TITLE IV LEGAL REQUIREMENTS

CHAPTERS:

Chapter 4.04 FORMS OF MUNICIPAL GOVERNMENT

Sections:

4.04.010 GENERALLY. No form of government will, in itself, produce good government. There must be an informed, alert citizenry in order to make governmental machinery effective. To understand the government of your own city, you must have some appreciation of the various forms of municipal government, their alleged advantages and disadvantages, and the manner in which they operate in Washington.

4.04.020 CITY AND TOWN POWERS. Cities and towns are authorized to levy sales, business, and property taxes and must furnish police and fire protection. They may require and issue licenses for the purpose of regulation or revenue generation; grant various franchises and acquire and operate certain types of public utilities; and borrow money or issue bonds for raising funds. They may enact building codes and zoning ordinances; may purchase, lease, condemn, or otherwise acquire real and personal property for city purposes; and provide construction and maintenance of streets, alleys, parks, and sidewalks.

4.04.030 CLASSIFICATION OF CITIES AND TOWNS. The class of government that a Washington city or town will have is determined by its size at the time of incorporation. The classification scheme for Washington municipalities was changed significantly at the 1994 legislative session. There are now four classes of municipalities; first class cities have over 10,000 in population; second class cities have 1500 to 10,000; towns have between 300 and 1500; and Optional Municipal Code cities must have at least 1500. While the class of government is determined at the time of incorporation, cities and towns do not automatically change classification upon attaining the population of a different class. The Optional Municipal Code class of government allows cities to operate under a statutory home rule concept. Any city or town, regardless of population, may elect to become a non-charter code city and be governed under statutes in the Optional Municipal Code, rather than under existing statutes relating to its current class. Any city adopting the Optional Municipal Code by becoming a code city abandons its previous classification.

The Optional Municipal Code was designed to provide broad statutory home rule authority. Any unincorporated area having a population of at least 1500 may incorporate as an Optional Municipal Code. Optional Municipal Code cities with a population over 10,000 may also adopt a charter.

4.04.040 FORMS OF GOVERNMENT. Washington cities use three principal forms of government: mayor-council, council-manager, and commission. The essential difference among the three forms is how the legislative and administrative responsibilities are separated. Cities organized under the Optional Municipal Code must adopt either the mayor-council or council-manager plan unless the city was previously organized under the commission form. Cities and towns have the option of choosing one of the three forms of government provided by statute, if the population requirements of the particular form are met. Cities having a population of 10,000 or more may form a charter, which provides greater latitude in designing the administrative framework of city government.

4.04.050 MAYOR-COUNCIL FORM. The mayor is the chief executive officer and administrative officer of the municipality. The mayor is responsible for carrying out policies of these offices. A mayor and council are elected and the remaining city elected offices vary with the class of the city. The size of the council is determined by class and population.

4.04.060 COUNCIL-MANAGER. Basic to this system, as well as the mayor-council system, is the belief that policy-making and administrative functions should be kept separate. The council, which determines policy and is politically responsible for its actions, selects a city manager as chief administrator. The manager is accountable to the council.

The mayor is chosen biennially by the council from the council ranks except in unique circumstances (i.e. charter cities). In charter cities, the charter may provide for direct election of the Mayor. RCW 35A.13.033 does authorize a procedure for the voters to directly elect the Mayor. In the council-manager form, a council is elected with the number of council members, five, or seven, determined by population. While the mayor retains council member rights and

privileges, and is recognized as head of the city for ceremonial purposes, he does not have any regular administrative duties.

4.04.070 COMMISSION FORM. The commission form provides for the election of three commissioners to serve terms of four years. The three are elected at-large to fill the specific offices of commissioner of public safety (also serves as mayor), commissioner of finances and accounting, and commissioner of streets and public improvements (public works). The commissioners, as a body, are authorized to determine by ordinance the powers and duties of all department officers and employees. The mayor has essentially the same powers as other commissioners, and has no veto power nor any power to direct city administration except in his/her own department.

4.04.080 STATUTORY REFERENCES. Title 35 RCW: Cities, Towns, and Title 35A RCW: Optional Municipal Code.

Chapter 4.08 LEGISLATIVE PROCEDURES

Sections:

4.08.010 LEGISLATIVE PROCEDURES GENERALLY. The clerk is required by statute to perform certain legislative functions such as maintaining the official record of proceedings and filing of certain documents to ensure the continued operation of the city. This chapter discusses various legislative areas where the clerk might desire clarification. The listing is not inclusive but is representative of the types of legislative areas in which the clerk may be expected to be knowledgeable.

4.08.020 LEGAL PROCEDURES - YOUR ATTORNEY. All municipalities either contract for or have on staff an attorney to advise the elected officials and the staff members on matters, which might have legal implications.

Each attorney handles advice, comments, or opinions in a different manner. However, it is important for the clerk to record oral advice given in some form so that, should you need to check the same question later, you have a written reference and do not have to ask the same question. This written reference can be in the form of a memorandum to the file noting the date and time of discussion with the attorney and the topic of discussion and the answer provided by the attorney. It is suggested that a copy of this memo be provided to the attorney as well.

In the event the council or a member of the staff requests a formal opinion from their legal counsel, this is usually completed in writing from the attorney and sometimes is numbered and indexed in a similar fashion to the opinions offered by the attorney general. Quite often, these opinions will also have attachments. These opinions and attachments should be kept on file by the clerk. Check with the attorney before relying on an old opinion. Statutes and case law are not static. Attorneys should review resolutions, ordinances, and agreements prior to presentation to the council. Many times these documents are prepared by the attorney's office. Conditions for approval attached by the council may require attorney approval on documents such as insurance certificates, labor and materials bonds, specifications, or contract completion. Many clerks have devised a transmittal memo to the attorney, which will provide for approval, signature, review, and comment, or requested action.

4.08.030 ORDINANCES. Ordinances are the laws of a municipality and are the most binding form of action taken by the council. The Ordinance form is required where an existing ordinance is to be amended or repealed; when the law will impose a penalty by fine, imprisonment, or forfeiture; and when state law expressly requires it. Actions, which have a general legislative purpose, must be done by ordinance. Ordinances typically contain a title which completely describes the content of the ordinance; recitals which outline the background and purpose for the ordinance ("the whereas"); a statement which reads, "Now therefore, the city council of the city of _____ does hereby ordain as follows"; and the sections which actually state the legislation being enacted. Ordinances are signed by the mayor and attested by the clerk and include the date of passage and the effective date which, if the ordinance is not subject to referendum, is typically five days after the date of publication in the official newspaper. In order to save publication costs, the clerk may, with the approval of the city attorney, prepare a summary of the ordinance for publication. This summary shall mean a brief description, which succinctly describes the main points of the ordinance. When summary is published, the publication shall include a statement that the full text of the ordinance will be mailed upon request at no cost.

4.08.040 RESOLUTIONS/MOTIONS. Resolutions, in contrast, are simply an expression of the opinion of the legislative body concerning some particular item of business or matter of administration coming under its jurisdiction. A resolution can be a statement of policy or a way

of taking administrative action. Although some municipalities do distinguish between motions and resolutions, the rule in Washington is that the terms "motion" and "resolution" are practically synonymous. Resolutions have no publication requirement and take effect immediately upon adoption. The resolution form is required to amend or repeal a prior resolution.

4.08.050 ENACTING CLAUSES. Be sure to read the enacting clauses of the ordinances and resolutions enacted by your council to determine if you need to record those documents with the county recorder. The most common documents required to be recorded are resolutions accepting deeds to property, resolutions approving conditions for a final planned unit development and other legislation, which affects land use that should be recorded against the parcel of property.

4.08.060 EMERGENCY ORDINANCES. Emergency ordinances may be passed by the council in some situations and become effective immediately.

4.08.070 ORDINANCE VS. RESOLUTION. In deciding whether to use an ordinance as opposed to a resolution, the first step is to refer to your city charter, if you have one, and the Revised Code of Washington (RCW) If the charter and the code are silent as to the mode of decision making, then either ordinance or resolution may be used provided; however, that "legislation" must be enacted by ordinance. Refer to your attorney for advice in this matter.

4.08.080 ACTIONS REQUIRING PASSAGE BY ORDINANCE. Cities often are treated differently according to classification and population. Some common threads run through the statutes; however. For example, the adoption of the final budget, establishment of a municipal court system and adoption of personnel policies are required for adoption by ordinance.

4.08.090 INDEXES OF ORDINANCES AND RESOLUTIONS. The clerk should set up a system to keep track of ordinances and resolutions. The system should include an index by subject matter as well as a chronological list of ordinances or resolutions or motions. In addition, the clerk is required to keep ordinance and resolution books with the original ordinances and resolutions in them. Certified copies of ordinances and resolutions may be prepared by the Clerk's Office for requests by the public; however, the original ordinances and resolutions should stay with the clerk until transferred to Washington State Archives. If your ordinances are codified in-house or through a codification company, there may be index of the ordinances prepared for you.

4.08.100 PUBLIC HEARINGS. A public hearing before the council is required by the RCW or by ordinance when considering major zoning or land use issues; prior to budget adoption; as a part of local improvement district proceedings; and at other times set by state or city legislation. In general, a public hearing is an open consideration within a regular or special regular meeting of the council/board/commission for which special notice has been given. The notice requirements are set by state or jurisdictional law.

During a specified portion of the hearing, concerned individuals are invited to present their opinions regarding the subject under consideration. A public hearing is open to everyone who

wishes to speak. Public hearing notices may be required to be posted, published, and mailed. Refer to your code, the RCW, and attorney to ensure compliance. Keep copies of notices posted, published, and/or mailed along with certificates attesting to authenticity for proof the public hearing was held in accordance to law.

4.08.110 CONFLICT OF INTEREST. The Washington Supreme Court has held that a public official may not vote on a matter where his or her financial interest is especially affected. In addition, state law forbids public officials from having personal financial interest in contractual matters over which they have control, whether or not they vote on the matter. The public's concern for conflicts of interest is reflected in several sections of the Open Government Law. A major segment of that act, RCW 42.17.240, is devoted to requiring some candidates and public officials to make a financial disclosure statement at various times throughout their campaign and their term of office so the public can be informed about potential conflicts. A new statute, RCW 42.23.070, provides a list of prohibited acts for officials, including a specific provision against disclosure of confidential information.

Public officials are prohibited from being "beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein .... " This means an elected official, mayor, or other executive officer having broad supervisory control over contracts or operations may not have anything but a "remote" interest in contracts with the municipality. Remote interests are detailed in RCW 42.23.040. Both direct and indirect financial interests are prohibited and the law prohibits an officer from receiving financial benefits from anyone else having a contract with the municipality.

