds?

Is the correct project name and number on the bonds?

Is each bond amount for 100% of the awarded contract amount?

Is the surety authorized to do business in the state?

Do the bonds provide for change order increases in the contract amount without additional surety approval?

Have the bonds been signed by both the surety and contractor? Without both signatures, the bond may not be enforceable.

Are the bonds accompanied by an up-to-date signed Power of Attorney?

RETAINAGE BONDS

Retainage is typically a percentage of the contract amount that is withheld by the owner from each progress payment made to the contractor. The typical amount is 5%, although this percentage may vary based on applicable state laws or funding requirements.

The purpose of retainage varies depending on applicable laws and requirements. In general, retainage is a tool to ensure various parties are paid appropriately. These parties may include subcontractors, suppliers, construction workers, various government agencies for payment of taxes, or the local government to ensure performance by the contractor.

However, some contractors may prefer to receive the full payment and submit a retainage bond instead.

A retainage bond is a guarantee by a surety to meet any claims filed against the retainage in the same manner as if the local government had withheld 5% of each progress payment earned by the contractor.

The use of retainage bonds is regulated by state law (see [RCW 60.28.011](#)) and may be governed by funding source requirements.

A retainage bond is relatively inexpensive for a contractor to obtain from their surety. Typically, the contractor will be charged about 1% of the amount retained. In other words, on a \$100,000 contract, \$5,000 (or 5%) represents the amount of the required retainage. The cost of bonding the \$5,000 would be approximately 1% or \$50. For this cost, the contractor would then receive 100% of each progress payment rather than just 95%.

Contractors often like to submit retainage bonds because they help manage the contractor's cash flow and ability to pay bills in a timely manner.



Practice Tip: In order for a retainage bond to cover the increased cost of the project due to change orders, the bond should include specific language authorizing an automatic increase in the amount protected by the bond. In describing the amount of the retainage bond, the following is language that increases the amount of the retainage bond due to change orders:

“...in the penal sum of _____ Dollars (\$_____), plus 5% of any increases in the contract amount that have occurred or may occur due to change orders, increases in the quantities, or the addition of any new item of work.”

WARRANTY OR MAINTENANCE BONDS

A warranty or maintenance bond is a specific bond that may be required by the local government to cover payment and performance issues during the warranty period for the project.

Typically, the payment and performance bonds cover these issues during the warranty period. However, if there is an extended warranty period required – usually more than one or two years – the surety may refuse to honor the terms of the payment and performance bonds. The agency would only be protected with a warranty or maintenance bond for an extended warranty period.

Thus, it is important for each project for the local government to determine whether an extended warranty period is necessary and, if so, whether to require in the bid documents a requirement for the contractor to provide a warranty or maintenance bond for the warranty period of the project.

COLLECTING OR RETURNING BID BONDS/GUARANTEES

There is only one condition in which a local government may collect on the amount of the bid bond from the surety. This occurs when the agency has awarded the contract to a bidder, and the bidder refuses to execute the contract and provide the required payment and performance bonds and evidence of insurance. If the bidder fails to enter into a contract, the local government should contact the surety to collect on the bid bond. Often, it is important to include the agency's attorneys in this collection effort.

In the State of Washington, local governments have requirements for returning or releasing bid bonds to the bidder. Current practice is for bonds to be issued with an expiration date, so there is no need to return any physical document. It is recommended to keep a copy of all bonds for audit purposes and as a public record to document the bidding process.

GENERAL BONDING ISSUES AND TIPS

Power of Attorney

The Power of Attorney is a separate document that should accompany any bond (bid, payment, performance, retainage, warranty). The Power of Attorney is the evidence that the bonding company has authorized a local “attorney-in-fact” to sign the bond and obligate the surety. Without a valid Power of Attorney, a local government doesn’t know whether the bond is a legitimate bond and that the surety will stand behind the terms of the bond.

