



Bob Ferguson  
**ATTORNEY GENERAL OF WASHINGTON**  
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

June 5, 2018

The Honorable Dan Griffey  
State Representative, District 35  
PO Box 40600  
Olympia, WA 98504-0600

Dear Representative Griffey:

By letter previously acknowledged, you have requested an opinion on two questions relating to purchases by fire protection districts. Under RCW 52.14.110, fire protection district purchases of materials, supplies, services, and equipment that exceed \$50,000, and which are unconnected to a public works project, must be based on a competitive, formal sealed bid procedure. I have paraphrased your questions about this procedure as follows:

1. **Does the competitive, formal bid procedure only consider the “lowest responsible bidder,” or may “best value” be considered?**
2. **Under what circumstances may a fire protection district “piggyback” off a previously established public contract?**

**BRIEF ANSWER**

1. A fire protection district may use best value criteria when contracting for non-public works purchases of materials, supplies, services, and equipment which exceed \$50,000. RCW 52.14.110 does not impose specific criteria that must be used in its formal sealed bid procedure, and it is thus not limited to the criteria of lowest possible bidder. However, if best value criteria is used as one of the criteria, it should be clearly stated in the bid solicitation.<sup>1</sup>

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<sup>1</sup> You also asked, in posing these questions, about potential conflicts or ambiguities in the law related to fire protection districts. One issue arising from your questions is whether a fire protection district can use best value criteria when the pertinent statute does not specify one way or the other. While we conclude such criteria can be used, the legislature could choose to make this more clear. Your questions also raise the issue of whether the competitive bid requirement conflicts with the statutes permitting cooperative purchasing. When possible, a court attempts to construe statutes so that they can be harmonized. *See Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 412, 377 P.3d 199 (2016) (“Where possible, we will read statutes as complementary, rather than in conflict with each other.”). Of course, the question of what a statute *should* provide is a policy choice for the legislature. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007) (discussing the legislature’s plenary power to enact laws). If

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2. A fire protection district's ability to piggyback off a previously established purchase contract will depend on the specific circumstances. RCW 39.26.060 authorizes fire protection districts to enter into cooperative purchasing agreements with the Department of Enterprise Services. Further, the Interlocal Cooperation Act permits local governments to contract with each other if they meet certain notice requirements during the procurement process. RCW 39.34.030(5)(b). Therefore, the ability to piggyback will depend on circumstances such as whether the use by additional local governments is contemplated in the contract and compliance with common law procurement principles.

## BACKGROUND

Under Washington law, fire protection districts may be established to provide fire prevention services, fire suppression services, emergency medical services, and to protect life and property. RCW 52.02.020(1). Fire protection districts are political subdivisions of the state and are held to be municipal corporations. RCW 52.12.011. Fire protection districts have the authority to contract with other governmental entities or private persons to provide services. RCW 52.12.031.

A board of fire commissioners manages each district. RCW 52.14.010(1). The board has the power to make and execute all necessary contracts. RCW 52.14.100. All purchases by the district must be based on competitive bids, with specified exceptions not applicable to your questions. RCW 52.14.110. Purchases and contracts for purchase by the board of commissioners require a formal sealed bid procedure. RCW 52.14.110. This statute does not provide a specified sealed bid procedure or the criteria that a fire protection district must use in competitive bidding.

This competitive bidding statute dates back to 1984. In 2012, the legislature passed an extensive procurement reform law applicable to state agencies. Laws of 2012, ch. 224. The law generally requires competitive solicitation for purchases of or contracts for goods and services. RCW 39.26.120. The law allows for acceptance of the lowest responsive and responsible bidder, which includes consideration of best value criteria. RCW 39.26.160. However, this law applies to agencies, which is defined to include state agencies and other state entities, but not local governments, such as fire protection districts. *See, e.g.*, RCW 39.26.010(1), .120(1).

The law describes, for state agencies, the use of best value criteria in the determination of whether a bidder is responsive and responsible. RCW 39.26.160(3). These criteria include:

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the legislature desires to make more clear the conclusions reached in this opinion, or conversely to change those conclusions, it could do so by providing more explicit authority for fire protection districts or other local governments to use best value criteria or more guidance on cooperative purchasing by fire protection districts.

