

Public Work

Requirements for School Districts

September 2022

What I Hope You Gain Today

NOT – an extensive knowledge of Public Work requirements

INSTEAD,

- An understanding of what is Public Work
- The knowledge to contact us when:
 - the work you desire might be Public Work
 - you need work done that is Public Work
 - you need to pay a vendor or contractor for Public Work

AND FOREMOST – why it's important that we follow the Public Work requirements

Public Work Options Table

Public Work Requirements for School Districts

- Part 1 - Why, How, Who, What and When
 - What is Public Work?
 - When is work considered Public Work?
 - Why is compliance with these requirements important?
 - How do we comply with these requirements?
 - Who is responsible for documenting compliance with these requirements?

Public Work Requirements for School Districts

- Part 2 - Complying with the Requirements
 - Plans, specifications and estimates
 - Permits and code compliance
 - Procurement
 - Contracts, bonds and insurance
 - Change management during construction
 - Completion, closeout and acceptance

What is Public Work? – RCW 39.04

- Part of Title 39 RCW – Public Contracts and Indebtedness
- 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.
- Other statutes that govern Public Work
 - 39.08 – Contractor's bond
 - 39.12 – Prevailing wages on public Work
 - 39.19 – Office of minority and women's business enterprises
 - 60.28 – Lien for labor, materials, taxes on public Work
 - 28A.335 – School districts' property

When is work considered to be Public Work?

- When the work falls under the categories of construction, alteration, repair, or improvements
- When the work is other than ordinary maintenance
 - Case law on “ordinary maintenance”
- When the work is maintenance when performed by contract, it is subject to prevailing wages
 - What is a contract?
- When the work is by law a lien or charge on any property therein
 - Payment of materials or prevailing wages

Why do we need to follow these requirements?

- To follow the statutory requirements and District policies
- To protect the District from:
 - Claims
 - Payment for materials
 - Payment of prevailing wages
 - Taxes, unemployment compensation and industrial insurance
 - Liens against District property
 - Poor workmanship
 - Code non-compliance
 - Liability
 - Overpayment for work
 - Audit findings

How do we protect the District?

- Plans and specifications
- Estimating
- Permitting
- Competitive procurement
- Withholding retainage
- Payment and performance bonds
- Construction management
- Pay application review
- Contract change orders
- Closeout documentation
- Agency signoff
- Board acceptance

Who works to protect the District?

- Architects and engineers
- Permitting specialists
- Agencies having jurisdiction (AHJs)
- Project support staff
- Construction managers
- Finance staff
- Administrators with signature authority
- Board of Directors
- State agencies

When is the District protected?

- If work is determined to be Public Work and it is, the District is protected.
- If work is determined to be Public Work and it is not, the District is protected.
- If work is determined not to be Public Work and it is not, the District is protected.
- If the work is determined not to be Public Work and it is, the District is not protected.

Public Work Requirements for School Districts

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 - Permits and code compliance
 - Procurement
 - Contracts, bonds and insurance
 - Construction and contract change management
 - Progress payments, invoicing and pay applications
 - Completion, closeout and acceptance

Plans, specifications and estimates

- Plans and specifications describe the work to be done and are used to understand when additional scope warrants additional compensation.
- Estimates are used to determine the procurement method necessary.
- RCW 39.04.020 – Plans and specifications–Estimates–Publication–Emergencies
 - Whenever the state or any municipality shall determine that any public work is necessary to be done, it shall cause plans, specifications, or both thereof and an estimate of the cost of such work to be made and filed in the office of the director, supervisor, commissioner, trustee, board, or agency having by law the authority to require such work to be done. The plans, specifications, and estimates of cost shall be approved by the director, supervisor, commissioner, trustee, board, or agency and the original draft or a certified copy filed in such office before further action is taken.
- RCW 28A.335.190 (1) portion
 - When, in the opinion of the board of directors of any school district, the cost of any furniture, supplies, equipment, building, improvements, or repairs, or other work or purchases, except books, will equal or exceed the threshold levels specified in subsections (2) and (4) of this section, complete plans and specifications for such work or purchases shall be prepared.

Permits and code compliance

- Code requirements
 - Building – International Building Code (IBC), State Building Code
 - Fire – International Fire Code (IFC), National Fire Protection Association (NFPA)
 - Mechanical – International Mechanical Code (IMC)
 - Plumbing – Uniform Plumbing Code
 - Electrical – National Electrical Code and NFPA
 - Energy – Washington State Energy Code
 - Health – State Department of Health
 - Stormwater – State Stormwater Management Manual for Western Washington
 - Critical areas – Army Corps of Engineers, US Department of Fish and Wildlife, National Marine Fisheries, state Department of Ecology, WA Department of Fish and Wildlife, county and city ordinances
 - Local city building and land use codes, ordinances and requirements

Permits and code compliance

- Permits
 - Conditional use
 - Land use
 - Building
 - Tenant-improvement
 - Foundation
 - Retaining wall
 - Labor and Industries electrical
 - Stormwater
 - Fence
 - Sign
 - Fire alarm
 - Critical areas