In reviewing a Power of Attorney document, check that the name of the attorney-in-fact signing the bond is included on the list of individuals listed on the Power of Attorney as authorized to bind the surety. In addition, check that the date of the signature by the actual bonding company is current or within the last six months. An older date may reflect that the attorney-in-fact is no longer authorized to bind the surety by issuing bonds.

Detecting Fraudulent Bonds

Some contractors have been known to fraudulently develop and doctor bonds. Public agencies should carefully review the bonds to note whether there are any irregularities or inconsistencies in the bonds. If the local government knows the good reputation of the contractor, review for fraudulent bonds becomes less important than if the contractor is an unknown quantity. The review process for the bonds may include independently verifying with the bonding company whether the bond is legitimate and has been issued by them through an authorized Power of Attorney.

INSURANCE

Bonds guarantee certain actions of a contractor; insurance, on the other hand, protects the contractor (and the local agency) against third-party claims for events such as property damage or personal injury.

There are a variety of different types of insurance policies that are appropriate to require contractors to carry on construction contracts. It is important to note that contractors should carry various insurance coverages depending on the type and scopes of work of the project; often specific construction risks are excluded from general coverage.

Below is a short summary of some of the typical types of insurance coverage for a construction project.

Insurance Type	Description
General Liability (commercial)	Protects the contractor (project) from claims of bodily injury or damage from another person or business (typically \$1-2 million).
Excess or umbrella	Provides general liability for values above the initial policy.
Products Completed Operations	Covers liability for property damage and/or injury once the project is complete.
Automobile Liability (commercial business)	Covers the financial responsibility if the contractor, subcontractor, or employee of either is at fault in an accident and people are injured while traveling to and from the project, performing work of the project.

Insurance Type	Description
In-transit pollution	Coverage if the contractor or subcontractor are transporting chemicals or other pollutants to and or from the project site. Pollutants are not just hazardous.
Heavy Machinery/Equipment (In-land marine)	If not part of a contractor's general liability, coverage that allows the contractor to replace damaged or stolen equipment and/or coverage that would protect in the event the equipment is damaged while operating it. (Not typically for leased equipment.)
Builder's Risk	Coverage specific to building/facility during the course of construction. Parties listed on the policy are insured against damage or loss to the structure from things such a fire, floods, wind, etc.
Pollution liability (environmental)	Coverage that helps protect against unexpected pollution exposure that causes harm or injury (e.g., dust exposure leading to respiratory injury, etc.).
Explosion, Collapse, Underground (XCU)	Coverage that helps protect in the event of damage or injury that results from activity such as an explosion, underground collapse, or similar; typically, if the work involves digging or excavation more than 4 feet deep.
Workers Compensation (Industrial Insurance)	Provides wage replacement and medical benefits to workers injured on the job. Requires separate coverage under Titles 50 and 51 RCW.
Longshore (harbor workers) (RCW 48.22.070)	Provides wage replacement and medical benefits to workers injured on the job while working near or over navigable water (bridges, docks, piers, etc.).

Local governments should work with their risk management professionals and attorneys to develop standard amounts of insurance to require on construction projects for each of the types of insurance to be required.

However, the amounts should be evaluated on a project-by-project basis to ensure they are appropriate given the size and risk of the project. Insurance coverage is not like bonding and assigned based on project value, it is assigned based on how likely the project is to receive a claim from a third-party for injury or how likely the coverage will be needed (the risk). Typical insurance is \$1-2 million per occurrence.

However, the local government should also include a provision in the contract that the amount of the contractor's liability is not limited by the amount of insurance available and/or paid out.

Documentation/Evidence of Insurance Coverage

It is one thing to require the contractor to obtain and carry certain types of insurance in specific dollar amounts. However, it is important to ensure the documentation you obtain and have on file is a sufficient demonstration of the contractor actually having that insurance coverage.

Agencies should receive, review, and approve evidence of insurance from the contractor prior to the agency executing a contract. The agency picks up liability as soon as the contract is signed by both parties.