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- Whether the bid satisfies the needs of the state as specified in the solicitation documents;
- Whether the bid encourages diverse contractor participation;
- Whether the bid provides competitive pricing, economies, and efficiencies;
- Whether the bid considers human health and environmental impacts;
- Whether the bid appropriately weighs cost and non-cost considerations; and
- Life-cycle cost.

## ANALYSIS

### 1. Does the competitive, formal bid procedure only consider the “lowest responsible bidder,” or may “best value” be considered?

Your initial question is comprised of two parts, which are both analyzed below. The first part asks whether the competitive bidding requirements must be evaluated only for the lowest responsible bidder.<sup>2</sup> I conclude that neither RCW 52.14.110, nor the other fire protection statutes, expressly limits the evaluation of bids in this way. Although some procurement cases interpret statutes requiring agencies to award contracts to the lowest responsive bidder, and the legislature likely intended that price be an important consideration for fire protection districts procuring goods and services, this limitation is not an express requirement in RCW 52.14.110.<sup>3</sup>

The second part asks whether fire protection districts may evaluate a contract on best value criteria. I interpret this question to mean whether the fire protection district is allowed to incorporate such criteria into its public procurement process. As noted, the state’s procurement reform law now expressly permits state agencies to consider such criteria, suggesting a question as to whether local governments may do so as well. RCW 39.26.160(3). We also assume that the local fire protection district does not have a specific policy or ordinance regarding consideration

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<sup>2</sup> While your question asks about whether an award is required to the lowest responsible bidder, cases primarily discuss statutes related to the lowest responsive bidder. As a general matter, in order for a bid to be accepted for evaluation, the *bidder* must be *responsible*, and the *bid* must be *responsive*. See RCW 39.26.160 (discussing requirements for both a responsible bidder and a responsive bid). The answer to your question does not turn upon this point of nomenclature, and nothing should be inferred from our use of the word “responsible” contrasted with “responsive.” Statutes sometimes use the terms together, referring to a “responsive and responsible bidder.” See, e.g., RCW 39.26.160(3).

<sup>3</sup> For example, see *Butler v. Federal Way School District 210*, 17 Wn. App. 288, 562 P.2d 271 (1977). *Butler* interpreted former RCW 28A.58.135, which required school districts to award certain contracts to the lowest responsible bidder. *Id.* at 292 n.1, 293-95.

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of best value criteria, or prohibiting consideration of criteria other than price and whether a bid is responsive. *See Platt Elec. Supply, Inc. v. City of Seattle*, 16 Wn. App. 265, 270, 555 P.2d 421 (1976) (provisions of city charter and ordinance related to the procurement process were binding on the city).

The law governing fire protection districts does not state what criteria must be considered in competitive bidding, or whether fire protection districts may consider best value criteria in their procurement decisions, other than to say that it must be competitive, and a formal, sealed procedure must be used. Although the 2012 state procurement reform law expressly permits state agencies to consider best value criteria in procurement decisions, RCW 39.26.160(3), the law does not apply to fire protection districts. For this reason, the analysis of both parts of your question depends on whether fire protection districts, in the absence of a statute either permitting or prohibiting political subdivisions of the state from considering best value criteria, may include such criteria in a competitive solicitation. Case law analyzing procurement suggests that fire protection districts are not limited to the lowest responsible bidder and may evaluate based on best value criteria so long as that criteria is set out in the bid request.

The purpose of requiring public bidding on municipal contracts is “to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable.” *Edwards v. City of Renton*, 67 Wn.2d 598, 602, 409 P.2d 153 (1965) (citing 10 McQuillin, *Municipal Corporations* § 29.29 (3d ed. 1950)). The primary purpose of public bidding is to protect the general public, but another purpose is to provide a fair forum for those interested in undertaking public projects. *Platt Elec. Supply, Inc.*, 16 Wn. App. at 269.

Public entities are free to exercise discretion and judgment in the procurement process, unless prohibited by statute, and subject to judicial review for reasonableness. *See Savage v. State*, 75 Wn.2d 618, 621, 453 P.2d 613 (1969); *see also* AGO 1984 No. 17, at 12 (reasoning that because public works law did not describe bidding process in detail and was not a “full-fledged bid law,” the awarding agency had more “freeboard”). While RCW 52.14.110 requires a process that is competitive and formal, it does not expressly require an award to the lowest responsive bidder. Because the statute does not require an award to the lowest responsive bidder, I conclude that a fire protection district can incorporate other considerations into its bidding process as long as those considerations are consistent with common law principles related to procurement.

