

Public Works Contracting and Purchasing 2009 MRSC Legislative Update

"No man's life, liberty, or property are safe while the legislature is in session."
[Often attributed to Mark Twain.]

There are a number of bills enacted in 2009 that impact public works contracting in Washington State. All bills are effective July 26, 2009. The following summary (in order of the bill number) is intended to provide the essence of each bill. For the actual bill language, go to <http://apps.leg.wa.gov/billinfo/>. As always, Mike Purdy, Contracts Manager for the University of Washington, provides commentary at his private blog: <http://PublicContracting.blogspot.com>.

HB 1195 Regarding Payment of Undisputed Claims. Session Law C 193 L 09

Summary of Bill: A state or municipality must issue a change order to a public works contract for the full dollar amount of the work not in dispute within 30 days of satisfactory completion of the additional work. Failure to do so will result in interest paid by the state or municipality on the undisputed amount at a rate of 1 percent per month. Adds new section to ch. 39.04.

HB 1196 Increasing the Dollar Limit For Small Works Roster Projects. Session Law C 74 L 09

Summary of Bill: The maximum dollar amount allowed for use of a small works roster process is raised from \$200,000 to \$300,000 and the dollar amount requiring notification of all contractors on the roster is changed from between \$100,000 and \$200,000 to between \$150,000 and \$300,000. Amends RCW 39.04.155 and RCW 53.08.120.

HB 1197 Regarding Alternative Public Works Contracting Procedures. Session Law C 75 L 09

Summary of Bill: The CPARB must develop guidelines to be used by the review committee for the review and approval of design-build demonstration projects that procure operation and maintenance services. The review committee may approve up to ten projects using design-build procedures that have total project costs between \$2 million and \$10 million. These projects are subject to the same criteria as those with a project cost over \$10 million. The review committee must report to the CPARB on recommendations for continued use of the design-build procedure for projects estimated under \$10 million.

The review committee may approve a maximum of two design-build demonstration projects that include procurement of operations and maintenance costs for more than three years. Where possible, the committee must approve projects among multiple public bodies. Public bodies seeking certification for the design-build procedure must demonstrate successful management of at least one design-build project within the previous five years, and those seeking certification for the GC/CM process must demonstrate successful management of at least one GC/CM project within the previous five years.

In awarding GC/CM contracts, public bodies must establish a time and place for the opening of sealed bids. Bids must be publically opened and read, and all previous scoring must be available to the public. Public bodies must provide appropriate honorarium payments to finalists that submit responsive design-build proposals, rather than those submitting "best and final" proposals.

GA, UW, and WSU may issue job order contract work orders for the state regional universities and The Evergreen State College. The statute regarding negotiated adjustments to lowest design-build bids is repealed. Amends 39.10.230, 39.10.250, 39.10.270, 39.10.300, 39.10.330, 39.10.360, 39.10.420, and 39.10.310.

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[HB 1199](#) Regarding Retainage of Funds on Public Works Projects. Session Law C 219 L 09

Summary of Bill: Obsolete references relating to retainage of funds on public works contracts entered into prior to September 1, 1992, are removed. Statutes related to timely payment of interest on unpaid public contracts; public works retainage; excess over lien claims to contractor; and duties of the disbursing officer upon final acceptance of contract are each repealed. Amends RCW 39.04.901, 39.12.040, 39.12.050, 39.12.065, 39.76.020, 60.28.040, and 60.28.080. Reenacts and amends RCW 60.28.011. Repeals RCW 39.04.140, 39.76.010, 60.28.010, 60.28.020 and 60.28.050.

[EHB 1513](#) Allowing Municipalities to Participate in Financing the Development of Water or Sewer Facility Projects. Session Law C 230 L 09 [Please contact John Carpita (jcarpita@mrsc.org) about the public works contracting issues involved in implementing the provisions of this bill.]

Summary of Engrossed Bill: If authorized by ordinance or contract, a municipality may participate in financing the development of local water or sewer facilities development projects. A municipality that contributes to such financing is entitled to the same right to reimbursement through latecomers agreements as are developers and property owners. If a project is jointly financed by a combination of municipal and private funding sources, each participant in such financing is entitled to pro rata reimbursement in accordance with the provisions of the latecomers agreement. A municipality seeking reimbursement from an owner of real estate pursuant to a latecomers agreement is limited to the dollar amount authorized by such agreement for the infrastructure or facilities that were constructed under the applicable ordinance, contract, or agreement. This reimbursement limitation does not apply to the collection of fees or charges relating to other expenditures for services or infrastructure that are not subject to the applicable latecomers provisions. Amends RCW 35.91.020.