Many insurance brokers provide a certificate of insurance (COI) to contractors as a demonstration that they carry the required types and amounts of insurance. The most common insurance certificate form is called an “ACORD” certificate. However, a certificate is not binding. To ensure the policies protect the local government, you need to hold applicable Schedules, Forms, and/or Endorsements as an additional insured of a contractor’s policy. You need to see the words “by written contract” so you have coverage if a claim is filed.

Additional Insured Endorsement

An endorsement is an amendment to an insurance policy. Public agencies are most concerned that in the event of an accident, the contractor’s insurance policy will financially protect the agency without any cost to the public. While the contractor is the named insured, public agencies should be named as an additional insured.

The best documentation to demonstrate the local government has been named as an additional insured to the contractor’s insurance policy is to receive an additional insured endorsement. This endorsement can be either agency-specific and include the name of the agency, or it may be a blanket additional insured endorsement in which the insurance company agrees to cover as an additional insured any party who, by contract with the contractor, requires they be named as an additional insured. Either an agency-specific or blanket additional insured endorsement is sufficient evidence that the local government is protected under the contractor’s insurance policy.

Primary and Non-Contributory Endorsement

Public agencies should also require in the bid and contract documents and subsequently obtain a primary and non-contributory endorsement to the contractor’s insurance policy. The purpose of this endorsement is to document that in the event of a claim, the contractor’s insurance will be primary in responding to the claim, and the agency’s insurance will not contribute to paying for the claim.

Name of Insured

The contractor’s name as the named insured on certificates of insurance and endorsements should be the official and legal name of the contractor, and consistent with the name on the contract between the contractor and the local government.

Monitoring Insurance Coverage

It is important to establish and maintain a system in which you monitor the expiration dates for insurance coverage for contractors. Most insurance policies renew annually, so when projects are active through policy renewal periods a local government will need to collect updated insurance documentation at least once before the contract ends. Without ensuring you have up-to-date insurance coverage by contractors, your agency may be financially liable in the event of an accident if the insurance has expired and is no longer available to respond to the claims.

Contract Administration

Once construction has begun on the project, the local government must administer a variety of contract issues, including but not limited to, payments, milestone schedules, change orders, dispute resolution, subcontractor tracking, and inspection of work.

PAYMENTS

Perhaps one of the most important construction contract administration functions is making payment to the contractor. Payment procedures should be clear and understandable not just for the contractor, but subcontractors, suppliers and the local agency staff involved. Contract documents should include detailed information on when, how, and the requirements for each payment to be made.

State law regulates how quickly the contractor must be paid and outlines interest penalties for failing to pay in a timely manner (see [chapter 39.76 RCW](#)). A local government may not make any payments under the contract until the contractor has submitted an approved Statement of Intent to Pay Prevailing Wages; the same requirement applies to subcontractors (see [RCW 39.12.040](#)).

Public agencies should be familiar with the law and ensure their internal approval and payment processes are consistent with the requirements of the law.

CALCULATING PAYMENT AMOUNTS

There are several different ways for payment amounts to be calculated, depending on the form of the project.

The most common ways for payments to be made on a construction project are:

Percent Complete Based on a Schedule of Values

A Schedule of Values is a document that lists the value of key items of work. The total of the Schedule of Values should equal the contract amount. The document is used to verify how much work has been completed and how much payment should be released to the contractor. A local government's contract documents should describe the Schedule of Values and how it will be used to make payments.

Unit Prices

Under a unit price form of contract, the total amount of the contract is calculated by multiplying the unit prices bid by the contractor times the estimated quantities. The extended unit prices are then added to develop the total amount of the bid and later contract amount. Each payment application then has verified agreement of how many units of any item was installed in the project during the pay period in question.