In reaching the conclusion that RCW 52.14.110 does not compel fire protection districts to award a contract to the lowest responsive bidder, I also caution that by requiring *competitive* procurement for fire protection districts, the legislature likely intended that price be at least one of the primary factors in choosing the winning bidder. *See, e.g., Equitable Shipyards, Inc. v. State ex rel. Dep't of Transp.*, 93 Wn.2d 465, 473, 611 P.2d 396 (1980) (“The primary purpose of public bidding is to benefit the taxpayers by procuring the best work or material at the lowest price practicable.”). Indeed, even the 2012 state procurement reform, which expressly permits use of

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best value criteria for state agencies, still provides for an award of a contract to the *lowest* responsive and responsible bidder. RCW 39.26.160(1)(a)(iii). Therefore, to the extent a fire protection district were to incorporate best value criteria into its solicitation, ignoring the price at which a vendor can deliver goods or services would likely run afoul of the legislature's intent in requiring competitive procurement.

The second part of your question asks whether a contract may be evaluated on "best value." I interpret this question to mean not whether best value criteria alone are to be considered, but rather whether the fire protection district may incorporate such criteria into its public procurement process. This question arises at least in part because the state's procurement reform now expressly permits state agencies to consider such criteria in their procurement processes. RCW 39.26.160(3).

The statute requiring competitive bidding for fire protection districts does not set forth specific criteria that the district must use. Therefore, the fire protection district likely can use criteria if those criteria are reasonable, and meet the general purposes of procurement "to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable." *Edwards*, 67 Wn.2d at 602 (citing 10 McQuillin, *Municipal Corporations* § 29.29 (3d ed. 1950)). The criteria also must be consistent with any ordinances or policies of those districts. *See Platt Elec. Supply, Inc.*, 16 Wn. App. at 270. While the 2012 state procurement law requirements do not apply to fire protection districts, the legislature's endorsement of the use of best value criteria or other criteria to evaluate the quality of a particular bidder or other social considerations provides support for the reasonableness of a fire protection district's use of such criteria.

Perhaps most important, if fire protection districts do use best value criteria in procurement, those criteria should be clearly spelled out in any solicitation for bids. While the use of value criteria can provide better value to government entities, if selection criteria are not clear when soliciting bids, the result could be an enhanced risk of favoritism or improvidence. The legislature likely understood this when requiring state agencies to clearly set forth the requirements and criteria that they will use in evaluating bids in their solicitation documents. RCW 39.26.160(4). Therefore, fire protection districts likely can use best value criteria in the procurement process if they state such criteria when soliciting bids so as to ensure a fair process.

## **2. Under what circumstances may a fire protection district "piggyback" off a previously established public contract?**

Your second question is also comprised of two parts. First, may a fire protection district use cooperative purchasing when contracting for goods? And, second, may a fire protection district later join a cooperative purchasing contract, a process known as piggyback contracting?

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Cooperative purchasing is the process by which different government entities may seek efficiencies by procuring and contracting for goods together. This analysis assumes that you are not referring to a contract previously established by the fire protection district itself. RCW 39.26.060 permits cooperative purchasing agreements between the state and local governments, but still requires the use of competitive solicitation. Further, RCW 39.34.030(5), which allows cooperative purchasing agreements between two local governments, requires compliance with any procurement requirements by the public agency or agencies entering the purchasing contract, and also imposes notice requirements. In other words, both of these statutes, like the fire protection procurement statute, are aimed at ensuring state procurement law is followed. By ensuring that either the state or the local government or governments contracting to buy goods comply with state procurement laws, the legislature has designed a process that it believes can deliver the best value to the state and also ensure a fair process for bidders of public contracts.

The state legislature has expressly endorsed cooperative purchasing in several statutes. One is the 2012 state procurement reform law discussed above. Other statutes governing local entities, such as fire protection districts, also endorse cooperative purchasing.

Washington's 2012 procurement reform law allows the Department of Enterprise Services to award a contract through competitive solicitation that will be utilized by other governments, including local governments and local government agencies, so long as the cooperative purchasing is through a competitive solicitation process. RCW 39.26.060. Although local governments or local government agencies have not been defined by the statute, it would likely encompass fire protection districts, because they are political subdivisions of the state and municipal corporations. Thus, this statute likely authorizes cooperative purchasing agreements between the state and fire protection districts so long as contracts are awarded through competitive solicitation.

