

Right-of-Way Authority

Third-party Use of Public Streets and **Public Construction/Public Bidding**

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Right-of-Way Authority

In order to provide ROW, counties:

- Purchase or Condemn Property
- Design
- Construct
- Manage
- Operate
- Maintain
- Improve
- Rebuild



Municipal Right-of-Way Authority

REGULATORY AUTHORITY

VS.

OWNERSHIP AUTHORITY

Right-of-Way as Public Streets

- **GUIDING PRINCIPLE:**

All streets are dedicated for public travel; this right is paramount; *secondary, subordinate uses are permissible only when not inconsistent with the primary purpose of public travel.*

Baxter-Wycoff Co. v. Seattle, 67 Wash.2d 555, 559 (1965)(emphasis added).

Regulatory Authority

- **Speed limits**
- **Channelization, markings, and signalization**
- **Lane width and turning radius**
- **Streetlights**
- **Pole height**
- **Paving materials**
- **Parking**
- **Sidewalks**
- **Landscaping**
- **Utility location, construction, connection and undergrounding**
- **Common carriers—taxis, trolleys, etc.**
- **Street closures & street use permits**

Regulatory Authority—Permit Fees

- **Must be a direct relationship between the fee charged and the service received by the feepayer**
 - **Primary purpose must be regulation, not raising revenue**
 - **Money collected must be allocated to the regulatory purpose**
 - **Must be a “direct relationship” between the fee charged and (1) the service received by feepayer or (2) the burden produced by the feepayer.**
 - **But charge need not be “individualized.”**

Covell v. Seattle, 127 Wash.2d 874, 879 (1995).

Regulatory Authority—Other Permits

- Temporary Closure-Parades and Assemblies

“If a municipality has authority to control the use of its public streets for parades or processions, *as it undoubtedly has*, it cannot be denied authority to give consideration, without unfair discrimination, to *time, place and manner* in relation to the other proper uses of the streets.”

Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (emphasis added).

Regulatory Authority—Other Permits

Temporary Closure-Parades and Assemblies

- **BUT the ordinance establishing the fee**
 - **May not delegate overly broad licensing discretion to a government official**
 - **Must not be based on the content of the message**
 - **Must be narrowly tailored to serve a significant governmental interest, and**
 - **Must leave open ample alternatives for communication.**

Forsyth County, GA v. Nationalist Movement, 505 U.S. 123, 130 (1992)

Regulatory Authority—Other Permits

- **Temporary Closure-Parades and Assemblies**
- **Parades and Assemblies: “the archetype of a traditional public forum.”**

Forsyth County, 505 U.S. at 130 (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

Regulatory Authority—Other Permits

- **Be particularly careful when permitting or restricting 1st amendment activities when conducted by individuals or small groups.**
- **U.S. Supreme Court “has consistently stuck down” permits limiting individual and small group activities in ROWs.**

Berger v. Seattle, 569 F.3d 1029, 1038 (2009).

- **Is the activity clearly interfering or obstructing public travel (the “paramount” use of public streets)?**

Regulatory Authority—Unopened ROW

- **ROW is only an easement.**

Bradley v. Spokane & I.E.R. Co., 79 Wash. 455, 458 (1914); *Rowe v. James*, 71 Wash 267, 270 (1912); *Gifford v. Horton*, 54 Wash. 495.

- **But the easement is expansive.**

- **Subject to the primary use of public travel, “highways may be put to any of the numerous incidental uses suitable to public thoroughfares, and with those uses the owner of the abutting land has no right to interfere.”**

Northwest Supermarkets, Inc. v. Crabtree, 54 Wn.2d 181, 186 (1959) (quoting 4 McQuillan, *Municipal Corporations* (Rev'd. 2d ed.) 134, §1437

- **If vacated, underlying fee returns to adjoining property owner from centerline of street.** *Bradley*, 79 Wash. at 458.

