



STATE OF WASHINGTON
Capital Projects Advisory Review Board

February 8, 2021

Senator Karen Keiser
Post Office Box 40433
Olympia, Washington 98504-0433

Sent via email to Karen.Keiser@leg.wa.gov

Re: *Capital Projects Advisory Review Board Report on Subcontractor Bid Listing on Public Works*

Dear Senator Keiser,

We had the opportunity to meet during the 2020 legislative session when you kindly attended CPARB's special meeting to discuss subcontractor bid listing on public works. CPARB members appreciate the fact that following the meeting, you included provisions in ESB 5457 to give CPARB the opportunity to further evaluate proposals regarding changes to the subcontractor bid listing statute (RCW 39.30.060).

After passage of ESB 5457, CPARB created the Subcontractor Bid Listing Policy Evaluation Committee. The committee included representatives of contractors, labor, and public bodies. The committee met numerous times and prepared a report with recommendations.

At its meeting on December 9, 2020, CPARB unanimously approved the report and minor changes recommended to RCW 39.30.060. In summary, the report recommended:

- Changing 'or' to 'and' in RCW 39.30.060(1)(a);
- Clarifying that the statute does not apply to projects procured under RCW 39.10; and
- No further expansion until the results or adding structural steel/rebar could be further evaluated with a second report due in November 2022.

With this letter, I am forwarding the report and recommended legislative changes to you. I sincerely apologize for the delay in transmittal of this report and the recommendations. The demands of CPARB's reauthorization bill played a role in the delay. Please do not hesitate to contact me at Rebecca.Keith@seattle.gov if there is any additional information I can provide. Thank you.

Yours truly,

Rebecca Keith

Rebecca Keith
Chair, CPARB

cc: Senator Hasegawa
Senator Warnick
Representative Tharinger
Representative Steele

Subcontractor Bid Listing Policy Evaluation Committee

Report to the Capital Projects Advisory Review Board (CPARB)

December 9, 2020 Meeting

Co-Chair Bill Dobyms (General Contractors)

Co-Chair Matthew Hepner (Construction Trades Labor)

This communique serves as the Subcontractor Bid Listing Policy Evaluation Committee's report to CPARB. As required by [ESB 5457](#) from the 2020 Session, CPARB must submit a report to the Governor and the appropriate committees of the legislature by November 1, 2020. The report must:

(a) Evaluate current subcontractor listing policies and practices;

(b) Recommend appropriate expansion of the number of subcontractors that may be listed in order to improve transparency and fairness without reducing competitive bidding and access to public works by minority and women-owned businesses; and

(c) Recommend possible project threshold and time frames for purposes of subcontractor listings for all scopes of work that are not required to list under law, including: The timing of subcontractor listing, bond requirements for subcontractors, general contractors standard contract request, and general contractor/construction manager and design-build applications.

In the spring of 2020, CPARB appointed the Subcontractor Bid Listing Policy Evaluation Committee (Committee) to make recommendations regarding ESB 5457 to the Board. Committee members include:

- Bill Dobyms, Co-Chair (General Contractors)
- Matthew Hepner Co-Chair (Construction Trades Labor)
- Olivia Yang (Higher Education)
- Garrett Buckingham (Public Owners)
- Michael Transue (Specialty Subcontractors)
- Denys Tak (WSDOT)
- Scott Middleton (Specialty Contractors)
- Irene Reyes (OMWBE/Private Industry)
- Russell King (Local Government)
- Kyle Dilbert (Ports)
- Jeff Gonzales (DES-State)
- [Barry Sherman \(NECA\)](#)

The Committee met four times between July 1 and September 8, 2020. Non-committee member participants included additional general contractor, subcontractor, Labor and public owner representatives.

While there was not enough time for a full evaluation of issues in ESB 5457, the Committee is recommending several technical changes to the state's bid listing statute, RCW 39.30.060:

1. **Amend RCW 39.30.060 paragraph (1)(a) to correct the "or" to an "and" wording mistake** that occurred in the enactment of ESB 5457 when adding the subcontractor listing of structural steel installation and rebar installation work to the existing sublisting statute.
 - All members of the Committee agreed the intent of ESB 5457 was to add the requirement for the prime contract bidder to list the names of the subcontractors ... for performance of the work of structural steel installation and rebar installation. This added sublisting is required, within forty-eight hours after the published bid submittal time. [Existing statute requires listing within one hour after the published bid submittal time, the subcontractors who perform the mechanical, electrical and plumbing (MEP) work.]