If a public official in your agency is suspected of a conflict of interest, discuss it with the official to ensure they are aware of the statutory prohibitions. A public officer who violates RCW 42.23 may be held liable for a $500 civil penalty in addition to any criminal or civil liability or penalty as may otherwise be imposed. Secondly, the contract entered into by the municipality may be held void, and finally, the officer may have to forfeit his or her office.

4.08.120 APPEARANCE OF FAIRNESS DOCTRINE. The appearance of fairness doctrine covers broader ground than the financial interest prohibitions described earlier. The appearance of fairness doctrine was first established in 1969 by case law, but was enacted by the legislature in 1982 and codified as RCW 42.36. This doctrine also applies to emotional, sentimental, or other biases on the issue being considered at certain hearings. Whenever councils, planning commissions, civil service commissions and similar bodies are required to hold hearings that affect individual or property rights ("quasi-judicial" proceedings), these proceedings should be governed by the same strict fairness rules that apply to cases in court. This rule requires such hearings must not only be fair, they must also be free from even the appearance of unfairness.

The appearance of fairness doctrine applies only to quasi-judicial actions which are defined as, "...actions of the legislative body, planning commission, hearing examiner, zoning adjuster,

board of adjustment, or boards which determine the legal rights, duties or privileges of specific parties in a hearing or other contested case proceeding." (RCW 42.36.010). This doctrine does not apply to local legislative actions, which adopt, amend, or revise comprehensive community or neighborhood plans or other land use planning documents, which have area-wide significance. The prohibition against ex-parte communications provides that if a member of the decision making body communicates with proponents or opponents outside the setting of the hearing, in order to continue to participate, the member must place on the record the substance of such communications and publicly announce the content of the communication and of the parties rights to rebut the substance of the communication at each hearing where action is taken or considered on the subject. This does not prohibit correspondence between a citizen and his or her elected official if the correspondence is made part of the record and available to all members of the decision making body.

Anyone seeking to disqualify a member of a decision-making body must raise the challenge as soon as the basis for disqualification is made known. A challenged official may participate and vote in proceedings if his or her absence would cause lack of a quorum or would result in a failure to obtain a majority vote as required by law, provided that a challenged official publicly discloses the basis for disqualification prior to rendering a decision.

As a rule of thumb, when in doubt, the appearance of fairness doctrine should be construed broadly; however, consult with the attorney and chief administrative officer when in doubt.

4.08.130 STREET VACATIONS. The general authority for the vacation of public streets is provided in RCW 35.79. Initiation of proceedings to affect a street vacation may be by petition by and on behalf of abutting owners, or the legislative body of the city may initiate by resolution. The petition method provides that when the petition is signed by the owners of more than two-thirds of the abutting property the legislative authority, by resolution, shall fix a time for hearing on the petition at a time between twenty days and sixty days of the adoption of the resolution, with twenty days' posted notice of the date of hearing.

Resolutions of the legislative body without petition require additional notice by mail of fifteen days to all owners or reputed owners of property abutting the street for which vacation is sought. In the event fifty percent of these abutting property owners file written objections prior to the hearing, the jurisdiction is prohibited from proceeding with the vacation.

Following the hearing, authority is granted by ordinance, if the council approves the street vacation. The council may require compensation from the abutting property owners in an amount, which does not exceed one-half the appraised value of the area so vacated. The city may retain an easement over the vacated land for the construction, repair, and maintenance of public utilities, which may be in the street. Street vacation ordinances must be recorded with the county auditor.

4.08.140 APPEAL PROCEDURES. The RCW's and local ordinances provide many actions of the SEPA official, hearing examiner, planning commission or zoning administrator either are or can be made appealable to the council/board/commission. Clerks should familiarize themselves

with the applicable code sections pertaining to each type of appeal. There are usually statutory limitations on the appeal period and requirements for setting and noticing hearings to be held on appeals. Once the clerk determines that an appeal is being filed in a timely manner and with the appropriate fee, the affected department should be provided with a copy of the appeal and a hearing date set. Some cities require the hearing dates be set by the legislative body. Others permit the mayor or city manager to set the hearing date. Appeal forms should be provided by the city and should include a space for the appellant's name, address and phone number, a description and number of the project or permit being appealed and a space for the appellant to explain the grounds or basis for the appeal.

4.08.150 OFFICIAL SEAL. The official seal is the property of your municipality and should only be used for official purposes. When you are preparing certified copies of ordinances or resolutions, the official seal may be affixed over the mayor's signature or the clerk's signature. Some municipalities place the seal on the original copies of ordinances and resolutions. However, this is not required by law. The seal is often placed on a gold emblem and affixed to proclamations, commendations, and certificates of appreciation. The official seal should not be used on documents not maintained in municipal offices. Members of the public often have varying requests to have their signature certified or acknowledged and in most cases, notarization by a notary public is adequate for this purpose. A notary seal and affidavit attest to the signature of a person signing a document; however, the official seal should only be used to certify or otherwise authenticate documents owned or maintained by the municipality.

4.08.160 FRANCHISES. A franchise is the right to use public streets or other publicly owned property for facilities owned by a private business. Franchises are granted for the construction and maintenance of public utilities such as telephone, cable television, railroad, gas, water, and electricity.

Franchises must be granted by ordinance and there are specific procedures required for the enactment of franchise ordinances by each class of city. First class cities should consult their local charters. Code cities RCW 35A.47.040, second-class cities see RCW 35.23.390 and 35.23.400 and towns see RCW 35.27.330.

4.08.170 OATH OF OFFICE AND BONDS. The clerk, city treasurer, chief of police, councilmembers and other officers or employees as may be designated by ordinance or by charter shall be required to take an oath, or affirmation, for the faithful performance of his or her duties. In addition, these officers or employees may be required to furnish annually an official bond conditioned on the honest and faithful performance of their official duties. Your jurisdiction's insurance agent or broker will be able to advise you on bonding for officials. The jurisdiction pays the premiums for these bonds. See RCW 35A.13.160, RCW 35A.12.080 and RCW 35A.13.160.

Chapter 4.10 ELECTIONS

Sections:

4.10.010 STATUTORY AUTHORITY. Elections in the State of Washington are governed by the provisions of RCW Titles 29A, 35 and 35A.

Title 29A RCW contains the basic information on voter registration, times for holding elections, notice of election, absentee ballots, recall elections, polling place regulations, voters' pamphlets, and so forth. These apply to cities and towns.

Additional election information, such as eligibility requirements for elective office, is contained in the chapters, which relate to each class of municipality.

4.10.020 CONDUCT OF ELECTIONS. In Washington State elections are conducted by the counties; however, you should familiarize yourself with the upcoming election dates and the deadlines, which precede them for the close of registration, filing nomination papers for candidates for public office, and filing of arguments for ballot measures.

4.10.030 NOMINATION OF LOCAL CANDIDATES. Candidates for city/town council or commission file their nomination papers with the county election department. Some city clerks wish to provide papers and transmitting them to the county. This is not recommended because you may seriously disappoint a council candidate when a situation beyond your control prevents you from filing on his or her behalf in a timely manner!

4.10.040 ELECTION DAY. It is recommended that city clerks' familiarize themselves with the addresses of their county Auditor's office. All counties within Washington State have changed to mail in voting only.

4.10.050 ELECTION FOLLOW-UP. If you have had candidates for your council/commission in an election, you may wish to post the preliminary results at City Hall in the morning following election day. Provide your public information staff with a copy, and instruct them to inform callers that the results are preliminary and not official until the canvass is certified by the county. Incumbents should be given an oath of office as the first item of business up to ten days prior to assuming office or at the last regular meeting of the governing body before they assume office.

4.10.060 VOTER REGISTRATION BY MAIL. Since January 1, 1994, Washington State has provided for voter registration by mail. The county auditor distributes forms by which a person may register to vote by mail or/and cancel any previous registration in this state. It is the responsibility of the county auditor to review applications to determine whether the information is complete.

4.10.070 ABSENTEE VOTING. Any voter may apply, in writing, for status as an ongoing absentee voter. Each qualified applicant automatically receives an absentee ballot for each ensuing election for which he or she is entitled to vote and need not submit a separate request for each election.

4.10.080 NEW VOTER REGISTRATION OR TRANSFER - ACKNOWLEDGMENT. The county auditor acknowledges each new voter registration or transfer by providing or sending the voter a card identifying his current precinct and containing such other information as may be prescribed by the secretary of state.

4.10.090 CLOSING REGISTRATION FILES - NOTICE. The registration files of all precincts shall be closed against original registration or transfers for thirty days immediately preceding every election and primary to be held in such precincts, respectively.

The county auditor shall give notice of the closing of said files for original registration and transfer by one publication in a newspaper of general circulation in the county at least five days before such closing.

Chapter 4.12 LOCAL VOTERS' PAMPHLET

Sections:

4.12.010 GENERALLY. The city clerk should maintain a policy and procedure for participation in the local voters' pamphlet. RCW 29.81A.010 provides that at least 90 days before any primary or general election, or at least 40 days before any special election, the legislative authority of any county or first-class or code city may adopt an ordinance authorizing the publication and distribution of a local voters pamphlet.

4.12.020 NOTICE OF PRODUCTION. Not later than ninety days before the publication and distribution of a local voters' pamphlet by a county, the county auditor shall notify each city,

town, or special taxing district located wholly within that county that a pamphlet will be produced. If a first class or code city authorizes the production of a local voters' pamphlet, the city clerk of that city shall notify any special taxing district located wholly within that city that a pamphlet will be produced.

4.12.030 ADMINISTRATIVE RULES. The county auditor or city clerk, if the city is publishing the voters' pamphlet, shall adopt and publish administrative rules necessary to facilitate the provisions of any ordinance authorizing production of a local voters' pamphlet. The rules should include: 1) deadlines for decisions; 2) limits on the length and deadlines for submission of arguments for and against each measure; 3) basis for rejection of any explanatory or candidates' statement deemed libelous or otherwise inappropriate; and 4) an appeal process in the case of the rejection of any statement or argument.

4.12.040 PREPARATION BY COMMITTEES OF ARGUMENTS ADVOCATING APPROVAL AND DISAPPROVAL. For each measure that is included in a local voters' pamphlet, the legislative authority shall, not later than 45 days before the publication of the pamphlet, formally appoint a committee to prepare arguments advocating voters' approval of the measure and another committee to prepare arguments advocating voters' rejection of the measure. The authority shall appoint persons known to favor the measure to serve on the committee advocating approval and shall, whenever possible, appoint persons known to oppose the measure to serve on the committee advocating rejection. Each committee shall have not more than three members; however, a committee may seek the advice of any person or persons.

4.12.050 REGISTRATION WITH THE PUBLIC DISCLOSURE COMMISSION. The Pro and Con committees must register with the State Public Disclosure Commission, in the same manner as do political candidates and groups.

