School districts may enter into interlocal or interagency agreements with educational service districts for construction management services, value engineering reviews, constructability reviews, or building commissioning without seeking competitive bids if, but only if, the project’s estimated cost is less than $100,000.

School districts are required to solicit competitive bids in order to engage in “other public works,” even if the school district acts through an interlocal or interagency agreement with an educational service district.

April 21, 2020

The Honorable Michelle Caldier
Representative, District 26
PO Box 40600
Olympia, WA 98504-0600

Dear Representative Caldier:

By email previously acknowledged, you requested an opinion on a question that we paraphrase and divide into two questions for clarity:

1. May a school district enter into an interlocal or interagency agreement with an educational service district for construction management services, value engineering reviews, constructability reviews, or building commissioning without seeking competitive bids?

2. May a school district enter into an interlocal or interagency agreement with an educational service district for other public works without seeking competitive bids?

**BRIEF ANSWER**

1. Yes, but only if the project’s estimated cost is less than $100,000. Under RCW 28A.335.190, when the cost of buildings, improvements, repairs, or “other work” exceeds a statutory cost threshold, competitive bidding applies. RCW 28A.335.190(4) contains a cost
threshold of $100,000 in estimated cost, which applies to construction management services, value engineering reviews, constructability reviews, and building commissioning, unless the contract is let using the small works roster process described in RCW 39.04.155 or any other procedure authorized for school districts.

2. Yes, but only if the project’s estimated cost is less than $100,000. Under RCW 28A.335.190, when the cost of buildings, improvements, repairs, or “other work” exceeds a statutory cost threshold, competitive bidding applies. RCW 28A.335.190(4) contains a cost threshold of $100,000 in estimated cost, which applies to other public works projects, unless the contract is let using the small works roster process described in RCW 39.04.155 or any other procedure authorized for school districts.

BACKGROUND

A school district is a legislatively created municipal or quasi municipal corporation. Federal Way Sch. Dist. 210 v. Vinson, 172 Wn.2d 756, 765, 261 P.3d 145 (2011). School districts operate local schools, including constructing and maintaining the school buildings. RCW 28A.320.015 (general powers of school boards); RCW 28A.335.010(1) (maintenance and operation of school buildings); RCW 28A.335.190(4) (improvements to school property).

Educational service districts (ESDs) “are ‘regional agencies’” created “to provide various services to local school districts and the state superintendent of public instruction.” AGO 2012 No. 5, at 3 (quoting RCW 28A.310.010); see also AGLO 1977 No. 39 (describing an ESD as a political subdivision). Among their functions, ESDs establish cooperative service programs and joint purchasing programs with school districts for the joint purchase of supplies, equipment, and services. RCW 28A.310.180(3); RCW 28A.320.080(3). State law authorizes ESDs to enter into contracts for the “joint financing” of such programs and “employ consultants and legal counsel relating to any of the duties, functions, and powers of educational service districts.” RCW 28A.310.200(9).

Your questions relate to a program established by Educational Service District 112 known as the Construction Services Group Program. ESD 112 describes the Program as a cooperative service program that “provides facilities planning, project/construction management, building commissioning, value engineering, constructability review, and furniture and equipment planning services to educational institutions.” Construction Services Group Program at 1 (information sheet enclosed with Email from Marnie Allen, Assistant Superintendent, Educational Service District 112, to Jeff Even, Deputy Solicitor General, Office of Attorney General (Aug. 10, 2018)). The program is not geographically limited to school districts within the boundaries of ESD 112 and “has provided services to 194 school districts throughout the state of Washington.” Id. According to its own materials, “CSG does not provide public works services to build schools, make improvements to school facilities or property, or provide staff to perform construction work in school districts.” Id. at 2.
The four services you ask about are required for school districts that participate in a state construction assistance program. WAC 392-343-102, WAC 392-344-068 (construction management); WAC 393-344-067 (building commissioning); WAC 392-344-065, WAC 392-343-080 (value engineering); WAC 392-344-066 (constructability review). Once the superintendent of public instruction has completed a project site review, a district has authority to complete a value engineering study and constructability review and to contract for building commissioning and construction management. WAC 392-342-040.

ANALYSIS

1. May a school district enter into an interlocal or interagency agreement with an educational service district for construction management services, value engineering reviews, constructability reviews, or building commissioning without seeking competitive bids?