Regulatory Authority—Unopened ROW

- **Underlying fee owner of unopened ROW still owns fee, subject to “springing” right of county to use its easement to open ROW.**
 - **Adjoining fee owner may use unopened ROW as it sees fit, but at its peril, if county opens ROW.**
 - **Landscaping, fences, parked cars, even private alley**

Regulatory Authority—Unopened ROW

- **Adverse possession:**
 - **County can assert ownership through adverse possession.**
 - **BUT, others *cannot* assert adverse possession against county.**
RCW 7.28.090.
 - ***But consider, proprietary v. governmental activity***
 - **ROW vs. Water treatment plant**

Regulatory Authority—Unopened ROW

- Final note: Non-user statute, RCW 36.87.090:
- 1890: Any *county* road that remains unopened for five years after authority to open, road is vacated.
- 1909 legislature added: *Provided*, this section does not apply to roads dedicated by a plat,... and does not apply to land conveyed by deed to county.
- 1904 is “marker” year. If a road in your county, prior to incorporation or annexation, was platted or deeded between 1890 and 1904, was not opened, and remained unopened for at least five consecutive years, you may not have the right to open that road for public travel.

Ownership Authority

- **Streets are not only real property**
- **Streets are *extremely valuable* real property**
- **Purchased at the expense of the municipality's taxpayers and feepayers**
- **For good and valuable consideration**
- **Cities have rights that come from property ownership**
 - **Separate from any regulatory or taxation authority**

Ownership Authority

“The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and its use and occupation thereof are temporary and shifting.”

St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98 (1893).

Permission given to a citizen or corporation of a permanent and exclusive use of a street “is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation.”

Id. at 98-102.

Ownership Authority

- **Washington Constitution:**
 - ***[N]o right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made ..., irrespective of any benefit from any improvement proposed by such corporation....***

CONST. ART. 1, §16

Ownership Authority—Other Use

- **Permanent/Long-term occupation in ROW:**
 - **Permanent occupancy, “by its very nature” decreases the area available for public travel.** *Baxter-Wycoff* 67 Wn.2d at 599.
 - **No private individual or corporation has a right to use streets for private gain without city’s consent and only upon the terms and conditions the city prescribes.** *Id.* At 560-561 (*relying on, Hadfield v. Lundin*, 98 Wash. 657, 660 (1917)).
 - **This rule applies “particularly ... to construction and maintenance of permanent structures.** *Id.*
 - **City may charge such fees and impose such other conditions with respect to such use as it deems proper.** *Id.* at 564.

Franchising Authority

- **County may grant franchises to:**
 - **Persons or private or private or municipal corporations**
 - **For use of county right-of-way (incl. bridges)**
 - **To construct or maintain**
 - **Water**
 - **Gas**
 - **Telephone or telegraph**
 - **Electricity**
 - **Sewers**
 - **Tramroads, railway roads, and cattle guards**

RCW 36.55.010 - .030.

Franchising Authority

- **APPLIES TO:**

- **Power and gas companies**
- **Public Utility Districts**
- **Telephone companies**
- **Water & Sewer districts**
- **Cable TV**
- **Municipalities**
- **Private property owners**

- **To locate within your roads, you can require a franchise.**

Franchising Authority

- ***King County v. King County Water Districts, 453 P.3d 681 (2019)***
 - First county in the state to implement “franchise compensation.”
- **GENERAL STATEMENT OF THE LAW:**
- **Franchise is a contract:**
 - County can set terms, limitations, and conditions.
 - May require a compensation for use of streets
- **County cannot compel entity to accept franchise terms, limitations, conditions, or fee.**
 - Franchisor and franchisee must agree to terms
- **If no agreement, no franchise and no right to exist in county road.**

Franchising Authority

- **“Home rule” charter counties in the clear**
 - The same rights and authority as the state has, except where limited by the constitution or legislation.
 - Clallam, Clark, King, Pierce, San Juan, Snohomish, and Whatcom
- **Non-home rule less certain—**
 - May need specific statutory authorization
 - Justice Stephens concurrence, 453 P.3d at ¶ 62.
- **Specific agreements, deed restrictions, other agreements may vary the outcome**
 - Existing franchises
 - Century link?
 - Other?