Chapter 4.14 INITIATIVES AND REFERENDUMS

Sections:

4.14.010 GENERALLY. The powers of initiative and referendum in non-charter code cities are those set for the commission form of government in RCW 35.17.240 through 35.17.360, except that the number of registered voters needed to sign a petition for initiative or referendum shall be 15% of the total number of registered voters in the city at the last municipal general elections (RCW 35A.11.100). The powers of initiative and referendum are not available to second-class cities and towns. The powers of initiative and referendum are not automatically available to code cities but may be adopted by the city council. (See RCW 4.14.030)

NOTE: The laws governing which ordinances are subject to referendum and which matters are appropriate subjects for an initiative are very complex. Consult the city attorney for assistance whenever these issues arise.

4.14.020 DEFINITIONS. An initiative is a procedure, which enables a specified number of voters, by petition, to propose or initiate a law or ordinance for submission to the city's voters for approval or rejection. For example, when the city council chooses not to pass legislation (and ordinance) which the voters want to have adopted, the electorate may present an initiative to the appropriate official or governing body to have the subject go to the vote of the people in a citywide election.

A referendum is the practice of submitting a petition to the city clerk after the adoption of an ordinance by the city council to determine whether it shall become effective. In other words, referendum is the right of the people to approve or reject an ordinance adopted by the city council by requesting the council to reconsider or to conduct a citywide election for a vote on the subject. The referendum process is usually used with the objective of defeating an ordinance adopted by the city council. The filing of a referendum petition does not nullify the ordinance. It merely suspends or prevents it from going into effect until a citywide election has been held on the measure.

4.14.030 OBTAINING THE POWERS OF INITIATIVE AND REFERENDUM. There are two methods by which a code city's voters can obtain these powers:

1. A petition seeking the powers of initiative and referendum may be filed with the city clerk signed by registered voters of the city equal to at least 50% of the votes cast in the last general city election. If the petition is sufficient, the city council must adopt a resolution declaring that the citizens have decided to adopt the powers of initiative and referendum. The resolution is published and, if no referendum petition is filed within 90 days, the city council must adopt an ordinance providing for initiative and referendum.

NOTE: If a referendum petition is filed in timely manner (RCW 35A.02.035) and signed by registered voters in a number not less than 10% of the votes cast in the last general city election, then the issue must be submitted to the voters at the next general city election if there is to be one within 180 days. If not, then a special election must be called. If the voters approve the matter, the city acquires the powers of initiative and referendum.

2. A majority of the city council may, by resolution, declare its intent to provide for the powers of initiative and referendum. The resolution is published and, if not referendum petition is filed within 90 days, the city council adopts an ordinance providing for initiative and referendum.

See NOTE above.

4.14.040 PROCESS. When an ordinance is adopted by the city council on a topic, which is subject to the powers of initiative and referendum, the ordinance does not become effective in the usual five days after passage and publication, but retains a 30-day effective date. If the electorates (registered voters) of the city do not object to the topic and the adoption of the ordinance, it will become effective 30 days after passage and publication. However, if the electorate feel strongly about the topic and want the city council to reconsider or to submit the ordinance to a vote of the people, they may invoke the powers of referendum by circulating a petition requiring the signatures of registered voters equal to 15% of the total number of the registered voters within the city on the day of the last municipal general election. A copy of the ordinance subject to such referendum petition should be attached to each petition sheet for the information of the parties requested to sign the petition.

The clerk may assign an identifying number and obtain legal review by the city attorney regarding the legitimacy of the petition and the form or wording, which is to be paced before the voters. These types of petitions usually have a time limit within which signatures must be obtained and the petition returned to the clerk in order to be valid. Completed petitions are filed with the city clerk, who is responsible for determining the validity of the petition, i.e., that it fulfills the legal requirements as to content. The city attorney assists in this determination. After the petition is determined to be valid as to subject and content, it is then forwarded to the county elections official to determine sufficiency, i.e., that the petition contains the required number of valid signatures.

4.14.050 ELECTION DATES. These are dependent on the laws on which the petition is based and so it is very important to check with the county elections official as to election requirements.

4.14.060 ORDINANCES NOT SUBJECT TO REFERENDUM. Certain ordinances are exempt from the referendum process:

- ordinances initiated by petition;
- ordinances necessary for the immediate preservation of public peace, health, and safety, or for the support of city government and its existing public institutions, which contain a statement of urgency and are passed by unanimous vote of the city council;
- ordinances providing for local improvement districts;
- ordinances appropriating money;
- ordinances providing for or approving collective bargaining;
- ordinances providing for the compensation or working conditions of city employees; and
- ordinances authorizing or repealing the levy of taxes.

4.14.070 RESTRICTIONS. The power of initiative and referendum is limited to legislative ordinance, and not to administrative or executive action.

1. If the authorizing legislation places the power in the "legislative body" rather than the "city," the ordinance is not subject to referendum. In other words, if a state statute says, "the legislative body of the city is authorized to . . ." and the city council adopts an ordinance to do that, it is not subject to referendum.

2. Administrative (or quasi-judicial) actions are not subject to referendum. Thus, rezones, which are administrative (or quasi-judicial), are not subject to referendum (Leonard v. Bothell).

3. Statutory scheme exemptions are those when there is a statutory arrangement that the courts have found to indicate a legislative intent not to allow referendum. For example, in Bidwell v. Bellevue, the Court of Appeals held that allowing an initiative on whether the city should enter into a lease purchase debt arrangement would conflict with state law, because state law allows incurring debt up to a specified limit without voter approval and the amount involved was under that limit.

4.14.080 EXERCISING THE POWERS OF INITIATIVE AND REFERENDUM. Registered voters may 1) initiate ordinances or 2) challenge certain ordinances adopted by the city council by referring them to an election process of acceptance or rejection. In either case, the process is begun by petition. In a code city, the petition requires the signatures of registered voters of at least 15% of the total number of registered voters in the city on the date of the last municipal general election, i.e., held in odd-numbered years (RCW 35A.11.100).

After receiving a valid initiative petition accompanied by the proposed ordinance, the city council must either 1) adopt the ordinance as it is proposed by the petitioners, within 20 days of the certification that the signatures on the petition are sufficient, or 2) cause a special election to be held on the next election date, as provided in RCW 29.13.020 that occurs not less than 45 days thereafter, unless a general election is to be held within 90 days, at which the unaltered proposed ordinance is submitted to the voters. The county certification must be attached to the petition.

If, after an initiative petition has been filed on a certain subject, the city council adopts the proposed measure verbatim, as the petitioners want it, or at least an acceptable amended version of the petition, the matter does not have to be referred to the election process.

4.14.090 FORM OF A PETITION. The petition may include any number of pages. Each page or group of pages shall contain:

1. the text of the petition (a clear statement of the action sought);

2. numbered lines for signatures; each line to contain the signature, the printed name of the signer, the resident address of the signer and zip code, and the date of signing;

3. a copy of the ordinance to be referred to the electorate; if the petition has a basis in law, the law should be referenced as such: ". . . as provided in RCW 26.12.010;" and

4. the following warning statement:

WARNING: Every person who signs this petition with any other than their true name, or who knowingly signs more than one of these petitions, or signs a petition seeking an election when he/she is not a legal voter, or signs a petition when he/she is otherwise not qualified to sign, or who makes herein any false statement, shall be guilty of a misdemeanor.
(RCW 35.21.005 and 35A.010.040, Sufficiency of Petition).

4.14.100 TIME LIMIT ON PETITION SIGNATURES. Petition signatures are good for only six months from the date of filing of the petition. (RCW 35.21.005(8)).

4.14.110 CERTIFICATION PROCESS. The city clerk submits the valid petition and its signatures to the county elections official for verification of signatures. With reasonable promptness, this individual must ascertain sufficiency of the signatures, using the voter registration records, and must prepare a certification as to sufficiency and file this with the city clerk.

If the signatures are found to be insufficient, the city clerk notifies the initiators of the petition, who then have 10 days from the date of certification of insufficiency to obtain more signatures. Again, within 10 days of receipt of the amended petition, the elections official must examine and ascertain sufficiency of the additional signatures and prepare a certification as to sufficiency or insufficiency as before.

If the second certificate shows the number of signatures to be insufficient, the petition shall be returned to the person filing it.

4.14.120 REFERENDUM BALLOT TITLE. RCW 29.79.055 requires that the referendum ballot title filed by the city be composed of three elements: 1) an identification of the enacting legislative body; 2) a concise statement identifying the essential features of the enactment on which the referendum is filed; and 3) a question asking the voters whether the enactment should be approved or rejected by the people.

The concise statement for local referendum measures must not exceed 75 words and must be prepared by the city attorney. The referendum measure must be advertised in the manner provided for nominees for elective office. The concise statement shall constitute the ballot title (RCW 35A.29.120). When any question or proposition is submitted to the voters of a code city, it must be printed on a ballot, which conforms to RCW 29.79.055, 9.27.060, 82.14.036, 82.46.021, or 82.80.090.

For more information, see Municipal Research & Services Center's publication *Initiative and Referendum Guide for Washington Cities and Charter Counties (updated June 2014)* at www.mrsc.org.

Chapter 4.16 ANNEXATIONS

Sections:

4.16.010 INTRODUCTION. Annexation is a procedure for bringing unincorporated areas into the city. All information in this chapter is subject to change and it is advisable to check with your city attorney and/or the Municipal Research and Services Center for the legal requirements for your municipality.

For more information, see Municipal Research & Services Center's publication *Annexation Handbook (updated June 2014)* at www.mrsc.org.

4.16.020 ANNEXATION GENERALLY. An annexation area is usually located adjacent to an incorporated city. Once an area is annexed, the city replaces the county as the primary provider of local government urban services. In the city, these services could include police, fire, water, and sewer services, transit service, if applicable, residential refuse service, animal control, zoning and land use planning, building regulation and inspection, improvement and maintenance of streets, parks and recreation services. Some cities contract for many of these services.

City residents are eligible to vote in all city elections, serve on the city council, and can serve on various appointed boards and commissions.

4.16.030 PROCEDURE FOR ANNEXATION. Washington state law governs the procedures for annexation. Annexation may be accomplished through an election, or by petition, which is the most common annexation method.

As explained in the text Annexation Handbook by Washington Cities and Towns, first, second class cities and towns are subject to RCW 35.13 and code cities are subject to RCW 35A.14. However, both annexation laws are similar in many respects, such that documents from all classes of cities may often be of assistance.

1. Election Method - Initiated by petition
2. Election Method - Initiated by resolution
3. Direct Petition Method:
    a. The most frequently used method of annexing territory in first and second-class cities and towns is by petition by the owners of at least 60% of the property value in the area.

b. Code cities are required to receive signed petitions from property owners, which represent at least 60% of the total assessed property value of the area proposed for annexation.