You ask whether a school district must comply with competitive bidding requirements in order to acquire the four services mentioned in your question, even if those services are acquired through an interlocal or interagency agreement with an ESD. We conclude that competitive bidding is required under RCW 28A.335.190 if the estimated cost of the project exceeds $100,000, unless the contract is let using the small works roster process or any other procedure authorized for school districts.

State law often requires that public entities solicit competitive bids before contracting for certain goods or services. Competitive bidding is often required “to obtain the advantages of free and fair competition for the benefit of the general public.” A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist. 303, 5 Wn. App. 887, 889-90, 491 P.2d 684 (1971). But competitive bidding is only required if there is “a constitutional, statutory, or charter provision requiring such a course to be pursued.” Dalton v. Clarke, 18 Wn.2d 322, 329, 139 P.2d 291 (1943); see also Petschl v. Century 21 Corp., 61 Wn.2d 276, 283, 377 P.2d 991 (1963).

We first consider whether any statute requires a school district to solicit competitive bids before contracting for construction management services, value engineering reviews, constructability reviews, or building commissioning.

You suggest two statutes that might require competitive bidding. The first statute is RCW 28A.335.190, which relates to work and purchases undertaken by school districts (copy attached). RCW 28A.335.190(1) requires school districts to engage in competitive bidding when the cost of “any furniture, supplies, equipment, building, improvements, or repairs, or other work or purchases, except books, will equal or exceed the threshold levels specified in subsections (2) and (4) of this section[.]” Subsection (2) sets cost thresholds for “furniture, equipment, or supplies, except books[.]” Subsection (4) requires competitive bidding “[w]henever the estimated cost of a
building, improvement, repair, or other public works project is one hundred thousand dollars or more[.]” RCW 28A.335.190(4). Under subsection (4), a school district can improve or repair district property without competitive bidding if the improvements and repairs do not exceed $75,000.

a. Construction management services, value engineering reviews, constructability reviews, and building commissioning are “other work” under RCW 28A.335.190 subject to competitive bidding requirements

The threshold question under RCW 28A.335.190 is whether the cost of construction management services, value engineering reviews, constructability reviews, and building commissioning can be considered the cost of any “building,” “improvements,” “repairs,” or “other work” under RCW 28A.335.190(1). If so, the cost thresholds in RCW 28A.335.190(2) and (4) apply to determine whether districts must obtain competitive bids.

The legislature has delegated the authority to define construction management services, value engineering reviews, constructability reviews, and building commissioning to the Office of the Superintendent of Public Instruction (OSPI). RCW 28A.525.090(1). OSPI has adopted rules defining each of those terms:

• “Construction management” means “the process of professional management applied to a construction program for the purpose of controlling time, cost, and quality.” WAC 392-343-102.

• “Value engineering study” means “a cost control technique which is based on the use of a systematic, creative analysis of the functions of the facility with the objective of identifying unnecessary high costs or functions and/or identifying cost savings that may result in high maintenance and operation costs.” WAC 392-343-080.

• “Constructability review” means “a cost control technique which is based on the review of project documents by mechanical, electrical, structural, construction, and design professionals prior to a request for bids.” WAC 392-343-080.

• “Building commissioning” means “the process of verifying that the installation and performance of selected building systems meet or exceed the specified design criteria and therefore satisfy the design intent.” WAC 392-343-080.

The legislature did not define “building,” “improvements,” “repairs,” or “other work” in its competitive bidding statute. Where the legislature has not defined a term, the court will give the term the plain and ordinary meaning ascertained from a standard dictionary. See State v. Watson, 146 Wn.2d 947, 956, 51 P.3d 66 (2002).

Regardless of whether the four services fit within the plain and ordinary meaning of “building,” “improvements,” or “repairs” (which some of them may), we conclude that they would qualify as “other work” under RCW 28A.335.190(1).1 The term “other work” in RCW 28A.335.190(1) is sufficiently broad to encompass work that is not specifically enumerated in that subsection. Painting & Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist., 96 Wn.2d 806, 810, 638 P.2d 1220 (1982). In Painting & Decorating Contractors, the Court rejected a school district’s argument that because a painting project was “maintenance,” a term that was not included in the predecessor to RCW 28A.335.190(1), competitive bidding requirements did not apply. Id. at 810-11. The Court determined that the district’s position ignored the phrase “or other work” in the statute. Id. at 810. As the Court explained, “if the painting was neither an improvement nor repair work it must logically be classified as ‘other work’ within the contemplation of RCW 28A.58.135.”2 Id. Because the painting project was “other work” and met the statute’s cost threshold, competitive bidding requirements applied. Id. at 812.