[HB 1555](#) Addressing the Underground Economy in the Construction Industry.

As of 5/07/09, Governor has not signed.

Summary of Substitute Bill: Provisions are adopted addressing contractor registration, workers' compensation education and outreach, liens on public works retainage, and unemployment record-keeping:

- A contractor must maintain, and have available for inspection by the Department of Labor and Industries (L&I), a list of all direct subcontractors and a copy of their certificate of registration.
- Before issuing a business license to a person required to be registered as a contractor, a city, town, or county may verify that the person is registered and report violations to L&I. The Department of Licensing must conduct the verification for cities that participate in the Master License System.
- The L&I is directed to conduct education and outreach to employers on workers' compensation requirements and premium responsibilities, including independent contractor issues. The L&I must work with new employers on an individual basis and also establish mass education campaigns.
- The L&I and the Employment Security Department (ESD) have a priority lien on retainage on public works projects following the Department of Revenue (DOR).
- After payment of employees, and payment of amounts owing to DOR with respect to the contract and other amounts owing to the DOR, the ESD and L&I have a lien for taxes, increases, and penalties due with respect to the contract. Other amounts owing to L&I and the ESD are a lien after other statutory lien claims have been paid.
- A penalty is created for employers who fail to keep and preserve unemployment insurance records. The penalty may not exceed \$250 or 200 percent of the quarterly tax for each offense, whichever is greater.

Adds a new section or chapter in RCW 18.27, 35.21, 35A.21, 36.01, and 51.04. Amends RCW 50.12.070, 60.28.021, 60.28.040, 60.28.051, and 60.28.060. Reenact and amends RCW 60.28.011.

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If signed by the governor, this bill amends the priority for liens against the retainage to:

Priority of claims against the retainage (per SHB 1555, 2009) is:

1. Workers for payment of prevailing wages (court order required)
2. State Department of Revenue and the Employment Security Department for unpaid taxes and the Department of Labor and Industries for unpaid industrial insurance premiums (no court order required)
3. Subcontractors, suppliers, and materialmen (court order required)
4. Other taxes due (no court order required)
5. The Agency (no court order required)

ESHB 1847 Regarding Bid Limits Session Law C 229 L 09

Summary of Engrossed Substitute Bill: Bid limits for public works and purchases of materials, supplies, or equipment are increased. Public works bid limits for higher education, first class cities, and counties with a population over 400,000 are raised to \$45,000 if only one trade or craft is involved, and \$90,000 if two or more trades are involved. For second class cities and towns and code cities, the limits are raised to \$40,000 for one trade, and \$65,000 for two or more trades. Bid limits for counties with a population of 400,000 and under are raised from \$10,000 to \$40,000 regardless of the number of trades involved. Bid limits for hospital districts are raised from \$50,000 to \$75,000. For metropolitan park districts (MPDs), fire protection districts, and water sewer districts bid limits are raised to \$20,000, regardless of the number of trades involved. Requirements are added to allow MPDs to purchase materials, supplies, or equipment estimated to cost less than \$40,000 without competitive bidding. Purchases estimated in excess of \$40,000 must be made by competitive bid, and purchases less than \$50,000 must be made using the vendor list process. Authority is given to MPDs to let contracts for purchases of materials, supplies, or equipment with suppliers designated on current state agency, county, city, or town purchasing rosters when the roster has been established in accordance with the competitive bidding law for that state agency, county, city, or town. The price and terms for purchases shall be as prescribed on the applicable roster. The dollar amount for purchases that must be made by competitive contract is increased from \$10,000 to \$40,000 for water and sewer districts.

Amend sections

RCW 28B.10.350, 28B.50.330, 35.22.620, 35.23.352, 35.61.135, 35A.40.210, 36.32.235, 36.32.240, 36.32.250, 52.14.110, 70.44.140, and 87.03.437. Reenact and amends section RCW 57.08.050.

Bid Limits for Selected Agencies		
(Includes ESHB 1847 Changes, Effective July 26, 2009)		
	Bid Limits	
	Single Craft	Multiple Crafts
Cities and Towns		
First Class City	\$45,000 (1)	\$90,000 (1)
Code City	\$40,000	\$65,000
2nd Class City & Towns	\$40,000	\$65,000
Counties		
Over 400 K w/ Purchasing Department (RCW 36.32.235)	\$45,000 (2,3)	\$90,000 (2,3)
Over 400 K w/o Purchasing Department (RCW 36.32.240,250)	\$40,000 (3,4)	\$40,000 (3,4)
Under 400 K w/ Purchasing Department (RCW 36.32.240,250)	\$40,000 (3,4)	\$40,000 (3,4)
Under 400 K w/o Purchasing	\$40,000 (3,4)	\$40,000 (3,4)

