

## 39.10.380 – Subcontracting

1. Owner roles and responsibilities generally (specifics in each subsection)
2. Packaging Subcontractor Bid Packages— Scott (Mike/Dave/Shannon/Gustine/Nick  
10. Bundling (Owner/Prime/Sub Perspective (table?))

Industry standards – how can we “define” this term – use the CSI divisions (16 vs. 50) as a point of reference for starting the conversation (within divisions and combining divisions)... Really finding a way to get the Owner aware and engaged in the process as they are required to approve packages now.

### Potential Advantages:

- a. Some scopes of work are inherently connected and require significant interface in order to best schedule and install a quality product. For example, concrete, reinforcing and subgrade waterproofing are systems and materials that are very closely tied together, are installed often concurrently and require close coordination. The combination of these scopes in one bid package can lead to enhanced coordination and ultimately a higher quality installation. Questions to explore when looking at different scope combinations to achieve this goal: Are these trades generally combined under a single contract? Does the interface of the trades require close coordination and work integral to both scopes? What benefit will the project see from this combination?
- b. There are situations where the public entity may have contract terms or requirements that are not generally accepted in the trade community that could lead to low bidder coverage or potentially inflated pricing. This can be especially true in an active market where trade partners have a multitude of options for new work. For example, a specific trade may be historically unwilling to accept or agree to some contract terms like liquidated damages. In this scenario, bundled bid package provides the option of putting another entity that is taking on the risk of the prime agreement terms between the public owner and the trade partner. The first tier bidder then takes on this risk and determines the appropriate compensation for that risk as they develop their bid price. The benefit to the public owner is maintaining these provisions and potentially increasing competition for the trade in question. This is a common issue with vertical transportation and is an alternate to working with the GCCM to develop agreeable contract terms for the bid package that do not place undue risk on the GCCM but increases competition within the trade package.
- c. GCCM is essentially a low bid award structure as it relates to the award of scopes outlined in bid packages, or first tier contracting. Bundling for this example could be done with the intent of creating an opportunity for some scopes of work to be included in the larger package but not necessarily awarded to the lowest bidder on their own. By bundling various trades, the “bidder” may use their professional judgement and expertise to select second tier trade partner to perform the work that may not be the low bidder for that trade. Examples of good use here could be selection of diverse or small businesses that are not based on low bid or bonding capacity. Similarly, a selection may be made based on ability to execute the schedule or proven history of quality work as opposed to low bid. In this scenario, the outcomes noted are not guaranteed, the bid package is still competitively bid and awarded to the low bidder that may or may not implement these strategies.

### Potential Disadvantages:

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An example of acceptable bundling would be cast in place concrete, rebar, underslab insulation, damp proofing, and waterproofing.

An example of unacceptable bundling would be structural concrete and wood framing, or concrete, structural steel, and the elevators.

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a) Combining of trade packages can limit competition by creating a situation where limited firms have the capability or bonding capacity to bid the work. When looking to ensure competition, questions that could be explored include: Who would generally perform the work and how much of the package would be self-performed by the firm awarded with it's own craft labor? Is this a combination that would require a general contractor to perform the work due to the varying scopes, ei a large percentage of the work is not self-performed and subcontracted? If so, is the management of these trades something that should be expected from the GCCM as a part of the base scope of services? With limited competition there is the possibility that the work will not be purchased at market price or the best price. Compounding mark-ups and indirect costs are incurred for work that is second tier as opposed to first tier to the GCCM. A way a Public Body can limit these types of potential issues would be understand what firms are performing the work and why it may be necessary to package work in this fashion. to require a majority percentage of the work to be self-performed.

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b) The creation of a bid package that bundles a portion of work that is planned to be bid by the GCCM can also have the potential of limiting competition due to a perception of advantage in favor of the GCCM because of knowledge of the project and personnel on the project that could create efficiencies specifically for the GCCM. A transparent process with controls in place to ensure a level competition is critical in this scenario to ensure the public owner receives the best value for the project.

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When evaluating bid packaging it is important that the Owner use their experience or that of an outside consultant to consider all aspects of the bidding process in conjunction with the GCCM. Effective bid packaging can help achieve project goals and maximize the advantages of using GCCM on a project.