It follows that even if the costs of construction management services, value engineering reviews, constructability reviews, and building commissioning are not considered to be the costs of building, improvements, or repairs, these costs would be the costs of “other work” under RCW 28A.335.190(1). Under the statute, there must be competitive public bidding if the relevant cost threshold is met. Former RCW 28A.58.135(1) (1989); see Painting & Decorating Contractors, 96 Wn.2d at 811.

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1 Because we conclude that the four services qualify as “other work” under RCW 28A.335.190(1) we do not need to separately analyze whether the four services may also qualify as “building,” “improvements,” or “repairs” under RCW 28A.335.190(1). However, we note that each of the four services that you ask about would likely fit within the plain and ordinary meaning of “building” under RCW 28A.335.190(1) because each is involved in the art and business of assembling materials into a structure. Construction management occurs “[p]rior to commencing with project design.” WAC 392-343-102. A school district must prepare a value engineering study, complete a constructability review, and perform building commissioning “[a]t the appropriate time in the design process” for all school facilities over 50,000 square feet. WAC 392-343-080. So each of these four services must be completed before or during the design of a school facility, which is a necessary part of the art and business of assembling the structure.

2 In 1990, the legislature recodified RCW 28A.58.135 as RCW 28A.335.190. Laws of 1990, ch. 33, § 4. The legislature has not amended the list of items subject to competitive bidding—“furniture, supplies, equipment, building, improvements, or repairs, or other work or purchases, except books”—since the Painting & Decorating Contractors case.
b. The cost threshold for “other work” under RCW 28A.335.190(4) is $100,000

The relevant cost threshold is $100,000. See RCW 28A.335.190(4). The statute contains two cost thresholds that determine whether a school district must seek competitive bids. The first threshold, in RCW 28A.335.190(2), does not apply here because it is limited to purchase of “furniture, equipment, or supplies, except books.” The second threshold, in RCW 28A.335.190(4), requires competitive bidding whenever “the estimated cost of a building, improvement, repair, or other public works project is one hundred thousand dollars or more[.]” This threshold applies here because “other work” that a school district undertakes concerning its property is a “public works project.”

The ordinary meaning of “public works” supports our conclusion that any “other work” that a school district undertakes concerning its property is a “public works project,” such that the cost threshold in RCW 28A.335.190(4) applies. The legislature did not define “public work” or “public works project” in RCW 28A.335, the chapter in the Revised Code of Washington that applies to school districts’ property.3 So the plain and ordinary meaning of those terms would apply. Watson, 146 Wn.2d at 956. The ordinary meaning of “public works” is “works (such as schools, highways, docks) constructed for public use or enjoyment especially when financed and owned by the government[,]” Public Works, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/public%20works (last visited Apr. 13, 2020). “Other work” fits within this definition. Other work that school districts undertake on their school facilities is for public use and enjoyment, and such work is financed by a public entity, the school district. See Federal Way Sch. Dist. 210, 172 Wn.2d at 765. It is public work.

Reading RCW 28A.335.190 as a whole also suggests that any “other work” that a school district undertakes concerning its property is a “public works project,” such that the cost threshold in RCW 28A.335.190(4) applies. The legislature used “public work” in two places in the statute. It used the term in directing school districts about how to determine whether its projects meet the cost threshold: “The cost of any public work, improvement, or repair for the purposes of this section shall be the aggregate of all amounts to be paid for labor, material, and equipment on one continuous or interrelated project where work is to be performed simultaneously or in close sequence.” RCW 28A.335.190(1) (emphasis added). And, as discussed above, it used “public works project” when setting a cost threshold for public bidding: “Whenever the estimated cost of a building, improvement, repair, or other public works project is one hundred thousand dollars or more, the public bidding process provided in subsection (1) of this section shall be followed . . . .” RCW 28A.335.190(4) (emphasis added).