The Interlocal Cooperation Act (ICA) also authorizes cooperative purchasing agreements between local governments. RCW 39.34.030(1). The ICA permits public agencies, which are defined to include municipal corporations, to jointly exercise their powers, privileges, and authorities. RCW 39.34.030(1). Because public agency is defined to include political subdivisions of the state and municipal corporations, it includes fire protection districts. The ICA also expressly contemplates cooperative purchasing under certain conditions. These conditions include the requirements that the public entity or entities awarding the bid, proposal, or contract comply with their own statutory procurement requirements and provide proper notice. *See* RCW 39.34.030(5). This statute therefore also authorizes fire protection districts to contract with other local governments to purchase materials, supplies, services, or equipment not connected with a public works project.

Your question also asks about piggybacking on a previously entered contract. Piggybacking is the ability of fire protection districts to join cooperative agreements that have already been reached. While the state statutes described above clearly authorize cooperative

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purchasing, they do not specifically address the process, or ability, for a political subdivision such as a fire protection district to join an existing contract.

I do not believe there is any strict rule governing when piggybacking is or is not permitted. While cooperative purchasing provides obvious efficiencies for local government and has been expressly endorsed by our legislature by statute, there is a “risk of upsetting that delicate balance between expediency and fairness.” Darwin A. Hindman, III & Raquel N. Parker, *Piggyback Contracts: The Benefits and the Limits of Shared Purchasing*, 49 Procurement Law. 16, 16 (Am. Bar Ass’n Spring 2014), [https://www.americanbar.org/groups/public\\_contract\\_law/publications/procurement\\_lawyer\\_home.html](https://www.americanbar.org/groups/public_contract_law/publications/procurement_lawyer_home.html). Some buyers see piggybacking as a way to acquire goods or services without competition, and some vendors may complain that they do not have an opportunity to bid. *Id.* These considerations make it important for a fire protection district that piggybacks off of a previously entered contract to ensure that both statutes and common law procurement principles are complied with.

While I cannot, in this opinion, address every possible risk, issue, or circumstance, I will address a few of the most pertinent to provide some framework for particular procurement situations as they arise. It is likely that a court evaluating a challenge to a procurement process that relied on piggybacking would evaluate it under common law procurement principles. These include the policy considerations that procurement obtain the best work at the lowest cost and be free from fraud, collusion, favoritism, and improvidence.

One consideration is whether a local government materially changes the scope or terms of the original contract. For example, a Florida court found that a county failed to follow its procurement code when it attempted to piggyback off of a Wisconsin contract with the same software vendor. *Accella, Inc. v. Sarasota County*, 993 So. 2d 1035, 1044-45 (Fla. Dist. Ct. App. 2008). Although the county’s procurement code permitted piggybacking, three agreements the county entered into significantly expanded the original agreement. The county therefore acted arbitrarily and capriciously, and the agreements were deemed void. *Id.* at 1044.

Another consideration is alerting bidders to the possibility of future piggybacking. Specifically, one national organization recommends that “[t]he contracting jurisdiction must include piggyback language in the contract and the vendor must agree.” Nat’l Ass’n of State Procurement Officials, *Strength In Numbers: An Introduction to Cooperative Procurements 3* (Feb. 2006), <http://www.naspo.org/dnn/Publications/ArtMID/8806/ArticleID/2196>. Thus to subsequently join a previously established contract, the original contract should expressly contemplate that other government entities will be joining. In this way, bidders know that the scope of the contract may involve yet to be determined government entities, and can choose whether to participate and on what terms.

Other considerations may be important as well. For example, “courts may also inquire about the nature and the quality of the competitive process under which the original contract was

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procured.” Hindman, 49 Procurement Law. at 20. It also stands to reason that piggybacking onto a contract entered years ago would raise greater scrutiny than a contract that had been recently procured. And piggybacking should not be used to circumvent the procurement process, for example, by contracting with a bidder that would not have been able to win a competitive procurement issued by the fire protection district itself.

To conclude, Washington statutes permitting cooperative purchasing would likely permit a fire protection district to join a previously bid contract entered into by another government entity provided that statutory requirements are followed. Such purchasing would still need to follow Washington common law principles of fairness in public procurement.

I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joshua Weissman", written in black ink.

JOSHUA WEISSMAN  
*Assistant Attorney General*  
(360) 664-9426

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