#### B. Factors to Consider If Bundling Bid Packages Outside of Industry Practice

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As noted in the statute, individual bid packages are to be prepared with single trades/disciplines in a manner consistent with local industry practice in order to promote competition. Combining individual trades into one bid package can limit competition and should only be done when certain factors are considered by the GCCM or public owner. The following factors should be considered before a single bid package is combined with multiple trades or specification sections:

1. Is it a generally recognized local industry practice?
2. Does the combination promote competition?
3. Does the GCCM plan to bid any portion of the package thereby discouraging competition?
4. Does the combination create an advantage for fewer bidders?
5. The management and coordination of the multiple trades is clearly defined in the bid package.
6. Is there an opportunity to increase MWBE participation by combining scopes?
7. If there are bid packages that received no bids during initial bidding, does it make sense to combine them to get better bid coverages?

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- 10.a. \_\_\_\_\_ Prioritizing work for the project
- 11.b. \_\_\_\_\_ Subcontracting plan (tie back to pre con section)
- 12.c. \_\_\_\_\_ S/DBE utilization plan (tie back to pre-con section)

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3. Self-performance of work by GCCM (Andrew Powell/Nick/Traci/Howard/Mike)

a. Definition of "self-performance"

- a.i. \_\_\_\_\_ Managing another sub or own forces work?
- ii. \_\_\_\_\_ Work that is not bid on

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- Transparent conversation with owner with self-performed work
- Should be discussed as early as possible during preconstruction
- Performance varies by firm and industry
- Not trying to limit performance of sub in package, but some packages are typically combined in industry
- Tiered subcontracting is typically part of a prime subcontracting package
- Owner Questions to consider

- o What opportunities do you have to further break down the package?
- o How does the subcontracting community typically bid on this package?
  - Do they typically want to qualify their bids?
- o "Tiered subcontracting" typically occurring in the industry
- o Will this generate sufficient competition for the subpackage?
- o Examples
  - Rebar supply and cement finishing inside a concrete structuring package

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b. Typical in industry (Owner examples)

c. \_\_\_\_\_ What's allowed (30% of sub-contract work)

- How do you calculate this percentage (MACC, NSS, GCs, Fee, etc.)?

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d. Administration staff and equipment requirements for subcontract work (different staff from GCCM staff)

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- Staff required to manage the subpackage should be different from the team managing overall GCCM contract
- Staff requirements on GCCM contract typically require full time staff to the overall GCCM cost.

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- e. Owners should verify that bids on subpackages requiring equipment are included by the GCCM as well and not included under other work packages (Subs, NSS, etc.). Also need to verify equipment under self-performed subpackages are actually on site (prevent double costs)

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e. Bidding and award process

- Preparation of solicitation documents are still performed by GCCM
- Owner is managing the procurement for sub packages the GCCM is bidding on
  - o Questions should be submitted to owner and owner should respond (solicitation should reflect this)
  - o Protests should go to the owner not the GCCM for these packages and Owner should respond (solicitation should reflect this)

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- Owner runs bid opening
  - Receive bids
  - Opening
  - Evaluating
  - Award selection

f. Notification

- e. Should be coming from the Owner, not GCCM

4. Solicitation Process — Nick

As discussed earlier, any work required to build the project not captured under Negotiated Support Services is considered subcontract work. Unless using the Heavy Civil GCCM Method, this work (including materials and supplies) must be competitively bid and require and require public bid openings. Additionally, RCW 39.10.380(1) requires materials and equipment purchases to be completely bid as well.

Most owners are familiar with this process as it mirrors the solicitation, selection, and award process under typical Design-Bid-Build procurements most agencies utilize. However, there are some additional requirements the GCCM and Owner are required to follow that will be discussed in this section

a. Preparing packages for solicitation

During preconstruction, the owner and the GCCM will have developed a subcontracting plan that outlines how the subcontract work will be procured. During the preconstruction phase, one of the deliverables required from the GCCM is the subcontracting plan, which was discussed in the Preconstruction Section of this manual. This plan outlines the various subcontracting packages (work, materials, and equipment). This plan should detail the number of subcontract packages, which which packages the GCCM intends to pursue as self-perform work, the anticipated procurement schedule, prequalification requirements (if applicable), and the associated diversity goals for each package.

