

# Contracting for Services

Guidelines for Local Governments  
in Washington State



## **Contracting for Services | Guidelines for Local Governments in Washington State**

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# Revision History

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

DATE	SUMMARY
<b>March 2024</b>	Updated a number of links, including links to sample solicitations/contracts, and made other minor technical/formatting edits. Note that some page numbers may have changed as a result, but the guidance provided in this document is unchanged.
<b>May 2021</b>	<b>Contracting for A/E Professional Services:</b> <ul style="list-style-type: none"><li>• <a href="#">Practice Tips/Q&amp;A</a>. Clarified answer regarding to what extent local knowledge can be considered.</li></ul>
<b>April 2021</b>	<b>Contracting for A/E Professional Services:</b> <ul style="list-style-type: none"><li>• <a href="#">Overview of QBS Requirements</a>. Clarified that geographical location should not be a selection criteria.</li></ul>

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# Why This Publication?

## Purpose and Applicability

This publication is intended to provide guidance to local government agencies in Washington State on contracting for services. In contrast to public works contracting, with its bid limits, bond requirements, retainage, etc, local government agencies in Washington State generally have few restrictions on contracting for services.

Some guidance on professional service contracting is also been provided on the MRSC website, which has been updated to reflect the information in this publication. MRSC's publications on bidding for cities and counties make only passing reference to service contracting, as there are few statutory requirements for service contracting.

If there are few statutory requirements for service contracting, except as noted above, why this publication? Public funds must be spent carefully and with the overriding goal of preventing fraud, collusion, favoritism, or improvidence in the awarding of public contracts. This publication encourages fair and open competition in selecting firms to perform all types of service contracts and recommends policies for contract amendments that maintain that transparency. One of MRSC's concerns is that, in the absence of statutory guidance, agencies become too creative in services contracting and trigger a public and legislative outcry that leads to unwarranted and draconian legislation. Our goal in this publication is to raise the quality of services contracting by local agencies in Washington State.

Please note that this publication contains best practice guidelines based on the collective experience of MRSC consultants and judicious consideration of the statutes referenced above. We have also "flagged" sections – in particular Tables B, C and D – where considerable variation in use of the practices is expected in relation to agency size and type.

Note also that MRSC, as an organization, fully supports diversity in contracting. We feel strongly that women, minority, and veteran-owned firms, both large and small, should be given every opportunity to compete for service contracts.

## Disclaimer

These service contracting guidelines are permissive and discretionary and are applicable to all municipal corporations/agencies that have authority to enter into contracts for services. However, agencies must also consider their own governing body resolutions, policies, and procedures to determine what requirements may be mandatory for a given contracting scenario. Case law, new regulations, or audit findings for one type of municipal corporation will not necessarily apply to all municipal corporations, because enabling statutes may differ.



# What Kind of Service Am I Contracting For?

## Service Categories

The first step in successfully contracting for services is to determine the category of service that you will be contracting for, as there are distinct differences between service types and the manner of solicitation. Categories of contracted services are defined as follows:

### **A/E Professional Services**

A/E professional services are services rendered by a consultant or any person, other than an employee of the agency, contracting to perform activities within the scope of the general definition of professional practice in chapters [18.08](#) (Architects), [18.43](#) (Engineers and Land Surveyors), or [18.96](#) (Landscape Architects) RCW. [RCW 39.80.020\(5\)](#). Go to Table E for the scopes of practice for these professions.

- Services are procured using the qualifications based selection (QBS) requirements in chapter 39.80 RCW.
- These services may be required in connection with a public works project meeting the definition of “public work” in [RCW 39.04.010\(4\)](#).
- Licenses or certification by state agencies are required.

Examples include:

- Architectural blueprints.
- Road design.
- Sewer and water system design.

### **Personal Services**

Personal services involve technical expertise provided by a consultant to accomplish a specific study, project, task, or other work.

- Personal services do not include purchased services or professional services procured using the competitive selection requirements in [chapter 39.80 RCW \(A/E\)](#).

- These services may or may not be required in connection with a public works project meeting the definition of “public work” in RCW 39.04.010(4).
- Activity or product is mostly intellectual in nature.
- Licenses or certification by state agencies may or may not be required, depending on the type of personal service required.

Examples include:

- Meeting facilitation
- Public outreach coordination
- Strategic planning development
- Economic development study
- Rate setting study

### **Purchased Services**

Purchased services are those provided by vendors for routine, necessary, and continuing functions of a local agency, mostly relating to physical activities.

Repetitive, routine, or mechanical in nature, as in these examples:

- following established or standardized procedures
- contribute to the day-to-day business operations
- completion of specific assignments and tasks
- decision-making is routine or perfunctory in nature
- may require payment of prevailing wages

Examples include:

- delivery/courier service
- landscaping and building maintenance (janitorial)
- herbicide application service
- recycling/disposal/litter pickup service
- vehicle inspection, lubricating, and repair services
- HVAC system maintenance service
- office furnishings installation, refurbishment, and repair service

### **Consultant**

A consultant is an independent person or firm contracting with an agency to perform a service or render an opinion or recommendation according to the consultant’s methods and without being subject to the control of the agency except as to the result of the work.

## Contracting for Services vs. Public Works

This publication applies to local government contracting for services, not public works. Distinguishing between services and public works is important, as acquiring services does not require bids, whereas contracting for public works may. RCW 39.04.010 defines the term “public work” as follows:

The term public work shall include all work, construction, alteration, repair or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. (Emphasis added.)

Note that this definition of public work includes construction and repair but excludes ordinary maintenance. The section of this publication related to Purchased Services will help you distinguish those types of activities that are within the gray area between repair and ordinary maintenance. See also MRSC’s City and County Bidding Books for more information about contracting for public works.

## Service Category Solicitation Procedures

Solicitation procedures should vary with the size and complexity of the contract. Small contracts certainly do not warrant the full-blown RFQ/RFP process that a large contract may require. (See What Level of Competitive Solicitation Should I Use?)

A major distinction for A/E professional services is that chapter 39.80 RCW does not allow price to be a consideration in the initial selection process. Solicitations for personal and purchased services can – and should – request prices. Note the following table:

**Table A – Qualifications Criteria Matrix**

Public Agency May Consider		
Purchased Services	Personal Services	A/E Professional Services Under Chapter 39.80 RCW
Cost or Price	Qualifications and fees or costs	Qualifications first, then price - after selection
Quality of previous performance	Quality of previous performance	Quality of previous performance
Ability to meet deadlines for contract performance	Ability to meet deadlines for contract performance	Ability to meet deadlines for contract performance
Responsiveness to solicitation requirements	Responsiveness to solicitation requirements	Responsiveness to solicitation requirements
Demonstrated compliance with employment security and sales tax requirements (all as applicable)	Compliance with statutes and rules relating to contracts or services	Compliance with statutes and rules relating to contracts or services
Ability, experience, and reputation	Ability, experience, and reputation	Ability, experience, and reputation
References	References	References
Staff readily available for the project	Staff readily available for the project	Staff readily available for the project
Financial capacity	Financial capacity	Financial capacity
Meets applicable licensing requirements	Meets applicable licensing requirements	Meets applicable licensing requirements
Safety record	Safety record	Safety record
Ability to meet necessary response times for unscheduled work and emergencies	Ability to meet necessary response times for unscheduled work and emergencies	Ability to meet necessary response times for unscheduled work and emergencies
N/A	History of Errors and Omissions	History of Errors and Omissions
N/A	N/A	Construction change order history

A/E professional service and personal service contracts very rarely trigger public works and prevailing wage requirements. In contrast, many purchased services require prevailing wages to be paid (see Contracting for Purchased Services) and some purchased services can be solicited as a public works project. For example, some agencies solicit building service maintenance contracts as purchased services (with prevailing wages) and others treat them as public works contracts.

# What Level of Competitive Solicitation Should I Use?

After you've determined the category of service that you are contracting for, the next step is to decide how to solicit candidates that you will select from to provide the service. Agencies generally have wide latitude in determining how they will solicit competition. A general guideline is the more complex or expensive the project, the more formal the process for soliciting competition should be. Also, if the project includes grant funding, the conditions of the grant may require a specific method of advertisement and other aspects of the solicitation process.

## Levels of Competitive Solicitation Definition

Differing levels of effort and procedure are involved in selecting a service provider, based on the estimated contract price, complexity, and type of project or work to be accomplished. Levels of competition for the purposes of this publication are minimal, informal, and formal:

**Minimal Competition** – Use a lower dollar limit ('Y'), below which agency staff could directly solicit proposals. Go to the appropriate service provider roster or other sources with a simple set of criteria and select 1-3 firms to submit a proposal. Select directly from the rosters or other sources for small projects.

**Informal Competition** – Select a dollar range ('X' to 'Y') in which a less structured process is followed and selection of potential firms from a roster or other sources is allowed with no advertisement.

- Develop fairly detailed criteria and prepare RFP
- Go to the appropriate service provider- or agency-maintained roster, using the criteria, and select 3-5 firms to submit a proposal in response to the RFP
- Evaluate proposals and make award decision.

