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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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RICHARD BANKSTON d/b/a AAROHN CONSTRUCTION

Plaintiffs/Appellants,

v.

PIERCE COUNTY

Defendant/Respondent.

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APPELLANT'S BRIEF

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## I. INTRODUCTION

Pierce County wrongfully terminated Aarohn Construction as the contractor for the Tree Replacement Project at Annex. The wrongful termination was a breach of the contract entered into by Aarohn Construction and Pierce County. Pierce County repeatedly denied Aarohn Construction meaningful access to the construction site and terminated the contract when the project was not completed within 90 days.

During the course of work, Aarohn Construction encountered multiple obstacles to completing the work within the time required under the contract. Pierce County provided inaccurate and incomplete plans for the Project which caused Aarohn Construction to inadvertently damage portions of the sprinkler system that was not shown on the plans. It further complicated Aarohn Construction's attempts to work because multiple sprinkler systems and wiring were located in areas not shown in the plans, which delayed the work. Additionally, Aarohn Construction had problems accessing the site to perform work because the County failed to keep the area clear of parked cars.

Aarohn Construction was a licensed contractor when it entered into the contract with Pierce County. As a licensed contractor and party to the contract, Aarohn Construction had a surety bond with Developers Surety and Indemnity Company ("Developers"). When Aarohn

Construction was wrongfully terminated from the construction project, Developers paid a performance bond to Pierce County. Developers paid Pierce County \$65,759.79 and then sought payment from Richard Bankston under the bond.

Aarohn Construction filed suit in the trial court seeking damages from the breach of contract. Pierce County filed a motion for summary judgment arguing that the contract between Pierce County and Aarohn Construction was void based on the violation of state and county laws governing public works contracting. The trial court agreed, and granted Pierce County's motion for summary judgment on October 28, 2011. The court's order granting Pierce County's motion for summary judgment should be reversed because the trial court misapplied the standard to determine whether the contract between Aarohn Construction and Pierce County was valid.

## **II. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

1. The trial court incorrectly found that Aarohn Construction could not pursue its breach of contract claim against Pierce County because the Tree Replacement Project at Annex contract was signed with the registration of Aarohn Construction as registered by Richard Bankston.

2. The trial court erred in failing to find substantial compliance with on the part of Aarohn Construction.

3. The trial court failed to make all reasonable inferences from the evidence in favor of Appellant's theory that there was substantial compliance with RCW 39.06.010 and 18.27 RCW.

*Issues Pertaining to the Assignments of Error*

1. Was Aarohn Construction a licensed contractor when its initial bid was submitted to Pierce County?

2. Was Aarohn Construction a licensed contractor when it was awarded the contract for the Tree Replacement Project at Annex?

3. Was Aarohn Construction a licensed contractor when the contract was executed by Aarohn Construction and Pierce County?

4. Did Aarohn Construction substantially comply with the statutory provisions of RCW 18.27 et seq. and RCW 39.06.010 when at all relevant times Pierce County was protected by the required surety bond?

5. Should Pierce County be estopped from asserting that its contract with Aarohn Construction was illegal, invalid and void when it collected money from the surety bond required by the contract?

6. Should Aarohn Construction be allowed to pursue its breach of contract claim when its actions do not contravene the purposed behind RCW 18.27?

### III. STATEMENT OF THE CASE

When Aarohn Construction filed its Complaint in the trial court, Pierce County argued that Aarohn Construction did not have standing and breached the contract entered into for the Aarohn Construction bid on and received the Pierce County contract for the Tree Replacement Project at Annex. Clerk's Papers (CP) 69-93. At all relevant times Aarohn Construction was a properly bonded and licensed contractor. CP 32, 60. Aarohn Construction was initially registered by John Bankston and was re-registered by Richard Bankston, John Bankston's son. *Id.*

Pierce County requested bids for its Tree Replacement Project at Annex. CP 40. Aarohn Construction submitted a bid on the project on March 23, 2006. *Id.* Aarohn Construction was a licensed and bonded contractor listed on Pierce County's small works roster at the time the bid was submitted on behalf of Aarohn Construction. CP 118. Aarohn Construction was awarded the contract for the project as the lowest bidder on March 28, 2006. CP 73, 118. On April 13, 2006, after Aarohn Construction had already been awarded the contract as the low bidder, John Bankston's contractor's license was suspended. CP 60, 73. John Bankston informed Judy Gasperez and Chester Hibbert of Pierce County that the business Aarohn Construction would be registered by his son, Richard Bankston. CP 118. Richard Bankston registered Aarohn

Construction on April 25, 2006. CP 32, 73. Aarohn Construction as registered by Richard Bankston was also licensed and bonded. CP 32. None of the terms of Aarohn Construction's bid or the parties who would perform the work were affected by the new registration. CP 118. Pierce County entered into the contract with Aarohn Construction for the Tree Replacement Project at Annex in May 2006. CP 44-45. The contract called for the project to be completed within 90 days. CP 118.

