

STATE OF WYOMING GENERAL SESSION 2012

Chapter 106

PUBLIC WORKS CONTRACTS

Original Senate File No. 107

AN ACT relating to administration of government; generally modifying provisions relating to contracts for public works; modifying contract amounts for which a bond is required; extending temporary provisions relating to procurement requirements for expenditures for capital construction projects; modifying penalties and enforcement provisions; modifying and specifying preference requirements; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 15-1-113(d) and (f), 16-6-104, 16-6-112(a)(intro) and (iii), 16-6-203, 16-6-205, 16-6-206, 16-6-701(a)(vii) and 16-6-1001(a)(intro), (i)(A), (B), (C)(intro), (III), (IV), (D)(III), (E), (ii)(A)(intro), (D), (iii), (iv), (b), (c) and (e) are amended to read:

15-1-113. Contracts for public improvements.

(d) Every contract shall be executed by the mayor or in his absence or disability, by the president or other presiding officer of the governing body and by the clerk or designee of the governing body. The successful bidder or respondent shall furnish to the city, town or joint powers board a bond as specified in the advertisement, or if the contract price is ~~one hundred thousand dollars (\$100,000.00)~~ one hundred fifty thousand dollars (\$150,000.00) or less, any other form of financial guarantee satisfactory to the city, town or joint powers board. The bond or other form of financial guarantee shall meet the requirements of W.S. 16-6-112.

(f) In advertising for any bid, the forms of guarantee required under this section and approved by the city, town or joint powers board shall be specified. In addition, bidders shall be required to accompany each bid with a bid bond or if the bid is ~~one hundred thousand dollars (\$100,000.00)~~ one hundred fifty thousand dollars (\$150,000.00) or less, any other form of bid guarantee approved by the city, town or joint powers board, equal to at least five percent (5%) of the total bid amount, with sufficient surety and payable to the city, town or joint powers board. The bid guarantee shall be forfeited as liquidated damages if the bidder, upon the letting of the contract to him, fails to enter into the contract within thirty (30) days after it is presented to him for that purpose or fails to proceed with the performance of the contract. The

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bid guarantee shall be retained by the city, town or joint powers board until proper bond or other form of security satisfactory to the city, town or joint powers board to secure performance of the contract has been filed and approved. The right to reject any bid is reserved in all bid advertisements. All bids shall be numbered consecutively before they are opened and no further bids may be received after the advertised time of opening bids and any bid is publicly opened. The city, town or joint powers board shall give all persons who desire an opportunity to inspect all bids when they are opened. No bid may be considered unless accompanied by a bid guarantee in the required amount.

16-6-104. Preference for Wyoming materials required in contracts.

Wyoming made materials and products, and Wyoming suppliers of products and materials of equal quality and desirability shall have preference over materials or products produced or supplied outside the state and any contract let shall so provide. The preference created by this section shall be applied in a manner identical to the preference for residence contractors in W.S. 16-6-102.

16-6-112. Contractor's bond or other guarantee; when required; conditions; amount; approval; filing; enforcement upon default.

(a) Except as provided under W.S. 9-2-1016(b)(xviii), any contract entered into with the state, any county, city, town, school district or other political subdivision of the state for the erection, construction, alteration, repair or addition to any public building or other public structure or for any public work or improvement and the contract price exceeds seven thousand five hundred dollars (\$7,500.00), shall require any contractor before beginning work under the contract to furnish the state or any political subdivision, as appropriate, a bond or if the contract price is ~~one hundred thousand dollars (\$100,000.00)~~ one hundred fifty thousand dollars (\$150,000.00) or less, any other form of guarantee approved by the state or the political subdivision. The bond or other form of guarantee shall be:

(iii) In an amount not less than fifty percent (50%) of the contract price unless the price exceeds ~~one hundred thousand dollars (\$100,000.00)~~ one hundred fifty thousand dollars (\$150,000.00), in which case the appropriate officer, agent or the governing body may fix a sufficient amount;

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16-6-203. Required resident labor on public works projects; exception.

(a) Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation, or other governmental unit, shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved. The contract shall contain a provision requiring specific acknowledgement of the requirements of this section. A person required to employ Wyoming laborers may employ other than Wyoming laborers if:

(i) That person informs the nearest state ~~employment office~~ workforce center of his employment needs at least eleven (11) days before work is commenced; and

(ii) The state ~~employment office~~ workforce center certifies that the person's need for laborers cannot be filled from those listed as of the date the information Wyoming laborers listed with the Wyoming department of workforce services. The department shall respond to a person's request for certification within ten (10) days of the date the information is filed.