**Formal Competition** – An agency may wish to establish an upper dollar limit ('X') and level of complexity above which a structured RFQ/RFP process and advertisement (web and/or print) is required.

- Develop fairly detailed criteria and prepare RFQ and/or RFQ/RFP
- Advertise on the agency web site, and/or in local papers and in the Daily Journal of Commerce.
- Evaluate RFQ and or RFQ/RFP submittals and short-list 4-6 firms for further consideration
- Request detailed proposals from short-listed firms
- Hold interviews and check references.
- Evaluate proposals and make award decision.

**Note:** For A/E solicitations under chapter 39.80 RCW, advance notification is required for all contracts, either by publishing an announcement each time A/E professional services are solicited or by publishing an announcement soliciting qualifications for a consultant roster for projected A/E professional service needs. [RCW 39.80.030](#).

## Recommended Levels of Competitive Solicitation by Service Type

At the back of this publication, we have included recommended dollar thresholds and selection processes for each of the three service types.

Note these tables:

- Table B, Soliciting for Professional Services, page 43
- Table C, Soliciting for Personal Services, page 45
- Table D, Soliciting for Purchased Services, page 47

Agencies have great latitude in setting their own policies and procedures, except for port districts that must follow [chapter 53.19 RCW](#) for personal service contracts. Threshold dollar amounts in these three tables can be modified by an agency to fit its comfort level. Recognition should also be given to federal procurement limits, and conditions of a grant or funding agency policies may require advertising for each project.

## Solicitation of Proposals

### Services Roster

In contracting for services, local governments may choose to solicit competition from an established services roster, particularly for minimal or informal selection processes. A services roster is defined as follows:

A categorized database of consultants and/or other service providers desiring to provide services to an agency that is established in response to notice or advertise-

ment and that contains statements of qualification (SOQs) and other information that an agency can use to evaluate a service provider. This database may be provided and maintained by a single agency, group of agencies, or a non-agency service provider, with interlocal agreements or other appropriate documents.

Applicants provide basic information, such as their UBI, federal tax information and contacts and

- identify categories and subcategories of services they provide
- provide references, experience and financial capacity
- more information depending on type of service.

Major roster headings would match definitions

- Category and subcategories would be as needed.

### **Request for Qualifications (RFQ)**

Local governments may request RFQs for a services roster or as an initial submission for a formal competitive solicitation. In the case of a formal competitive solicitation, the RFQ can be combined with a Request for Proposals (RFP), or it could be an initial submission requirement that is reviewed before requesting formal proposals. The RFQ:

Asks only for firm’s general capabilities, list of principals, previous projects, number of employees, licenses, etc. for either a services roster or an individual project.

### **Request for Proposals (RFP)**

RFP procedures ask proposers to submit qualifications (if not already on file) and a proposed scope of services in response to specific agency needs. A request for proposals typically asks for consultants to identify key personnel proposed for the services and their experience and availability, a general description of the firm’s service approach, schedule, and deliverables.

### **Proposals**

Every RFP should include:

<b>Basic Elements of RFP</b>	<b>Suggestions for Content</b>
Statement of Need (Scope)	Well written with adequate level of detail describing project tasks and products; List availability of supporting documents
Estimated Budget (except for A/E projects*)	Adequate and well-matched with the requested scope of services
Estimated Schedule	Realistic; Matched to the scope
Evaluation Criteria	Clear; Matched to the scope of services; Provide scoring criteria up front; Provide decision schedule, if available
Proposal Elements (information to be submitted)	Keep submittal requirements, page limitations, and due date in same section of the RFP; Allow for flexibility in format of response



Deadline for acceptance of the proposal	Allow adequate response time (3-4 weeks); Accept electronic submittals; Acknowledge receipt of proposal
Agency's standard terms and conditions	Copy of contract terms and conditions attached to the RFP, if available

\*Price cannot be used as a selection criterion for A/E projects.

In addition to the basics, other common RFP elements include:

- Background on the agency and project, including budgets
- Reference documents – large files may be posted to a website for consultant access
- Whether interviews will be scheduled or whether the selection may be based on the submitted proposals without interviews
- Pre-proposal conference schedule
- Page limits
- Public disclosure guidance
- Formal certification by the proposer of its authorization to submit the proposal, time validity of proposal, non-collusion, etc.
- Notice that cost incurred in the development of proposals and participation in the selection process shall be borne by proposers.

### **Review Committee**

A single agency representative may evaluate proposals for smaller, less complex proposals or bids and recommend award of contract. A review panel of three or more persons is typically required as the value and complexity of the service increases. The panel may include non-agency employees who offer subject matter expertise. Participation by elected officials on a consultant evaluation panel could have open public meetings implications. If a quorum of the members of an agency governing body participates on a consultant selection panel, the activity would be considered a meeting subject to the Open Public Meetings Act.

Review of SOQs, proposals, or bids should occur in these progressively more rigid stages:

- Agency staff should review all timely submittals to determine if they are responsive in comparison to the stated requirements.
- Using uniform evaluation criteria agreed to in advance by review committee members, the committee should evaluate responsive SOQs, proposals, or bids to establish list of firms to be further considered.
- Criteria and scoring may give more importance, or weights, to certain aspects of the expected experience and qualifications. See Criteria and Weighting System under the personal services section.
- The number of firms to be considered further depends on the type and character of the service under consideration, but 3-6 firms is the norm.

## Selection Process

If an agency has a very large and complex A/E services project, the consultant selection process can include all of the following steps:

- Develop a Request for Qualifications (RFQ)
- Advertise RFQs
- Evaluate RFQ submittals received
- Select qualified firms for ‘Short List’
- Send Request for Proposals (RFP) to firms on ‘Short List’
- Interview firms who respond to the RFP
- Select most qualified finalist
- Identify scope of work, tasks, and milestones
- Estimate person-hours required for each task
- Select compensation method(s)
- Negotiate contract with finalist
- If agreement on price not reached, may negotiate with next most qualified firm.
- Write contract and secure necessary reviews and approvals.

## Interviews

Should you interview finalists? There are pros and cons:

Pro –

- Interviews can streamline the process and assist the agency in understanding the technical proposals or bids.
- Interviews can provide greater opportunities to identify the best value based on all the proposals or bids received.
- Interviews provide an opportunity for agencies to meet the consultant or service personnel who will be in charge of the project in order to gauge their effectiveness.

Con –

- When time is a factor, scheduling all panel members and consultants becomes a challenge.
- When the interview becomes the deciding selection factor, the absence of a record of what transpired may preclude meaningful review of the selection rationale. To mitigate against the lack of a record of what transpired, have specific evaluation criteria worksheets for the interview panel. Consider developing scripted questions or scenarios to distribute before the interviews.

If interviews are held, it is important for panel members to weigh the interview consistent with the selection criteria in the RFP or, possibly, selection criteria developed specifically for the interview process. The preliminary scores from the written proposals should carry over to the interview to ensure that the final selection is not entirely based on presentation skills.

The most frequent reason why consultant selection is successfully challenged is that the evaluation was not consistent with the stated evaluation criteria.

#### Practice Tips –

- Have review and interview panel members read the RFP and understand the criteria and selection process.
- Review proposed evaluation criteria with panel members before RFP issuance

Tailor general criteria to the specific requirements.

- Document references, preferably from two contacts at each reference.

State whether the agency will consider references other than those listed by the proposer

- While larger review committees may be a political necessity at times, the sheer difficulty of scheduling time for face-to-face meetings and interviews where all committee members can be present argues against their regular use.

#### Make Interviews Fun –

- Ask consultant to design a project at a working interview.
- Ask consultant to conduct a public meeting at a working interview.
- Ask real interview questions.
- The less rehearsed, the better.

# Contracting for A/E Professional Services



## Qualifications-Based Selection (QBS)

QBS is a competitive procurement process in which consultants submit qualifications and/or a non-cost proposal to an agency. The distinguishing feature of QBS over other types of consultant selection is that price is not used as a selection criterion. An agency assesses the expertise of competing firms and selects the most highly qualified firm, then negotiates the final project scope and associated fee. If the agency and most highly qualified firm cannot reach an agreement on project scope, schedule, and budget, the agency then negotiates with the next most highly qualified firm.

Since 1981, the State of Washington has required QBS for all state and local agency procurement for A/E, land surveying, and landscape architecture services. QBS does not mean that you cannot negotiate a fair and reasonable price for services, but it does mean that price is negotiated after competent professionals are selected. QBS recognizes that the lowest price should not be the primary determining factor for selecting highly-skilled design services for essential public facilities and infrastructure.

## Overview of QBS Requirements

Chapter 39.80 RCW provides a uniform statutory procedure for the procurement of architectural, landscape architecture, engineering, and land surveying services by all state and local government agencies in the State of Washington. The chapter applies to Washington State agencies, cities, counties, and all types and sizes of special purpose districts.

The defining characteristic of chapter 39.80 RCW is its strict insistence on qualification-based selection (QBS) of A/E professionals. In contrast to public works contracts, purchases (equipment, materials, and supplies), and purchased service contracts, an agency cannot consider price in the selection process for professional A/E services: it must select the most qualified firm, and then negotiate a price for the work contemplated.