3 In Painting & Decorating Contractors, the Court concluded that the definition of “public work” in RCW 39.04.010(4), a subsection of the Revised Code of Washington that applies to public contracts, did not apply when interpreting the competitive bidding procedures in RCW 28A.335.190. Painting & Decorating Contractors, 96 Wn.2d at 811.
Courts harmonize related statutory provisions to effectuate a consistent statutory scheme that maintains the integrity of the respective statutes. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). The relevant portion of the series of activities at issue in RCW 28A.335.190(1)—“building, improvements, or repairs, or other work or purchases”—parallels the language of the cost threshold in RCW 28A.335.190(4)—“building, improvement, repair, or other public works project[.]” This parallel construction suggests that the legislature had “other work” in mind when referring to “public works project.” Interpreting “other work” that a school district undertakes on its property to be “public work” harmonizes the statute’s different sections.

c. **RCW 39.26.120 does not apply to school districts**

The other statute you ask about is RCW 39.26.120. RCW 39.26 governs the procurement of goods and services by state agencies. RCW 39.26.005. The chapter defines “agency” as “any state office or activity of the executive and judicial branches of state government, including state agencies, departments, offices, divisions, boards, commissions, institutions of higher education, . . . and correctional and other types of institutions.” RCW 39.26.010(1). A school district is not a subdivision of the executive or judicial branches of state government. Rather, it is a legislatively created municipal or quasi municipal corporation. *Federal Way Sch. Dist. 210*, 172 Wn.2d at 765. It is therefore not an “agency” as defined by RCW 39.26, and it is not bound by the requirements of RCW 39.26.120.

A different statute authorizes school districts to contract for construction management services, value engineering reviews, constructability reviews, or commissioning procedures. “The board of directors of a school district may contract for goods and services, including but not limited to contracts for goods and services as specifically authorized in statute or rule, as well as other educational, instructional, and specialized services.” RCW 28A.320.035(1).

We conclude that RCW 28A.335.190 requires a school district to solicit competitive bids to acquire construction management services, value engineering reviews, constructability reviews, and commissioning procedures for projects of one hundred thousand dollars or more. For projects that meet this cost threshold, the school district cannot obtain those services directly or through an interlocal or interagency agreement with an ESD without competitive bidding.

2. **May a school district enter into an interlocal or interagency agreement with an educational service district for other public works without seeking competitive bids?**

This second question differs from the first question in that you expressly ask about “other public works” rather than about specific services. This question is therefore much more general than your first question. We conclude that a school district entering into an interlocal or interagency agreement with an ESD for “other public works” must solicit competitive bids. RCW 28A.335.190(4). There are two exceptions under which competitive bids would not be required: if the estimated cost falls below $100,000 or if the work can be completed through a small works roster. RCW 28A.335.190(4). If competitive bids are required, then the use of an interlocal or interagency agreement with an ESD would not eliminate that requirement.
The legislature enacted the Interlocal Cooperation Act so that public agencies could cooperate to provide services and facilities to their respective communities more efficiently. RCW 39.34.010. The Act “provides general authority for two or more public agencies to undertake joint or cooperative action under RCW 39.34.030, and to enter into interagency agreements under RCW 39.34.080 to perform any governmental service or activity which each public agency entering into the contract is authorized by law to perform.” AGO 2011 No. 2, at 4. The Act accordingly provides authority for governmental entities to act jointly only if both would independently have the authority to take the action called for in a contract. AGO 2011 No. 2, at 4.

A school district and an ESD are both public agencies as defined by the Act. The Act includes “political subdivisions,” “municipal corporations,” and “quasi municipal corporations” as public agencies. RCW 39.34.020(1). Both entities therefore fall under the Act’s definition of public agency. As public agencies, a school district and an ESD may enter into agreements with one another under the purview of the Act.

However, the Act directs that “[n]o agreement made pursuant to this chapter relieves any public agency of any obligation or responsibility imposed upon it by law[.]” RCW 39.34.030(5). Any public agency entering into an agreement under the Act with another public agency, such as school districts and ESDs, must comply with any legal obligation or responsibility imposed upon it by the Act or elsewhere. The Act does not supplant any other legal obligations or responsibilities applicable to a public agency. RCW 39.34.030(5).