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Department (RCW 36.32.250)		
Water & Sewer Districts (Title 57 RCW)	\$20,000	\$20,000
Metropolitan Park Districts (Ch. 35.61 RCW)	\$20,000	\$20,000
Fire Districts (Title 52 RCW)	\$20,000	\$20,000
Port Districts (Title 53 RCW)	\$200,000, except note RCW 53.08.135	
Public Utility Districts (Title 54 RCW)	See RCW 54.04.070 & 54.04.082	
Public Hospital Districts (Ch. 70.44 RCW)	\$75,000	\$75,000
Housing Authorities (Ch. 35.82 RCW)	??	??
School Districts (RCW 28A.335.190)	\$40,000	\$40,000
<p>1) RCW 35.22.620(2) further limits the dollar value of public works performed by city employees or day labor to ten (10) percent of the total public works construction budget in a given budget period. Work performed within a city by county employees under an interlocal agreement is to be included in this limit.</p> <p>2) Also subject to annual limit of 10% of public works construction budget (RCW 36.32.235).</p> <p>3) Also subject to county road force limitations for road funds under RCW 36.77.065.</p> <p>4) Not a bid limit, per se, but is a limit below which informal contracting procedures may be used.</p>		

SB 5228 Regarding Construction Projects by County Forces. Session Law C 29 L 09

Summary: The term "day labor" is removed from the language and replace with "county forces." For the purpose of calculating the amount of road construction that a county may do using county forces, counties are separated into four groups based on population and provided with a formula to determine the maximum amount:

- Counties with less than 30,000 people may have no more than \$700,000, plus \$700,000 multiplied by the previous year's motor vehicle fuel tax distribution factor in construction programs completed by county forces.
- Counties with between 30,000 and 150,000 people may have no more than \$1.15 million, plus \$1.15 million multiplied by the previous year's motor vehicle fuel tax distribution factor in construction programs completed by county forces.
- Counties with between 150,000 and 400,000 people may have no more than \$1.75 million, plus \$1.75 million multiplied by the previous year's motor vehicle fuel tax distribution factor in construction programs completed by county forces.
- Counties with more than 400,000 people may have no more than \$3.25 million, plus \$3.25 million multiplied by the previous year's motor vehicle fuel tax distribution factor in construction programs completed using county forces.

Amend sections RCW 36.77.065 and 36.77.070.

SSB 5904 Independent Contractor. Session Law C 63 L 09

Summary: Independent contractor is defined for prevailing wage purposes. An individual employed on a public works project is not considered to be a laborer, worker, or mechanic, and consequently not required to be paid prevailing wages, when:

- the individual has been and is free from control or direction over the performance of services;
- the service is outside the usual course of business for the contractor for whom the individual performs services;
- the individual is customarily engaged in an independently established trade;
- the individual is responsible for filing paperwork with the Internal Revenue Service;
- the individual has an active and valid certificate of registration with the Department of Revenue for the business the individual is conducting;

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- the individual maintains separate books and records; and
- the individual has a valid contractor registration or license if the nature of the work requires registration or licensure.

Adds section or chapter to RCW 39.12.

[SB 6173](#) Improving Sales Tax Compliance. As of 5/07/09, Governor has not signed.

Summary: Beginning January 1, 2010, the requirement for a resale certificate to make purchases for resale exempt of the sales tax is eliminated and replaced with a seller's permit. The seller's permit will be issued by the Department to businesses registered with the Department if the business makes wholesale purchases. This will be determined based generally on industry type and reporting history. Businesses that do not make wholesale purchases as part of their business will not be issued a sellers permit. Permits issued to taxpayers who register with the Department after January 1, 2009, are valid for two years and may be renewed for four years. Permits issued to taxpayers who registered with the Department on or before January 1, 2009, are valid for four years. Custom contractors may receive a sellers permit valid for one year. They must reapply for a permit each year. Businesses seeking a new seller's permit or to renew or reinstate a seller's permit must apply to the Department. The Department must rule on applications within 60 days. The Department will develop a database for businesses to voluntarily verify an eligible seller's permit. The House Finance Committee and the Joint Task Force on the Underground economy must each review the issues and concerns created by the act and provide reports to the Legislature by December 1, 2009. Adds a section or chapter to RCW 82.32. Amends RCW 82.04.470, 82.08.050, 82.08.130, 82.14B.042, 82.14B.200, 82.32.087, 82.32.290, 82.32.291, 82.32.330, 82.72.040, and 82.72.070. Reenacts and amends RCW 82.04.050.