## Case Law and Attorney General Opinions

In contrast to other purchasing and contracting categories, particularly public works contracts, there is no significant legal authority (case law) qualifying or affecting chapter 39.80 RCW. One reason for this is that the statutes themselves are short and to the point. Another reason is that, for the most part, local government agencies and the professional consultant community have mutually agreed to reasonable selection processes that make sense and are generally accepted.

Attorney General Opinions:

- AGO 2011 No. 2 – Cities, counties, and special districts cannot contract directly with another agency for architectural and engineering services without first complying with the procurement procedures set forth in RCW 39.80, except where the legislature has granted specific statutory authority to do so.
- AGO 1988, No. 4 – A public agency may not, in procuring architectural or engineering services, consider proposed price or cost in determining which firm is most highly qualified to provide services. When a public agency selects a firm to perform architectural or engineering services, price and cost may be considered only after the most qualified firm has been selected, at which time the law provides for negotiation of a “fair and reasonable” price.
- AGO 1988 No. 14 – The principles stated in AGO 1988 No. 4 apply in the same way to land surveyors.

## Advance Publication

RCW 39.80.030 requires advance publication of an agency’s requirement for professional services. Two methods of compliance are noted:

- an announcement for each project, or
- a general announcement of projected requirements for any category or type of professional services (typically referred to as a consultant roster).

## Women and Minority (WMBE) and Veteran Requirements

Women and Minority (WMBE) and Veteran Requirements

RCW 39.80.040 contains this provision:

Such agency procedures and guidelines shall include a plan to insure that minority and women-owned firms and veteran-owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The level of participation by minority and women-owned firms and veteran-owned firms shall be consistent with their general availability within the professional communities involved.



This provision, however, was affected by the passage of Initiative 200 in 1998, now codified at RCW 49.60.400(1):

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The level of participation requirement in RCW 39.80.040 is likely in violation of the Initiative 200 prohibition of granting preferential treatment and, as such, would be unenforceable.

### **Consultant Selection Scenarios**

Consultant selection under chapter 39.80 RCW can occur in three main scenarios:

- With no roster, agency must advertise for consulting services for individual projects, perhaps combining the RFQ and RFP processes, with or without interviews. Best practice supports interviewing firms as part of the selection process.
- With a roster, an agency may select consultants from the roster and ask them to respond to RFPs for individual projects, with or without interviews. Best practice supports interviewing firms as part of the selection process.
- Even with a roster, for certain projects, the agency may choose to advertise its specific need for services and select firms based on the RFQ submittals and then interview those firms using a committee.

### **Qualification- Based Selection Criteria**

RCW 39.80.040 states in part:

The agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, based on criteria established by the agency, the firm deemed to be most highly qualified to provide the services required for the proposed project.

(Emphasis added.)

Examples of Selection Criteria (See also Steps needed to solicit and evaluate proposals?, Table A:

- Team members – tailored to project
- Production capabilities
- Similar projects



- Consultant's workload
- References/quality of past performance
- Ability, experience, and reputation
- Ability to meet deadlines for contract performance
- Staff readily available for the project
- Compliance with statutes and rules relating to contracts or services

## Brooks Act (Federal)

Qualifications-based selection (QBS) was established by Congress in 1972 as a part of the Brooks Act (P.L. 92–582), 40 U.S.C. Ch. 11, and was developed as a process for federal agencies to use for the selection of architectural and engineering services for public projects. The QBS process has been adopted by 44 states via what are sometimes referred to as “mini-Brooks Acts.”

Note (courtesy of Mike Purdy and Associates) that the list of disciplines covered under the Brooks Act is more expansive than the list of covered disciplines by Washington state law:

- **Licensing:** Professional services of an architectural or engineering nature, as defined by state law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services.
- **Related to Real Property:** Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
- **Typically Performed by:** Such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operation and maintenance manuals, and other related services.

## American Council of Engineering Companies (ACEC) QBS Position

The American Council of Engineering Companies (ACEC) is a nationwide trade and advocacy association of engineering firms, has long been an advocate of QBS procedures and provides training for its member firms and agencies. In 2009, the American Public Works Association (APWA) and American Council of Engineering Companies (ACEC) jointly published An Analysis of Issues Pertaining to Qualifications-Based Selection.



## Practice Tips/Q&A

- **Conceptual Planning Services** – A potential contract for a conceptual or facility plan may seem to require that a firm have merely a planning (personal) services background, but if the planning services involve architectural or engineering work, then the entire contract should be handled using the chapter 39.80 RCW QBS process.
- **Construction Management** – If construction management services will necessarily involve professional services covered by chapter 39.80 RCW, then at least those portions involving chapter 39.80 RCW services must be procured using the QBS process.
- **Construction Inspection and Testing Services** – If inspection and/or testing services for a public works project are simply reporting results of either to a project manager or project engineer for their review and ultimate decision that the results are acceptable, then a QBS process is probably not required for solicitation of those services.

### MRSC Inquiry Responses

**Q** Is it mandatory to interview several firms for (day-to-day) general engineering services? We have done this year after year, and we end up selecting the most qualified firm who are the ones that designed our water and wastewater treatment plants. We have SOQs off the MRSC roster, and we can select the most qualified from the SOQs and past interviews. We will definitely interview a minimum of four for new projects.

**A** It is not mandatory to interview anyone for any project, strange as that may seem. You can select 3-4 firms directly from the MRSC Roster and ask them to submit non-price proposals, then review the proposals and select the most qualified firm, without interviews. For projects outside the scope of the city engineer work, you should definitely seek non-price proposals from other firms, and then select the most qualified firm for price negotiation.

**Q** What process do you recommend for retaining an on-call geotechnical firm for on-site and lab materials testing, soils compaction, concrete cylinders, etc.?

**A** This is on the borderline between a professional services contract and a personal services contract. If all you ask for is testing and raw data reports that will be analyzed by your project staff or consulting engineer, you can ask for both qualifications and price in your RFP. If you ask the firm to provide analyses of the testing for compliance with specifications in their reports, you are asking them to exercise professional judgment that is probably within the scope of engineering practice in chapter 18.43 RCW. In that case, it is better to do a QBS process in accordance with chapter 39.80 RCW.





**Q** To what extent can local knowledge be considered?

**A** It can be considered to the extent that it relates to the potential success of the A/E contract.

A/E contracts must be awarded to “the firm deemed to be the most highly qualified to provide the services required for the proposed project” “based upon criteria established by the agency” (see [RCW 39.80.040](#)). The key is whether criteria are used to identify qualifications and/or factors that are reasonably related to the project and allow the agency to select the most qualified firm. Explicit local preferences and granting evaluation points for local businesses are subject to challenge.

RCW 39.80.040 requires that when a jurisdiction is procuring architectural or engineering services, it is to select the most qualified firm available for the project. Nevertheless, the {agency} may be able to identify factors involved in being a local business that would add to the firm’s qualifications to do the project. As such, the agency should provide those factors in the RFQ, and substantiate how it will evaluate responding firms.

**Q** If a consultant from the roster has a current contract with an agency, may they enter into another contract with that agency - state or federal contract?

**A** Look at Chapter 31 of the Local Agency Guidelines (LAG) Manual. If the consultant is an on-call consultant selected under the auspices of this chapter, then they can have only one contract at a time, particularly for contracts with federal money involved. You as an agency can choose to follow this same policy for state only or local only contracts. If, however, the consultant is working under a contract that was solicited by advertisement – not on-call – then there would be no restriction on use of that consultant for other similarly solicited contracts.

**Q** Are geologists covered by A/E QBS in the RCW’s?

**A** “Architectural and engineering services” or “professional services” are defined in state law as including architectural, engineering, land surveying, and landscape architectural services. [RCW 39.80.020(5)] Geologists are not specifically included within these professions, so their selection is not statutorily subject to QBS requirements. There is no reason that you cannot use QBS, however, and it is probably a good idea.

**Q** If I have an existing conceptual design plan (created by a landscape architecture firm a few years back and they are on the MRSC Roster) and I need this drawing updated, do I still need to advertise the need for this (per RCW 39.80) or can I simply use the QBS method and select them if they are the most qualified?

**A** I would certainly use the QBS method and select off the roster for this type of action. Document the criteria that made you select this firm as the most qualified



## Contract Negotiations

The end result of RFQ, RFP, or invitation to bid (ITB) processes in most cases will be that agency staff and/or the review committee recommend a single A/E firm to the council/commission/board for award of a contract on terms, including price, negotiated as part of the process. For A/E professional service contracts, the recommended firm will be the most qualified firm unless the agency is unable to negotiate a fair and reasonable price with that firm and turned to the second (or other) most qualified firm as allowed in [RCW 39.80.050](#).

Negotiations with the recommended firm include discussions to refine the scope of work, schedule, deliverables and final price, all with the objective of obtaining the best value for the agency. The agency must ensure that the final scope is consistent with the services described in the formal solicitation document. A substantial change in project scope in the final contract may lead to protests by unsuccessful firms, particularly if accompanied by an increase in costs over and above the original projections.