School districts must solicit competitive bids for “other public works project[s]” when the estimated cost exceeds $100,000, unless the contract is let using the small works roster process. RCW 28A.335.190(4). The use of an interlocal or interagency agreement does not relieve a school district of this requirement. RCW 39.34.030(5). This is so even though ESDs have broad statutory authority to cooperate contractually with school districts. RCW 28A.310.180(3), .200(9). The cited statutes grant ESDs broad authority to work with school districts to provide services that school districts would otherwise provide directly, but do not excuse school districts from their own statutory obligations.

We trust that the foregoing will be useful to you.

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Attorney General

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wro
RCW 28A.335.190

Advertising for bids—Competitive bid procedures—Purchases from inmate work programs—Telephone or written quotation solicitation, limitations—Emergencies.

(1) When, in the opinion of the board of directors of any school district, the cost of any furniture, supplies, equipment, building, improvements, or repairs, or other work or purchases, except books, will equal or exceed the threshold levels specified in subsections (2) and (4) of this section, complete plans and specifications for such work or purchases shall be prepared and notice by publication given in at least one newspaper of general circulation within the district, once each week for two consecutive weeks, of the intention to receive bids and that specifications and other information may be examined at the office of the board or any other officially designated location. The cost of any public work, improvement, or repair for the purposes of this section shall be the aggregate of all amounts to be paid for labor, material, and equipment on one continuous or interrelated project where work is to be performed simultaneously or in close sequence. The bids shall be in writing and shall be opened and read in public on the date and in the place named in the notice and after being opened shall be filed for public inspection.

(2) Every purchase of furniture, equipment, or supplies, except books, the cost of which is estimated to be in excess of forty thousand dollars, shall be on a competitive basis. The board of directors shall establish a procedure for securing telephone and/or written quotations for such purchases. Whenever the estimated cost is from forty thousand dollars up to seventy-five thousand dollars, the procedure shall require quotations from at least three different sources to be obtained in writing or by telephone, and recorded for public perusal. Whenever the estimated cost is in excess of seventy-five thousand dollars, the public bidding process provided in subsection (1) of this section shall be followed.

(3) Any school district may purchase goods produced or provided in whole or in part from class II inmate work programs operated by the department of corrections pursuant to RCW 72.09.100, including but not limited to furniture, equipment, or supplies. School districts are encouraged to set as a target to contract, beginning after June 30, 2006, to purchase up to one percent of the total goods required by the school districts each year, goods produced or provided in whole or in part from class II inmate work programs operated by the department of corrections.

(4) The board may make improvements or repairs to the property of the district through a department within the district without following the public bidding process provided in subsection (1) of this section when the total of such improvements or repairs does not exceed the sum of seventy-five thousand dollars. Whenever the estimated cost of a building, improvement, repair, or other public works project is one hundred thousand dollars or more, the public bidding process provided in subsection (1) of this section shall be followed unless the contract is let using the small works roster process in RCW 39.04.155 or under any other procedure authorized for school districts. One or more school districts may authorize an educational service district to establish and operate a small works roster for the school district under the provisions of RCW 39.04.155.
(5) The contract for the work or purchase shall be awarded to the lowest responsible bidder as described in RCW 39.26.160(2) but the board may by resolution reject any and all bids and make further calls for bids in the same manner as the original call. On any work or purchase the board shall provide bidding information to any qualified bidder or the bidder’s agent, requesting it in person.

(6) In the event of any emergency when the public interest or property of the district would suffer material injury or damage by delay, upon resolution of the board declaring the existence of such an emergency and reciting the facts constituting the same, the board may waive the requirements of this section with reference to any purchase or contract: PROVIDED, That an “emergency,” for the purposes of this section, means a condition likely to result in immediate physical injury to persons or to property of the school district in the absence of prompt remedial action.

(7) This section does not apply to the direct purchase of school buses by school districts and educational services in accordance with RCW 28A.160.195.

(8) This section does not apply to the purchase of Washington grown food.

(9) At the discretion of the board, a school district may develop and implement policies and procedures to facilitate and maximize to the extent practicable, purchases of Washington grown food including, but not limited to, policies that permit a percentage price preference for the purpose of procuring Washington grown food.

(10) As used in this section, “Washington grown” has the definition in RCW 15.64.060.

(11) As used in this section, “price percentage preference” means the percent by which a responsive bid from a responsible bidder whose product is a Washington grown food may exceed the lowest responsive bid submitted by a responsible bidder whose product is not a Washington grown food.