Lump Sum

Lump Sum contracts or items are used on public works construction projects where the contractor bids a fixed price (sometimes based on specific unit prices) to perform the work. Regardless of how much time or money it takes the contractor to perform the scope of work, the local government agrees to pay only the Lump Sum amount unless there are authorized change orders. It is therefore important that there be a well-defined scope

of work. When making payments on a lump sum basis it is common to either pay upon completion (of the item or work) or at another milestone completion point (e.g., mutually agreed halfway.)

Time-and-Materials

The local government pays the contractor for the actual cost of labor, equipment, and materials used and agrees to a negotiated hourly rate for labor. This method is often used on public works construction project change orders where such work is often referred to as "force account" work. It is not often used on the original contract except for bid allowances. If using a time-and-materials approach to payment it is best practice to also include a not-to-exceed amount.

APPROVING PAYMENTS

Before approving a payment on an active contract, procurement officials need to verify the following information:

- **Work Performed Compared to the Bid Form.** Payment is not to be made unless local government staff, or representatives, have verified the work was performed or the equipment and materials were used.

Question: Has your local government inspected, verified, and accepted the work that the contractor is billing for? Has the contractor submitted any as-builts or revised construction schedules, as applicable? Are the listed quantities, prices, and/or percentages correct, including any applicable sales tax, freight, or other variables? If billing for actual costs incurred, are there documented invoices supporting the payment request? Have you verified that the math is correct and that the work has not been billed previously?

- **Prevailing Wages and Certified Payroll.** A local government may not make any payments under a public works contract until the contractor has submitted a Statement of Intent to Pay Prevailing Wages that has been approved by the Department of Labor & Industries. See [RCW 39.12.040](#). In addition, contractors are required to file certified payroll reports at least once per month to L&I for all prevailing wage jobs. See [RCW 39.12.120](#). The best practice is for local governments to review these certified payroll reports to verify compliance.

If a local government does not have adequate, tangible evidence that the work has been performed according to the contract requirements, an auditor could construe this as an improper gift of public funds.



Practice Tip: Local governments should inspect work being performed by the contractor on a daily basis to know what the conditions are and to ensure the contractor is performing in accordance with the contract documents. The inspections can be done by agency staff, the project designer, and/or a third-party construction manager or inspector hired to oversee the project.

The inspector should be familiar with the contract documents, including both the technical requirements and the process, and must be able to verify that the work is being performed in accordance with the contractual requirements. The inspector must verify any work before it is covered and should submit a daily inspection report.

CHANGE ORDERS

Any modification, adjustment, or alteration to the price or work of a project during construction is a “change order.” A change order needs to be in writing and both the contractor, and the local government need to agree to the change.

For example, if during construction of a building foundation, additional excavation work is needed to avoid unstable soil conditions, the additional excavation work is a result of a change in conditions, and the added cost to the contractor may be covered by a change order. Conversely, reductions in work may result in a change order that provides a credit to the local government.



Practice Tip: Local government staff should know the requirements of the contract documents, including any dollar threshold signature requirements on changes. Change orders should never be approved for work that is already required in the plans and specifications; and should never be approved for things that aren’t necessary for the successful completion of the project. For more information, see the [State Auditor’s Office Best Practices for Change Orders](#).

Payment Issues

The following payment-related issues on change orders are an important part of the construction management function:

- **When to Pay.** Do not pay a contractor for change order work until the change order has been officially approved and executed by both parties. A change order is an amendment to the contract. To pay without such an amendment is to pay for work not authorized. This could be the subject of an audit finding.
- **Waiver.** Your contract documents and change order template should both contain language noting that the contractor is waiving their rights to make a claim in the future for additional money or time for the work described in the change order.
- **Pricing.** An agency’s contract documents should describe the various methodologies under which change order pricing is determined. Regardless of which method is used for a particular change order, it is important for an agency to document how the dollar amount of the change order was determined and negotiated. The most common methods are:
 - To use unit prices included in the original bid and simply increase or decrease quantities;
 - A negotiated amount; or
 - Time and materials (force account) in which the agency agrees to pay the contractor for actual costs of labor, equipment, and materials to perform the change order work.
- **Markup Rates.** An agency’s contract documents should describe acceptable markup rates or percentages for labor, equipment, and materials. When negotiating a change order, review to make sure the percentages are consistent with the contract documents.
- **Overhead and Profit.** Acceptable overhead and profit percentages should be defined in an agency’s contract documents. When negotiating a change order, review to make sure the percentages are consistent with the contract documents.