4. Alternative Petition Annexation Method (code city)
5. Municipal purposes method -All classes of municipalities
6. Federal owned Areas
7. Unincorporated Islands -Applicable to Code Cities Only

4.16.040 NOTICE TO REVIEW BOARD. If applicable, the city must submit an application to a boundary review board for their approval.

4.16.050 PUBLIC HEARING. Notice must be given of a public hearing specifying date, time, and place, of the hearing. At the public hearing, the council or commission receives all oral and written protests, objections, and evidence presented.

4.16.060 NOTICE TO COUNTY. If favorable, an ordinance is adopted and all pertinent information such as copies of the ordinance and maps are filed with the county legislative authority. (Send notice to county auditor, assessor, and other officers requesting notice where legislative authority may not readily forward information.)

4.16.070 CERTIFICATE OF ANNEXATION. A certificate of annexation is filed with the State Office of Financial Management as soon as possible, not later than 30 days after the effective date of annexation.

4.16.080 NOTIFICATION REQUIREMENTS. Notice must be sent to:

- Washington State Department of Revenue;
- Telephone companies, refuse contractors, utility companies, etc.;
- US Bureau of Census
- City or town departments

Chapter 4.18 PUBLIC DISCLOSURE

Sections:

4.18.010 History
4.18.020 Reporting
4.18.030 Contributions
4.18.040 Clerk responsibilities

4.18.010 HISTORY. In November 1972, Washington State voters approved Initiative 276 designed to place limitations on campaign spending and bring more openness and accountability by requiring public reporting of the personal financial affairs of candidates and

office holders. The law requires that records be kept and reports of all contributions and expenditures filed.

The Public Disclosure Act followed close on the heels of the Open Public Meetings Act of 1971. Washington citizens were interested in open government and began to use the initiative process to enact policies and political reform when the legislature failed to do so.

4.18.020 REPORTING. All elected officials in cities or towns with more than 1,000 registered voters must file an F-1 or F-1A form with the Public Disclosure Commission between January 1 and April 15 of each year they hold office. If the term ends December 31 or in January, a final report is required by April 15. If a candidate filed a report in the year of candidacy and is subsequently elected to office, another report must be filed by April 15 and every year thereafter, that he or she holds office.

If a local elected official resigns or is removed from office prior to the end of his term, a report must be filed by April 15 for the period he or she was in office. If appointed to fill a vacant elective office, the appointee must file an F-1 report within two weeks of the appointment. The F-1 form is used by persons completing their first report or by those ineligible to use the shorter F-1A form.

The F-1A form is used if no changes or only minor changes have occurred since the last report. If a complete F-1 report is on file with the Public Disclosure Commission, the F-1A form may be used for the next three successive reports if there have been no changes or only minor changes. A complete F-1 form must be filed at least every four years.

Candidates must report within two weeks of becoming a candidate. Candidates who already have a current F-1 or F-1A form on file because they are incumbents, or hold another position, which makes them subject to the law, do not have to file a second report. A candidate is a candidate when he or she (1) first receives contributions or makes expenditures; (2) reserves space or facilities for the race; (3) publicly announces his/her candidacy; or (4) files for office. This reporting consists of an F-1 form (unless a current F-1 or F-1A form is on file) and a C-1 form, C-3 and C-4 forms are filed monthly, if necessary. The Public Disclosure website has all of the reports and resources for elected officials at www.pdc.wa.gov.

4.18.030 CONTRIBUTIONS. The campaign financing provisions of the public disclosure law do not apply in cities or towns that have less than 1,000 registered voters, unless specifically required by local ordinance. The Public Disclosure Commission has many brochures and manuals available and most of these can be viewed online at www.pdc.wa.gov.

4.18.040 CITY CLERK RESPONSIBILITIES. The Public Disclosure Commission e-mails reminders to city clerks for distribution to current elected officials. The clerk is also contacted when elected officials have not filed in a timely fashion.

Chapter 4.20 BIDDING REQUIREMENTS

Sections:

4.20.010 INTRODUCTION.

Competitive bidding is designed to ensure that public works contracts and purchases are performed satisfactorily and efficiently at the least cost to the public while avoiding fraud and favoritism in the awarding of such contracts. This chapter is designed to familiarize you with competitive bidding requirements and the procedures that should be observed to avoid pitfalls in the construction of public works and improvements and in public purchasing. See MRSC Publication - The City Bidding Book (Report Number 52 *Revised* May 2013)

4.20.020 PUBLIC WORKS CONTRACTING.

Public policy favors competitive bidding for public works contracting, and, in general, ambiguous statutes are construed in favor of requiring that procedure. However, competitive bidding procedures do not have to be followed except as required by statute, or by local charter provision or ordinance. Accordingly, the following outline is meant to deal only with those positive requirements.

There are two sets of "bid limits" in the statutes:

1. Limits on the amount of work or project cost above which an agency cannot use its own forces or "day labor" hires to accomplish a public works contract.

2. Limits on the amount of work or project cost above which an agency must seek formal, competitive bids rather than informal bids or no bids at all.

Note this table:

Bid Limit Matrix			
Agency	**RCW Cite**	**Contracting Bid Limits**	**Day/Agency Labor Limits**
First Class Cities	RCW 35.22.620	None See City Bidding Book, Page 7	$45K, $90K
Code Cities, 2nd Class Cities and Towns	RCW 35.23.352	$40K, $65K	$40K, $65K
Counties Over 400K	RCW 36.32.235 & 250	$40,000	$45K, $90K See County Bidding Book, Page 6
Counties Under 400K	RCW 36.32.240 & 250	$40,000	None See County Bidding Book, Page 6

Purchasing limits, for buying goods, materials, supplies and equipment unrelated to a public works contract, are:

		Quotes Allowed	Vendor List Allowed (Note A)	Competitive Bids Required
Cities and Towns				
	First Class City Over 150,000	Purchasing policies are set by City Council.		
	First Class City Under 150,000	Purchasing policies are set by City Council.		
	Code City Over 20,000 (B)	Purchasing policies are set by City Council.		
	Code City Under 20,000 (B)	< $7,500	< $15,000	> $15,000
	2nd Class City & Towns	< $7,500	< $15,000	> $15,000
Counties				
	Over 400k w/ Purchasing Department	< $5,000	< $25,000	> $25,000
	Under 400k w/ Purchasing Department	< $5,000	< $25,000	> $25,000

Note A: See RCW 39.04.190
Note B: See RCW 35A.40.210

FIRST CLASS CITIES

1. In first class cities, competitive bids are required for all public works projects costing over $90.000, if more than a single craft or trade is involved. If only a single craft or trade is involved, bids are required when the cost is over $45,000. If the project is less than $300,000, but more than these limits, the city may use a small public works roster process.

2. Whenever a first class city has had public works performed by city employees in any budget period up to the maximum permitted amount (10%) for that budget period, all remaining public works within that budget period must be done by contract pursuant to public notice and call for competitive bids, regardless of the individual project limits in paragraph 1.

3. There are certain bidding exceptions or special situations applicable to first class cities. Per MRSC, a strong argument could be made that bid laws are virtually non-existent for these cities, as explained below:

RCW 35.22.620 primarily places limits on when a city can use its own employees or day labor in the construction of a public works project. RCW 35.22.620(1) states:
A first class city may have public works performed by contract pursuant to public notice and call for competitive bids.

This language is permissive and does not in itself mandate competitive bidding. The only instance when bids are actually required is when the limits placed on the use of city employees are reached. Paragraph three of subsection (2) says:

Whenever a first class city has had public works performed in any budget period up to the maximum permitted amount of that budget period, all remaining public works within that budget period shall be done by contract pursuant to public notice and call for competitive bids.

While not clear, it appears that the reference to "public works performed in any budget period up to the maximum amount" is to the maximum work (ten percent of the public works construction budget) that may be performed by city forces. That conclusion seems consistent with the other paragraphs of subsection (2), all of which relate to the use of public employees for the performance of public works projects. Subsection (3) of RCW 35.22.620 places additional restrictions on when city forces may be used in performing work. (This subsection gives explicit dollar limits.) No reference is made to competitive bids.

Based on the above analysis, the following conclusions appear warranted under this alternative view: (1) for most projects, competitive bids are not required, although a city may call for them; (2) a city could, in most instances, use city employees for projects, as long as the limits on the use of city forces are not exceeded; and (3) a city may negotiate a contract for a public works project.

The use of city forces is limited both generally (may work on projects costing up to ten percent of the public works construction budget in any budget year) and specifically. For example, in first class cities, city employees may be used for any multiple craft or trade project that does not cost more than $90,000, and on any single craft or trade project that does not cost more than

$45,000. Once city employees have been used on projects that cost ten percent of the construction budget in any budget period, all projects, regardless of their cost, must be put out for competitive bids.

Reporting and Notice Requirements.
First class cities must report to the state auditor yearly, indicating their total public works construction budget, supplemental public works construction budget, total construction costs of public works performed by public employees, and the amount of public works performed by public employees above or below the permissible ten percent of the total construction budget. First class cities with populations less than 150,000 must report all public works in excess of $5,000 that are not let by contract. Every city that uses its own forces on projects costing more than $25,000 must public a description and the estimated cost of the project in its official newspaper, fifteen days before beginning the project.

Women's and Minority Business Enterprise (WMBE) Requirements. Presumably, all contracts entered into by a first class city for any public work or improvement exceeding $10,000 (or $15,000 for water mains) are required to contain the following clause:

Contractor agrees that he shall actively solicit the employment of minority group members. Contractor further agrees that he shall actively solicit bids for the subcontracting of goods or services from qualified minority businesses. Contractor shall furnish evidence of his compliance with these requirements of minority employment and solicitation. Contractor further agrees to consider the grant of subcontracts to said minority bidders on the basis of substantially equal proposals in the light most favorable to said minority businesses. The contractor shall be required to submit evidence of compliance with this section a part of the bid.

It is doubtful this requirement continues to apply in view of the passage of Initiative 200 in 1998, now codified at RCW 49.60.400(1):

The state shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The term "preferential treatment" has not yet been defined. A strong argument could be made; however, that compliance with RCW 35.22.650 would constitute preferential treatment, especially if city disqualified a bidder for statutory noncompliance.

Minor Exceptions. The cost of water services and metering equipment furnished by any first class city in the course of a water service installation, from the utility owned main to and including the meter box assembly, is not be included in determining the cost of a public work or improvement.

RCW 35.22.640 relieves first class cities from the bidding requirements when the public work relates solely to electrical distribution and generating systems on public rights of way or on municipally owned property.

Material, Supplies and Equipment. Unlike the state statutes applicable to small cities, the first class city statutes and, by reference, those that govern code cities with a population of 20,000 or more do not require the city to seek competitive bids for purchase of materials, supplies and equipment not associated with a public work. Nevertheless, bidding requirements could still apply, if there are local requirements. It is recommended to review charter requirements, local ordinances, and policies to determine whether bids must be sought for such purchases.