Shortly after commencing work on the project, Aarohn Construction had difficulties accessing the project site. *Id.* A parked car blocked access to the worksite for weeks by preventing the workers from getting their equipment to the worksite. CP 118-119. Pierce County also refused to clear a parking lot to allow Aarohn Construction to fell trees. CP 119. The contract called for the removal of trees that were upwards of 30 inches in diameter which could not be done with cars parked in the adjacent parking lot. *Id.*

The original contract called for the installation of four (4) rain gardens. *Id.* After being awarded the contract, Pierce County requested the installation of five (5) rain gardens. *Id.* Despite the request of additional work, Pierce County did not grant Aarohn Construction additional time or compensation for the increase in labor. *Id.*

While digging to install the rain gardens and the irrigation system, Aarohn Construction found that the soil was contaminated, the prior irrigation system was not located where it was depicted in the drawings provided by Pierce County and there were also high-voltage power lines buried where Aarohn Construction needed to dig. *Id.* Each incident required two to three days for Pierce County to inspect the situation and additional days were lost while Pierce County decided how to address the problem. *Id.* In spite of the need for additional time and in the face of no pressing deadline, Pierce County refused Aarohn Construction's reasonable request for additional time or compensation to deal with the unforeseeable delays. *Id.* On August 30, 2006, Pierce County terminated its contract with Aarohn Construction because the project was not completed within 90 days. *Id.* Pierce County did not terminate the contract because of any irregularity in the bidding process or because John Bankston was not licensed, insured or bonded at the time he performed the bid.

Aarohn Construction obtained a contractor's surety bond with Developers Surety and Indemnity Company to comply with the requirements of being a licensed and bonded contractor. CP 120. When the contract was not completed within 90 days, Developers paid Pierce County \$65,759.79 under the surety bond. Developers then sued Richard

Bankston under the indemnity agreement. *Id.* Developers obtained a judgment against Richard Bankston and has initiated a collection action against Richard Bankston. Richard Bankston and his wife assigned all of their rights regarding their potential contractual and equitable claims to John Bankston. *Id.*

Richard Bankston, d/b/a Aarohn Construction filed its breach of contract claim against Pierce County on October 7, 2010. CP 1-4. Pierce County filed its motion for summary judgment on September 30, 2011. CP 69-93. The motion for summary judgment was heard and granted by the Honorable Roseanne Buckner in Pierce County Superior Court on October 28, 2011. Report of Proceedings (RP) (October 28, 2011) at 1-13. At the time the motion was granted, Appellant had several motions pending including a CR 56(f) motion for continuance, motion to amend the Complaint and a motion to compel. CP 133-141, 142-166, 167- 190. Judge Buckner granted Pierce County's motion for summary judgment and struck the remaining pending motions. RP at 12.

The trial court granted Pierce County's motion for summary judgment based on the bidding process involved with the awarding of the contract for the tree replacement project. The superior court explained its ruling as follows:

...It's clear in this case that Richard Bankston did not bid the project in March of 2006. His father, John Bankston, submitted the bid and was awarded the bid as the low bidder. But then, after that, on April 13<sup>th</sup>, 2006, John Bankston's contractor registration was suspended. But he went ahead and signed the contract in May, using his son's registration of his son's company. So therefore, that's not a legal situation, and I'll grant the motion to dismiss.

RP (October 28, 2011) at 11.

#### IV. SUMMARY OF ARGUMENT

Aarohn Construction was a licensed and bonded contractor when the bid for the tree replacement project was submitted, when the contract for the tree replacement project was awarded and when the contract for the tree replacement project was signed. Pierce County entered into a valid contract with Aarohn Construction. Pierce County's reliance on the bidding procedure authorized by Pierce County Code (PCC) 2.106 et seq. is misplaced. First, the Tree Replacement Project at Annex was competitively bid by Aarohn Construction. The identity of the contractor and the terms of the bid remained the same at all relevant times. Second, PCC 2.106.060(A)(4) states that "[i]n the case of public works purchases from \$10,000.00 to \$200,000 the procedures of RCW 39.04.155 for small works contract awards process *may* be used. Aarohn Construction was a licensed and bonded contractor listed on Pierce County's small works roster at the time the bid on the tree replacement contract was bid. None

of the applicable bidding procedures was violated in the instant case. There is nothing in the record supporting the contention that Pierce County terminated the contract because of any irregularity with the bidding requirement or a failure to comply with RCW 18.27. Moreover, there is nothing in the record supporting any contention that Pierce County terminated the contract because John Bankston was not licensed or bonded at the time the bid was done. In fact, when the bid was submitted, he was.

Aarohn Construction submitted a bid for the tree replacement project. Although the ownership of Aarohn Construction changed prior to the signing of the contract, the change in ownership did not affect any of the terms in the bid. Furthermore, Aarohn Construction complied with the insurance and surety bond requirements of the contractor registration statute. In this case, Pierce County benefitted directly from Aarohn Construction's compliance with the insurance and surety bond requirements because Pierce County was paid by the surety bond issued to Aarohn Construction when Pierce County wrongfully terminated Aarohn Construction from the contract. Compliance with the insurance and surety bond requirements of the contractor registration statute is sufficient to permit a contractor to maintain an action for compensation for work performed. A contractor who has substantially complied with the requirements of the contractor's registration statutes is permitted to

maintain an action for compensation for the work that was performed. Furthermore, Pierce County should not be allowed to receive the payment from Aarohn Construction's surety bond authorized by its contract and now argue that there was never a valid contract between Pierce County and Aarohn Construction.