An agency should, as mentioned above, include its standard or intended contract language in the RFP package and be prepared to defend its most cherished contract terms against proposed changes in contract language during negotiations. In particular, an agency should not simply incorporate the consultant's proposal by reference in the final contract because the proposal may include contracting provisions that conflict with the agency's standard terms and conditions. The better practice is to review an electronic version of the consultant's proposal and include in the final contract only those portions specific to the consultant's scope of services. The best practice is to integrate relevant portions of the consultant's proposal into an overall agency template scope of services to ensure that standard key tasks and deliverables are required. As a safeguard, the agency's standard contract should include an order of precedence clause, giving lower priority to the proposal as opposed to the final contract scope or agency's standard terms and conditions.

When determining whether a fee is fair and reasonable, consider such factors as:

- Risk assumed by the consultant
- Nature of the services performed
- Management of any sub-consultants
- Time for performance.

### Checklist of Contract Terms

Each contract, even if based on standard agency templates, will have a unique scope and a set of tasks and milestones, but certain terms and conditions must be included. Following is a general listing of terms that should be in a contract for A/E services. This list should be used in conjunction with an agency's standard contract terms and condition and deference given in both cases to terms and conditions required by a funding agency.

- Representatives
- Key Personnel



- Relationship of the Parties
- Conflicts of Interest
- Records and Other Tangibles
- Ownership of Work
- Disclosure
- Tasks and Milestones
- Deliverables
- Compensation
- Payment Schedule
- Costs and Disbursements
- Indemnification
- Insurance
- Standard of Care
- Time
- Assignability
- Termination of Agreement
- Disputes
- Extent of Agreement

### **Contract Amendments and Scope of Services Changes**

While not required by statute, agency policies should address contract amendments – singly or cumulatively – that exceed a given percentage of the value of the original contract. A suggested guideline is:

If the value of an amendment or amendments, whether singly or cumulatively, exceeds 50 percent of the value of the original contract, the amendment must be filed with the agency’s governing board and made available for public inspection prior to the proposed starting date of services under the amendment.

Similarly, agency policies should address substantial changes in the scope of work specified in the contract and additions to the scope of work specified in the formal solicitation document. A suggested guideline is:

Substantial changes in the scope of work specified in the contract or which are substantial additions to the scope of work specified in the formal solicitation document must be submitted to the agency’s governing board for a determination as to whether the change warrants the work to be awarded as a new contract. This is true even if the original contract did not require governing board approval.

## **Examples of Professional A&E Service Solicitations and Contracts**

For examples of personal service solicitations and agreements, see our webpage [Professional Architecture & Engineering Service Contracts](#).

# Contracting for Personal Services



## Introduction

Much of the discussion about professional service contracting applies to personal service contracting, EXCEPT that Qualifications-Based Selection (QBS) procedures do not apply. Local agencies can and should ask for fees or estimated costs in their requests for proposals (RFPs) for personal services contracts. Also note that:

- Port districts have direct statutory requirements for personal services contracts under chapter 53.19 RCW. Ports districts should use guidance provided by MRSC and Washington Public Ports Association (WPPA) in 2009 and published at <https://mrsc.org/getmedia/a3efe8d5-668a-4b2f-9f1d-ed298b9b6221/Personal-Services-Contracting-Manual-For-Washington-Ports.pdf?ext=.pdf>.
- All other local governments have no statutory requirements for personal or purchased services but are encouraged to follow the guidelines in this publication.

## Personal Services Definition

Technical expertise provided by a consultant to accomplish a specific study, project, task, or other work statement:

- Personal services do not include purchased services or professional services procured using the competitive selection requirements in chapter 39.80 RCW (A/E).
- These services may or may not reasonably be required in connection with a public works project meeting the definition in RCW 39.04.010(4).
- Activity or product is mostly intellectual in nature.
- Licenses or certification by state agencies may or may not be required, depending on the type of personal service required.



Examples include:

- Meeting facilitation
- Public outreach coordination
- Strategic planning development
- Economic development study
- Rate setting study

## Criteria and Weighting System

### Qualifications Criteria Matrix

Basic criteria to consider in the initial selection of any service provider include (note Table A also):

- Fees or costs (except use QBS procedures for A/E)
- Ability and reputation
- Quality of previous performance
- Ability to meet deadlines for contract performance
- Responsiveness to solicitation requirements
- Staff readily available for the project
- Experience and reputation
- Compliance with statutes and rules relating to contracts or services.

Beyond these basic criteria, each type of service provider and each contract will require unique criteria to be applied. Generally, cost or price will be the main consideration in purchased service solicitations, while they may be less important relative to qualifications for personal and non-A/E solicitations. And, of course, qualifications must be the sole consideration in the initial solicitation for A/E services. Note also the discussion in the Levels of Competitive Solicitation section.

### Weighted Criteria versus Ranking

For basic RFPs, the basis for evaluation may simply be that proposals will be ranked as first, second, and third, etc., based on the proposal's overall quality, price, and reference checks. A simple ranking process presumes that all criteria are weighted equally. However, it does not work well with numerous proposals or if individual criteria are deemed to be more important.

For more complex procurements, an agency may want to assign differing weights to the quality and price factors. The evaluations may include both a score and a weight to be assigned to each factor, but avoid turning the evaluation into a mathematical challenge for reviewers. Address whether interviews will be a separate part of the score or whether the interview serves as part of the information the evaluators will use in evaluating the proposal. Compare the following examples:



### Example 1 – Basis of Selection

The selection panel will consider the information provided in the proposal, interview, and references based on the following criteria:

- Experience of key personnel - 40%
- Ability to meet schedule - 20%
- Cost - 40%

(Note that this example commits the agency to interviewing and checking references of all proposers, not just the finalist.)

### Example 2 – Basis of Selection

The selection panel will consider the information provided in the proposal based on the following criteria:

- Experience of key personnel - 40%
- Ability to meet schedule - 20%
- Cost - 40%

The agency may then interview and check references of one or more firms before finalizing the evaluation.

### Example 3 – Basis of selection

Selection will be based on:

- Experience of key personnel - 20%
- Ability to meet schedule - 20%
- Cost - 40%
- Interview - 20%

The agency may then check references of one or more firms before finalizing the evaluation.

How do you further account for cost differentials between proposals, assuming that the costs submitted with the proposals are not subject to further negotiation and potential scope changes? One approach is to give the lowest cost proposal the maximum percentage points for that criterion (40 in the examples above) and to give other proposals percentage points based on the ratio of the lowest proposal amount to the other proposals' amounts. Another approach is to assign incremental percentage points in reverse order of the relative costs.



Note these computations for a hypothetical project under Example 3:

Proposal	A	B	C
Experience - 20 pts. max.	15	20	20
Schedule - 20 pts. max.	15	20	20
Interview - 20 pts. max.	15	20	20
Proposal costs	\$135 K	\$170K	\$200K
Ratio of lowest proposal to actual proposal cost	1.00	0.794	0.675
Costs - 40 pts. max.	40	32	27
Total percentage points	85	92	87

The weighted price scoring process works well when all proposers are expected to be close in price and/or a budget has been published. If price is assigned a weight significantly less than 50 percent, the quality points will control selection; quality factors are indeed the main consideration.

When assigning relative weights, consider the implications of the weights assigned by doing hypothetical proposals, as above. Consider the challenge a lower-priced proposal would have to overcome if past experience is heavily weighted. Conversely, assigning a greater weight to past experience is fully justified if the service required affects core agency operations.

When costs are not to be considered in the initial selection, the agency can use something similar to the following:

Technical Proposal	Points
Project Approach/Methodology	35
Quality of Work Plan	35
Project Schedule	15
Project Deliverables	15
Total Points	100
Management Proposal/Interviews	Points
Project Team Structure	30
Key Staff Qualifications/Experience	30
Experience as a Project Team	20
Interview/References	20
Total Points	100
Total Points Maximum	200



## Selection and Contract Negotiations

The end result of RFQ, RFP, or invitation to bid (ITB) processes in most cases will be that agency staff and/or the review committee recommend a single firm to the council/commission/board for award of a contract on terms, including price, negotiated as part of the process. The recommended firm will be the firm that provides the best value for the agency based on the combination of price and qualifications as identified in the RFP responses and/or interviews.

Negotiations with the recommended firm include discussions to refine the scope of work, schedule, deliverables and final price, all with the objective of obtaining the best value for the agency. The agency should ensure that the final scope is consistent with the services described in the formal solicitation document.

An agency, as mentioned above, should include its standard or intended contract language in the RFP package and be prepared to defend its most cherished contract terms against proposed changes in contract language during negotiations. In particular, an agency should not simply incorporate the consultant's proposal by reference in the final contract because the proposal may include contracting provisions that conflict with the agency's standard terms and conditions. The better practice is to review an electronic version of the consultant's proposal and include in the final contract only those portions specific to the consultant's scope of services. The best practice is to integrate relevant portions of the consultant's proposal into an overall agency template scope of services to ensure that standard key tasks and deliverables are required. As a safeguard, the agency's standard contract should include an order of precedence clause, giving lower priority to the proposal as opposed to the final contract scope or agency's standard terms and conditions.