Franchising Authority

- **“Franchise Compensation”**
 - Not limited to actual administrative expense
 - Need not be directly related to service requested
 - Revenue may go to general fund
 - May be applied retroactively to existing franchises
- **Compensation in return for use of ROW**
- **Enacted by county ordinance and implementing rule.**
- **Subject to negotiation**

Franchising Authority

- **Relevant factors:**
 - **Land value of ROW within applicant's service area**
 - **Approximate amount of ROW needed for applicant's use**
 - **Reasonable rate of return to county for that use**
 - **Business opportunity created for applicant by use of ROW**
 - **Density of households served**
 - **Reasonable annual adjustment**
 - **Other reasonably related factors**

Franchising Authority

- **Rule establishes methodology to apply factors and estimate compensation**
 - County provides estimate to applicant
 - Applicant may counter-offer
 - If unable to agree, applicant cannot use ROW
- **NOT a tax**
 - Charge based on value of franchise to applicant
 - Charge is for a valuable property right
 - Customers pay to use the service—metered use
- **County holds ROW “in trust for the public”**
 - **BUT** in the public interest to receive compensation in return for use of ROW
- *Id.* at ¶ 38; RCW 36.55.050.

Franchising Authority

- **Water-sewer districts:**
 - No statutory franchise rights
 - Only those powers granted to them by legislature
 - Statutory right to acquire, by purchase or condemnation, property or property rights
 - Also, though, right to conduct water and carry it along public ROW
 - But statute doesn't say, "right to use ROW *without a franchise*"
 - Utility customers ≠ "public." Utility does not provide service if customer does not request it.

King County, 453 P.3d at ¶¶ 50 - 57.

Franchising Authority

Cautionary Notes: Pre-existing Facilities

- **Tendency to restrain municipal franchise fee authority.** – *Seattle v. Western Union*
- **Facilities already in streets when Washington a territory.**
- **City incorporated after county had lines in ground; city can “request,” but not “require” franchise.** — *Lakewood v. Pierce Cty.*
- **City, after winning right to charge rental fee for poles in ROW, found to have yielded right to charge fee when it accepted free use of poles for its own lines.** — *St. Louis v. Western Union*
St. Louis v. Western Union Telegraph Co., 63 Fed. 68, 72 (1894).

Franchising Authority

BUT NOT Century Link....

- **Post Roads Act of 1866: Allows “telegraph” companies to use all U.S. roads, if the company delivers its written acceptance of Act to Postmaster General.** *Seattle v. Western Union Telegraph Co.*, 21 Wn.2d 838, 843-844 (1944).
- **Western Union Telegraph Co. filed written acceptance on June 8, 1867.** *Id.*
- **State, on March 28, 1890, enacted legislation to regulate existing telegraph companies on state roads.** Laws, 1889-90, p. 292, Rem. Rev. Stat. § 11352.

PUBLIC CONSTRUCTION/PUBLIC BIDDING:

Legislative Update; Key Concepts and Cases; AIA

I. LEGISLATIVE UPDATE

Three Important New Bills:

- ESSB 1673 (*eff.* 07/01/2019)
- ESSB 5418 (*eff.* 07/28/2019)
- ESSB 5035 (*eff.* 01/01/2020)

ESSB 1673 *(eff. 07/01/2019)*

- New bidder responsibility criteria (RCW 39.04.350(f))
- Contractor must have prevailing wage and public works *training*
- Contractor must *certify* it has had training in addition to other statutorily mandated bidder responsibility criteria
- Training *provided by L&I*
- *L&I keeps record* of contractors that meet requirements

ESSB 5418 (eff. 07/28/2019)