Inappropriate Change Orders

Change orders should relate to the project and not be work that could or should be separately bid. Make sure your agency has an independent internal review process for change orders and that they are reviewed for validity to ensure there are not cardinal changes outside the original scope of work for the project. If you know of certain work that must be performed, include it on the bid form so that you can obtain competitive prices for the work. Change orders outside the original scope of the project, that could be bid separately, are often the subject of audit findings.

Reconciling Change Orders

It is important to execute a reconciling change order at least at the end of the project to address changes in quantities from what was bid. The total contract amount as amended by change orders should be consistent with the actual dollar amount paid to the contractor. Without such a reconciling change order, the contract may reflect that more money was paid to the contractor than was authorized by the contract amount.

DISPUTE RESOLUTION

Due to the nature of public construction projects where changes frequently occur, it's not surprising that there are often disagreements and disputes.

It's important that the contract includes clear dispute resolution procedures for identifying and documenting claims for additional compensation that may be due to the contractor. The contract should describe amicable negotiations as the first step, followed by a process for the contractor to submit a change order request, followed by a claims process. And it is equally important that both the local government and contractor know and understand what these procedures are.

If you encounter a dispute, attempt to resolve it at the lowest possible level, follow the contract documents, and document any resolution through the project's notification process. Disputes that are not resolved at a lower level may end up in an expensive formal dispute resolution process with lawyers involved and unpredictable outcomes.

SUBCONTRACTORS

Subcontractors play a significant role in administering and implementing public works construction contracts. Often public works construction projects have larger bodies of work performed by a prime contractor (the bidder) and have subcontractors performing smaller and/or more technical scopes of work. State laws mention subcontractors in responsibility considerations, bidder's subcontractor list, prevailing wage, and bonding; indicating that subcontractors are to be treated as parties to the contractor for which public dollars are being spent.

To that end, some local governments have established a subcontractor review and/or approval process that requires prior to being on a project site, or actively working on the project, subcontractors must be verified by the local government.

There are three common practices used by local government regarding subcontractors verification:

- **Notification Only.** The best practice is only to require the contractor to notify the local government of what subcontractors will be used, and paid, on the project. This provides information to the local government on what to expect at the project site.

- **No Notification or Verification.** Under this option, the local government has no requirements that the contractor notify the local government of what subcontractors will be on site or required any sort of pre-work verification. However, it is in the agency's best interest to have information about what subcontractors will be performing work and getting paid on a construction project.
- **Notification and Verification.** Under this option, the local government requires the contractor to not only notify the agency of which subcontractors they intend to use, but to also obtain the agency's concurrence and verification of any subcontractors intending to be used.

It is important to remember that the local government has a contract only with the contractor, and the contractor is ultimately responsible for ensuring the work is faithfully performed in accordance with the contract documents. Verifying that prevailing wage intents are accurately filed and there are no responsibility issues with a subcontractor prior to paying can fall to the local government, so information is key.

Tracking Subcontractors

At a minimum, a local government needs to verify intents are filed prior to making any payments on a project. To do this effectively there needs to be some tracking of subcontractors.