When determining whether a fee is fair and reasonable, consider such factors as:

- Risk assumed by the consultant;
- Nature of the services performed;
- Management of any sub-consultants;
- Time for performance.

When price is a major evaluation factor, an open competitive solicitation is presumed to result in competitive pricing. So long as the price proposals are all based on the same RFP scope and risk allocation, the competitive process is sufficient documentation that the price is fair and reasonable. At a minimum, adequate price competition exists if you receive two or more proposals responsive to the RFP from responsible firms competing independently.

However, if price is not a major factor, if the prices exceed the anticipated budget, if the prices reflect a wide variation, or if only one proposal is received, a price analysis should be performed. Price analysis is a process of examining and analyzing a proposed price





without evaluating separate cost elements and proposed profit/fee. Methods include:

- Comparison of prior proposed prices and contract prices with current proposed prices for the same or similar end items and services in comparable quantities
- Comparison of contract pricing of other public agencies for similar scopes of services
- Application of rough yardsticks (fee per lab test or hourly fee) to highlight significant inconsistencies that warrant additional pricing inquiry
- Comparison with competitive published catalogs or lists, published market prices or commodities, similar indexes, and discount or rebate arrangements
- Comparison of proposed prices with cost estimate developed independently by the agency
- Ascertaining that the price is not set by law or regulation
- Comparison with the agency's own estimate.

In either case, the objective is a finding that the proposed price is reasonable in comparison with current or recent prices for the same or similar services procured in comparable amounts, and under comparable terms and conditions under contracts that resulted from adequate price competition.

### **Checklist of Contract Terms**

Each contract, even if based on standard agency templates, will have a unique scope and a set of tasks and milestones, but certain terms and conditions must be included. Following is a general listing of terms that should be in a contract for services. This list should be used in conjunction with an agency's standard contract terms and condition and deference given in both cases to terms and conditions required by a funding agency.

- Representatives
- Key Personnel
- Relationship of the Parties
- Conflicts of Interest
- Records and Other Tangibles
- Ownership of Work
- Disclosure
- Tasks and Milestones
- Deliverables
- Compensation
- Payment Schedule
- Costs and Disbursements
- Indemnification
- Insurance
- Standard of Care
- Time
- Assignability



- Termination of Agreement
- Disputes
- Extent of Agreement

### **Contract Amendments and Scope of Services Changes**

While not required by statute, agency policies should address personal service contract amendments – singly or cumulatively – that exceed a given percentage of the value of the original contract. A suggested guideline is:

If the value of an amendment or amendments, whether singly or cumulatively, exceeds 50 percent of the value of the original contract, the amendment must be filed with the agency’s governing board and made available for public inspection prior to the proposed starting date of services under the amendment.

Similarly, agency policies should address substantial changes in the scope of work specified in the contract and additions to the scope of work specified in the formal solicitation document. A suggested guideline is:

Substantial changes in the scope of work specified in the contract or which are substantial additions to the scope of work specified in the formal solicitation document must be submitted to the agency’s governing board for a determination as to whether the change warrants the work to be awarded as a new contract. This is true even if the original contract did not require governing board approval.

## **Examples of Personal Service Solicitations and Contracts**

For examples of personal service solicitations and agreements, see our webpage [Personal Service Contracts](#).

# Contracting for Purchased Services



## Introduction

As noted in the definition below, purchased services include a wide variety of activities. For most purchased services, the main determinant of award is price and there are no bid limits or requirements for advertising, bonds and/or retainage, or, depending on the specific facts, prevailing wages. We recommend that local agencies adopt policies that establish differing levels of solicitation processes for purchased services as described in *What Level of Competitive Solicitation Should I Use?*.

There are a number of purchased services, however, that hover over that thin gray line between purchased services and public works contracting (note the definitions below). Purchased service contracts require, on the whole, much less paperwork than public works contracts. If a particular contract is very near the gray line, the conservative approach is to consider it a public works contract.

## Purchased Services Definition

Purchased services are those provided by vendors for routine, necessary and continuing functions of a local agency, mostly relating to physical activities:

Repetitive, routine, or mechanical in nature:

- following established or standardized procedures
- contribute to the day-to-day business operations
- completion of an assigned and/or specific tasks
- decision-making is routine or perfunctory in nature
- may require payment of prevailing wages.

Examples include:

- delivery/courier service
- landscaping and building maintenance (janitorial)
- herbicide application service



- recycling/disposal/litter pickup service
- vehicle inspection, lubricating and repair services
- HVAC system maintenance service
- office furnishings installation, refurbishment, and repair service

## Public Works Definitions

RCW 39.04.010(4): “Public work” means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.

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

WAC 296-127-010(7) (for purposes of prevailing wages):

(a) The term “public work” shall include:

(i) All work, construction, alteration, enlargement, improvement, repair, and/or demolition that is executed by contract, purchase order, or any other legal agreement and that is executed at the cost of the state of Washington or of any municipality. The source of the funding shall not determine the applicability of the statute, and may include, but is not limited to, such sources as those payments made through contracts with insurance companies on behalf of the insured state or municipality;

(ii) All work, construction, alteration, enlargement, improvement, repair, and/or demolition which, by law, constitutes a lien or charge on any property of the state or of a municipality;

(iii) All work, construction, alteration, repair, or improvement, other than ordinary maintenance that the state or a municipality causes to be performed by a private party through a contract to rent, lease, or purchase at least fifty percent of the project by one or more state agencies or municipalities, pursuant to RCW 39.04.260;

(iv) Maintenance, except ordinary maintenance as defined by (b)(iii) of this subsection, when performed by contract. Maintenance is defined as keeping existing facilities in good usable, operational condition;

(v) Janitorial and building service maintenance as defined by WAC 296-127-023, when performed by contract, on public buildings and/or assets; and



(vi) The fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (a)(i) through (v) of this subsection.

(b) The term “public work” shall not include:

(i) Work, construction, alteration, enlargement, improvement, repair, demolition, and/or maintenance for which no wage or salary compensation is paid, consistent with the requirements of RCW 35.21.278;

(ii) The construction, alteration, repair, or improvement of any municipal street railway system;\*

(iii) Ordinary maintenance which is defined as work not performed by contract and that is performed on a regularly scheduled basis (e.g., daily, weekly, monthly, seasonally, semi-annually, but not less frequently than once per year), to service, check, or replace items that are not broken; or work not performed by contract that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary.\*\*

\*Comment from L&I: Please note in 1993 the definition of public work found in RCW 39.04.010 was changed to eliminate the exclusion of municipal street railway systems from the definition of public work.

\*\*Comment from L&I: Case law narrowed the definition of “ordinary maintenance” to include only work performed by in-house employees of the public entity. See *City of Spokane v. Dept. of Labor & Industries*, 100 Wn. App. 805, 810 (2000).

## Prevailing Wages and Public Works Issues

As noted above, purchased service contracts require, on the whole, much less paperwork than public works contracts. If a particular contract is very near the gray line, the conservative approach is to consider it a public works contract. What difference does this make? Note this comparison:

Public Works Contracts	Purchased Service Contracts
Bid limits apply	No bid/purchasing limits
Advertisement method required/specified in many enabling statutes	Advertisement method not required or specified
Bid and performance/payment bonds required	Bid and performance/payment bonds not required
Retainage required	Retainage not required
Prevailing wages required	Prevailing wages may be required
Approved Intents and Affidavits required	Approved Intents and Affidavits may or may not be required



Responsible contractor ( <a href="#">RCW 39.04.350</a> ) required	Contractor license may or may not be required
Releases from Depts. of Employment Security, Revenue, and Industrial Insurance required for contracts over \$35K	Releases not required

Note the following table, which lists public works and purchased services that have or can have gray line issues.

We (MRSC) are reminded continually by our colleagues at the Department of Labor and Industries that the facts of any given situation may change which side of the gray line any given contract falls on, so when in doubt call L&I at (360) 902-5335 or email to [PW1@Lni.wa.gov](mailto:PW1@Lni.wa.gov).

You may also wish to browse L&I's [Prevailing Wage Policies & Determinations](#) page.

### Examples Distinguishing Public Works from Purchased Services

Subject to Both Bid Laws and Prevailing Wages (Public Works)	Subject to Prevailing Wages Only	Not Subject to Bid Laws or Prevailing Wages
HVAC Maintenance		Remote HVAC Monitoring/Adjustment
	<u>Building Maintenance Services</u>	
Construction Site Sweeping	Street Sweeping	
<u>Landscaping/Construction Maintenance</u>	Groundskeeping (1)	
Tree Removal and Disposal (2)		Tree Removal and Disposal (2)
Tree Trimming, Removal, and Disposal under Power Lines	Traffic Control (Flagging)(6)	Moving Services (3)
Street/Road Striping		Furniture Delivery (3)
Elevator Repairs (4)	Fire Extinguisher Inspection and Replacement (7)	Elevator Inspection (4)
Electrical, Plumbing & Painting		
Vactoring, Sewer/Storm Sewer Cleaning		
Building Generator Repair and Maintenance		Mobile Generator Repair and Maintenance
Shoveling Snow off Building Roof		Snowplowing in Streets



Snowplowing at a PW Construction Site		
Transfer Station Repair or Maintenance		Garbage Collection/Disposal Recycling
	Construction Staking (5)	
	Potholing, Drilling for Geotechnical Investigations (5)	

(1) Groundskeeping is litter control, sidewalk cleaning, lawn mowing, etc. – not landscaping maintenance/construction.