- **Raises Small Works Roster limits**
 - Limited public works: \$35,000 to \$50,000
 - “Tier 1” small works: \$150,000 to \$250,000
 - “Tier 2” small works: \$300,000 to \$350,000
- **Allows waiver of retainage—small works roster only**
- **BUT county on the hook for claims from**
 - Laborers, suppliers, subcontractors *and*
 - All state taxes that may be due on this *or other* jobs

ESSB 5418 (eff. 07/28/2019)

- **RCW 35.32.235 no longer applies only to counties with a population of 400,000+ —applies to ALL counties *with Purchasing Departments***
 - **Use of county forces**
 - **Unit priced contracts**
 - **New reporting requirements: certified minority and women contractors**
 - **county must file annual report listing total number of MWBEs to Dep't. of Commerce**
 - **Allows use of small works roster**

ESSB 5035 (*eff.* 01/01/2020)

- **Changes time for filing a prevailing wage violation claim *with L&I* from 30 days to 60 days**
- **Apparently *does not* change the 30-day time limit to file a wage claim (prevailing wage or otherwise) against a contract bond or retainage.**

II. BASIC STRUCTURAL FRAMEWORK

FOCUS ON STATUTORY PUBLIC WORKS REQUIREMENTS:

- DEFINITIONS
- TYPES OF CONTRACTS
- RESPONSIBLE BIDDER CRITERIA
- RETAINAGE AND BOND RULES
- EXEMPTIONS

PUBLIC WORK DEFINITION

- [A]ll work, construction, alteration, repair or improvement, other than ordinary maintenance, executed at the cost of the ... municipality.... RCW 39.04.010(4)
 - “Ordinary maintenance” not defined
 - Generally safe with one year or less maintenance intervals
 - Maintenance by contract—prevailing wage, possibly bond and retainage
 - “At the cost of” language may affect your determination
 - If either exception applies, *NOT* a public work

PROCEDURES

- **Types of allowed procedures**
 - **Performance by county forces** (RCW 36.32.235, --.250; 36.77.065)
 - **Unit priced contracts** (RCW 36.32.235)
 - **Job order contracts** (RCW 39.10.430 *et. seq.*) (not discussed)
 - **Limited public works** (*ref.* RCW 39.04.155)
 - **Small works** (RCW 36.32.235(14)(*ref.* RCW 39.04.155))
 - **Advertised bids** (RCW 35.32.235; --.250)

UNIT PRICED CONTRACTS (RCW 35.32.236(9))

- No bid limit
- Competitively bid contract for
 - Recurring work
 - Fixed time period
 - Defined price
 - Indefinite quantity
- Term cannot exceed 3 years, option to renew 1 more year
- Prevailing wages apply (Bond? Retainage?)

LIMITED PUBLIC WORKS (RCW 29.04.155(3))

- Small works roster process only
- Under \$50,000
- Bids from at least 3 contractors—equitably distributed
- Must maintain 2-year list
 - Contractor's registration number
 - Contract amount
 - Brief description of work
 - Date awarded
- May waive bond and retainage, but assume liability for claims

SMALL WORKS ROSTER (RCW 39.04.155)

- **Must adopt by ordinance or resolution**
- **May create own roster or adopt another**
 - **May be differentiated by specialties**
 - **May be based on geographic area**
- **Contractors may be added to roster at any time**

SMALL WORKS ROSTER (RCW 39.04.155)

- Telephone, written, or electronic quotes
- Invitations for quotes must include
 - Estimated scope and nature of work, including materials and equipment
 - “Detailed plans and specifications need not be included”

SMALL WORKS ROSTER (RCW 39.04.155)

- Options to invite quotes
 - Invite all contractors on “appropriate” roster
 - If under \$250,000, at least 5 quotes, “equitably distributed”
 - If between \$250,000 and \$350,000, invite at least 5 quotes with same conditions as for contracts under \$250K, *plus*
 - Notify remaining contractors on that roster
 - Published notice, mailed notice, or electronic notice
- May waive retainage, ***BUT*** county assumes liability for claims