There are three common tools a local government may use to keep track of subcontractors on a project site:

- **Daily Inspection Report.** A local government should require the completion of a daily inspection report by its representative on site that includes a listing of subcontractors and trades present each day. This is one of the most effective tools, as it doesn't rely on others to report on subcontractors but collects live information from the field. Similarly, contractors can be contractually required to keep daily records of daily site activities including labor.
- **Contract Notification Requirement.** A local government could include a provision in the contract between the agency and contractor requiring the contractor to notify the local government of any subcontractors used and require that such a contractual provision be passed down into lower-tier subcontracts as well. When using a notification requirement, it is key to detail how, and in what format, these notifications are to take place.
- **Listing Subcontractors with Pay Applications.** A local government should require with each application for payment a form identifying all subcontractors who worked during the month. This form should be compared with the daily inspection reports of the agency to ensure that the report is complete and accurate.

Subcontractors Not Paid

Subcontractors and suppliers who are not paid in a timely manner by the contractor may file a claim against the payment bond and retainage held by the local government. Suppliers are also required to file a pre-claim notice with the agency and contractor. [RCW 60.28.011](#) regulates the timing for filing claims and collecting payment from the payment bond and retainage. With the contractor's permission, a local government may write a joint check to the contractor and subcontractor in the event the subcontractor has not been paid.

CONTRACT TERMINATION

Terminating a public works contract may be either for *cause* or *convenience* and is typically a last resort of a local government not satisfied with a contractor's performance. Cause means the contractor is at fault and has failed to perform or did not perform in compliance with the contract documents. Convenience is the local government's right to terminate the contract for things such as funding was pulled, or the project is no longer

in the public's best interest. It is important that public works contracts have clear language relating to both termination for cause and convenience.

In addition, if an agency decides to terminate a contract, it is important to follow the procedures outlined in the contract documents, including notifying the contractor and surety in writing of such termination.

Project Close-Out

When the physical construction work is completed (also referred to as Substantial Completion), and final testing and/or commissioning is occurring, a construction contract will enter the final phase of administration often referred to as “close-out.” The closing out of a construction contract is most often concerned with proper documentation and financial reconciliation of the project. Each local government and funding agency may have records and financial verification requirements. It is important to understand these requirements so a project close out process can be detailed in your contract documents.

Included below are common project close-out topics. It is important you work with your financial, audit, and legal representatives to ensure compliance and include any specific needs for your local government.

WORK ACCEPTANCE RECORDS

It is often required that the local government keep all records of work as it was accepted on a construction project. This could include, but is not limited to, daily inspection reports, work verification forms, or similar. Work acceptance can also be included in project record documentation and/or payment records.

PROJECT RECORD DOCUMENTS

Project record documents are commonly conformed drawings that graphically depict the original design and all the installed elements together to account for where they may vary. Other common terms used are “red-line set” or “as-builts.” Also included in project record documentation is often all paperwork on change orders, warranty, operation requirements, reports, (e.g., energy usage, etc.) or similar records that are necessary to not just record what was constructed but also verify that the local government has a completed project with unrestricted use and demonstrate the schedule and public spending.

PAYMENT RECORDS AND FINANCIAL REPORTING

Before closing a contract, the local government will need to account for all payments made on the contracts and reconcile the award amount, final contract amount, and all changes at the level of detail both discussed in the contract documents and as required by funding. It is good practice to have your final payment report and financial reports in your contract file.

WAGE REPORTING

As discussed in a previous section, the contractor must report all wages paid, the rate and the employee classification, and must require all subcontractors to do the same. Wages are typically paid weekly and tracked through certified payrolls on-file with the Department of Labor and Industries. At the end of a construction contract all wage reports need to be on file with the appropriate agency and an affidavit filed stating the final wage paid to each classification of laborer.

For more information, see the L&I webpage [Public Works Projects Awarding Agencies](#), under the tab “When the Work is Done.”

RETAINAGE RELEASE

As the contract is closing, any retainage held, and not used, will be released to the contractor. The time and process of when retainage should be released is generally regulated by a combination of state laws (see [RCW 60.28.011](#)) and contract provisions. A common practice is to reconcile all project finances and release retainage through the project's final payment to the contractor.