SECOND CLASS CITIES AND TOWNS. Second class cities and towns must call for bids whenever the cost of a public work, including the cost of materials, supplies, and equipment, will exceed $65,000, if more than one craft or trade is involved. If a single craft or trade is involved or if the project is one of street signalization or street lighting bids must be called for if the cost is greater than $40,000

Second class cities and towns must provide a report to the state auditor of the costs of all public works in excess of $5,000 not let by contract. For any project, using city workers that cost in excess of $25,000 a city must publish a description of the project and its estimated cost in its official newspaper at least fifteen days before beginning the work.

Material, Supplies, and Equipment. Any second class city, town, or code city with a population under 20,000 that purchases supplies, materials, or equipment costing more than $7,500, which are not to be used in connection with any public work or improvement, must call for bids. Purchases by code cities with a population of 20,000 or more are governed by RCW 35.22.620; this referenced statute, though, does not require bids for the purchase of materials, supplies, and equipment.

PREVAILNG WAGES. Payment of prevailing wages under RCW 39.12 in Washington State applies to public works contracts accomplished through competitive bidding or the small works roster: AND to smaller public works contracts for which telephone quotes were secured or for which the contractor was simply chosen for any number of good reasons: AND to maintenance contracts of any nature and for any amount, except for those considered by the Department of Labor and Industrial Services to be ordinary maintenance. DLIS has defined ordinary maintenance as work done by an agency's own forces "to keep existing facilities in good usable, operational condition."

Note these points: Contractor must be told in advance that prevailing wages must be paid to all employees who work on the contract. Contractor must be given a copy of the prevailing wages in effect for the contract OR the agency may now simply provide a link to the applicable prevailing wage listing on the DLIS website. Contractor (and subcontractors) must file a Statement of Intent to Pay Prevailing Wages with the Industrial Statistician of the Department of Labor and Industrial Services (DLIS). The city must have a copy of the DLIS approved Statement of Intent before it can make payments under the contract.

After completion of the contract, the contractor must file an Affidavit of Wages Paid with the Industrial Statistician of the Department of Labor and Industrial Services (DLIS). The city must have a copy of the DLIS approved Affidavit before it can release the contract retainage.

TELECOMMUNICATIONS AND DATA PROCESSING EQUIPMENT AND INSTALLATION.
When purchasing telecommunications and data processing (computer) equipment or software costing above that amount, all municipalities may follow a "competitive negotiation" process as an alternative to the bid process. Recognizing the unique aspects of computer and telecommunication systems, the legislature established an alternative process for making such purchases. RCW 39.04.270 allows purchases through use of an alternative competitive negotiation process requiring, at a minimum, the following steps:

- A request for proposals (RFP) must be published in a newspaper of general circulation at least 13 days before the last date on which the proposals will be retrieved.
- The RFP must identify significant evaluation factors, including price, and their relative importance.
- The municipality must provide reasonable procedures for technical evaluation of the proposals, identification of qualified sources, and selection for awarding the contract.
- The award must be made to the qualified bidder whose proposal is "most advantageous" to the city. A city may reject all proposals for good cause and request new proposals.

The Single Unclassified, Territorial Charter City.
Only one Washington city, Waitsburg, still operates under its territorial charter. There are relatively few statutes that specifically regulate an unclassified city, and none that require competitive bids for public works or purchases. Without specific statutory bidding requirements, cities need not seek competitive bids. The Washington State Supreme Court has stated:

"We have heretofore, in common with the weight of authority, recognized that, in the absence of constitutional, statutory or charter requirement, authorized state or municipal contracts need not be let under competitive bidding."

Accordingly, unless the territorial charter of the unclassified city requires competitive bids, or the city has adopted a local policy requiring them, bids would not be required for either public works or purchases. (From a policy standpoint, though, it would probably be best to seek bids on some projects to assure that the city receives the best possible value.)

4.20.030 LEASE WITH AN OPTION TO PURCHASE. A lease of personal (or real) property with an option to purchase may require competitive bids, dependent upon the cost of the property. RCW 35.42.220 requires a call for bids in accordance with RCW 35.23.352, if the cost of the property to be leased exceeds the amounts specified in RCW 35.23.352 (thus, $7,500 for supplies, materials, and equipment). A lease of property without an option to purchase does not require a call for bids.

4.20.040 SMALL WORKS ROSTER. A city or town may use small works roster procedures for construction of a public work or improvement, as an alternative to ("in lieu of") general competitive bidding requirements, when the contract amount is $300,000 or less. A small works roster lists contractors who have requested placement on the roster and who, where required, are properly licensed or registered to perform work in this state. RCW 39.04.155(2) describes the procedures that a city must follow if it chooses to use a small works roster.

The MRSC Publication - Small Public Works Roster Manual for Local Governments: (Report Number 51 *Revised,* October 2014) contains a wealth of information about the small public works roster process and sample documents.

4.20.050 EXCEPTIONS TO BIDDING REQUIREMENTS. There are various exceptions to the previously discussed bidding requirements. It has been recognized, for example, that a municipality is not required to advertise for bids when there is an actual emergency, when the desired product is so monopolized that advertising for bids would produce only one bid, or if professional services are needed.

Qualifying neighborhood "self-help" projects may be constructed by a contracting association, such as the chamber of commerce, without regard to competitive bidding laws. Some pollution control facilities may likewise be exempt from competitive bidding requirements. Cities may not be required to seek bids if there are "special facilities or market conditions." Cities may also hire their county to do road projects without going out for bids.

Note these Bid Law Exemption resources.

Emergencies. Certain emergency situations justify the making of a contract without adherence to bid requirements. In case of an emergency, where it is essential to the health, safety, or welfare of the people that immediate action is taken, the requirement may be dispensed with. The term "emergency" is defined by statute to mean unforeseen circumstances beyond the control of the municipality that either: (a) presents a real, immediate threat to the proper performance of essential functions; or (b) will likely result in material loss or damage to property, bodily injury, or loss of life, if immediate action is not taken.

RCW 39.04.280(1)(c) specifically authorizes a municipality to waive competitive bidding requirements for purchases "in the event of an emergency." In such a situation, the person designated by the governing body to act in the event of an emergency may declare that an emergency situation exists, waive competitive bidding requirements, and award all necessary contracts on behalf of the city to address the emergency. If the city has not designated a person to act in the event of an emergency, the city council, presumably by resolution or motion, would declare an emergency exists, waive the bidding requirements, and award the contract. If a contract is awarded without competitive bidding due to an emergency, written findings of the existence of an emergency must be made by the governing body or its designee and entered into its record no later than two weeks following the contract's award.

RCW 35.22.620 also recognizes exceptions to the bidding requirements for first class cities in the event of an emergency. Several first class city charters also provide that the city may forego bidding procedures in the event an emergency exists.

RCW 38.52.070(2) authorizes political subdivisions in which major disasters occur (as defined in RCW 38.52.020 and 38.52.020 of the Washington Emergency Management Act), in the event of an extreme emergency, to forego compliance with statutory competitive bidding requirements. Checking with the state auditor's office before declaring the emergency is also recommended. If the auditor's office agrees that a particular factual constitutes an emergency situation, that does not guarantee that unhappy contractors will not sue, saying there was no emergency, but it should prevent a possible negative audit finding.

Sole Source. It has been recognized in *Washington Fruit & Produce Co. V. The City Of Yakima*, 3 Wn.2d 152, 103 P.2d 1106 (1940) that municipalities may also forego calling for bids when the desired product is available from a sole or single source and advertising for bids would result in only one bid. In that case, the City of Yakima awarded a contract to a private utility company for the maintenance of overhead electrical street lighting without calling for bids. The resolution adopted by the commissioners recited the fact that the utility company had provided Yakima with electrical service for many years and that it was the only entity then capable of providing the city with that service. Since advertising for bids in such a situation would have been futile because it would produce only one bid, the court held that the City of Yakima did not violate the bidding requirements of its city charter by not calling for bids.

Not only is there appellate case authority for purchasing without bids from a sole source, there is now also a statute, RCW 39.04.280(10(a), that explicitly addresses the practice. To engage in sole source bidding under this statute, the city council must either apply a previously adopted written policy or pass a resolution that states, "the purchase is clearly and legitimately limited to a single source or supply." If the city council waives the bid requirement through application of a written policy, it must, immediately following the award of the contract, set out the factual basis for the waiver.

Neighborhood "self-help" projects. Per RCW 35.21.278 cities, counties, and towns may contract with a chamber of commerce, a service organization, a community youth, or athletic association, or other similar association located in and providing service to the immediate neighborhood, for the construction of neighborhood improvements, without regard to competitive bidding laws. The contracting association may make park and recreation improvements, install equipment or artwork, or provide maintenance services for the facility as a community or neighborhood project, and may be reimbursed by the city or town for its expenses. The consideration received by the municipality (improvements, artwork, etc.) must at least equal three times the city or town's payment to the association. Payments for all contracts made by a city or town to neighborhood associations may not exceed $25,000 or two dollars per resident, whichever is greater, in any year.

State or county construction or repair of streets. A city or town may, by resolution of its legislative body, authorize the county in which it is located to construct, repair, or maintain a city

street. The city or town pays the "actual cost" of the work, with the payment being deposited in the county road fund. The State Department of Transportation may also provide engineering assistance to a city on road projects or do the actual construction. The state is reimbursed from the city's share of the motor vehicle excise tax in the motor vehicle fund. Such agreements with the county or the state do not require competitive bids on the city's part. RCW 35.77.020 provides separate and additional authority for cities to enter agreements with the county in which they are located for all or a specified part of the construction, repair, or maintenance of city streets and bridges.

Pollution Control Facilities. RCW 70.95A relating to pollution control facilities and enacted in 1973 may offer an important exception to bidding requirements. Although the primary emphasis of the chapter appears to relate to financing pollution control facilities, one section may exempt certain projects from any bidding requirements that might otherwise apply. RCW 70.95A.090 states in part:

"The [pollution control] facilities shall be constructed, reconstructed, and improved ... in the manner determined by the governing body in its sole discretion and any requirement of competitive bidding, lease performance bonds or other restriction imposed on the procedure for the award of contracts for such purpose ... is not applicable to any action taken under authority of this chapter."

The term "facility" is defined to mean "any land, building, structure, machinery, system, fixture, appurtenance, equipment or any combination thereof ... which is used or to be used ... in furtherance of the purpose of abating, controlling, or preventing pollution." "Pollution" is defined broadly to include water pollution, land pollution, solid waste disposal, thermal pollution, radiation contamination, or noise pollution.