ADVERTISED BIDS (RCW 36.32.250)

With or without a Purchasing Department

- **Notice of request for bids**
 - **Published in newspaper at least 13 days before award**
 - **Official newspaper and legal newspaper in job area**
 - **40% exception**
 - **Must state character of work, materials and equipment needed**
 - **Must state plans and specs are on file for "inspection"**

ADVERTISED BIDS (RCW 36.32.250)

With or without a Purchasing Department

- Bids must be sealed
- Bids must include a bid bond “not less than 5%”
- Must award bid to lowest responsible bidder
- Bidder that claims error and withdraws bid cannot re-bid

ADVERTISED BIDS (RCW 36.32.235)

- If county does *not* have a Purchasing Department:
 - Bids required over \$40,000
- If county does have a Purchasing Department
 - \$40,000 exception may not apply

RESPONSIBLE BIDDER CRITERIA

(RCW 39.04.390)

- Applies to *all* PW contracts
- Must be submitted before contract is *awarded*
 - I.e., may be submitted after bid opening
- Bidder must include signed statement, under penalty of perjury, that bidder is in compliance with criteria
 - Mandatory criteria
 - Additional criteria, if county chooses

RESPONSIBLE BIDDER CRITERIA

(RCW 39.04.390)

- Mandatory criteria—*Compliance required*
- Contractor's failure to respond, comply, or certify *requires county to reject bid.*
- Refer to written materials for information and certification requirements

RESPONSIBLE BIDDER CRITERIA

(RCW 39.04.390)

- Permissive criteria—*Optional* to county
- Only add if genuinely helpful
- Should be as objective as possible
- Should be tailored to specific project
- Refer to written materials for specific statutory requirements

RESPONSIBLE BIDDER CRITERIA

(RCW 39.04.390)

- If bidder determined not responsible, bidder may appeal “within the time specified in the bidding documents”
 - Keep appeal timeline tight—24-48 hours; be specific
- If final determination non-responsible, inform bidder in writing and cannot contract with any other bidder for at least two business days

RESPONSIBLE BIDDER CRITERIA

(RCW 39.04.390)

- **county should prepare form with certification statement**
- **Use “must” language for mandatory criteria**
- **Use “may” language for added criteria**
 - **“Failure to comply may result in rejection of your bid”**
- **Base additional criteria as a practical business would**
 - **AIA criteria?**

RETAINAGE AND BOND

- **Retainage—County “must provide” and “must reserve” retainage “not to exceed” 5% (RCW 60.28.011)**
 - **Does no retainage, or zero, “not exceed 5%”?**
- **Bond—Payment and performance bond**
 - **“Must require ... a good and sufficient bond” (RCW 39.08.010)**
 - **BUT, if no bond taken, county liable for laborer and material supplier claims, perhaps taxes too. (RCW 39.08.015)**
- **Timing and priority—see materials**

EXEMPTIONS FROM BIDDING

- **Emergencies**
 - Requires written finding of existence of emergency w/in 2 weeks of contract award
- **Electronic data processing and telecommunications systems**
 - Competitive negotiation
 - Liberal or strict interpretation?
- **Design Build (“turnkey”)**
- **GCCM (owner/architect/contractor collaboration)**
- **NOT sole source**
- **NOT special market conditions**

III. KEY CASES AND CONCEPTS

- Purpose
- Bid Preparation
- Bid award
- Errors
- Remedies

PURPOSE OF PUBLIC BIDDING

“To prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable.”

Edwards v. City of Renton, 67 Wn.2d 598 (1965)

FIRST PRIORITY: PROTECT THE PUBLIC PURSE

The “mantle of protection [of competitive bidding statutes] was not intended to benefit the unsuccessful contractor seeking a public work contract, but rather the tax paying public from arbitrary, capricious, fraudulent conduct on the part of public officials....”

