

VII. STANDING COMMITTEES**A. Academic and Student Affairs Committee**

In Joint Session With

B. Finance, Audit and Facilities Committee**Establishment of Contracting Regulations****RECOMMENDED ACTION:**

It is the recommendation of the Administration and of the Finance, Audit and Facilities Committee that the Board of Regents take the following actions under the authority granted in RCW 28B.20.140:

- 1) Establish regulations providing for a fair, open, and efficient development agreement method by which the University may, under limited circumstances, move expeditiously and efficiently to contract for Capital Projects in a way that protects the best interests of the University and assures the delivery of quality work and products at a reasonable price under the most advantageous terms.

The full text of the proposed regulations is attached.

BACKGROUND:

In 1969, the legislature amended RCW 28B.20.140 to authorize the Board of Regents to construct and improve university buildings through contracts as the Regents deem to be in the best interest of the University. The statute authorizes the Regents to let such contracts under regulations as the Regents may establish or through processes established elsewhere in state law.

The University has historically used the processes set forth in other state law (for instance, the General Contractor Construction Manager (GCCM) or Design-Build processes set forth in Chapter 39.10 RCW) in contracting for construction and improvement of University facilities. Currently, there are plans for construction of the Sound Transit Station adjacent to Husky Stadium. There is also consideration of other large projects by other transportation agencies, on sites adjacent to Husky Stadium. The University is at the same time making plans for major renovations of Husky Stadium.

If the University were to follow existing contracting processes for the Stadium renovations, it may suffer significant adverse effects on its operation, mission, and/or financial interests due to the Sound Transit project and potentially the 520

VII. STANDING COMMITTEES

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project. These circumstances call for a specialized contracting method to protect the interests of the University.

The purpose of the proposed regulations is to establish a fair, open, and efficient contracting method by which the University may, under limited circumstances, move expeditiously and efficiently to contract for a project in a way that protects the best interests of the University and assures the timely delivery of quality work at a reasonable price under the most advantageous terms. For this reason, the Regents are being asked to use the authority of RCW 28B.20.140 to establish the regulation to enable use of different contracting methods.

Because time was a crucial factor in this situation, the Regents previously authorized adoption of these regulations on an emergency basis. A full period of notice and comment has now taken place and therefore these regulations are coming back to the Board for final adoption. This period of notice and comment included: filing and publication of a Pre-proposal Statement of Inquiry; filing the Proposed Rule Making Notice; and a hearing was held. A report on the hearing is attached for review.

Attachments:

1. Hearing Officer's Report
2. Chapter 478-350 WAC: Alternative Contracting Process for the University of Washington.

June 2, 2008

President Mark A. Emmert
Office of the President
University of Washington
Box 351230

Dear President Emmert:

Pursuant to your delegation, I served as the Hearing Officer to receive public comment on the University of Washington's proposed new Chapter 478-350 WAC, "Alternative Contracting Process for the University of Washington." The hearing commenced at 12:00 p.m. on Wednesday, May 28, 2008, in Room 310 of the Husky Union Building (HUB) at the University of Washington, Seattle campus. I am pleased to provide you a report of that hearing and the written comments received.

As required by the Administrative Procedure Act, the University filed the following notices with the State of Washington Code Reviser: a Preproposal Statement of Inquiry (published as WSR 08-05-101, in the *Washington State Register*) and a notice of Proposed Rule Making (published as WSR 08-09-059, in the *Washington State Register*). Campus notice that the hearing would be held was published in *University Week* on May 15, 2008, and in *The Daily* on May 20, 2008. In addition, notice of the public hearing was included in the online events calendar for the Seattle campus. The written comment period began March 5, 2008, and ended May 28, 2008. An audio tape of the hearing has been deposited with the Secretary of the Board of Regents.

Public Comment

Four individuals provided oral testimony at the hearing and the University received six written comments. The oral and written comments were on behalf of the following organizations: The Architects and Engineers Legislative Council, the Associated General Contractors, the Inland Northwest Associated General Contractors, the Mechanical Contractors Association, the Mechanical Contractors Association of Western Washington, the National Electrical Contractors Association, and the Washington Construction Industry Council.

All comments and testimony received included expressions of concern with the proposed new rules. Specific areas of concern included the following:

- The contracting community believes the proposed rules are unnecessary and that currently available contracting procurement methods are sufficient for any complex projects the University of Washington needs to build.