(2) Tree removal and trimming as part of a public works contract is subject to both prevailing wages and bid laws. Tree removal and trimming in parks is maintenance, subject to prevailing wages at least, and bid laws, conservatively.

Tree removal and trimming in conservation areas or for timber sales are probably not subject to either prevailing wages or bid laws, as such work may be considered silviculture.

Call L&I at (360) 902-5335, as the determination in each case is very fact-specific.

(3) If moving and/or furniture delivery and installation require attachment to the building structure, prevailing wages are required.

(4) A contract solely for inspection (which is rare) is a purchased service. But when you add maintenance and repairs, then it becomes subject to bid laws and prevailing wages.

(5) Construction staking, whether under contract to the agency or contractor, is subject to prevailing wages. (Look at Prevailing Wage Determination [07292011](#).) Potholing and drilling for subsurface geotechnical investigations, whether under contract to the agency or professional services firm, is subject to prevailing wages.

(6) Many agencies have contracts with companies to provide flagging (traffic control) services for their in-house crews as they perform maintenance activities. If such work is not ordinary maintenance as described above, then the cost of flagging must be considered in a determination of whether the agency can do the work with its own forces (below bid limits) or must contract for the work.

(7) Look at prevailing wage determination [03102009](#).

## Q&A Examples

**Q** What is the difference between “Construction Street Sweeping” and “Street Sweeping”?

**A** Construction street sweeping is sweeping done in conjunction with a public works construction contract. Street sweeping is when an agency contract with a private company to sweep its streets on a regular basis. Note this recent inquiry response:

We have a bid out for street sweeping services in 2013. A business who would like to bid is on the MRSC roster and is registered with DOR and ESD but does not have a contractor’s license. Does street sweeping require someone with a contractor’s license?



Street sweeping is one of those really strange animals. It is a purchased service – not a public works – so no retainage or Notices of Completion (NOC) for DOR, L&I Industrial Insurance, or ESD are required. However, prevailing wages are required per [WAC 296-127-01393](#) (Street sweepers (nonconstruction)), so intents and affidavits are required.

Note this response from Laura Herman at L&I:

“We have a significant volume of prevailing wage work that does not require a contractor registration. Examples include trucking and janitorial work. Landscape maintenance that only involves mowing type activities would not require a contractor registration but that answer changes the second the Landscape company starts planting plants or removing trees.

Chapter 18.27 RCW is the contractor registration statute. The best contact here at L&I for contractor registration questions is Bruce Springer, (360) 902-4768. [RCW 18.27.020](#) requires contractors to register with the department. [RCW 18.27.010\(1\)](#) defines “contractor” for purposes of the contractor registration statute.

As I understand this street sweeper question, the Street Sweepers (non-construction), WAC 296-127-01393 that perform routine street and parking lot sweeping not related to any construction activity, do not require a contractor registration. However, a change in facts can change that answer. For example, a Power Equipment Operator (WAC 296-127-01354) operating a street sweeper to pick up the road grindings from a repaving project is part of a project that is altering or improving real property and does need to have a contractor registration.

When we receive an Intent that does not have a contractor registration, it is flagged for attention in the processing. Our processing staff would look at what work is being performed and ask the contractor compliance program for help if the answer is not obvious. In the event of forms that should have a contractor registration but the contractor is not actually registered (we check) will be referred to contractor registration for compliance action.”

**Q** What about snowplowing a street? Shoveling snow off a roof? Shoveling sidewalks by hand?

- A**
- A contract for snowplowing streets and roads is a purchased service, service not subject to bid laws, and not subject to the prevailing wage law since it is not a contract for “construction, reconstruction, maintenance or repair” as those words are used in RCW 39.12.030.
  - A contract for shoveling snow off a roof is maintaining the asset (the building) and is subject to prevailing wages and bid laws as applicable.
  - A contract for shoveling sidewalks by hand is a purchased service not subject to





prevailing wages or bid laws since it is not a contract for “construction, reconstruction, maintenance or repair” as those words are used in RCW 39.12.030.

## Solicitation and Evaluation of Bids and Proposals

### **Straightforward Purchased Service Contracts**

Solicitation of a purchased service is normally very straightforward. An agency:

- determines the need for such service;
- develops specifications for the performance and frequency of the services;
- establishes minimum qualifications that the service contractor must meet (financial capability, experience, language skills, licenses, equipment, etc.); and
- develops a bid form and other elements of an invitation to bid (ITB).

A reasonable time is given for prospective bidders to respond, bids are opened, and the contract is awarded to the qualified bidder with the lowest price for the services. The exact process varies with the size and complexity of the contract for services as noted in *What Level of Competitive Solicitation Should I Use?*.

### **Public Works Contracts to Which Both Bid Laws and Prevailing**

#### **Wages Apply**

If your contract is a “gray line” public works contract to which both bid laws and prevailing wages apply, as discussed above in *Prevailing Wages and Public Works Issues*, an agency should use processes and contract documents that closely mimic those for public works projects. This means that ITBs for these services must address the following common public works requirements:

- a statement that prevailing wage are required and a link to the appropriate set of wage rates; *(Where the link to the L&I web site is used, please state the effective date, the county, and any other information necessary to look up the correct rates (the link alone is insufficient.)*
- a statement that sales and use taxes are applicable (or not) and the rate to be applied;
- a statement that the contractor must meet the mandatory bidder responsibility criteria of [RCW 39.04.350\(1\)](#);
- a statement that the contractor must meet supplemental bidder responsibility criteria (financial capability, experience, language skills, licenses, equipment, etc.) established in accordance with [RCW 39.04.350\(2\)](#);
- the need (or not) for a bid bond and the amount thereof;
- the need (or not) for sealed written bids and the due date thereof;
- the need (or not) for public bid opening and the time, place, and date;
- the need for performance/payment bonds per [chapter 39.08 RCW](#); and
- a statement that retainage will be withheld.



An agency must consider whether it can simply ask for informal bids (quotes), or if it can use a small works roster process, or if it must advertise in its official newspaper in accordance with competitive bidding requirements, if any, applicable to that agency. Also, some agencies are required to (by statute or agency policy) to have the contract awarded by its council/commission/board.

### **Purchased Service Contracts to Which Only Prevailing Wages Apply**

If the purchased service is one of the “gray line” services that require prevailing wages only, as discussed above in Prevailing Wages and Public Works Issues, ITBs (or RFPs in some cases) for these services must address the following:

- a statement that prevailing wage are required and a link to the appropriate set of wage rates; *(Where the link to the L&I web site is used, please state the effective date, the county, and any other information necessary to look up the correct rates (the link alone is insufficient.)*
- a statement that sales and use taxes are applicable (or not) and the rate to be applied;
- a statement that retainage will be (or will not be) withheld;
- the need (or not) for sealed written bids and the due date thereof;
- the need (or not) for public bid opening and the time, place, and date;
- the need (or not)for performance/payment bonds per chapter 39.08 RCW;
- specifications for the performance and frequency of the services; and
- minimum qualifications that the service contractor must meet (financial capability, experience, language skills, licenses, equipment, etc.).

A reasonable time is given for prospective bidders to respond, bids are opened, and the contract is awarded to the qualified bidder with the lowest price for the services. The exact process varies with the size and complexity of the contract for services as noted in [What Level of Competitive Solicitation Should I Use?](#)

## **Examples of Purchased Service Solicitations and Contracts**

For examples of purchased service solicitations and agreements, see our webpage [Purchased Service Contracts](#).

# What Concerns Should I Have About Ethics and Unfair Labor Practices?

## Organizational Conflicts of Interest

An organizational conflict of interest exists when the services to be performed by a provider may, without some restrictions on future participation by the provider in additional contracting activities, result in an unfair competitive advantage to the provider or impair its objectivity in performing the services. As examples:

- A consultant paid to identify software solutions recommends only those software systems it is certified to install.
- A consultant is paid to design a system and then proposes to install the system.
- A firm providing audit services recommends follow-on management improvements to be provided by a related entity.

Practice Tip –

In your request for proposals (RFP) address possible follow-on work and whether the selected provider will be precluded from performing the follow-on work. This will allow providers to determine which portions of the work will afford it the best business opportunity. If the agency wants the flexibility to have the same firm that designed the solution to install the solution, write the RFP to include installation within the scope of possible, but not guaranteed, services.

## Personal Conflicts of Interest

Local government agencies are subject to the “Code of Ethics for Municipal Officers” in [chapter 42.23 RCW](#). “Municipal officer” is defined in [RCW 42.23.020\(2\)](#) to include “all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer.”