Gostovich v. West Richland, 75 Wn.2d 583,587 (1969); *Mottner v. Mercer Island*, 75 Wn.2d 575, 5787 (1969)

SECOND PRIORITY: TREAT CONTRACTORS FAIRLY

Although the primary purpose of competitive bidding is to protect the general public, “another purpose is to provide a fair forum for those interested in undertaking public projects.”

Gostovich v. West Richland, 75 Wn. 2d 583, 587 (1969)

LEVEL PLAYING FIELD

- **Competitive bidding must “afford an opportunity to all persons to bid upon the specific thing to be let according to plans previously adopted and made known....”**
- **“[T]here should be such definite and detailed specifications as would disclose the work to be done with fullness and detail, without which there could be no intelligent competitive bidding and no basis of comparison for ascertaining who in fact was the lowest bidder.”**

Goshert v. Seattle, 57 Wash. 645, 650 (1910)

INVITATION TO BID— NOT AN OFFER

- If county reserves the absolute right to reject any and all bids, the “right to reject the bids was unconditional.”
- Can reject “for any cause it might deem satisfactory or even without an assignable cause.”
- “[T]he motive for rejection of bids is immaterial.”
- The aggrieved bidder’s rights cannot be be greater than those conferred by the published bid.
- Advertisement is “not an offer of a contract, but an offer to receive proposals for a contract.”

Bellingham American Publishing Co. v. Bellingham Publishing Co., 145 Wash. 25, 29 (1927)

BID DETERMINATION/BID SPLITTING

Purchase or public work?

- When does a purchased product require so much installation that it becomes a public work?

Bid splitting

- “A public works project means a single project.” (RCW 35.23.352)
- Breaking into units or phases to avoid the maximum dollar amount is prohibited (RCW 39.04.155(4))
 - Stock items v. build to suit
 - If “single project” cost exceeds advertised bid threshold, then all contracts must be bid.

PREPARING BID DOCUMENTS— ADDENDA

- An addendum is a contract clarification issued *before* bid opening
- Can issue multiple addenda
- Should be timely (at least x days before bid opening)
- Should be delivered to all contractors on list
 - Be sure to maintain a list of all contractors that have purchased or “inspected” plans and specifications
- Confirm that bidders acknowledge receipt of all addenda, in writing, by time of submitting bid proposal

PREPARING BID DOCUMENTS— ALTERNATE BID SCHEDULES

- Alternate schedules show additional work that may be awarded, depending upon cost of bids received
- Can be more than one alternate
- Can “mix and match” to determine lowest responsible bidder
- Recommend: That, if alternate schedules used, county should clarify in call for bids how lowest bidder will be determined.

SPECIFIC PRODUCT

- “It is not the purpose of [public bidding] statutes to deprive the city of the right to procure the best article available simply because it is held in a monopoly or is procurable only from a limited number of sources.”
- “[T]he fact that there can be only a limited competition, or even no competition at all, is not a bar to calling for bids for the particular article desired....”
- BUT, “There must be competition where competition is possible.”

Smith v. Seattle, 192 Wash. 64 (1937):

- City control of “Alternate,” or “or Equal” language in specifications.

MISTAKE/WITHDRAWAL BEFORE BID OPENING

- **“The rule ... is that, until the proposal is accepted, it may be withdrawn.”**
- **“[T]he transaction [has] not reached the degree of a contract—a proposal and acceptance.**
- **“[W]here there is a reservation on the part of a municipality to reject any and all bids, there can be no mutuality until the bid is accepted, and until it is accepted, the proposer is under no obligation to keep it good, but may withdraw it.”**