(b) Upon request by the workforce center, the general contractor shall provide the most recent construction schedule for the project.

16-6-205. Enforcement.

(a) The department of workforce services shall promulgate rules and regulations required to enforce this act and is authorized and directed to enforce this act. For purposes of all investigations, the department shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any books, papers, documents or records which the department deems relevant or material to the inquiry.

(b) Along with each application for payment for a contract subject to this act, the general contractor shall provide to the contracting entity a payroll report

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for all contractors and subcontractors involved in the project in a form that is consistent with federally certified reporting requirements and includes residency status for each laborer.

(c) This act shall not be enforced in a manner which conflicts with any federal statutes or rules and regulations.

16-6-206. Failure to employ state laborers; penalty.

(a) A person who willfully or intentionally fails to use Wyoming laborers as required in this act ~~is guilty of a misdemeanor punishable by a fine shall be subject to a civil penalty of not more than seven hundred fifty dollars (\$750.00) one thousand dollars (\$1,000.00) per nonresident laborer employed per day, not to exceed a total penalty of ten percent (10%) of the amount of the person's contract.~~ Each separate case of failure to employ Wyoming laborers on public works projects constitutes a separate offense.

(b) In the event a second offense occurs, the person shall be barred from bidding on any ~~state contract~~ subject to the provisions of this act or submitting any request for proposal on any ~~state project~~ subject to the provisions of this act for one (1) year from the date the violation is corrected.

(c) Before a civil penalty is imposed under this section, the department of workforce services shall notify the person accused of a violation. The notice shall be served in accordance with the Wyoming Rules of Civil Procedure and contain:

(i)A statement of the grounds for imposing the civil penalty, including a citation to the statute involved;

(ii)A statement of the facts in support of the allegations;

(iii)A statement informing the person of the right to a hearing and that failure to timely request a hearing will result in imposition of the civil penalty stated.

(d)A request for hearing on a proposed civil penalty shall be in writing and shall be submitted to the department no later than seven (7) days after receipt of

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the notice from the department. The hearing shall be conducted as a contested case before a hearing examiner of the office of administrative hearings. The hearing shall be no later than fifteen (15) days after receipt of the request for hearing, unless the person subject to the proposed civil penalty requests an extension of time for good cause shown. The hearing officer shall recommend a decision to the director of the department. After hearing or upon failure of the accused to request a hearing, the director of the department shall determine the amount of the civil penalty to be imposed in accordance with the limitations in this section. Judicial review, if any, shall be from the decision of the director and in accordance with the provisions of the Wyoming Administrative Procedure Act.

(e) A civil penalty may be recovered in an action brought by the attorney general in the name of the state of Wyoming in any court of appropriate jurisdiction.

16-6-701. Definitions.

(a) As used in this act:

(vii) "Construction manager at-risk" means a type of construction management delivery in which the construction manager at-risk is an advocate for the public entity as determined by the contracts throughout the preconstruction phase of a project. In the construction phase of a project, the construction manager at-risk is responsible for all project subcontracts and purchase orders and may conduct all or a portion of the construction project work. Under this delivery method, the construction manager at-risk is responsible for providing a guaranteed maximum price for the project to the public entity prior to commencing the construction project and the construction manager at-risk shall be required to bond any project with a guaranteed maximum price in excess of ~~one hundred thousand dollars (\$100,000.00)~~ two hundred fifty thousand dollars (\$250,000.00) in accordance with W.S. 16-6-112;

16-6-1001. Capital construction projects restrictions; preference requirements; waivers; sunset of section.

(a) Unless otherwise prohibited by federal law, any legislatively appropriated funds appropriated or authorized for expenditure during the fiscal biennium

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ending June 30, 2012 or ending June 30, 2014, which have not been encumbered, obligated by contract or designed as of January 17, 2011, for capital construction projects shall be subject to the restrictions of this section which shall be construed where possible as complimentary and consistent with other statutory requirements relating to competitive bidding and contractor preferences. To the extent the restrictions in this section are inconsistent with other state statutes, this section shall supersede all such inconsistent provisions and shall govern. This section shall be applied as follows:

(i) This paragraph shall apply to any alternate design and construction delivery method as defined in W.S. 16-6-701(a)(v):

(A) All contracts shall require the construction manager at risk or design builder to conduct an open bid process in compliance with Wyoming contractor preference laws before awarding any subcontracts for work ~~to be performed for the project covered under the contract;~~