Although there have not been any relevant appellate court decisions or attorney general opinions on the statute, it would appear that its terms could be used to avoid bidding whenever a city or town constructs or reconstructs a building or structure or acquires fixtures or equipment which will be used for pollution control. Given the broad scope of the statute, this exception to the bid laws could be far-reaching. Cities may be able to build a sewage lagoon, aerate a lake, or purchase a landfill scale, all without going out for bids. However, in view of the lack of appellate or other authority regarding the chapter's use and the presumed fact that its provisions are seldom used, caution is suggested before a city or town decides to make use of its provisions. Asking the department of ecology to certify that the project is designed to abate, control, and/or prevent pollution would be a judicious step to take before ignoring the bid laws.

Services. There are few restrictions on contracting for services provided to city and county governments. All cities must secure the services of architects and engineers by a qualifications based selection process per RCW 39.080.

4.20.060 ARCHITECTURAL AND ENGINEERING SERVICES. Architectural and engineering services are professional in character and thus are not covered by competitive bidding provisions.

Contracts for such services may only be negotiated after following the procedures set out in RCW 39.80.

RCW 39.80 requires that a city or town publish its need for architectural or engineering services in advance, stating the general scope and nature of the project or work for which services are required. The notice must also provide the address of a representative of the city or town who can provide additional details. Compliance with this requirement may be accomplished by either: (1) publishing an announcement each time the service is needed or (2) announcing generally to the public the city's or town's projected requirements for any category or type of engineering or architectural service.

Cities and towns are to encourage architectural and engineering firms "engaged in the lawful practice of their profession" to annually submit a statement of qualifications and performance data. The city or town then evaluates the qualifications and performance data it has on file along with that submitted regarding a proposed project. Procedures and guidelines are to be developed "to insure that minority and women owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services."

The city or town next conducts discussions with one or more firms "regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services. The city or town then may select from among the firms the firm "most highly qualified to provide the services required. The price or cost of the service may not be considered by the city when determining which firm is the "most highly qualified." Once the "most qualified firm" has been determined, the city or town may negotiate a contract for the services at a price which the city or town determines is fair and reasonable. Price may only be considered when negotiations are conducted with the "most qualified firm." In reaching its determination, the municipality "shall take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof." If a satisfactory contract cannot be negotiated, negotiations are to be formally terminated with the firm and another firm, following the above procedure, selected. The process continues until an agreement is reached or the search is terminated.

The process outlined above for the procurement of architectural or engineering services may be dispensed with upon a finding by the city or town that "an emergency requires the immediate execution of the work involved."

Go to Appendix J of the Purchasing, Bidding, and Contract Management Sourcebook for more information and sample documents.

4.20.070 MEANING OF PUBLIC WORK or "IS MAINTENANCE PUBLIC WORKS?"

The definition of public work includes all work, construction, alteration, repair, or improvement, but excludes ordinary maintenance. But what is "ordinary maintenance?" The statutes provide no definition. However, WAC 296-127-010(7)(b)(iii), which defines "ordinary maintenance" in the context of prevailing wages, can be used to craft a definition that distinguishes ordinary maintenance from a public work for bidding purposes:

[Ordinary maintenance is] defined as work *not performed by contract* and that is performed on a regularly scheduled basis (e.g., daily, weekly, monthly, seasonally, semiannually, but not less frequently than once per year), to service, check, or replace items that are not broken; or work not performed by contract that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary.

(Emphasis added.) For example, replacing a deteriorating bridge or roof would amount to a repair, or perhaps new construction, but not maintenance. Such a project would be considered to be a public work and subject to limits on the amount of such work that can be performed by agency employees. On the other hand, using agency employees to rod or clean a sewer or clean a roof is considered ordinary maintenance and, therefore, would not be a public work. However, if instead of using city employees to perform the work, the city *contracts out* for the repair, the repair work is likely deemed a public work, both for bidding and for prevailing wage purposes. Other examples:

- Although often part of an agency's ongoing maintenance program, sidewalk replacement is not ordinary maintenance because it is not done annually. The asset is being replaced, rather than "maintained."
- Replacement of carpeting is not ordinary maintenance. Because carpeting is neither replaced annually nor used to maintain the asset, in this case the subflooring, it does not fall into the ordinary maintenance category.
- Although tree trimming may not take place annually, it is considered ordinary maintenance because it is necessary to prevent branches from interfering with wires and to prevent damage during windstorms.

As noted above, some agencies feel that the non-mention of maintenance in the main body of the definition of public works, and the exclusion of ordinary maintenance means that maintenance is not a public works, even if prevailing wages are required for maintenance. Why is this an issue? If maintenance when performed by contract is a public works, then ALL of the following apply:

- Prevailing Wages
- Bonds
- Retainage
- Bid Limits

If maintenance when performed by contract were NOT considered a public works, then ONLY **prevailing wages** would apply.

MRSC's position, conservatively, is that agencies treat maintenance contracts as public works contracts, subject to bid limits, bonds, retainage, and prevailing wages.

Do Prevailing Wages Always "Prevail?" RCW 39.12 applies to all public works and maintenance by contract, regardless of dollar amount. More detail on prevailing wages can be found on the MRSC webpage Purchasing and Bidding: Prevailing Wage Issues. However, legitimate questions arise in applying prevailing wages to service contracts and other arcane work items. MRSC has

prepared a Public Works vs. Prevailing Wages Worksheet ( ) in an attempt to sort out some of this confusion. Agencies should not rely on this document; however. In many cases, a determination as to whether prevailing wages are to be paid is very fact dependent and you should contact the Department of Labor & Industries directly for a determination.

4.20.080 COST OF A PUBLIC WORKS PROJECT OR PURCHASE. The question often arises as to what is to be included in estimating the total cost of each public works project in determining the applicability of the bidding requirements. RCW 35.22.620(5) provides that, in determining the cost of a separate public works project for first class all amounts paid for materials, supplies, equipment, and labor on the construction of that project should be included. RCW 35.23.352(5), applicable to second class cities, code cities, and towns provides that the cost of a separate public works project includes all cost of materials, supplies, equipment and labor.

RCW 39.04.020 requires that an agency prepare plans, specifications, and cost estimates. These are to be "filed" in the agency's office. RCW 39.04.040 thru RCW 39.04.100 also require that changes the plans, specifications, and updated cost estimates are also filed with the agency.

Cost estimates are to include all construction related work, but not engineering or architectural design fees. They are to include all phases of the project. They (should) include applicable sales and use taxes, but not include donated labor, materials, supplies, etc. Estimates should be based on a competitive bid basis.

Inclusion of Sales And Use Tax. Normally sales tax applies to every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons, including those who install, repair, clean, alter, improve, construct, or decorate real or personal property. Thus, the tax should be included in determining the cost of an item or project.

The sales tax and use tax apply to most public works projects, with specific exemptions. Some exemptions include:

- Labor and services rendered for the building, repairing, or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle owned by a city or town.
- Labor and services for the processing and handling of sand, gravel, and rock taken from city pits and quarries when the material is for publicly owned road projects.

MRSC has prepared a table WAC 458-20-171 Matrix, which attempts to summarize WAC regulations regarding sales and use tax applicability to public works contracts. For almost all local government public works contracts, the sales and use tax issue boils down to this:
Does the contractor include sales and use taxes, as applicable, in his/her unit prices or lump sum bid or does the agency include a line item in the contract for sales tax, either on the whole amount or on items not included in the exemptions?

When developing contract documents, it may be useful, in the bid proposal (bid item listing), to group those items that are subject to sales tax. Then, in a separate line item labeled "sales tax,"

reference that group, making it clear that in all other bid items, sales and use taxes, as applicable, are to be included in the unit price or lump sum bid.

4.20.090 BREAKING A PUBLIC WORKS PROJECT INTO SEGMENTS.

Municipalities may not break a public works project into phases to avoid compliance with bidding statutes. RCW 35.22.630, which relates to first class cities, provides in part:

"The breaking down of any public work or improvement into units or accomplishing any public work or improvement by phases for the purpose of avoiding the minimum dollar amount prescribed in RCW 35.22.620 [for first class cities] is contrary to public policy and is prohibited."

RCW 35.23.352(1) relating to code cities and other classes of cities and towns, provide similarly; both restrict the division of a project into units of work or classes of work to avoid the restriction on work that may be performed by day labor on a single project.

It has been held that a city cannot break a public work into phases, even though those phases are performed at different intervals of time, for the purpose of estimating the cost of a public works project. Instead, a city, while accomplishing the actual project in phases, must total the cost of all phases of the public work and, if the aggregate cost exceeds the applicable bid limit, bid each phase of the public work even though a given phase may cost less than the bid limit by itself.

4.20.100 INTERGOVERNMENTAL PURCHASES AND BIDDING.

No bidding is required when cities and towns enter into certain contracts with counties under RCW 47.24.050 for the latter to do work for cities and towns. This statute allows a city or town to enter into an agreement with a county whereby the county constructs, repairs, or maintains a city street. RCW 36.75.200 provides that a county may expend funds for the repair, maintenance, or construction of any bridges within the corporate boundaries of a city if the bridge is essential to continuation of the county road system.

A city or town may acquire used surplus property from another government entity without regard to bid laws. RCW 39.33.010 authorizes such purchases "on such terms and conditions as may be mutually agreed upon by the proper authorities."

RCW 39.34.080, a section of the Interlocal Cooperation Act, authorizes one public agency to contract with another public agency to perform any function which each agency is authorized by law to perform. Under this statute, one public entity (e.g., the state) could act as agent or contractor for one or more public entities (e.g., cities or towns). RCW 39.34.030, another section of the Interlocal Cooperation Act, authorizes cooperative action, including joint purchases, by different governmental entities. Municipalities frequently use the authority granted in RCW 39.34.030 for making purchases through the Office of State Procurement (OSP) of the state Department of Enterprise Services (DES). Municipalities thus realize savings through quantity purchasing. In order to make such purchases, a municipality must enter into a written agreement (an intergovernmental cooperative purchasing agreement) with the state Department of Enterprise Services, a copy of which is filed with the secretary of state, the city or

town clerk, and the county auditor. The purchasing division of the department of general administration then sends to the municipality lists of contracts which have been entered into by that department with suppliers (vendors), and which the municipality is eligible to use. These contracts are general in nature and are obtained by the department of general administration with the vendor agreeing to provide the same items to municipalities under the same terms and conditions as provided to state agencies.

If a municipality decides to make a purchase under one of the listed contracts, it notifies the Department of Enterprise Services of its intent to do so, and the department sends the municipality a copy of the particular contract. The contract contains instructions on the procedures used to make purchases. Under most contracts, the purchase is made by the city or town directly from the vendor. In some cases, with respect to the purchase of motor vehicles, for example, DES requires the purchase be made through DES.