Because the RCW requires all subcontract work, materials, and equipment to be publicly bid, eachEach subcontract package requires will require its own set of solicitation documents; including associated terms and conditions, project specifications, drawings, and other applicable documents. Some owners and GCCM firms have found that creating a set of boilerplate solicitation documents can reduce streamline the subcontracting process the amount time required to award each package of work. Boilerplate solicitation documents will include the standard terms and conditions necessary for each that apply to each solicitation package, allowing the GCCM and owner to focus on including the necessary documents and special special terms and conditions, specifications, drawings, and other documents that are specific to an each required for each subsequent solicitation package.

There is not a typical form of the solicitation documents, and each most GCCM tends firms start with to use their own form for the solicitation and contract documents. But that does not mean the Owner is removed from the development of the solicitation documents process. Most Public Bodies have provisions in the main GCCM contract that GCCM contracts from an Owner will include flow down into each subcontract contract, like labor requirements, small and disadvantaged business provisions, or prompt payment provisions, provisions that are required

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~~to be included in each subcontract, along with the applicable RCW 39.10.380(3) provisions.~~  
That's why it's critical for Owner's to ~~be fully engaged with the development of the~~ review each solicitation package documents, ensuring the appropriate terms and conditions are included in each subcontract and ~~—~~ those terms and conditions are fair to the subcontract community, don't limit competition, and don't ~~unfairly/unnecessarily~~ transfer project risk from the GCCM to the subcontractors. Some things a Public Body should look for when reviewing solicitation packages are:

- I. Flow down provisions from Public Body or funding source
- II. Insurance requirements
- III. Transfer of risk provisions
- IV. Contract duration
- V. Conflicting terms and conditions
- VI. Small and Disadvantaged Business goals
- VII. Bid opening date and location
- VIII. Liquidated damages (ensuring they are fair and not punitive)

#### a-b. Prequalification vs. bidder responsibility criteria

The GCCM and Owner may decide that a subcontract package requires ~~special-specific experience qualifications~~ necessary to successfully complete the work. There are two ways the GCCM can go about establishing these qualification requirements; prequalification or supplemental bidder responsibility criteria.

##### I. Supplemental Bidder Responsibility Criteria

Many Public Bodies are familiar with using supplemental bidder responsibility criteria from procuring work under the design-bid-build model. There is nothing unique under the GCCM delivery method when using supplemental bidder responsibility criteria for subcontract packages. Public bodies and the GCCM should consult RCW 39.04.350 for responsibility requirements and supplemental responsibility options for each subcontract solicitation packages.

##### II. Pre-Qualification

Prequalification of subcontractors for GCCM subcontract work is not typically used under the GCCM delivery method, but in those rare cases where it's necessary there are a number of things a Public Body and GCCM should be aware of as it requires additional administration and time for selecting firms. Public Bodies must ensure that additional prequalification requirements do not create an unfair competitive advantage for any firm pursuing this work, including the GCCM.

Any package that requires prequalification of subcontractors must go through a public review process which includes a public notification, a public hearing, an evaluation of the firms pursuing the work, and a protest process. RCW 39.10.400 outlines the specific requirements for each of those steps, and Public Bodies and the GCCM should familiarize themselves with those requirements to ensure that the process is fair, transparent, and allows for sufficient competition and a fair and reasonable price for the project.

RCW 39.10.400: General contractor/construction manager procedure — Prebid determination of subcontractor eligibility.

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~~(1) If determination of subcontractor eligibility prior to seeking bids is in the best interest of the project and critical to the successful completion of a subcontract bid package, the general contractor/construction manager and the public body may determine subcontractor eligibility to bid. The general contractor/construction manager and the public body must:~~

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~~(a) Conduct a hearing and provide an opportunity for any interested party to submit written and verbal comments regarding the justification for conducting bidder eligibility, the evaluation criteria, and weights for each criteria and subcriteria;~~

~~(b) Publish a notice of intent to evaluate and determine bidder eligibility in a legal newspaper published in or as near as possible to that part of the county where the public work will be constructed at least fourteen calendar days before conducting a public hearing;~~

~~(c) Ensure the public hearing notice includes the date, time, and location of the hearing, a statement justifying the basis and need for performing eligibility analysis before bid opening, and how interested parties may, at least five days before the hearing, obtain the specific eligibility criteria and applicable weights given to each criteria and subcriteria that will be used during evaluation;~~