Seattle Construction & Dry Dock v. Newell,

81 Wash. 144, 146 (1914)



BID OPENING

- Be specific in your call for bids.
- Specify exact location for receipt of bids.
- State that bids must be sealed, with exact labeling instructions
- State whether bids can or cannot be delivered by email or fax
- State that it is bidder's responsibility to accomplish timely delivery
- Clearly explain how the county will mark the time for bid submittal
- Think about “must” and “may” language

NEGOTIATIONS AFTER BID OPENING

- **“The law does not permit private negotiations with an individual bidder...”**
- **“The whole matter is to be conducted with ... fairness, certainty, publicity, and absolute impartiality....”**

Platt Electric Supply v. Seattle, 16 Wn.App. 265, 271 (1976)

MISTAKE AFTER BID OPENING

- “The modern trend is to accord equitable relief to mistakes which render the bid incompatible with the true intent of the bidder, and which can be clearly and convincingly demonstrated by objective proof.
- “[T]here are certain types of judgmental error which never provide grounds for equitable relief.”
 - Guessing at the nature and cost of work not grounds for equitable relief
 - Errors of judgment, not fact.

Peter Kiewit Sons’ Company v. Department of Transportation, 30 Wn.App 424, 431 (1981)

BID BONDS

- “The basic purpose of bid bonds is to afford protection against a change of status involving substantial damages, loss, or detriment” to the county.
- Equity will relieve against forfeiture of a bid bond if:
 - Bidder acted in good faith
 - Without gross negligence
 - Reasonably prompt in giving notice of the error
 - Bidder will suffer “substantial detriment” by forfeiture
 - Other party’s status has not greatly changed

Puget Sound Painters v. Washington, 45 Wn.2d 819, 823 (1954)

LOWEST RESPONSIBLE BIDDER

- Bid instructions had 3-stage process: (1) selection of low bidder; (2) further investigation of bidder and its subcontractors; and (3) contract formation.
- Low bidder received mixed messages, but failed to provide adequate evidence of responsibility for one of its subcontractors; architect found bidder not responsible to do the work; bid awarded to next low bidder.
- “[N]o binding contract could be formed until the Port’s investigation under [the bid’s responsibility criteria] was completed.”

Hadaller v. Port of Chehalis, 97 Wn.App. 750, 756 (1999) (but see, RCW 39.04.350: Complicated bidder responsibility procedures.)

BID IRREGULARITIES

- “[W]hen less than all bids are rejected, the right to reject is more limited.”

Platt Electric Supply, Inc. v. Seattle, 16 Wn.App. 265, 274 (1976)

- “If there are material irregularities in the bidding process, the municipality should not accept the offensive bid.”
- The county may “waive the irregularity as an informality in the bidding if the irregularity is not material.”
- “The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders.”

Gostovich v. West Richland, 75 Wn.2d 583, 587 (1969)

BID IRREGULARITY: CASE STUDY 1

- Pieler mails bid postmarked 5:00 p.m., Thursday, August 17, 1961.
- Bids opened at 7:30 p.m., Friday, August 18, 1961.
- Pieler's bid arrives Monday, August 21, 1961, but "by due course of mail this bid should have reached West Richland in time for the bid opening."
- City award to Pieler; Gostovich sues.

Gostovich v. West Richland, 75 Wn.2d 583 (1969):

Material or immaterial bid irregularity?

BID IRREGULARITY: CASE STUDY 1

IMMATERIAL.

Bid was mailed in 24 hours ahead of time; “not the slightest suggestion of fraud, collusion” by Pieler.

Gostovich , 75 Wn. 2d 583, 587 (1969)

BID IRREGULARITY: CASE STUDY 2

- City requires contractor to meet MBE goals with state-certified MBEs.
- Land submits low bid with uncertified MBE
- Land offers to substitute certified MBE without changing its bid

Land Construction Company v. Snohomish County, 40 Wn.App. 480 (1985)

Material or Immaterial Irregularity?

BID IRREGULARITY: CASE STUDY 2

MATERIAL.