4.20.110 BIDDING WHEN A BRAND NAME OR PATENTED ITEM IS DESIRED.

Cities and towns may advertise for bids by specifying a particular brand name item so long as the responsible municipal officer or officers have exercised their judgment and determined that a certain brand name is of higher quality or is better suited to the municipality's needs. In *Smith V. City Of Seattle*, 192 Wash. 64, 72 P.2d 588 (1937), the city advertised for bids for incandescent lamps, specifying a particular brand. In a suit brought by a maker of a similar lamp, the court stated that as long as the officials involved exercised their discretion in determining that a particular brand of lamps was more desirable, the city's procedure was proper in the absence of abuse of discretion or fraud. In this case, the fact that the city had used the specified lamps previously and they had performed satisfactorily provided a rational basis for city authorities to limit the bid advertisement to that specified brand of lamps and the court found no abuse of discretion. There is no requirement that the bid specifications naming a particular brand also include a phrase such as "or an equal brand." It would seem, then, that the proper authorities of a municipality may advertise for a particular brand when that brand is best suited to the municipality's needs or when from past experience they can be more confident that it fits the municipality's needs.

Note, however, that reliance on a particular brand may result in higher costs if the supplier perceives that the agency is "stuck" with his/her products. The agency should periodically evaluate the need for that brand name in relation to products offered by competitors.

4.20.120 WORK BY AGENCY FORCES (OR DAY LABOR).

As noted above in section 4.20.020, there are two sets of "bid limits" in the statutes:

1. Limits on the amount of work or project cost above which an agency cannot use its own forces or "day labor" hires to accomplish a public works contract.

2. Limits on the amount of work or project cost above which an agency must seek formal, competitive bids rather than informal bids or no bids at all.

Code Cities, Second Class Cities, and Towns. RCW 35.23.352 applies to all code cities, regardless of population, thanks to RCW 35A.40.210. RCW 35.23.352 says:

"Any second-class city or any town may construct any public works, as defined in RCW 39.04.010, by contract or day labor without calling for bids therefor whenever the estimated cost of the work or improvement, including cost of materials, supplies and equipment will not exceed the sum of sixty-five thousand dollars if more than one craft or trade is involved with the public works, or forty thousand dollars if a single craft or trade is involved with the public works or the public works project is street signalization or street lighting. …"

RCW 35.23.352 also says: "If no bid is received on the first call the council or commission may readvertise and make a second call, or may enter into a contract without any further call or may purchase the supplies, material, or equipment and perform the work or improvement by day labor (agency forces)." It should be noted that a non-responsive bid is not a bid. If, however, responsive bids are received, but they are more than the city's available funds, the option to use agency forces does not apply.

First Class Cities. RCW 35.22.620 places two limits on when a first class city can use its own employees or day labor in the construction of a public works project.

- The first limit is on a project-by-project basis as noted in Section 4.20.020, with limits of $90K for multi-craft projects and $45K for single-craft projects. If individual projects are more than these limits, the city must contract for that work and cannot do them with its own forces.

- The second limit is that in any annual or biennial budget period, city employees are limited in the amount of work they can do on public works projects. This limit is ten percent of the city's total public works construction budget, including any supplemental amounts, either cumulatively or for a single project. Whenever a first class has had public works performed by city employees in any budget period up to the maximum permitted amount for that budget period, all remaining public works within that budget period must be contracted through the competitive process.

Penalties may be applied if cities break the ten-percent limit. If the employees of any first class city perform public works in excess of the ten percent limit, the amount in excess of ten-percent will be subtracted from the amount of public works otherwise permitted to be performed by city employees during the next budget period. If, after two years from the date of the excess work, the city has failed to reduce the amount of public works performed by its employees, the state will reduce the motor vehicle fuel tax distributions to the city by twenty percent.

Notice of Work Performed by Agency Forces or Day Labor.
RCW 39.04.020 says in part (emphasis added): If the state or such municipality shall determine that it is necessary or advisable that such work shall be executed by any means or method other than by contract or by a small works roster process, and it shall appear by such estimate that the probable cost of executing such work will exceed the sum of twenty-five thousand dollars, then the state or such municipality shall at least fifteen days before beginning work cause such estimate, together with a description of the work, to be published 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 such work is to be done. When any emergency shall require the immediate execution of such public work, upon a finding of the existence of such emergency by the authority having power to direct such public work to be done and duly entered of record, publication of description and estimate may be made within seven days after the commencement of the work.

Also, according to RCW 39.04.070, whenever public work is accomplished by agency forces or day labor, a full record of the kinds of work performed and the costs of such work must be kept. The BARS Manual prescribes reporting requirements and forms for reporting this work.

4.20.130 PURCHASING FROM THE FEDERAL GOVERNMENT.

The authority for cities to purchase from or through the federal government is found in RCW 39.32.070, .080 and .090. The first statute states that cities are authorized to purchase equipment, supplies, materials, and other property, without advertising, giving notice, or inviting bids. RCW 39.32.080 suspends any charter provisions, ordinances, or policies that require bidding when dealing with the federal government. RCW 39.32.090 requires that an ordinance or resolution be passed before any particular purchase is made from the federal government or through a federal government contract.

Most purchases from the federal government are through the General Services Administration (GSA). Note this information from the GSA Website: Under the Cooperative Purchasing Program, state and local government entities may purchase a variety of Information Technology (IT) products, software, and services from contracts awarded under GSA Federal Supply Schedule 70, Information Technology, as well as from contracts under the schedule containing IT special item numbers.

State and local government entities may also purchase alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services from contracts awarded under GSA Federal Supply Schedule 84, Total Solutions for Law Enforcement, Security, Facility Management Systems, Fire, Rescue, Special Purpose Clothing, Marine Craft, and Emergency/Disaster Response.

4.20.140 ADVERTISING FOR BIDS - NOTICE.

Code Cities, Second Class Cities, and Towns. RCW 35.23.352(1), provides, in part: "…All such contracts shall be let at public bidding upon publication of notice calling for sealed bids upon the work. The notice shall be published in the official newspaper, or a newspaper of general circulation most likely to bring responsive bids, at least thirteen days prior to the last date upon which bids will be received. The notice shall generally state the nature of the work to be done that plans and specifications therefor shall then be on file in the city or town hall for public inspections, and require that bids be sealed and filed with the council or commission within the time specified therein."

RCW 35A.65.020 provides: "The publication of a legal notice required by general law or by a code city ordinance shall be in a newspaper of general circulation within the city having the

qualifications prescribed by RCW 65.16 and shall be governed by the provisions thereof as the same relate to a city of any class."

RCW 65.16 specifies the qualifications of a legal newspaper. To be a legal newspaper a publication must be so approved by an order of the superior court and possess the following qualifications: (1) it must be published at least once per week, (2) it must be in English, (3) it must be published regularly, (4) it must hold a second class mailing permit, (5) it must contain news of general as opposed to special or particular interest, and (6) it must have been published for at least six months prior to its petition to the superior court for approval as a legal newspaper. Code cities, then, must publish notice as set forth in RCW 35.23.352 and RCW 35A.65.020 in a legal newspaper which is also the city's official newspaper and, as well, post such notice in a public place in the city.

First Class Cities
The first class city bid statute, RCW 35.22.620(2), provides, simply that "A first-class city may have public works performed by contract pursuant to public notice and call for competitive bids…"

4.20.150 BID AND PERFORMANCE BONDS.

Bid Bonds. Bid bonds are required in order to guarantee that a bid has been made in good faith and to compensate the city if the bidder does not enter into a contract if his or her bid is accepted.

Code Cities, Second Class Cities and Towns RCW 35.23.352 provides, in part:
"Each bid shall be accompanied by a bid proposal deposit in the form of a cashier's check, postal money order, or surety bond to the council or commission for a sum of not less than five percent of the amount of the bid, and no bid shall be considered unless accompanied by such bid proposal deposit."

After bids are opened and the contract is awarded to the lowest responsive and responsible bidder as required by RCW 35.23.352, the bid proposal deposits or bid bonds are to be returned to the unsuccessful bidders. The successful bidder's bid bond or deposit is retained until the bidder enters into a contract with the municipality and furnishes a performance bond in the full amount of the contract price. If the successful bidder fails to enter into a contract with the municipality and to provide a performance bond within ten days of being notified of his or her bid's acceptance, the bidder is required to forfeit the bid bond or deposit, as the case may be.
Practice note: It is a good idea to hold the bid bonds of both the second and third low bidders until the low bidder has signed the contract.

First Class Cities.
There is no similar statutory requirement for first class cities in RCW 35.22.620, but several city charters as well as city ordinances require that bid bonds or deposits of five percent of the bid be submitted.

Performance and Payment Bonds

RCW 39.08.010 provides that a municipality (all classes of cities) must require a performance and payment bond in the amount of 100% of the contract amount whenever it enters into a contract to ensure that the job will be completed and all laborers, mechanics, subcontractors, and material men will be paid.

On contracts of thirty-five thousand dollars or less, at the option of the contractor the respective public entity may, in lieu of the bond, retain fifty percent of the contract amount for a period of thirty days after date of final acceptance, or until receipt of all necessary releases from the department of revenue and the department of labor and industries and settlement of any liens filed under RCW 60.28, whichever is later:

4.20.160 BIDDING IRREGULARITIES.

Errors in Bid Procedures or in Complying with Specifications. Advertisements for bids should set forth definite specifications and procedures for bidders to use in estimating their bids. There must be substantial compliance with the applicable specifications if a bid is to be considered. However, an insubstantial variance with certain specifications or bidding procedure will not prevent a municipality from considering a bid. As a general rule, an immaterial or insubstantial variance is one, which fails to give one bidder a substantial advantage over the others.

Example of insubstantial variance: in Rhine, Inc. v. Tacoma, 13 Wn. App. 597 (1975), the court concluded that the late filing of a bid bond was an insubstantial variance that could be waived by the city because it did not give the late bidder an advantage over the others

Examples of substantial variance: in *AAB Electric v. Stevenson Public School District*, 5 Wn. App.887 (1971), the court held that the failure to sign a bid was a substantial variance that justified the city's rejecting the low bid. The court noted that this defect would give the bidder who failed to sign the bid an advantage over the other bidders. This bidder could choose not to enter into a contract, if accepted as the low bidder, without having to forfeit his bid bond because his bid was unsigned. The other bidders, who had properly signed their bids, would forfeit their bid bonds if any of their bids were accepted and they failed to enter into a contract.

In a similar vein, the court in *Land Construction v. Snohomish County*, 40 Wn. App. 480 (1985), concluded that a substantial variance existed where a bidder included, as a subcontractor, a women's business enterprise (WBE) that was not certified as required by the specifications. The court saw in this circumstance an advantage over other bidders, because the bidder would have to substitute a certified WBE in order for the county to accept the bid and the bidder could therefore decide not to enter into the contract if it thought the bid too low.