~~(d) After the public hearing, consider written and verbal comments received and determine if establishing bidder eligibility in advance of seeking bids is in the best interests of the project and critical to the successful completion of a subcontract bid package; and~~

~~(e) Issue a written final determination to all interested parties. All protests of the decision to establish bidder eligibility before issuing a subcontractor bid package must be filed with the superior court within seven calendar days of the final determination. Any modifications to the eligibility criteria and weights shall be based on comments received during the public hearing process and shall be included in the final determination.~~

## ~~II. Bidder Responsibility Criteria~~

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~~(2) Determinations of bidder eligibility shall be in accordance with the evaluation criteria and weights for each criteria established in the final determination and shall be provided to interested persons upon request. Any potential bidder determined not to meet eligibility criteria must be afforded one opportunity to establish its eligibility. Protests concerning bidder eligibility determinations shall be in accordance with subsection (1) of this section. 39.10.380(2) All subcontract bid packages in which bidder eligibility was not determined in advance shall include the specific objective criteria that will be used by the general contractor/construction manager and the public body to evaluate bidder responsibility.~~

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### ~~b. Owner Responsibility~~

~~The GCCM is responsible for preparing all subcontract solicitation packages, but the Owner plays a key role during this process. The Owner should review every bid package prior to solicitation. Typical things and owner should look for when reviewing bid packages: \_\_\_\_\_~~

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#### ~~a. Advertisement — Scott/Traci~~

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#### Timing (Pre-Con vs. Construction)

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- Bidders should have somewhere in the three week range minimum to review and compile bids.
- \_\_\_\_\_GCCM and Owners should allow for more time in the bidding process should the bid date needed to be extended via addendum or if the bid results are protested.

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- Often a prebid meeting is held to convey project specific details and requirements. GCCM/Owner should state if the prebid meeting is mandatory or not.
- Advertisement should identify a contact person and process to submit and answer formal bid questions. All questions should be formally submitted and formally responded to via addendum so that all parties have the same information. GCCM/Owner should never provide information unless it's for all bidders to review (transparency/fairness).

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- Engineer's estimate (negotiations for bids 10% over published estimates)
- Availability and access of bid documents (one location for docs, links)

Include all subcontractor terms (insurance requirements, etc) in bid documents

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- Responding to questions/clarifications/addenda (GCCM pursuing vs. Not)

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- a. Last date of addenda

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## 5. Evaluating Bids - Nick/Howard/Andrew

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### a. Low Bid

I. Bids are opened publicly

II. GCCM should review all bids received

III. Should review all lines on bid form against GCCM estimate

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a) Looking for significant bid discrepancies

b) Helps identify potential errors in bidder's submission (large variance between estimate and bid)

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c) Evaluating both high and low bids

d) Comparing bids against each other – especially if the low bid is significantly different than the other bids received

e) Can meet with low bidder to discuss bid to ensure it is accurate and covers the entire scope of work – (bring owner into this process)

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f) Need to share bid results with bidder's quickly (Protest Process)

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### b. S/DBE evaluation

I. Reviewing good faith efforts by the bidder's – did they meet the goal or if not, did they make good faith efforts to try and achieve the goal

II. Verify that the firms submitted are S/DBE firms and certified by OMWBE, if required

III. Verifying the math is correct

IV. If they didn't make the goal – GCCM should follow agency guidance for determining whether the bidder made good faith efforts to achieve the goal. (Owner needs to be heavily involved in this process)

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### c. Responsiveness and Responsibility Review (Move up)

I. Responsiveness Review

a) Did they complete the required submittal documents per the solicitation?

b) Did they sign the correct documents?

c) Is the individual signing the bid authorized to sign for the firm?