## V. ARGUMENT

### A. Standard of Review

This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Summary judgment is proper if the court, viewing all facts and reasonable inferences in the light most favorable to the non-moving party, finds no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ellis*, 142 Wn.2d at 458. A material fact is one upon which the outcome of the litigation depends. *Kim v. O'Sullivan*, 133 Wn. App. 557, 559, 137 P.3d 61 (2006), review denied 159 Wn.2d 1018 (2007). When determining whether an issue of material fact exists, all reasonable inferences are construed in favor of the moving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

To successfully move for summary judgment, a party must demonstrate a complete lack of evidence of a material fact that cannot be

rebutted. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 132, 822 P.2d 1257 (1992). Even when evidentiary facts are not disputed, a motion for summary judgment will be defeated if different inferences may be drawn from the evidence in the record as to ultimate facts. Philip A. Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Wash. L. Rev. 1, 4 (1970).

B. Aarohn Construction Properly Bid on the Tree Replacement Project at Annex

Pierce County Code (PCC) 2.106.035 states that all Public Works construction shall be performed following competitive bidding by independent contractors when the projected value of a project exceeds \$25,000. PCC 2.106.060(A)(4) states that [i]n the case of public works purchases from \$10,000 to \$200,000 the procedures of RCW 39.04.155 for small works contract awards process may be used. RCW 39.04.155(c) states that “[p]rocedures shall be established for securing telephone, written, or electronic quotations from contractors on the appropriate small works roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder, as defined in RCW 39.04.010.” “Responsible bidder” means a contractor who meets the criteria in RCW 39.04.350.

RCW 39.04.350 defines the bidder responsibility criteria. The statute reads in pertinent part:

(1) Before award of a public works contract, a bidder must meet the following responsibility criteria to be considered a responsible bidder and qualified to be awarded a public works project. The bidder must:

(a) *At the time of bid submittal*, have a certificate of registration in compliance with chapter 18.27 RCW;

(b) Have a current state unified business identification number;

(c) If applicable, have industrial insurance coverage for the bidder's employees working in Washington as required in Title 51 RCW; an employment security department number as required in Title 50 RCW; and a state excise tax registration number as required in Title 82 RCW; and

(d) Not be disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065(3). (emphasis added)

It is undisputed that all of these criteria were satisfied at the time of the bid submittal. The Pierce County Code and RCW 39.04 et seq. do not have any further requirements for the competitive bidding of public works. As such, Aarohn Construction submitted a valid and proper competitive bid for the project.

C. The Contract Between Pierce County and Aarohn Construction Did Not Violate Competitive Bidding Laws.

Pierce County alleges that the contract between Aarohn Construction and Pierce County is void and unenforceable because the contract was in violation of competitive bidding laws. First, this argument

is undermined because Aarohn Construction did in fact submit a bid for the tree replacement project at the annex. CP 40. The bid was submitted by John Bankston on behalf of Aarohn Construction. CP 40. John Bankston, as Aarohn Construction, was listed in Pierce County's small works roster. CP 118. The documents submitted by Pierce County also show that John Bankston was a licensed contractor at the time the bid was submitted on behalf of Aarohn Construction. CP 60. It is undisputable that the project was let in accordance with PCC 2.106.060A and RCW 43.19.1911.

The contract entered into by Pierce County and Aarohn Construction listed John Bankston as the contractor. John Bankston was listed as the contractor for Aarohn Construction in the original bid sent to Pierce County. Aarohn Construction was listed as the firm in the bid sent to Pierce County and in the contract signed by Pierce County. The reality is that as the long-time superintendent and foreman of Aarohn Construction, John Bankston oversaw all of the work and took the lead in all communication with Pierce County. At all relevant times, Aarohn Construction ensured that the public was protected by insurance and a surety bond. The change in ownership of Aarohn Construction does not negate the award of the contract to Aarohn Construction as the contractor. *Leon's Plumbing & Heating, Inc. v. Aqua Drilling*, 26 Wn. App. 789, 614 P.2d 237 (1980).

Moreover, the work was performed under the contract between Richard Bankston d/b/a Aarohn Construction and Pierce County. Richard

Bankston d/b/a Aarohn Construction was licensed, insured and bonded pursuant to all legal requirements and consistent with the legislative purpose of RCW 18.27.

The cases cited by Pierce County in support of its contention that Aarohn Construction violated the competitive bidding laws are not persuasive. In *Platt Electric v. Seattle*, 16 Wash. App. 265, 555 P.2d 421 (1976), Platt Electric was the lowest bid for the contract to supply the city's light bulbs for one year. Instead of awarding the contract to Platt, the city entered into negotiations with other bidders for a lower price and eventually awarded the contract to Graybar with terms not included in the original bid request. The Court held that: 1) the City could not negotiate with some but not all bidders to obtain a contract price lower than the lowest bid; 2) bidders to a public contract cannot determine their own specifications; 3) the specifications of the awarded contract must match those of the invitation to bid; and 4) a public contract let in violation of competitive bidding laws is void. None of the issues present in *Platt* are present in this case. Aarohn Construction bid on the project, Aarohn Construction was awarded the contract, and until it was terminated, Aarohn Construction worked on the tree replacement project without negotiating any additional terms to the contract.