(B) Unless exempted pursuant to subparagraph (C) of this paragraph the construction manager at risk or design builder shall award to responsible Wyoming resident contractors not less than seventy percent (70%) of the ~~value of the total subcontract work to be performed for the project work covered by the manager's or builder's contract.~~ As used in this subparagraph "work covered" shall be calculated using the total contract price and the total of payments made to all subcontractors under the contract, including materials but excluding from both amounts the price for any part of the contract for which a waiver is provided under subparagraph (C) of this paragraph;

(C) The requirement of subparagraph (B) of this paragraph may be waived ~~in part upon for any part of the subcontract work to be performed under the contract.~~ If waived in part, the remaining value of the total subcontract work to be performed under the contract is subject to and shall be used to calculate compliance with the requirement of subparagraph (B) of this paragraph. A waiver shall require a written determination that:

(III) The enforcement of the requirement would unreasonably delay completion of construction; or

(IV) There were insufficient responsible Wyoming contractors submitting bids to make the seventy percent (70%) requirement.; ~~or~~

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(D) Any waiver shall be approved in writing by the following persons:

(III) For projects subject to review by the school facilities ~~commission~~ department, by the director of the school facilities commission and the chairman of the board of the school facilities commission;

(E) Any approved waiver shall be documented in writing and provided to the governor. ~~and the joint appropriations interim committee.~~

(ii) Unless exempted pursuant to subparagraph (D) of this paragraph, this paragraph shall apply to all construction delivery methods:

(A) The procurement of furniture, ~~fixtures~~ and movable equipment shall be done by competitive bid based upon either:

(D) The requirements of subparagraph (A) or (B) of this paragraph may be waived for furniture, ~~fixtures~~ or movable equipment upon a written determination that the furniture, ~~fixtures~~ or movable equipment requirements of the project are so specialized or that an item or type of furniture, ~~fixture~~ or movable equipment is so unique or uncommon that failure to waive the requirements would materially impair the functionality of the project. Waivers under this subparagraph shall be approved by the persons listed in subparagraph (a)(i)(D) of this section and are subject to subparagraph (a)(i)(E) of this section.

(iii) All bids shall be opened in public in an office of the agency soliciting the bid. This paragraph shall apply to all construction delivery methods;

(iv) Contractor progress payments shall be made only ~~after the agency has been supplied with applicable lien waivers signed by the materialman, subcontractor or laborer, as applicable, or upon the contractor's affidavit that all materialmen, subcontractors and laborers have been paid for that portion of payment requested, less any contracted amounts held for retainage or for which there is a reasonable basis for dispute in accordance with this paragraph.~~ If a contracting entity determines that a general contractor in good standing on a project requires a progress payment due for work completed in a workmanlike manner in order to pay a materialman, subcontractor or laborer for their work performed to date, the entity may issue the progress

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payment upon verification that all materialmen, subcontractors and laborers have been paid for completed work through the date of the most recent previous progress payment. If a progress payment has been withheld by a general contractor due to a reasonable dispute between a general contractor and a materialman, subcontractor or laborer, further progress payments shall not be paid to the general contractor but shall be retained in accordance with the guidelines addressing disputed final payments under the provisions of W.S. 16-6-117. A person submitting false information regarding a progress payment subject to this paragraph shall be subject to the provisions of W.S. 16-6-120.

(b) No funds subject to this section shall be expended unless the contracting agency has submitted a plan to the governor ~~and the joint appropriations interim committee~~ which promotes the employment of responsible Wyoming resident design firms, including professional architectural and engineering services as defined by W.S. 9-2-1028(a)(v), in the planning and design phases of facilities funded with monies subject to this section. The plans shall allow for partnerships between responsible Wyoming design firms, including professional architectural and engineering services, and nonresident firms when necessary to secure specialized services required for a project. The contracting agency shall evaluate and consider overall qualifications, residency, fee proposal, past performance and level of services in the final decisions.

(c) Any ~~agency entity~~ which has received an appropriation of state funds on or after July 1, 2008, for any capital construction project shall conduct a review of each project funded with state funds to assess whether contractors that were awarded contracts using a resident preference complied in all respects to applicable resident preference laws. If the ~~agency entity~~ determines that there is reasonable suspicion that a contractor failed to comply with the resident preference laws, the ~~agency entity~~ shall report the matter to the department of ~~employment-workforce services~~ and the attorney general. The department of ~~employment-workforce services~~ and the attorney general shall take such enforcement action on behalf of the state of Wyoming and the ~~agency entity~~ against the contractor as they deem appropriate. An entity shall be required to conduct only one (1) review under this subsection after March 1, 2011.

(e) This section is repealed effective June 30, ~~2012~~2014.

Section 2. W.S. 16-6-1001(a)(i)(C)(V) is repealed.

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Section 3. This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

Approved March 21, 2012.