Briefly, the Code prohibits a municipal officer from having a beneficial (financial) interest in a contract made by or under the municipal officer’s supervision or for the benefit of his or her office. [RCW 42.23.030](#). Contracts made in violation of this statutory conflict of

interest law are void. [RCW 42.23.050](#). Certain interests in contracts are deemed “remote interests” and are not prohibited; however, an official with a remote interest must not participate in selecting the contractor. [RCW 42.23.040](#).

The Code’s conflict of interest prohibition contains several exemptions, including one applicable to most local government agencies:

“The letting of any other contract in which the total amount received under the contract or contracts by the municipal officer or the municipal officer’s business does not exceed one thousand five hundred dollars in any calendar month.” [RCW 42.23.030\(6\)](#).

[Except, note [RCW 42.23.030\(6\)\(d\)](#): The exceptions provided in this subsection (6) do not apply to:

- (i) A sale or lease by the municipality as the seller or lessor;
- (ii) The letting of any contract by a county with a population of one hundred twenty-five thousand or more, a city with a population of ten thousand or more, or an irrigation district encompassing more than fifty thousand acres; or
- (iii) Contracts for legal services, except for reimbursement of expenditures.]

However, an agency officer should not participate in any decision to award a contract to him/herself that is subject to this exemption. See [RCW 42.23.030](#) for other procedural requirements. For more information on statutory conflicts of interest, see the MRSC webpage [Ethics and Conflicts of Interest](#).

The Code also identifies for municipal officers certain “prohibited acts”:

- Using his or her position to obtain special privileges;
- Accepting any compensation, gratuity, or reward from a source other than the employing municipality in connection with the officer’s duties;
- Engaging in a business or professional activity that the officer might reasonably expect would induce him or her to disclose confidential information gained by virtue of his or her official position; and
- Disclosing confidential information or using such information for personal gain. [RCW 42.23.070](#).

Practice Tip –

Agencies should provide clear guidance to their employees and commissioners by adopting a detailed code of ethics. The code of ethics, among other things, should address participation by agency staff in provider-sponsored seminars and post-agency employment with providers performing services for agencies. The Port of Seattle’s [code of ethics](#) provides a detailed example. Other examples are available from the [National Institute of Governmental Purchasing, Inc. \(NIGP\)](#) website.

## Appearance of Fairness

In addition to ensuring the actual fairness of the selection process, the agency should ensure that the process appears fair to the proposers and the agency's stakeholders. By conducting an open competition with a transparent, documented selection process, both proposers and stakeholders can verify that all qualified proposers received fair consideration and that the selection was based on the published evaluation criteria.

Because of its prior experience with the agency, a firm may have a competitive advantage; but this is not of itself an unfair advantage. Just make sure that firms currently working with the agency are not given advance information about future projects, which would give these firms extra time to develop proposals. Also, be careful to not structure selection processes to give those firms an unfair advantage.

Practice Tips –

- The agency may maintain a central clearinghouse (roster) of provider statements of qualifications (SOQs) or use a shared roster such as MRSC's or similar roster.
- Ensure that providers who have demonstrated an interest in working with the agency are solicited when appropriate.
- All potential proposers should be given equal access to the RFP and related information. Consider implementation of a policy of electronic distribution of RFP's, reference documents, and addenda so that all parties receive the same information at the same time.
- Strive for consistent contract administration procedures within the agency, including invoicing payment procedures and performance evaluation practices.

## Service Provider (Contractor) vs. Employee

Before contracting for services, consider including in the contract language and procedures for monitoring the contract to help ensure that the service provider is in fact an independent contractor and will not be considered an agency employee. This issue is enough of a problem that specific legislation was enacted in 2002 making it an unfair practice to misclassify an employee to avoid providing or continuing to provide employment-based benefits. See [RCW 49.44.170](#). The general rule (according to the IRS) is that an individual is an independent contractor if the person for whom the services are performed has the right to control or direct only the result of the work, and not what will be done or how it will be done or the method of accomplishing the result.

This issue arises in numerous contexts, including:

- Internal Revenue Service – Taxes
- Fair Labor Standards Act
- Social Security
- Liability for acts or accidents
- Workers' compensation

- Laws against discrimination

If a consultant is found (in actuality) to be an employee, the agency (the employer) is required to pay workers' compensation, to meet wage and hour requirements, to pay unemployment taxes, to make deductions for IRS and social security, to provide benefits based on personnel policies, and to maintain a safe work site.

Note that titles and labels in a contract are not governing, and objective standards are used to determine if a person is in fact an employee or independent contractor. To misclassify is to label a permanent employee as "temporary," "seasonal," "intermittent," "leased," or "contract." RCW 49.44.170(2)(d). There is no one single test or factor that is controlling – it is the total activity or situation that controls and the burden of proof is on the employer. The single most important factor is the nature and degree of control exercised by the employer over the person performing the work:

- Does the employer control not only the work product, but also details of how the work is performed?
- Who provides the workplace and the tools to perform the work?
- The duration of the work – independent contractors usually perform for a relatively short time.
- Is this work usually performed by a specialist without supervision or usually under direction of a supervisor?
- Independent contractors usually are sole proprietors that bid to perform specific work and are evaluated on results and on not day-to-day work.
- Do they have and maintain a separate place of business?
- Independent contractors are usually paid by the job, sometimes by time and materials.

It is best to err in favor of the person being an employee rather than an independent contractor. All the liabilities, which may include penalties and back taxes, are present with the opposite mischaracterization – that the person is an independent contractor when he/she is really an employee.

Practice Tips –

- Consultant contracts should have a definite date of completion and specify that time extensions must be approved by an appropriate agency official;
- Establish objective standards for your definitions of employees and consultants;
- Establish a review process to ensure that these standards are being followed;
- Review current consultant contracting and employment for compliance with these standards;
- Be cautious when contracting for services normally performed by public employees.

# Tables

**Table A – Qualifications Criteria Matrix**

Public Agency May Consider		
Purchased Services	Personal Services	A/E Professional Services Under Chapter 39.80 RCW
Cost or Price	Qualifications and Fees or costs	Qualifications first, then price - after selection
Quality of previous performance	Quality of previous performance	Quality of previous performance
Ability to meet deadlines for contract performance	Ability to meet deadlines for contract performance	Ability to meet deadlines for contract performance
Responsiveness to solicitation requirements	Responsiveness to solicitation requirements	Responsiveness to solicitation requirements
Demonstrated compliance with employment security and sales tax requirements (all as applicable)	Compliance with statutes and rules relating to contracts or services	Compliance with statutes and rules relating to contracts or services
Ability, experience, and reputation	Ability, experience, and reputation	Ability, experience, and reputation
References	References	References
Staff readily available for the project	Staff readily available for the project	Staff readily available for the project
Financial capacity	Financial capacity	Financial capacity
Meets applicable licensing requirements	Meets applicable licensing requirements	Meets applicable licensing requirements
Safety record	Safety record	Safety record
Ability to meet necessary response times for unscheduled work and emergencies	Ability to meet necessary response times for unscheduled work and emergencies	Ability to meet necessary response times for unscheduled work and emergencies
N/A	History of Errors and Omissions	History of Errors and Omissions
N/A	N/A	Construction Change Order History

## Table B – Soliciting for Professional Architecture & Engineering Services

This table contains a set of suggested procedures and dollar limit thresholds that are best suited for small to medium-sized agencies of all types. Agencies have great latitude in setting their own policies and procedures. Threshold dollar amounts in this table can and should be modified by an agency to fit its comfort level. Recognition should be given to federal procurement limits, and conditions of a grant or of funding agency policies may require advertising for each project.

### **Dollar Threshold: \$0 to \$25K**

#### **Competitive Process: Minimal Competition**

##### **Major Activities:**

- Select qualified firms (1-3) based on established criteria from those who have qualifications on file with the Agency.
- OR advertise for statements of qualifications and proposals from interested firms.
- Ask for proposals from selected firm(s).
- Select most qualified firm.
- Negotiate a contract with the firm deemed most highly qualified.
- Document process.

### **Dollar Threshold: \$25K to \$100K**

#### **Competitive Process: Informal Competition**

##### **Major Activities:**

- Select 3-5 qualified firms based on established criteria from those who have qualifications on file with the Agency.
- OR advertise for statements of qualifications and proposals from interested firms.
- Prepare written solicitation document/letter, including at a minimum: description of services required, project schedule, request for consultant's qualifications and/or non-price proposal and due date for the responses.
- Send to a minimum of three firms/individuals. May be emailed to them and responses may be emailed to the Agency to expedite processing.
- Evaluate responses and select the most qualified firm.
- Negotiate contract with most qualified firm.
- Document process for file, including selection criteria: names of firms considered; all responses to RFP; basis for award decision; and copy of contract.

### **Dollar Threshold: Over \$100K**

#### **Competitive Process: Formal Competition**

##### **Major Activities:**

- Prepare formal solicitation document, e.g., Request for Proposals (RFP) or Request for Qualifications/Proposal (RFQ/RFP). Include all requirements in order for proposers to understand what the Agency needs and how the Agency will evaluate responses.