In *Evans v. Luster*, 84 Wn. App. 447, 928 P.2d 455 (1996), a homeowner and a contractor entered into a contract to grade wetlands on the homeowner's property when the county permit office would be unable to issue a stop work order. The Court held that the contract was illegal

from inception because both parties knew it violated the county code. In the instant case, neither party acted illegally and Aarohn Construction never entered into an agreement with Pierce County to violate a county code or ordinance. In *Vedder v. Spellman*, 78 Wn.2d 834, 480 P.2d 207 (1971), an unlicensed contractor made repairs to defendants' home when he was not licensed to do so. The defendants submitted a check to the contractor for payment, but issued a stop payment order on the check before it could be cashed. The Court held that the contractor was prohibited from bringing suit because he was unlicensed. *Vedder* is distinguishable from the instant case because Aarohn Construction was a registered contractor when the contractual work was undertaken for the tree replacement project.

Furthermore, whether a contract is void based on an illegal agreement is a question of fact that cannot be determined without a trial on the merits. *Golberg v. Sanglier*, 97 Wn.2d 874, 639 SP.2d 1347 (1982); *Hammack v. Hammack*, 114 Wn. App. 805, 60 P.3d 663 (2003). To the extent the trial court granted Pierce County's motion for summary judgment because it found the contract between Pierce County and Aarohn Construction was void or illegal, such a determination was improperly made as a matter of law. RP (October 28, 2011) at 11. Pierce County has not presented any evidence that Pierce County's contract with Aarohn Construction was void from its inception. There not any malfeasance or clear violation of laws committed or intended by any party to this case. The fairness in the bidding process was maintained.

D. Substantial Compliance With 18.27 RCW Allows Aarohn Construction to Pursue Its Claims Against Pierce County.

Pierce County claims in its motion that John Bankston is barred from bringing a claim pursuant to RCW 18.27.080. In 2006, RCW 18.27.080 read:

No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he was a duly registered contractor and held a current a valid certificate of registration at the time he contracted for the performance of such work or entered into such contract. For the purposes of this section, the court shall not find a contractor in substantial compliance with the registration requirements of this chapter unless: (1) the department has on file the information required by RCW 18.27.030; 2) the contractor has a current bond or other security as required by RCW 18.27.040; and 3) the contractor has current insurance as required by RCW 18.27.050. In determining under this section whether a contractor is in substantial compliance with the registration requirements of this chapter, the court shall take into consideration the length of time during which the contractor did not hold a valid certificate of registration.

First, whether John Bankston substantially complied with RCW 18.27.080 is a question of material fact to be determined by the trier of fact. *Murphy v. Campbell Investment Co.*, 79 Wn.2d 417, 486 P.2d 1080 (1971). Second, the public policy behind RCW 18.27 et seq. is to protect consumers and the public by ensuring that contractors obtain a surety bond, public liability and property damage insurance. *Id.* RCW 18.27.140

states: [i]t is the purpose of this chapter to afford protection to the public including all persons, firms, and corporations furnishing labor, materials, or equipment to a contractor from unreliable, fraudulent, financially irresponsible, or incompetent contractors. The public policy behind the statutory scheme was satisfied in this case because Aarohn Construction was compliant with the financial responsibility standards at all relevant times. In fact, Pierce County was paid by the surety bond secured by Aarohn Construction when the Pierce County wrongfully terminated Aarohn Construction from the project. When a contractor substantially complies with RCW 18.27, the contractor is not barred from suit. *Lobak Partitions, Inc. v. Atlas Construction Company, Inc.*, 50 Wn. App. 493, 749 P.2d 716 (1988); *Leon's Plumbing & Heating, Inc.*, 26 Wn. App. at 240; *Murphy*, 79 Wn.2d at 421. Evidence of substantial compliance renders summary judgment improper. *Lobak Partitions, Inc.*, 50 Wn. App. at 503.

E. Pierce County is Estopped From Disputing the Validity of the Contract with Aarohn Construction

The work on the tree replacement project was performed under the contract between Richard Bankston d/b/a Aarohn Construction and Pierce County. Richard Bankston d/b/a Aarohn Construction was licensed and bonded while the contract was performed. When Pierce County

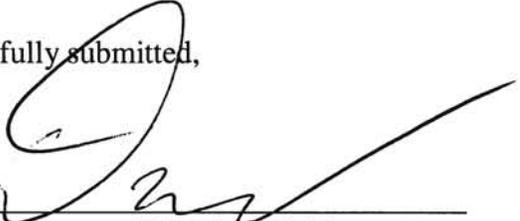
wrongfully terminated its contract with Aarohn Construction, Pierce County obtained payment of \$65,759.79 from Richard Bankston's payment and performance bond. Pierce County accepted the payment without raising any arguments regarding the validity of its contract with Aarohn Construction. The bonding company in turn sued Richard Bankston and obtained a judgment that it is now collecting from Richard Bankston. Pierce County is estopped from arguing that the contract is void or voidable when it has accepted the benefit of the contract under the principle of equitable estoppel. Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens the contract imposes. *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012). Pierce County should not be allowed to receive payment from the surety company based on Aarohn Construction's compliance with RCW 18.27 et seq. and still avoid having to answer for Aarohn Construction's wrongful termination based upon a narrow reading of the statutory scheme.

## VI. CONCLUSION

Summary judgment dismissing appellant's claims against Pierce County was improper. This Court should reverse the trial court's decision on summary judgment and remand for trial. Costs on appeal should be awarded to Aarohn Construction.

DATED this 11<sup>th</sup> day of May, 2012.