Practice Tip: There are a couple of options that are often used to withhold retainage. In some cases, a local government simply withholds the retainage percentage from each progress payment and keeps the funds with the project funds. In other instances, an agreement is executed between the contractor, local government, and a financial institution, in which the retainage funds are deposited in an interest-bearing account of the contractor's but is not to be released to the contractor until the agency authorizes its release. Sometimes, the contractor may request to submit a retainage bond and be paid the full amount of each progress payment without the 5% being withheld.

APPENDIX: RESOURCES

Revised Code of Washington (RCW)

Below are selected statutes pertinent to public works contracting for local governments in Washington State.

RCW	Description
Bidding and Construction	
39.35A	Performance-Based Contracts for Water Conservation, Solid Waste Reduction, and Energy Equipment
39.04	Public Works
39.08	Contractor's Bond
39.10	Alternative Public Works Contracting Procedures
39.12	Prevailing Wages
39.30.060	Subcontractor Listing Requirements
39.76	Interest on Unpaid Public Contracts
60.28	Lien for Labor, Materials, Taxes on Public Works, Retainage, Retainage Bonds, Supplemental Contracts
42.23.030	Interest in contracts prohibited – exceptions
By Agency Type	
Cities and Towns	
RCW 35.22.620	First Class Cities. Public Works or Improvements – Limitations on Work by Public Employees – Small Works Roster – Purchase of Reused or Recycled Materials or Products
RCW 35.23.352	Second Class Cities, Towns, and (via RCW 35A.40.200) Code Cities. Public Works – Contracts – Bids – Small Works Roster – Purchasing Requirements, Recycled or Reused Materials or Products
RCW 35.92.350	Prequalification of contractors for cities or towns owning an electrical utility for electrical work
Fire Protection Districts	
RCW 52.14.110	Purchases and Public Works – Competitive Bids Required – Exceptions
RCW 52.14.120	Purchases and Public Works – Competitive Bidding Requirements
RCW 52.14.130	Low Bidder Claiming Error – Prohibition on Later Bid for Same Project
Housing Authorities	
Chapter 35.82 RCW	Housing Authorities Law
Metropolitan Park Districts	
RCW 35.61.135	Contracts – Competitive Bidding – Small Works Roster – Exemption
Port Districts	
RCW 53.08.120	Contracts for Labor and Material – Small Works Roster
RCW 53.08.135	Construction Projects Over Forty Thousand Dollars – Contracting Out
Chapter 53.19 RCW	Personal Service Contracts

RCW	Description
Public Utility Districts (PUDs)	
RCW 54.04.070	Contracts for work or materials – Notice – Exemptions – Unit Priced contracts
RCW 54.04.080	Bids – Deposit – Low Bidder Claiming Error – Contract – Bond – Definitions
RCW 54.04.085	Prequalification of Contractors – Electrical facility construction or improvement – Bid proposals – contract proposal forms – Conditions for issuance – Appeals
School Districts	
RCW 28A.335.190	Advertising for Bids – Competitive Bid Procedures – Purchases from Inmate Work Programs – Telephone or Written Quotation Solicitation, Limitations – Emergencies
Water and Sewer Districts	
RCW 57.08.050	Contracts for Materials and Work – Notice – Bids – Small Works Roster – Waiver of Requirements
General	
35.21.278	Contracts with Community Service Organizations for Public Improvements – Limitations
39.06	Public Works – Registration, Licensing of Contractors
39.34	Interlocal Cooperation Act
42.52	Ethics in Public Service
42.56	Public Records Act
49.60.400	Discrimination, Preferential Treatment Prohibited
Consultant Contracts	
39.80	Contracts for Architectural and Engineering Services

Washington Administrative Code (WAC)

Below are selected administrative codes adopted by the Washington State Department of Labor & Industries related to public works contracting.