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II. Responsibility Review

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a) Ensuring all responsibility requirements of RCW 39.04.350 are met  
i. Reviewing the bidder's response to any supplemental Responsible Bidder Criteria per the solicitation Supplemental criteria

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b)  
c) If bidder is determined to not be responsible the GCCM must comply with RCW 39.10.380(2), which requires written notification to the bidder and an opportunity for that firm to establish that it is a responsible bidder

~~(2) If the lowest bidder submitting a responsive bid is determined by the general contractor/construction manager and the public body not to be responsible, the general contractor/construction manager and the public body must provide written documentation to that bidder explaining their intent to reject the bidder as not responsible and afford the bidder the opportunity to establish that it is a responsible bidder. Responsibility shall be determined in accordance with criteria listed in the bid documents. Protests concerning bidder responsibility determination by the general contractor/construction manager and the public body shall be in accordance with subsection (4) of this section.~~

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~~(3) All subcontractors who bid work over three hundred thousand dollars shall post a bid bond. All subcontractors who are awarded a contract over three hundred thousand dollars shall provide a performance and payment bond for the contract amount. All other subcontractors shall provide a performance and payment bond if required by the general contractor/construction manager.~~

d. Lack of responses/Lack of Competition

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I. Single bid

- i. Need to perform the review described above
- ii. Should perform a cost-price analysis to ensure the bid is fair and reasonable
- iii. Should reach out to other firms that typically perform this work to understand why they didn't bid.
- iv. If the only bidder is the GCCM, The Owner need to review the solicitation documents to ensure fairness (ensuring the GCCM didn't have a competitive advantage and other firms had a fair opportunity to compete for and be awarded the package).
- v. Review main GCCM contract to ensure compliance with any single bid requirements and review. (Does the main contract have a minimum number of bids required in order to award)
- vi. Perform a more detailed analysis of the bid against the estimate, may require meetings with bidder and additional documentation from them to establish that the bid is reasonable.
- vii. Need to ensure bid is fair and reasonable and that there was sufficient opportunity for competition before awarding the package.

II. No Bids

- i. Will have to rebid the package, but should review to understand why no bids were submitted
- ii. Evaluate scope of work to ensure correct work is packaged together
- iii. Look for opportunities to break work into smaller packages to encourage participation from bidders

- iv. Reach out to firms that typically pursue this work to understand why they didn't submit a bid
- ~~iv.~~ Review terms and conditions of contract to ensure there aren't provisions that are overly burdensome to subcontractors (insurance, LDs, etc.)

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e. Bidder error

Bidders may claim error and retract their bid as outlined in the solicitation documents. That bidder may not pursue the same package of work if the GCCM rebids it.(5) A low bidder who claims error and fails to enter into a contract is prohibited from bidding on the same project if a second or subsequent call for bids is made for the project.

f. Awarding Bid Package

GCCM should summarize process above and notify Owner for review and final approval

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~~f.g.~~ Rejecting Bids

- I. GCCM and Owner may reject all bids for any reason
- II. Must provide a written explanation is all bids are rejected.(6) The general contractor/construction manager must provide a written explanation if all bids are rejected.

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~~g.h.~~ Negotiations

- I. 39.10.380(6) & (7)
- II. GCCM and Owner can negotiate with the low bidder, but under certain conditions:
  - a) The estimate must be published with the solicitation
  - b) All bids must exceed the published estimate
  - c) The apparent low Bidder's bid does not exceed the published estimate by more than 10%
- III. GCCM and Owner should perform a cost/price analysis and develop a negotiation plan prior to meeting with the apparent low bidder
- IV. What is negotiation – changes to scope which reduces the price, not how much you can extract from the sub

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—If the GCCM cannot successfully negotiate a lower price the package of work must be rebid.(6) The general contractor/construction manager may negotiate with the lowest responsible and responsive bidder to negotiate an adjustment to the lowest bid or proposal price based upon agreed changes to the contract plans and specifications under the following conditions:

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- (a) All responsive bids or proposal prices exceed the available funds;
- (b) The apparent low responsive bid or proposal does not exceed the available funds by the greater of one hundred twenty five thousand dollars or two percent for projects valued over ten million dollars; and
- (c) The negotiated adjustment will bring the bid or proposal price within the amount of available funds.
- (7) If the negotiation is unsuccessful, the subcontract work or equipment or material purchases must be rebid.

~~h.v.~~ Owner involvement

## 6. Subcontract Award ~~(Howard)~~

RCW 39.10.380(1): Subcontract bid packages and equipment and materials purchases shall be awarded to the responsible bidder submitting the lowest responsive bid.