Respectfully submitted,

By 

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of May, 2012 I caused a true and correct copy of the foregoing to be delivered to all counsel of record as indicated below:

Mr. John F. Salmon Pierce County Prosecuting Attorney/Civil Division 955 Tacoma Ave. S, Suite 301 Tacoma, WA 98402-2160	<input checked="" type="checkbox"/> Via U.S. Mail
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\_\_\_\_\_  
Jill Martin, Legal Assistant

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APPENDIX

A

- 2.106.360 Notice of Cancellation or Rejection of Bids.**
- 2.106.370 Performance Bond.**
- 2.106.380 Product Fitness.**
- 2.106.390 Price Escalation.**
- 2.106.400 Change of Product Offered.**
- 2.106.410 Intergovernmental Cooperative Purchasing.**
- 2.106.420 Authorization to Implement Procedures.**
- 2.106.425 Exemptions.**
- 2.106.430 Severability.**

**2.106.010 Purpose.**

The purpose of this Chapter is to set forth rules and regulations applicable to the purchase or lease of material, equipment, services, and supplies by, through, or under authority delegated by the Executive to the County Purchasing Agent or other designee. (Ord. 94-114S § 1 (part), 1995; Ord. 81-31 § 2 (part), 1981; prior Code § 2.04.010)

**2.106.020 Definitions.**

As used in this Chapter, the following terms shall have the following meanings:

- A. "Alternate" means material, supplies, equipment, or services which deviate in respect to features, performance, or use from the brand, model, or specification designated as a standard, whether or not such deviation constitutes an improvement.
- B. "Annual Contract" means an agreement between the County and a vendor, entered into pursuant to the formal advertising and Invitation to Bid process, whereby the vendor agrees to supply specified items to the County for a fixed period of time in quantities to be determined by County requirements and at a bid unit price. The annual contract is used whenever historical data indicates a reasonable likelihood that the County will require a quantity of an item costing in excess of the amount required for Invitations to Bid.
- C. "Architectural/Engineering Services" mean services performed by any person, other than by an employee of Pierce County, which are within the scope of services regulated by Chapters 18.08, 18.43, and 18.96 RCW.
- D. "Bid" means an offer to perform a contract to purchase or supply material, equipment, services, or supplies in response to a formal solicitation.
- E. "Bidder" means one who submits a bid.
- F. "Blanket Contract" means an agreement between the County and a vendor that said vendor shall supply any and all goods or services merchandised by that vendor for a one-year period in quantities to be determined by County requirements and indicated on purchase requisitions. The cost of such goods or services shall be as set forth in a pricing policy submitted by the vendor at the time of contracting. Blanket Contracts entered into without formal advertising or bidding, are for the convenient purchase of low-cost items and no individual requisition shall exceed \$2,499.99.
- G. "Business Entity" means any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit with the County. The term business entity shall include, but not be limited to partnerships, corporations, contractors, and subcontractors doing business with the County.

- H. "Contractor", for purposes of PCC 2.106.022 and 2.106.025, means a person, employer, or business entity that enters into a contract or an agreement with the County to perform any service or work or to provide a certain product in exchange for valuable consideration. For purposes of PCC 2.106.022 and 2.106.025, the term "contractor" shall not include government agencies; legal, architectural and engineering service providers; those whose contracts would be exempt from competitive bidding under PCC 2.106.060 B.; those whose contracts issue under PCC 2.106.070; those whose supplies and services are purchased under PCC 2.106.410; regulated providers of insurance, bonding, banking, or investment services; or public utilities.
- I. "Contracts for Public Works" includes all contracts for work, construction, alteration, repair, or improvement to real property, other than ordinary maintenance, as defined by RCW 39.04.010.
- J. "County" means the offices of the Executive, the County Council, the Superior and District Courts, Prosecuting Attorney, the Assessor-Treasurer, the Auditor, and all other administrative and appointive offices serving under the supervision or at the pleasure of any of the above.
- K. "Council" means the Pierce County Council, the legislative body of Pierce County.
- L. "County Purchasing Agent" referred to in this Chapter as "Agent" is the designee of the Executive charged with procurement of all supplies, materials, equipment, and services for the County with the exception of contracts for public works for public roads.
- M. "Description" means identifying information distinctly and plainly set forth and sufficiently portrayed and explained to insure that the product or service under consideration is uniquely identified.
- N. "E-Verify" shall mean the electronic verification of work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, Division C, Title IVY s. 403(a), as amended, and operated by the United States Department of Homeland Security, or a successor electronic verification of work authorization program designated by the United States Department of Homeland Security or other federal agency authorized to verify the work authorization status of newly hired employees pursuant to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603.
- O. "Emergency Purchase" means a purchase made in response to unforeseen circumstances beyond the control of the County which present a real, immediate, and material threat to the public interest or property of the County.
- P. An "Equal" is material, equipment, supplies, or services which are equal to or exceed the quality, performance, and use of the brand, model, or specifications designated as the standard.
- Q. "Executive" is the County Executive.
- R. An "Informality" or "Irregularity" is one which is merely a matter of form or is some immaterial variation from the exact requirements of the Invitation for Bids, having no effect or merely a trivial or negligible effect on quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to bidders.
- S. "Invitation to Bid" means the procedure used in the formal sealed bid procedure.
- T. "Legal Newspaper" means the official County Newspaper as required by RCW 36.72.075.