- The construction community believes the proposed rules lack protections offered them through the competitive bid process. Moreover, the community believes the “competitive negotiation” process specified in proposed WAC 478-350-040 is too vague in concept and has the potential for waste, fraud, or abuse through biased contractor selection.
- The low dollar amount — \$25 million — specified in proposed WAC 478-350-030 (one of the four criteria necessary for the use of these alternative contracting rules) has led the contracting community to believe this process would be widely used by the University in lieu of existing statutorily authorized contracting methods.
- The construction community believes the reputation the University has built as an exemplary manager of contracting processes and a leader in implementing and amending the Alternative Public Works legislation, among other efforts, would be damaged by using an untried contracting method without the full partnership of the contracting professions.

Analysis and Recommendation

Given the issues individuals representing the construction community expressed, as mentioned above, it is my recommendation that the University limit the circumstances under which these proposed rules would be used in lieu of existing construction methods. Specifically, the University should limit these rules to apply to buildings or improvements which are part of the University’s Intercollegiate Athletics Facilities, which include renovations to Husky Stadium, and should raise the dollar threshold to apply to those projects with a total project cost in excess of one hundred million dollars.

These thoughtful amendments to proposed Chapter 478-350 WAC have incorporated the major expressed concerns of the construction community. Once these amendments to proposed Chapter 478-350 WAC have been made, I recommend that these rules be considered for adoption by the Board of Regents.

Sincerely yours,

Carol S. Niccolls
Special Counsel to the President

cc: Mr. Richard Chapman
Ms. Rebecca Goodwin Deardorff
Mr. Randy Hodgins
Ms. Karin Nyrop
Mr. John Palewicz
Ms. Michele M. Sams
Ms. V’Ella Warren
Mr. Scott Woodward

Chapter 478-350 WAC

ALTERNATIVE CONTRACTING PROCESS FOR THE UNIVERSITY OF WASHINGTON

NEW SECTION

WAC 478-350-010 Authority. The University of Washington adopts these rules pursuant to RCW 28B.20.140.

NEW SECTION

WAC 478-350-020 Purpose. The purpose of this chapter is to establish a fair, open, and efficient method by which the university may, under certain circumstances, contract for the erection and construction of university buildings or improvements thereto, in lieu of other statutorily authorized contracting methods. These rules are intended to protect the best interests of the university and assure the delivery of quality work and products at a reasonable price under the most advantageous terms.

NEW SECTION

WAC 478-350-030 Applicability. The contracting method set forth in this chapter may be used only when the president of the university finds that all of the following criteria are met:

(1) The buildings or improvements involved are part of the university's intercollegiate athletics facilities, include renovations to Husky Stadium, and have a total project cost in excess of one hundred million dollars;

(2) The design or construction of the building or improvement or its construction schedule may be directly impacted by large construction projects being planned or constructed by other agencies or private developers;

(3) Postponing the building or improvement or delaying it through the use of other contracting methods is likely to have a

significant adverse effect on the operation, mission, or financial interests of the university; and

(4) The building or improvement may benefit from a contracting method that integrates services including but not limited to a developer, designer, construction manager and contractor being on the same team and working collaboratively.

A finding by the university president that a project meets all of the above criteria shall be subject to review by the University of Washington board of regents at their discretion.

NEW SECTION

WAC 478-350-040 Contracting method. Upon an approved finding that a project meets the criteria set forth above, the president or the president's designee may proceed to conduct a competitive process that is open, fair, and unbiased and results in one or more contracts with a qualified entity or team on the most advantageous terms. The process must include at least the following elements:

(1) RFQ/RFP. Contracts will be awarded through either a Request for Qualifications (RFQ) or a Request for Proposals (RFP) process or a combination thereof. The RFQ/RFP will include a clear description of what the university believes to be most important about the project as well as the weight of selection criteria.

(2) Public notice. The university shall publish at least once in a legal newspaper of general circulation published in, or as near as possible to, that part of the county in which the project will be constructed, a notice of its RFQ/RFP, and information regarding the availability and location of the RFQ/RFP documents.

(3) Selection criteria. Selection criteria shall include, but are not limited to, qualifications of the project team, technical excellence and competence, experience, capacity to accomplish the work, ability to deliver a quality project, past performance of the team or its constituent members, and price or fee, taking into consideration the estimated cost of construction as well as the long-term performance, operation and maintenance of the building or improvement.

(4) Negotiations. The university shall first attempt to negotiate a contract with the entity deemed to have submitted the best overall response. If such negotiations are not successful, the university may proceed to negotiate with the entity deemed to have submitted the next best response.

NEW SECTION

WAC 478-350-050 Prevailing wages, bonds and retainage. Any contract awarded pursuant to these rules shall require full compliance with applicable sections of chapters 39.08, 39.12, and 60.28 RCW. The selected entity shall also be encouraged to work closely with the university's business diversity program.