### i. Protests

(4) If the general contractor/construction manager receives a written protest from a subcontractor bidder or an equipment or material supplier, the general contractor/construction manager shall not execute a contract for the subcontract bid package or equipment or material purchase order with anyone ~~other than the protesting bidder~~ without first providing at least two full business days' written notice to all bidders of the intent to execute a contract for the subcontract bid package. The protesting bidder must submit written notice of its protest and the reason for protest, no later than two full business days following the bid opening. Intermediate Saturdays, Sundays, and legal holidays are not counted.

### j. Subcontract Agreements

RCW 39.10.410: General contractor/construction manager procedure—Subcontract agreements.

Subcontract agreements used by the general contractor/construction manager shall not:

(1) Delegate, restrict, or assign the general contractor/construction manager's implied duty not to hinder or delay the subcontractor. Nothing in this subsection (1) prohibits the general contractor/construction manager from requiring subcontractors not to hinder or delay the work of the general contractor/construction manager or other subcontractors and to hold subcontractors responsible for such damages;

(2) Delegate, restrict, or assign the general contractor/construction manager's authority to resolve subcontractor conflicts. The general contractor/construction manager may delegate or assign coordination of specific elements of the work, including: (a) The coordination of shop drawings among subcontractors; (b) the coordination among subcontractors in ceiling spaces and mechanical rooms; and (c) the coordination of a subcontractor's lower tier subcontractors. Nothing in this subsection prohibits the general contractor/construction manager from imposing a duty on its subcontractors to cooperate with the general contractor/construction manager and other subcontractors in the coordination of the work;

(3) Restrict the subcontractor's right to damages for changes to the construction schedule or work to the extent that the delay or disruption is caused by the general contractor/construction manager or entities acting for it. The general contractor/construction manager may require the subcontractor to provide notice that rescheduling or resequencing will result in delays or additional costs;

(4) Require the subcontractor to bear the cost of trade damage repair except to the extent the subcontractor is responsible for the damage. Nothing in this subsection (4) precludes the general contractor/construction manager from requiring the subcontractor to take reasonable steps to protect the subcontractor's work from trade damage; or

(5) Require the subcontractor to execute progress payment applications that waive claims for additional time or compensation or bond or retainage rights as a condition of receipt of progress payment, except to the extent the subcontractor has received or will receive payment. Nothing in this section precludes the general contractor/construction manager from requiring the

subcontractor to provide notice of claims for additional time or compensation as a condition precedent to right of recovery or to execute a full and final release, including a waiver of bond and retainage rights, as a condition of final payment.

## 7. Encouraging Competition (Howard/Andrew/Janice/OMWBE rep./Mike)

### 1. Working through contract terms

- Insurance limits should be tailored to the scope being performed and the risk associated with the work
- 1. Indemnification should be tailored to the scope being performed and the risk associated with the work

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### 2. Diverse business inclusion

- Prior to bid, contact potential firms directly, not just blast emails
  - When finishing DD GCCM should begin outreach (should happen much earlier than when packages hit street)
- Work with owner to compile list of potential firms
- Have open outreach events early in the project
  - Open to questions from subs
  - Allows firms who cannot bid on work can network with subcontractors that can
- 2. Consider geographic outreach to firms – firms farther away may struggle to perform work

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### 3. Entering this market

- Fairness & Transparency - Tie back into owner responsibility when GCCM pursuing the work above
- 3. Packaging of work – tie into conversation above

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### 4. Pre-bid qualification (39.10.400)

### 5. Responsible bidder criteria

## 8. Change Management (Howard/Andrew/Mike)

- Establish whether change is Risk Contingency or scope change
- Challenge getting change orders processed quickly and sometimes months after work performed.
  - Reference RCW... (mike to provide reference)
  - Establish mechanism to ensure that firms are getting paid for work performed even if the change order isn't approved
  - Owner's and GCCM should work to approving change order prior to work being performed, but a lot of the times this isn't realistic
  - Have firms submit labor/equipment rates and approved by owner and then work under a force account for that change work, verifying hours and quantities as work proceeds.
  - Owner and GCCM should look to ways to approve partial change orders when that subs work is finished
- Risk Contingency

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o Empower the GCCM to administer the use of risk contingency for managing change that are not considered Owner initiated changes and the owner should help facilitate this process

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• Prompt payments to GCCM and Subs

o Establish weekly/bi weekly meetings to focus on change order processing and information sharing

o Dedicate team to work with GCCM and subs

o Provide as much information to owner as much as possible

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