- U. "Project" means a task sufficiently specific to limit the services to only those services required to accomplish the specific task. Pricing agreements which require that each future request for specific services shall be approved under Section 2.106.070 as an emergency shall be exempt from this limitation.
- V. "Purchase" includes leasing or renting.
- W. "Purchaser" means the County of Pierce and the department or agencies using the material, equipment, supplies, or services purchased.
- X. "Request for Quotation" means the procedure used when purchases are solicited in accordance with RCW 36.32.245. The request and the quote in response may be either written or oral as specified by the Agent.
- Y. "Single source purchase" means a purchase of goods or services which can be obtained from only one known vendor.
- Z. "Specifications" means the explicit requirements furnished with an Invitation to Bid or Request for Quotation upon which a purchase order or contract is to be based. Specifications set forth the characteristics of the equipment, material, supplies, or services to be purchased or sold to enable the bidder or vendor to determine and understand that which is to be supplied or sold. This information may be either in terms of physical characteristics or performance requirements or both.
- AA. "Unauthorized Alien" means a person who is unauthorized to be lawfully employed in the United States, pursuant to 8 U.S.C. § 1324a(h)(3). The County shall not conclude that a person is an unauthorized alien unless and until an authorized representative of the County has verified with the federal government, pursuant to 8 U.S.C. § 1373(c), that the person is an unauthorized alien.
- AB. "Vendor" means supplier of goods and/or services.  
(Ord. 2009-74s § 1 (part), 2009; Ord. 94-114S § 1 (part), 1995; Ord. 81-31 § 2 (part), 1981; prior Code § 2.04.020)

#### **2.106.022 Application of E-Verify Requirements.**

- A. As a condition for the award of any County contract for public works in excess of \$100,000.00 or any other County contract in excess of \$25,000.00, the contractor shall enroll in the E-Verify program, or its successor, and thereafter shall provide the County documentation affirming its enrollment and participation in the program. The conditions of this Section shall not apply to contracts that:
  - 1. Are only for work that will be performed outside the United States;
  - 2. Are for a period of performance of less than 120 days; or
  - 3. Are only for:
    - a. Commercially available off-the-shelf items (COTS) as defined by federal law;
    - b. Items that would be COTS items, but for minor modifications;
    - c. Items that would be COTS items if they were not bulk cargo; or
  - 4. Provide commercial services that are:
    - a. Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);
    - b. Performed by the COTS provider; and
    - c. Are normally provided for that COTS item.
- B. Contractors shall be required to continue participation in the E-Verify program throughout the course of their business relationship with the County.

- C. If a contractor described in subsection A. uses a subcontractor whose work in connection with the performance of the contract would be subject to the requirements of subsection A. were the contract to be with Pierce County, the subcontractor shall, as a condition of contract, certify to the contractor in a manner that does not violate federal law that the subcontractor has registered and is participating in the E-Verify program and will not knowingly employ or contract with an unauthorized alien.
- D. The County shall include specific written notice in all requests for bids or proposals subject to this Section that contractors may be required to enroll in the E-Verify program pursuant to subsection A. as a condition of award. Contractors are exempt from this Section if they received requests for bids or proposals not containing such notice.
- E. Nothing provided in this Section or PCC 2.106.025 shall relieve contractors otherwise subject to federal E-Verify requirements from complying with the requirements of federal law.

(Ord. 2009-74s § 1 (part), 2009)

**2.106.025 Enforcement of E-Verify Contract Terms.**

- A. The Executive or their designee shall develop contracting protocols facilitating enforcement of the requirements of PCC 2.106.022. These procedures shall ensure that no business engages in discrimination based on sex, sexual orientation, marital status, race, age, disability, national origin, religion, or other status protected by law. The County shall suspend a contract with any business entity or contractor that the United States Attorney General or the Secretary of Homeland Security has found to have been in violation of 8 U.S.C. § 1324a should the business entity or contractor fail to correct the violation within 30 business days of receiving notice of the violation from the United States Attorney General or the Secretary of Homeland Security.
- B. The County shall not suspend the contract of any business entity or contractor per subsection A. of this Section if, prior to the date of the violation, the business entity or contractor verifies the work authorization of any alleged unlawful workers using the E-Verify program and demonstrates the same to the County.
- C. The Executive may waive the suspension mandated by subsection A. or a disqualification mandated by PCC 2.106.022 after making a determination that a suspension or disqualification would substantially disrupt the operations of the County. The Executive shall provide notice to the Council within ten days of waiving a suspension or disqualification under this subsection.
- D. Every contract entered into by the County shall provide that any suspension for E-Verify noncompliance shall terminate one business day after a legal representative of the business entity or contractor submits, at a County office designated by the Executive, a declaration signed under penalty of perjury of the laws of the state, in the form provided by the County, stating with specificity that the violation has ended.

(Ord. 2009-74s § 1 (part), 2009)

**2.106.030 Purchasing Agent Position Created.**

- A. There is created the post of Pierce County Purchasing Agent (Agent), through whom all heads of County departments and departments of elected County officials shall make their purchases of every kind and character for and on account of Pierce County. The Agent shall prepare, award, and execute contracts and finally accept upon completion of work, with the exception of contracts for public works for public roads, which shall be

prepared, awarded, executed, and finally accepted upon completion of work by the Director of Public Works and Utilities Department, in accordance with procedures set forth in this Chapter.