Permits and code compliance

- Utilities
 - Developer extension agreements
 - Service agreements
 - Plans review
 - Facilities improvement transfers
 - Easements
 - Bill of sale
 - Maintenance bonds

Procurement – Threshold determinations

- Estimated cost of work, including materials, most often excluding tax
- Cannot break work into parts to avoid procurement thresholds
- Timing of work
- RCW 28A.335.190 (1)
 - The cost of any public work, improvement, or repair for the purposes of this section shall be the aggregate of all amounts to be paid for labor, material, and equipment on one continuous or interrelated project where work is to be performed simultaneously or in close sequence.
- RCW 39.04.155 (4) – Small works roster contract procedures
 - The breaking of any project into units or accomplishing any projects by phases is prohibited if it is done for the purpose of avoiding the maximum dollar amount of a contract that may be let using the small works roster process or limited public works process.

Procurement - Self-performed work

- District can perform work with its own forces if the estimated cost is less than \$75,000
- RCW 28A.335.190 (4)
 - The board may make improvements or repairs to the property of the district through a department within the district without following the public bidding process provided in subsection (1) of this section when the total of such improvements or repairs does not exceed the sum of seventy-five thousand dollars.

Procurement – Public bidding threshold

- Work for which the estimated value is less than \$100,000 can be contracted without competitive pricing
- RCW 28A.335.190 (4)
 - Whenever the estimated cost of a building, improvement, repair, or other public works project is one hundred thousand dollars or more, the public bidding process provided in subsection (1) of this section shall be followed unless the contract is let using the small works roster process in RCW [39.04.155](#) or under any other procedure authorized for school districts.”

Procurement – Public bid procedure

- RCW 28A.335.190 (1) Bid procedure
 - Complete plans and specifications for such work or purchases shall be prepared
 - Notice by publication given in at least one newspaper of general circulation within the district, once each week for two consecutive weeks
 - Specifications and other information may be examined at the office of the board or any other officially designated location
 - The bids shall be in writing and shall be opened and read in public on the date and in the place named in the notice and after being opened shall be filed for public inspection

Procurement – Small Works Roster

- RCW 39.04.155
 - Provisions may be used in lieu of other procedures to award contracts for such work with an estimated cost of three hundred fifty thousand dollars or less.
 - The small works roster or rosters shall consist of all responsible contractors who have requested to be on the list, and where required by law are properly licensed or registered to perform such work in this state.
 - Telephone, written, or electronic quotations from contractors on the appropriate small works roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder
 - Invitations for quotations shall include an estimate of the scope and nature of the work to be performed as well as materials and equipment to be furnished. However, detailed plans and specifications need not be included in the invitation.
 - A contract awarded from a small works roster under this section need not be advertised.
 - Retainage may be waived, but it is not recommended that we do so.

Procurement – Limited Public Works – RCW 39.04.155 (3)

- Provisions may be used in lieu of other procedures to award contracts for work with an estimated cost of less than fifty thousand dollars.
- Solicit electronic or written quotations from a minimum of three contractors from the appropriate small works roster and shall award the contract to the lowest responsible bidder
- Must equitably distribute opportunities for limited public works projects among contractors willing to perform in the geographic area of the work.
- May waive the payment and performance bond and retainage requirements, but again this is not recommended
- A contract awarded using the limited public works process need not be advertised

Procurement – Thresholds summarized

- Full bid may be used at any level but must be used for estimates above \$350,000
- Small works roster process may be used at any estimate up to \$350,000
- Limited public works process may be used at any estimate up to \$50,000
- Below \$100,000, no competitive pricing or bid is necessary, but it may be of benefit to use competitive quotations or any of the above bid processes

Contracts

- Contracts are used to define the responsibilities and assign the risks to parties on a construction project
- Contracts include General Conditions and any Special Conditions
- Contracts define the terms of the work
 - Scope
 - Schedule
 - Cost
- Contracts define the working relationships between parties and describe how the work will be done, and how changes and conflicts will be resolved

Contract types

- AIA Form A101 (contract) and A201 (general conditions) – very large projects
- Lake Stevens Small Construction Contract – for projects larger than \$150,000
- Lake Stevens Very Small Construction Contract – for projects less than \$150,000
- Master Construction Agreements – for contractors with whom we work on multiple small projects
- Purchase orders
- We do not use contractor-developed agreements or conditions
- We never send a contractor an editable contract document

Contractor Bonds

- RCW 39.08 – Payment and performance bonds
- RCW 60.25-011 – Retainage bond

Payment and Performance Bonds – RCW 39.08.010

- Payment and performance (P&P) bonds are issued by a surety that ensures that the contractor will:
 - Payment bond
 - Pay all laborers, mechanics, and subcontractors and material suppliers
 - Pay the taxes, increases, and penalties incurred on the project for unemployment compensation, industrial insurance and excise taxes
 - Performance bond
 - Faithfully perform all provisions of the contract
- Bonds protect the district from contractor non-payment (liens and claims) or non-performance (not finishing the work)
- Payment and performance bonds may be waived in certain cases, but doing so puts the district at risk for contractor non-performance and payment
- On projects less than \$150,000, the contractor may request, and the district may accept, an increase in retainage withheld to 10% in lieu of P&P bonds