- However, ESB 5457 inadvertently used the word “or” rather than “and” in RCW 39.30.060(1)(a), such that the prime contractor must list the MEP subcontractors “or” (rather than “and”) the structural steel installation and rebar installation subcontractors.
 - Public owner representatives indicated to the Committee that most public owners are enforcing the listing of the MEP and structural steel installation and rebar installation subcontractors as was intended, but nevertheless the statute should be corrected to avoid any confusion within the contracting community and to eliminate this potential rationale for bid protests.
2. **Amend RCW 39.30.060 paragraph (5) to include exemption of sublisting requirements for Design-Build (DB) and General Contractor/Construction Manager (GC/CM) projects**, in addition to the already exempt job order contracting delivery method.
- The processes and terminology for selection versus bidding are quite different for alternative procurement methods than for traditional design-bid-build procurement.
 - For example, an "invitation to bid" as noted in RCW 39.30.060 is not used for Design-Build, but rather a request for qualifications as the selection is based on qualifications and cost or price related factors.
 - Similarly, the GC/CM is not selected based on an "invitation to bid," but through a Request for Proposals process.
 - Timing of identification of subcontractors in both Design-Build and GC/CM projects, makes it impossible for submittal of the subcontractors lists at time of selection.
 - Subcontractors are generally not identified at the time a Design-Build Team submits their qualifications to the public agency.
 - For GC/CM, subcontractors submit bids to the GC/CM after the GC/CM has already been selected and has executed a contract with the public agency. RCW 39.30.060 requires the prime contract bidder to submit the required subcontractors list soon after their bid, but with when the GC/CM is selected, subcontractors have not been identified because RCW 39.10.380 requires the GC/CM to competitively bid all subcontract work.
 - There is confusion as to the intent of the listing law with regard to Design-Build and GC/CM because RCW 39.30.060 currently explicitly exempts another alternative procurement method: Job Order Contracting.
3. **No additional subcontractor listings or expansion should be required at this time.** Rather, the Committee suggests that additional time be given for understanding the effects of implementation of ESB 5457, further evaluation, and stakeholder input, with another report by November 1, 2022. Committee members believe that the statute is in need of correction (#1 above) before suggesting any additional subcontractor listing requirements.

***CPARB's Subcontractor Bid Listing Policy Evaluation Committee
Draft Legislative Proposal per recommendations***

RCW 39.30.060

Bids on public works—Identification, substitution of subcontractors—Review, report of subcontractor listing requirements.

(1) Every invitation to bid on a prime contract that is expected to cost one million dollars or more for the construction, alteration, or repair of any public building or public work of the state or a state agency or municipality as defined under RCW 39.04.010 or an institution of higher education as defined under RCW 28B.10.016 shall require each prime contract bidder to submit:

(a) Within one hour after the published bid submittal time, the names of the subcontractors with whom the bidder, if awarded the contract, will subcontract for performance of the work of: HVAC (heating, ventilation, and air conditioning); plumbing as described in chapter 18.106 RCW; and electrical as described in chapter 19.28 RCW, or to name itself for the work; ~~or and~~

(b) Within forty-eight hours after the published bid submittal time, the names of the subcontractors with whom the bidder, if awarded the contract, will subcontract for performance of the work of structural steel installation and rebar installation.

(2) The prime contract bidder shall not list more than one subcontractor for each category of work identified, unless subcontractors vary with bid alternates, in which case the prime contract bidder must indicate which subcontractor will be used for which alternate. Failure of the prime contract bidder to submit as part of the bid the names of such subcontractors or to name itself to perform such work or the naming of two or more subcontractors to perform the same work shall render the prime contract bidder's bid nonresponsive and, therefore, void.

(3) Substitution of a listed subcontractor in furtherance of bid shopping or bid peddling before or after the award of the prime contract is prohibited and the originally listed subcontractor is entitled to recover monetary damages from the prime contract bidder who executed a contract with the public entity and the substituted subcontractor but not from the public entity inviting the bid. It is the original subcontractor's burden to prove by a preponderance of the evidence that bid shopping or bid peddling occurred. Substitution of a listed subcontractor may be made by the prime contractor for the following reasons:

(a) Refusal of the listed subcontractor to sign a contract with the prime contractor;

(b) Bankruptcy or insolvency of the listed subcontractor;

(c) Inability of the listed subcontractor to perform the requirements of the proposed contract or the project;

(d) Inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract;

(e) Refusal or inability to provide a letter of bondability from a surety company; or

(f) The listed subcontractor is barred from participating in the project as a result of a court order or summary judgment.

(4) The requirement of this section to name the prime contract bidder's proposed subcontractors applies only to proposed HVAC, plumbing, electrical, structural steel installation, and rebar installation subcontractors who will contract directly with the prime contract bidder submitting the bid to the public entity.

(5) This section does not apply to design-build requests for proposals under RCW 39.10.330, to general contractor/construction manager requests for proposals under RCW 39.10.350, or to job order contract requests for proposals under RCW 39.10.420.

(6) The legislature finds that there are hundreds of capital construction projects completed each year which include complex contracting and bidding requirements. It is the intent of the legislature to review current subcontractor listing requirements to allow fair, transparent, and competitive bidding while prohibiting bid shopping. The capital projects advisory review board must submit a report to the governor and the appropriate committees of the legislature by November 1, 2020 and a second report by November 1, 2022. The report reports must:

(a) Evaluate current subcontractor listing policies and practices;

***CPARB's Subcontractor Bid Listing Policy Evaluation Committee
Draft Legislative Proposal per recommendations***

(b) Recommend appropriate expansion of the number of subcontractors that may be listed in order to improve transparency and fairness without reducing competitive bidding and access to public works by minority and women-owned businesses; and

(c) Recommend possible project threshold and time frames for purposes of subcontractor listings for all scopes of work that are not required to list under law, including: The timing of subcontractor listing, bond requirements for subcontractors, general contractors standard contract request, and general contractor/construction manager and design-build applications.