- B. Within the limits of available technology and personnel capabilities:
  - 1. The Agent shall develop a system to collect information concerning the type, cost, quality, and annually consumed quantity of commonly used supplies, materials, and equipment and shall purchase such items in quantities for a period of time as determined by County-wide demand, volume purchase cost savings, storage costs, unique market conditions and other available information clearly indicating a continuing need for such items.
  - 2. The Agent shall develop a system to maintain current records of the amounts purchased off of each annual and blanket contract.

(Ord. 94-114S § 1 (part), 1995; Ord. 81-70 § 1 (part), 1981; Ord. 81-31 § 2 (part), 1981; prior Code § 2.04.030)

#### **2.106.035 Competitive Bidding for Public Works Projects.**

All Public Works construction shall be performed following competitive bidding by independent contractors when the projected value of a project exceeds \$25,000.00. (Pierce County Charter Section 9.15 as amended November 28, 1987.) (Ord. 88-18 § 1, 1988)

#### **2.106.040 Procedure for Purchases of Tangible Personal Property and Public Works.**

For all purchases of tangible personal property in excess of \$25,000.00, and public works purchases of \$10,000.00 or more, or such future limits as may be set by State Law, the Agent or designee shall prepare bid specifications and advertise for bids as required by State law. In addition, the Agent shall mail Invitations to Bid to a sufficient number of prospective bidders to elicit adequate competition, such vendors being drawn from established vendor lists and from any other source thought to be of advantage to the County.

The Agent shall have the authority to extend contracts entered into under the provisions of this Section upon the same terms, conditions, and consideration for a period of up to five years, when the Agent shall deem such extensions to be in the best interest of Pierce County. (Ord. 94-114S § 1 (part), 1995; Ord. 88-20 § 1, 1988; Ord. 81-31 § 2 (part), 1981; prior Code § 2.04.040)

#### **2.106.050 Procedure for Solicitation and Purchase of Service Contracts.**

- A. Annually, the Agent shall determine the County's anticipated requirements for any category or type of service and shall publish an announcement of these requirements. If the County later requires any further, previously unpublished services, it shall publish additional announcements on each occasion when such services are required. All such publications shall include a request that firms interested in providing those services to the County submit a statement of qualifications and performance data to be placed on file.
- B. Prior to entering into a service contract for an amount of \$5,000.00 or greater, the requesting department or the Agent, when appropriate, shall evaluate all statements on file, together with those that may be submitted by other firms and shall conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach. Written criteria shall then be developed in consultation with the requesting department, which will be used to determine which firm to recommend for contract award. Such criteria may include the following:

1. Quality of past performance;
  2. Known and documented expertise;
  3. Documentation, as required, and demonstration of financial capability to perform required work;
  4. Cost of performance, where appropriate.
- C. Prior to entering into service contracts between \$5,000.00 and \$25,000.00, at least three vendors, if possible, shall be contacted and provided with the scope of work, including the project description, with responses being submitted, either in writing or by phone. The requesting department or the Agent, when appropriate, shall rank the proposals submitted based on the criteria set forth in subsection B. of this Section and shall award to the vendor best meeting the needs of the County. In the event that a satisfactory contract cannot be negotiated with the highest ranked contractor, the requesting Department or Agent shall then begin negotiations with the next highest ranked contractor.
- D. Prior to entering into service contracts exceeding \$25,000.00, the Executive or designee shall:
1. Develop specifications with a project description in the form of a Request for Proposal in concert with the requesting County department;
  2. Publicly advertise the Request for Proposals and include the name of a contact person from whom the project specifications shall be available;
  3. Rank the proposals submitted based on the criteria set forth in subsection B. of this Section and award the contract in a manner that is in the best interest of the County; provided, that in the event the County fails to negotiate satisfactory terms with the highest ranked proposed contractor, the Executive shall then begin negotiations with the next highest ranked contractor;
- E. The selection of a Vendor for Architectural and Engineering services may be accomplished by following the procedures set forth by State law Chapter RCW 39.80 RCW.
- F. Exceptions to the competitive solicitation provisions of this Section:
1. Services of Special Deputy Prosecuting Attorneys.
  2. Services of attorney(s) appointed pursuant to legal mandate by the Courts or the Department of Assigned Counsel.
  3. Services (e.g., professional, forensic, technical, consultant) deemed necessary by the Courts or the Department of Assigned Counsel to provide effective assistance of counsel and services deemed necessary by the Prosecuting Attorney to provide effective legal representation.
  4. Appointment of service providers whose selection is solely within the discretion of the Courts.

The Executive or designee shall have the authority to modify service contracts to accomplish the original scope of services rendered to the County when it is deemed to be in the best interest of Pierce County; provided, the Executive or designee shall make a quarterly report to the Council's Fiscal Management Committee regarding all instances where additional compensation paid to the vendor exceeded 50 percent of the original contract amount and the original contract amount was \$5,000.00 or greater.