Retainage and Retainage Bonds – RCW 60.28.11

- Public improvement contracts must provide, and public bodies must reserve, a contract retainage not to exceed five percent of the moneys earned by the contractor
- Retainage is a trust fund for the protection and payment of: (i) The claims of any person arising under the contract; and (ii) the state with respect to taxes, increases, and penalties imposed
- A contractor may provide a bond from a surety in lieu of having retainage withheld
- Contractors, laborers and material suppliers must file claims within 45 days of project acceptance by the board
- Retainage is held until 60 days after the board accepts the work or when releases are received from State agencies

Insurance

- The contractor must provide insurance coverage as indicated in the contract. This includes:
 - Commercial General Liability, Bodily Injury and Property Damage Liability
 - Completed Operations and Products
 - Commercial Auto Liability, Bodily Injury and Property Damage
 - Blanket Contractual Liability
 - Umbrella policy
 - Industrial insurance (workers' compensation)
 - Builder's Risk

Construction Management

- Scope (drawings and specifications), time and cost (contract and general conditions)
- Site observation reports
 - Document conditions, labor force, materials onsite
 - Useful when defending against contractor claims
- Avoid directing means and methods
- Punchlist when work is complete

Invoices, Pay Applications and Payment

- Invoices – acceptable for single-payment projects
- Pay applications – necessary for progress payments in a multi-payment project
 - Schedule of values
 - Work completed to date
 - Material received and stored
 - Onsite
 - Bonded warehouse – requires agreement
 - Percentage of work completed and materials received and stored must be verified by construction manager before payment
- Tax (on whole amount requested) and retainage (without tax, if not bonded) must be included
- Request for payment for changes not approved by change order are not allowed

Invoices, Pay Applications and Payment, continued

- First pay application
 - Intent to Pay Prevailing Wage required prior to first pay application (for contractor and each subcontractor that requests payment)
 - Approved schedule of values
- Progress payments
 - Updated schedule
- Substantial completion pay application
 - Final payment prior to final completion
- Final pay application
 - All Affidavit of Wages Paid (or Combined Form) must be approved
 - Payment for full contract amount, less retainage (if not bonded)

Change Management

- Change in scope, cost or time is not contractual without authorized district approval
- Change management
 - Contractor may be due:
 - Time
 - Money
 - Both
 - Neither
- Appropriate changes
 - Changes that occur during construction directly related to scope that was procured
 - Cannot be for additional work not directly related to scope procured
 - Roofing project
 - Repair damaged underlayment discovered during roof removal – appropriate
 - Add roof replacement of adjacent building – not appropriate

Change Management, continued

- Change order proposal (COP)
 - Contractor proposes a cost and/or time adjustment for a change in scope
 - Authorized only by Executive Director
 - Authorization allows work to proceed but does not modify contract or allow contractor to bill
- Construction change directive (CCD)
 - Very sparingly used, only in urgent situations
 - Authorized only by Executive Director
 - Authorizes work to proceed while cost to be determined
 - Does not modify contract or allow contractor to bill

Change Management, continued

- Change Order
 - Modifies the contract for time, cost or both
 - Aggregates previously-approved change order proposals and construction change directives
 - Authorized only by Superintendent or Assistant Superintendent of Business Services
 - Authorizes contractor to bill for changes

Completion

- Substantial completion
 - District gains beneficial use of improvement
 - Only punchlist work remaining
 - Work can reach final completion in contract-specified time
- Final completion
 - Contract requirements have been fulfilled and work is ready to be accepted by the board
 - All required permits, documentation and affidavits have been completed and submitted
- Final acceptance
 - Board approval
 - Starts the clock on warranties and retainage release

Completion Requirements

- Substantial completion
 - Contractor's statement of completion
 - District can fully utilize the work for which it is intended
 - All work except incidental corrective or punchlist work completed
 - Occupancy permit (temporary or final) issued
- Final completion
 - All work, including corrective or punchlist work, is complete
 - Final occupancy permit

Completion Requirements, continued

- Final acceptance
 - Affidavit that all payrolls, bills for materials and equipment have been paid
 - Consent of surety for final payment
 - Certificate of continuing insurance and statement that insurance is renewable
 - Affidavit of Wages Paid from contractor and all subcontractors
 - All claims have been resolved
 - Affidavit of Release of Liens and Claims
 - Contractor certified statement that all permits have been closed and copies of all completed permits
 - Hard copy of as-built drawings and specifications
 - All warranties, owner stock, other documents required by the contract

Final payment and retainage release

- Final payment
 - Follows board acceptance
- Retainage release
 - After 60 days from board acceptance
 - All claims must be satisfied
 - Follows release of retainage from Departments of Labor and Industries, Revenue and Employment Security for projects over \$35,000



Questions?