RCW	Description
296-62-07721	Survey of Hazardous Materials
296-127	Prevailing Wages/Labor Classifications and Scopes of Work

Washington State Government Resources

Below are selected resources prepared by the State of Washington related to public works contracting:

- [Attorney General Opinions by Topic](#)
- [Capital Projects Advisory Review Board \(CPARB\) Background and Reference](#)
- [Office of Minority and Women's Business Enterprises \(OMWBE\)](#)
- [State Auditor's Office Resource Library – Procurement](#)

Key Court Decisions

The following is a list of some key court cases that impact public bidding. Facts in a particular instance may be different and courts may render different decisions based on different facts. Public agencies should consult with their attorneys in making key bidding and contractual decisions.

- Lack of Signature on Bid Form
 - [Farmer Construction, Ltd. v. State](#), 98 Wn. 2d 600 (1983).
- Material vs. Immaterial Irregularities in Bid
 - [Gostovich v. City of West Richland](#), 75 Wash. 2d 583 (1969).
- Performing Public Works with County Staff
 - [Associated General Contractors v. King County](#), 124 Wn. 2d 855 (1994).
- Claim of Error
 - [Peter Kiewit Sons' Co. v. Department of Transportation](#), 30 Wn. App. 424 (1981).
- Material Variance in Bid for Failure to Submit Certified WBE Subcontractor with Bid
 - [Land Construction Co. v. Snohomish County](#), 40 Wn. App. 480 (1985).
- Suit Regarding Failure to Meet WMBE Subcontract Set-Asides Dismissed Since the Contract Had Already Been Awarded
 - [Dick Enterprises, Inc. v. King County](#), 83 Wn. App. 566 (1996).
- Contractor Not Entitled to Change Order Compensation Due to Failure to Provide Notice of Change per Contract
 - [Mike M. Johnson, Inc. v. Spokane County](#), 150 Wn. 2d 375 (2003).
- Contractor Not Liable for Defective Specifications
 - [United States v. Spearin](#), 248 U.S. 132
- Local Resident Hire Programs Prohibited
 - [Laborer's Local Union No. 74 v. Felton Construction Co.](#), 98 Wn.2d 121 (1982).

MRSC Resources and Topic Pages

- [Public Works Contracts](#)
- [Sample Document Library: RFP/RFQ/Bid Documents](#)
- [City Bidding Book](#)
- [County Bidding Book](#)
- [Small Works Roster Manual](#)
- [Donations and Volunteers for Public Works Projects](#)
- [Gift of Public Funds](#)

Industry Association Standards

- [ACEC Washington](#) (American Council of Engineering Companies)
- [American Public Works Association \(APWA\)](#) – Washington State Chapter
- [Associated Builders and Contractors of Western Washington](#)
- [Associated General Contractors of Washington](#)
- [Construction Management Association of America \(CMAA\)](#) – Pacific Northwest Chapter
- [Construction Users Roundtable](#)
- [Design-Build Institute of America \(DBIA\)](#)
- [Design-Build Institute of America – Northwest Region](#)
- [Lean Construction Institute](#)
- [Mike Purdy's Public Contracting Blog](#)
- [NIGP – The Institute for Public Procurement](#)
 - [Code of Ethics](#)
 - [NIGP Washington State Chapter](#)
- [Northwest Construction Consumer Council](#)
- [Principles and Standards of Ethical Supply Management Conduct with Guidelines](#) (Institute for Supply Management)

Federal Requirements

- [Circular A-102](#) (Common Federal Procurement Rules)
- [Contract Provisions for Federal-aid Construction and Service Contracts Required by FHWA or Other Agencies](#)
- [Federal Acquisition Regulations \(FAR\)](#)
- [Stan Hinton: Government Contracts Resources](#)
- [Office of Federal Procurement Policy](#), White House Office of Management and Budget (contains valuable links)
- [Prevailing Wage Resources](#), U.S. Department of Labor, Wage and Hour Division


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