Bid Amount Errors. Bid amount errors are of two types:

1. those that favor a city, where the bidder makes a mistake that causes the bid to be lower than it should be; or

2. those that favor a bidder, where the mistake causes the bid to be higher than it should be.

These errors, which are relevant only when they affect the lowest responsible bid, are governed by some general rules, as follows:

A bidder is bound by the bid amount. The courts will not reform (that is, correct) a contract because of an error, even an obvious one, in the amount bid.

Example: In *J. J. Welcome & Sons Construction v. State*, 6 Wn. App. 985 (1972), the court refused to reform a contract based on a bid that was $10,000 short as a result of a mistake made by Western Union in transmitting a telegram, even though the mistake was not noticed until after the bids were opened. The court, at page 990, noted that the state highway commission was statutorily foreclosed from any post-bid opening revision, concluding that:

granting reformatory relief in this instance would open the door in a sensitive area to factual review of bid-letting procedures, which would adversely invade the safeguards surrounding the competitive bidding system and the confidence, which contractors and the public have, in its fairness.

A city is not necessarily bound by the bid amount. In *Red-Samm Mining v. Port of Seattle*, 8 Wn.App. 610 (1973), the low bidder submitted a bid that the port determined was calculated incorrectly and was actually over $96,000 less than the submitted total. The port refused to award the contract at the higher amount and threatened the bidder with forfeiture of the bid bond if it did not accept the bid award at the lower amount. The bidder elected to accept the contract at the lower amount, but then sued the port, claiming that it entered into the contract at the lower amount under duress. The court rejected the bidder's claim, because it had decided to enter into the contract rather than refusing the award at the lower figure and raising equitable defenses (duress), if the port had sought forfeiture of the bid bond.

Does the Red-Samm case mean that a city, when confronted with an obvious error that favors the bidder, can force the bidder to accept the contract at the correct amount? Probably the best that can be said is that it depends upon the circumstances and how a court might look at the equities of the situation and resolve the apparent inconsistency between the Red-Samm and J.J. Welcome cases.

The bidder who submitted the erroneous low bid may withdraw the bid, at the risk of forfeiting the bid bond. In *Puget Sound Painters v. State*, 45 Wn.2d 819 (1954), the low bidder submitted an erroneous bid as a result of a mistake made in estimating the cost of performing the proposed contract. After the bid was accepted, the bidder immediately realized the mistake and notified the state. The bidder was successful in a suit to recover its bid bond. The court stated that following factors should be considered in determining if a bidder can be relieved of his contractual obligations (and not forfeit the bid bond) after submitting an erroneous low bid:

- whether the bidder acted in good faith,
- whether the bidder acted without gross negligence,
- whether the bidder was reasonably prompt in giving notice of the error in the bid
- whether the bidder will suffer substantial detriment by forfeiture

- whether the other party's (i.e., the city's) status has not greatly changed, and
- relief from forfeiture will cause no substantial hardship on that party.

RCW 39.04.107 says that a low bidder on a public works project 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.

4.20.170 ACTION TAKEN AFTER BIDS ARE SUBMITTED AND OPENED. A municipality cannot negotiate with the bidders once the bids have been submitted and opened. It must then either accept one bid or reject all of them. (It should be noted, though, that a bid which does not meet the bid specifications need not be treated as a bid at all.)

4.20.180 CHANGE ORDERS.
Any alteration to a project during construction that is not consistent with the bid specifications upon which the contract was awarded is a "change order." If, for example, during construction of a building foundation additional excavation work is required to avoid unstable soil conditions, the additional excavation is a result of a change in conditions, and the added cost to the contractor may be covered by a change order. If machinery anchors must be relocated to accommodate a piece of machinery that has been ordered, the relocation is a change order. If, during construction, a building must be redesigned to meet new federal or state standards, such as for access for the handicapped, the redesign and additional work is a change order. Conversely, reductions in work may result in a change order, which will provide a credit to the city or town.

When does the additional work required by a change order require competitive bids? Look at Practical Change Order Ideas for SAO audit findings and ways of avoiding them. Also, many agencies have policies regarding change order. Go to Change Order Policy Summary.

4.20.190 LOWEST RESPONSIBLE BIDDER.
RCW 39.04.010(1) defines award as "Award" means the formal decision by the state or municipality notifying a responsible bidder with the lowest responsive bid of the state's or municipality's acceptance of the bid and intent to enter into a contract with the bidder.

RCW 39.04.010(5) defines a responsible bidder as "Responsible bidder" means a contractor who meets the criteria in RCW 39.04.350."

RCW 39.04.350 sets forth, for all municipalities, both mandatory and (optional) supplementary criteria for a responsible bidder:

Mandatory Bidder Responsibility Criteria
Registered contractor
Current UBI number
Industrial insurance coverage
Employment Security Dept #

State excise tax registration #
Not disqualified from bidding
No Apprenticeship violations*
No Violations of Off-Site Reporting**
**2009, **2010 Legislative Session*

Supplemental Responsibility Criteria

RCW 39.04.350 (2) states the following:
(2) In addition to the bidder responsibility criteria in subsection (1) of this section, the state or municipality may adopt relevant supplemental criteria for determining bidder responsibility applicable to a particular project which the bidder must meet.

(a) Supplemental criteria for determining bidder responsibility, including the basis for evaluation and the deadline for appealing a determination that a bidder is not responsible, must be provided in the invitation to bid or bidding documents.

(b) In a timely manner before the bid submittal deadline, a potential bidder may request that the state or municipality modify the supplemental criteria. The state or municipality must evaluate the information submitted by the potential bidder and respond before the bid submittal deadline. If the evaluation results in a change of the criteria, the state or municipality must issue an addendum to the bidding documents identifying the new criteria.

(c) If the bidder fails to supply information requested concerning responsibility within the time and manner specified in the bid documents, the state or municipality may base its determination of responsibility upon any available information related to the supplemental criteria or may find the bidder not responsible.

(d) If the state or municipality determines a bidder to be not responsible, the state or municipality must provide, in writing, the reasons for the determination. The bidder may appeal the determination within the time period specified in the bidding documents by presenting additional information to the state or municipality. The state or municipality must consider the additional information before issuing its final determination. If the final determination affirms that the bidder is not responsible, the state or municipality may not execute a contract with any other bidder until two business days after the bidder determined to be not responsible has received the final determination.

Good reference to have is: Capital Projects Advisory Review Board (CPARB) Suggested Guidelines for Bidder Responsibility

4.20.200 CONFLICT OF INTEREST.
Municipal contracts which may benefit a municipal officer are severely restricted. RCW 42.23.030 provides, in part: "No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole

or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein."
Municipal officer includes:

- all elected and appointed officers of a municipality
- all deputies and assistants of such an officer
- all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer

Second and third class cities, towns, and non-charter code cities may let contracts in which a corporate officer has an interest if the amount of such contract, although exceeding $750 per month, does not exceed $9,000 per year. Another exception to the prohibition of RCW 42.23.030 is the employment of any person for unskilled day labor by second and third class cities, towns, or non-charter code cities, provided that their wages do not exceed $100 per month. Unskilled labor is defined by Webster's Third New International Dictionary, Unabridged as "labor that requires little or no training or experience for its satisfactory performance." Some qualified and conditional exemptions are also made for "remote" interests; e.g., ordinary employment of a municipal officer by a contractor for salary or wages.

RCW 42.23.050 provides that any contract made in violation of RCW 42.23.030 is void. Any officer who violates RCW 42.23.030 is subject to a civil penalty of $300 and a forfeiture of his or her office.

4.20.210 RESULTS OF VIOLATION OF BID STATUTES.
A violation of statutory bidding requirements may have a number of consequences.

First, a contract made in violation of such requirements, or those of a city charter or ordinance, is illegal and void.134 Nevertheless, a city may have to pay for the reasonable value of a partially performed contract that is voided for violation of bid law, where there is no bad faith or fraud.

Second, a violation of bid law has consequences for the municipal officer under whom or under whose supervision the contract was made. RCW 39.30.020 provides that the officer is liable for a penalty of not less than $300 if the violation of bid law was "willful and intentional," and that, further, the officer may be held liable for the consequential damages to the city resulting from the violation. The definition of "municipal officer," for purposes of the penalties in RCW 39.30.020, is that contained in RCW 42.23.020(2), above, for conflicts of interest. If the officer, in a criminal action against him or her, is found to have intentionally violated bid law, he or she immediately forfeits his or her office.

Chapter 4.24 CONTRACTS AND AGREEMENTS

Sections:

4.24.010 CONTRACTS AND AGREEMENTS GENERALLY.

The clerk is responsible for maintaining contract and agreement files for all departments. Contracts may be for construction of public works improvement projects, professional services, maintenance of facilities, interlocal cooperative agreements for service provision, agreements to waive a property owner's right to protest a future assessment district, and a variety of other subjects. Whatever the department of origin, it is a good idea to keep all original contracts and agreements located in the Clerk's Office, filed and cross-indexed so that agreements can be located easily and referenced by staff and the public. Alternatively, the clerk could deputize individuals in other departments to maintain original document files.

All contracts and agreements should be reviewed by the city attorney and approved "as to legal form;" in addition, most cities have only one city official sign all agreements and contracts, usually the mayor or city manager. The contract should be executed at least in duplicate and one original kept by the clerk, with the other forwarded to the other party to the agreement. Executed agreement should be made available to staff, at a minimum the department of origin plus the finance department if the agreement has monetary implications.

Whether an agreement needs to be approved by the legislative body or by the city's administration depends on the nature of the agreement and your city's policy. Some cities authorize the chief administrative officer to execute public works contracts or professional service agreements if the amount does not exceed specified dollar limits. Interlocal agreements usually require legislative approval. Public works contracts in excess of specified dollar limits usually require award by the legislative body.

4.24.020 PUBLIC WORKS CONTRACTS.

Public works contract files usually contain the following documents, some of which constitute the original contract document package and some of which are furnished after the contract is awarded:

Initial Document Set

- Call for sealed bids
- Bid specifications and plans
- Instructions to bidders
- General provisions
- Bid proposal form
- Bid bond form

- Equal opportunity statement
- Affidavit of non-collusion
- Affidavit of nondiscrimination
- Intent to pay prevailing wages
- Performance bond form
- Power of attorney form
- Certificate of insurance with specified limits and naming the city as an additional insured
- Copy of state contractor's license
- Evidence that the contractor meets mandatory bidder responsibility criteria per RCW 39.04.350
- Copy of city business license
- Contract agreement form
- The clerk should coordinate with the project administrator concerning who should retain pertinent documents.

Contract Administration Files and Contract Closeout. Go to Appendices H and I in the MRSC Purchasing, Bidding, and Contract Management Sourcebook for information and sample documents regarding change orders and project closeout, including a project closeout checklist.