(Ord. 2008-65 § 1 (part), 2008; Ord. 94-114S § 1 (part), 1995; Ord. 88-20 § 2, 1988; Ord. 81-108 § 1, 1982; Ord. 81-70 § 1 (part), 1981; Ord. 81-31 § 2 (part), 1981; prior Code § 2.04.050)

**2.106.060 Exceptions to Competitive Formal Sealed Bid Procedures.**

**A. Small Purchases.**

1. In accordance with the provisions of RCW 36.32.245 and 36.32.250, the Agent is granted authority to let any contract, lease, or purchase of material, equipment, or services involving less than \$25,000.00 and public works under \$10,000.00, without advertisement and without formal competitive bidding; to prevent the artificial division of purchase requirements to constitute a small purchase under this Section, the Agent shall accumulate and consolidate purchase orders County wide, to the greatest extent possible, based on the ordering department's and the Agent's best knowledge of known quantity requirements at a known time. The Agent shall adopt procedures for purchases or leases of material, equipment, services, and supplies of less than \$5,000.00, and for public works purchases less than \$10,000.00.
2. In the case of purchases, except services and public works, for an amount between \$5,000.01 and \$10,000.00, the following procedures shall be followed:
  - a. Telephone and/or written quotations shall be obtained from at least three vendors, if possible, to assure establishment of a competitive price and to award such contract to the lowest responsible bidder.
  - b. Immediately after the award is made, the bid quotations or proposals obtained shall be recorded and opened to public inspection.
3. In the case of purchases, except services and public works from \$10,001.00 to \$25,000.00, the Agent shall follow the following procedures:
  - a. Requests for Quotation will be prepared and mailed to three or more vendors, if possible, such vendors being drawn from established vendor lists and from any other source thought to be of advantage to the County.
  - b. The Requests for Quotation shall be opened at a place and manner as specified by the Agent.
  - c. Award will be made to the lowest responsible bidder.
  - d. Immediately after the award is made, the bid quotations shall be recorded and opened to public inspection.
4. In the case of public works purchases from \$10,000.00 to \$200,000.00 the procedures of RCW 39.04.155 for small works contract awards process may be used.

**B. Single Source or Special Facilities, Services, or Market Conditions.** Purchases which are clearly and legitimately limited to a single known source of supply, and purchases involving special facilities, services, or market conditions may be acquired through direct negotiation with a single vendor.

**C. Used Equipment.**

1. The purchase of used equipment from private vendors is generally considered to be a purchase falling within the exceptions set forth in subsection B. of this Section. A County department desiring to purchase used equipment shall be responsible to determine what used equipment is available on the market and properly record this search. The purchase request must fully justify the acquisition of used equipment.
2. In the case of purchases in excess of \$25,000.00, notice of the intention to purchase the used equipment, a description of the equipment, and a deadline for submitting bids to sell, shall be advertised by publishing a notice at least one week prior to said deadline in the legal newspaper or appropriate trade journal. The notice so published shall state that anyone desiring to sell to the County similar used equipment should contact the Agent for full requirements of the equipment, and then submit a bid in

writing to the location specified by the Agent stating the equipment offered; the sale price; the owner's name, address, and phone number; and time and place where the equipment can be seen.

3. The Agent, with the assistance of the requesting department, shall review all bids and make an award as best meets the needs of the County. On bids exceeding \$50,000.00, the Executive shall make the award.

D. Service contracts subject to the provisions of Section 2.106.050.

E. Credit Card Purchases. The Agent shall:

1. Establish and maintain all credit arrangements with appropriate vendor(s) or credit card companies.
2. Promulgate policies and procedures governing their use, including but not limited to:
  - a. Authorization, distribution, and credit limits associated with credit cards;
  - b. Revocation for misuse;
  - c. System for control of payment process.

Personal use of official credit cards is prohibited. Cash advances on credit cards are prohibited. Cards must be surrendered to the Department of Budget and Finance if used in a manner which is inconsistent with County policy.

(Ord. 2008-65 § 1 (part), 2008; Ord. 2002-2 § 1, 2002; Ord. 94-114S § 1 (part), 1995; Ord. 81-70 § 1 (part), 1981; Ord. 81-31 § 2 (part), 1981; prior Code § 2.04.060)

#### **2.106.070 Emergency Purchases.**

- A. For purposes of this Section, an "Emergency" shall exist when the public interest or property of Pierce County would suffer material injury or damage by delay, or when there exists a threat to public health, safety, or welfare by reason of the time required to follow Pierce County's regular contracting procedures, the Executive or designee may dispense with such procedures consistent with the provisions of this Section; provided that such contracting shall be made with such completion as is practicable under the circumstances. A written finding of the existence of such emergency must be made by the Executive or designee and duly entered of record.
- B. The provisions of this Section shall not apply to emergencies governed by Chapter 38.52 RCW as it now exists or is hereafter amended; provided, during the duration of such an emergency, the Executive shall report to the Council at least every seven days.
- C. In the event of an emergency and upon declaring its existence the Executive, or the official authorized by Chapter 2.118 PCC for declarations subject to that Chapter, in consultation with the Prosecuting Attorney, may waive the requirements of Sections 2.106.040 and 2.106.050 PCC.
- D. For all emergency purchases, the Executive or designee shall declare an emergency and contact at least three vendors to the extent practicable under the circumstances and provide them with a scope of work. The Executive or designee shall award to the vendor who best meets the needs of the County as outlined in the scope of work. The Executive or designee shall make a quarterly report to the Council's Fiscal Management Committee setting forth for each emergency purchase the name of the vendor, a summary of the services performed or goods provided, the amount of the emergency purchase and a summary of the written finding made pursuant to subsection A. of this Section.
- E. In addition to the requirements of subsection D. of this Section, the Executive shall, for emergency purchases that have a value of \$50,000.00 or more, report such emergency purchases to the Council within five days of declaring the emergency and provide a