- Publish legal notice in major daily newspapers to notify firms of upcoming solicitation. Develop mailing list from firms responding to notice.
- Post solicitation document on Agency website (optional).
- Develop score sheets for use by evaluators.
- Issue RFP or RFQ/RFP to a minimum of six firms/businesses. Agency may also just send a notification to six or more businesses that the solicitation document is posted on their website and can be accessed there. Document for the file if fewer than six firms are contacted and state the reason why.
- Conduct pre-proposal conference, if required in RFP or RFQ/RFP, and issue addendum.
- Provide answers to bidders' questions via addenda to all who receive the RFP or RFQ/RFP. Or advise those who download the RFP or RFQ/RFP from the website to check back for any addenda that may be posted.
- Date and time stamp proposals received by the due date. Electronic proposals will have the date and time automatically noted.
- Evaluate proposals strictly against criteria set forth in the RFP or RFQ/RFP and score. Use three evaluators (recommended) for scoring and score proposals using score sheets. Tabulate scores and determine ranking of proposers.
- Schedule and conduct oral interviews of top finalists, if desired.
- Determine final scoring and select most qualified firm.
- Notify successful and unsuccessful firms.
- Negotiate contract with most qualified firm.
- Conduct debriefing conferences with unsuccessful proposers, if requested.

## Table C – Soliciting for Personal Services

This table contains a set of suggested procedures and dollar limit thresholds that are best suited for small to medium-sized agencies of all types. Agencies have great latitude in setting their own policies and procedures (except for port districts that must follow chapter 53.19 RCW for personal service contracts). Threshold dollar amounts in this table can and should be modified by an agency to fit its comfort level. Recognition should be given to federal procurement limits, and conditions of a grant or of funding agency policies may require advertising for each project.

### **Dollar Threshold: \$0 to \$5K**

#### **Competitive Process: Minimal Competition**

##### **Major Activities:**

- Seeking competition is always recommended, though not required for this dollar range.
- Telephone calls can be made to firms or individuals describing the services desired and requesting price, schedule, and qualifications to perform.
- Contract with selected firm.

### **Dollar Threshold: \$5K to \$20K**

#### **Competitive Process: Informal Competition**

##### **Major Activities:**

- Prepare written solicitation document/letter, including at a minimum: description of services required, project schedule, request for consultant's qualifications, request for costs or fees, and due date for responses.
- Send to a minimum of three firms/individuals. May be emailed to them and responses may be emailed to the Agency to expedite processing.
- List of firms can be developed from telephone listings, professional societies and periodicals, Internet listings, a published legal notice requesting information on available services, etc.
- Evaluate responses and make award decision.
- Negotiate contract with successful firm.
- Document for file: names of firms solicited; information of firm's responses, basis for award decision, and copy of contract.

### **Dollar Threshold: Over \$20K**

#### **Competitive Process: Formal Competition**

##### **Major Activities:**

- Prepare formal solicitation document, e.g., Request for Proposals (RFP) or Request for Qualifications/Quotations (RFQQ). Include all requirements in order for proposers to understand what the agency needs and how the agency will evaluate responses.
- Publish legal notice in major daily newspapers to notify firms of upcoming solicitation.

tion. Develop mailing list from firms responding to notice.

- Post solicitation document on Agency website (optional).
- Develop score sheets for use by evaluators.
- Issue RFP or RFQQ to a minimum of six firms/businesses. Agency may also just send a notification to six or more businesses that the solicitation document is posted on their website and can be accessed there. Document for the file if fewer than six firms are contacted and state the reason why.
- Conduct pre-proposal conference, if required in RFP or RFQQ, and issue addendum.
- Provide answers to bidders' questions via addenda to all who receive the RFP or RFQQ. Or advise those who download the RFP or RFQQ from the website to check back for any addenda that may be posted.
- Date and time stamp proposals received by the due date. Electronic proposals will have the date and time automatically noted.
- Evaluate proposals strictly against criteria set forth in the RFP or RFQQ and score. Must use a minimum of three evaluators for scoring and score proposals using score sheets. Tabulate scores and determine ranking of proposers.
- Schedule and conduct oral interviews of top finalists, if desired.
- Determine final scoring and select apparent successful contractor.
- Notify successful and unsuccessful firms.
- Negotiate contract with apparent successful contractor.
- Conduct debriefing conferences with unsuccessful proposers, if requested.

## Table D - Soliciting for Purchased Services

This table contains a set of suggested procedures and dollar limit thresholds that are best suited for small to medium-sized agencies of all types. Agencies have great latitude in setting their own policies and procedures. Threshold dollar amounts in this table can and should be modified by an agency to fit its comfort level. Recognition should be given to federal procurement limits, and conditions of a grant or of funding agency policies may require advertising for each project.

### **Dollar Threshold: \$0 to \$5K**

#### **Competitive Process: Minimal Competition**

##### **Major Activities:**

- Seeking competition is always recommended, though not required for this dollar range.
- Telephone calls can be made to vendors describing the services desired and requesting price, schedule and qualifications to perform.
- Purchases should be made based on the Agency's inquiries and experience and knowledge of the market to obtain the best quality product at the best price.

### **Dollar Threshold: \$5K to \$20K**

#### **Competitive Process: Informal Competition**

##### **Major Activities:**

- Either written solicitation or documented telephone solicitation may be used. The solicitation should include at a minimum: a description of services required, project schedule, request for qualifications, request for bid, and due date for responses.
- If solicitation is done by phone, it must be thoroughly documented.
- Seek bids from a minimum of three vendors. If written, the solicitation may be emailed to them and responses may be emailed to the Agency to expedite processing. A list of vendors can be developed from telephone listings, internet listings, a published legal notice requesting information on available services, etc.
- Evaluate responses and make award decision.
- Negotiate subcontract with successful bidder.
- Document for file: names of vendors solicited; information on vendor's responses, basis for award decision, and copy of subcontract.

### **Dollar Threshold: Over \$20K**

#### **Competitive Process: Formal Competition**

##### **Major Activities:**

- Prepare formal solicitation document. The Invitation for Bid (IFB) is the solicitation document most frequently used by Agencies to subcontract for purchased services or goods. The IFB identifies the functional performance threshold at which the Agency needs would be met, serves as the basis for the applicants to respond, and also provides the foundation for the eventual subcontract.

- Publish legal notice in major daily newspapers to notify firms of upcoming solicitation. Develop bidder's list from firms responding to notice.
- Issue IFB to responding bidders.
- Conduct a pre-proposal conference to clarify the extent of the work and permit prospective bidders to ask questions.
- Date and time stamp proposals received by due date.
- Evaluate proposals strictly against the criteria that are set forth in the IFB and score the proposals. Should use three evaluators for scoring and score proposals using score sheets. Determine apparent successful bidder.
- Notify successful and unsuccessful firms.
- Negotiate subcontract with successful contractor.
- Conduct debriefing conferences, if requested.
- Begin contract work.

**Table E – Definitions of Practice of Professions Included in Chapter 39.80 RCW**

*Architects – Chapter 18.08 RCW and Chapter 308-12 WAC*

The practice of architecture is defined in RCW 18.08.320(12) as:

“Practice of architecture” means the rendering of services in connection with the art and science of building design for construction of any structure or grouping of structures and the use of space within and surrounding the structures or the design for construction of alterations or additions to the structures, including but not specifically limited to predesign services, schematic design, design development, preparation of construction contract documents, and administration of the construction contract.

More information can be found at the Department of Licensing (DOL) Architects website.

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*Engineers and Land Surveyors – Chapter 18.43 RCW and Title 196 WAC*

The practice of engineering is defined in RCW 18.43.020(5)(a) as:

“Practice of engineering” means any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects.

The practice of land surveying is defined in RCW 18.43.020(9) as:

“Practice of land surveying” means assuming responsible charge of the surveying of land for the establishment of corners, lines, boundaries, and monuments, the laying out and subdivision of land, the defining and locating of corners, lines, boundaries, and monuments of land after they have been established, the survey of land areas for the purpose of determining the topography thereof, the making of topographical delineations and the preparing of maps and accurate records thereof, when the proper performance of such services requires technical knowledge and skill.

More information can be found at the Department of Licensing (DOL) Engineers and Land Surveyors website.

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*Landscape Architects – Chapter 18.96 RCW and Chapter 308-13 WAC*

The practice of landscape architecture is defined in RCW 18.96.030(10) as:

“Landscape architecture” means the rendering of professional services in connection with consultations, investigations, reconnaissance, research, planning, design, construction document preparation, construction administration, or teaching supervision in connection with the development of land areas where, and to the extent that, the dominant purpose of such services is the preservation, enhancement, or determination of proper land uses, natural land features, ground cover and planting, naturalistic and aesthetic values, the settings and approaches to structures or other improvements, or natural drainage and erosion control. This practice includes the location, design, and arrangement of such tangible objects as pools, walls, steps, trellises, canopies, and such features as are incidental and necessary to the purposes in this chapter. Landscape architecture involves the design and arrangement of land forms and the development of outdoor space including, but not limited to, the design of public parks, trails, playgrounds, cemeteries, home and school grounds, and the development of industrial and recreational sites.

More information can be found at the Department of Licensing (DOL) [Landscape Architects](#) website.

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