- After bid opening, Land could refuse to substitute certified MBE if Land determines its bid is too low.
- “[C]ontrol over the award of public work contracts would pass from the municipality to the bidder.”

Land Construction, 40 Wn.App. 480 (1985).

INJUNCTIVE RELIEF; NOT DAMAGES

- Only injunctive relief is available to stop bid award
- “The plaintiffs did not in this action seek injunctive relief. Instead they sought a remedy that is not available to them, that is monetary damages.”

Mottner v. Mercer Island, 75 Wn. 2d 575, 580 (1969):

- Since no injunction sought, contract had been awarded, and appellant had no right to compel the acceptance of its bid, “there is not now existing any legal controversy between the parties. The question has become merely academic or moot.”
- *Bellingham American Publishing Co. v. Bellingham Publishing Co.*, 145 Wash. 25, 29-30 (1927)

INJUNCTIVE RELIEF; NOT DAMAGES

- **By reserving the right to reject all bids, no contract formed and no right to mandamus to compel county to take low bid.**

Bellingham American Publishing Co. v. Bellingham Publishing Co., 145 Wash. 25, 29-30 (1927)

- **“By restricting the remedy available to disappointed low bidders to the parameters outlined in *Mottner* and *Bellingham Am.*, we allow relief to bidders that does not compete with the public interest....”**
- **Allowing damages to a low bidder denied a public contract “is a remedy inherently conflicting with the primary policy behind public bidding law: the protection of the public purse.”**

Peerless Food Products, Inc. v. Washington,
119 Wn.2d 584, 596-597 (1992):



INJUNCTIVE RELIEF; NOT DAMAGES

- “Post-contract injunctive suits by bidders would compete with the public interest in preventing excessive taxation, and we will therefore not recognize them.”
- Because the only relief requested was to enjoin the *creation* of a contract, and a contract has been formed, there is no longer any remedy that this court can provide to it.

Dick Enterprises, Inc. v. Metropolitan King County, 83 Wn.App. 566, (1996):

- ***But see*, RCW 39.04.105: If county receives bid protest, county cannot sign with any other bidder unless it first provides aggrieved bidder two business days’ notice of intent to sign with other bidder.**

IV. AIA FORMS 101 & 201

- **QUICK OVERVIEW OF PITFALLS**
- **ROLE OF ARCHITECT**
- **DESIGNED PRIMARILY FOR PRIVATE CONSTRUCTION**
- **DIFFERS FROM WSDOT STANDARD SPECIFICATIONS**

A DIFFERENT KIND OF CONTRACT

- Misses many protections found in WSDOT Standard Specifications for Road, Bridge, and Municipal Construction
- Architect is constant arbiter between general contractor and owner (county)

FOCUS ON PRIVATE CONSTRUCTION

- Not drafted to accommodate state laws for public projects
- Doesn't address laborer, supplier, subcontractor rights
- Does not address prevailing wage rates

OWNER/CONTRACTOR CONFLICTS

- **Does not clarify who has speaking authority for county**
 - Staff and department heads
- **Owner/county warrants field conditions**
 - Must provide accurate surveys and show underground conflicts
- **Weak protection for owner/county after date of substantial completion**

ARCHITECT'S PRIMARY ROLE

- **Architect is king--"Initial Decision Maker"**
 - **Architect is contract administrator**
 - **All communications filter through the architect**
 - **Architect approves general's selection of subcontractors**
 - **Architect approves shop drawings**
 - **Architect approves change orders**
 - **Architect conducts inspections**
 - **Pay requests go through architect**

ARCHITECT'S PRIMARY ROLE

- **Architect resolves disputes**
 - **Has authority to “rule” in favor of contractor over county**
 - **If that occurs, county must comply**
 - **If a time or payment dispute, and architect agrees with contractor, county is out of luck**

Right-of-Way Authority

Third-party Use of Public Streets and Public Construction/Public Bidding

TOM BRUBAKER, Lighthouse Law Group

Washington State Association of County Engineers

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