

HOUSE BILL REPORT

2SSB 5662

As Reported by House Committee On:
State Government & Tribal Affairs
Capital Budget

Title: An act relating to establishing a preference for resident contractors on public works.

Brief Description: Concerning preferences for in-state contractors bidding on public works.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Conway, Chase, Kline, Shin, Keiser, Kohl-Welles, White, Roach, Hobbs, Nelson, Prentice, Haugen and Fraser).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 3/16/11, 3/24/11 [DPA];

Capital Budget: 3/28/11, 3/29/11 [DP(w/oSGTA amd)].

Brief Summary of Second Substitute Bill

- Requires the Department of General Administration (GA) to conduct a two-step survey to determine which states provide a preference on public works projects to resident contractors.
- Requires that reciprocity be applied on public works projects in the event a bid is received from a nonresident contractor from a state that provides a preference to resident contractors.
- Requires the GA to adopt rules and procedures, and recommend draft legislation to implement the reciprocity provisions.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: Do pass as amended. Signed by 7 members: Representatives Hunt, Chair; Taylor, Ranking Minority Member; Darneille, Dunshee, Hurst, McCoy and Miloscia.

Minority Report: Do not pass. Signed by 4 members: Representatives Appleton, Vice Chair; Overstreet, Assistant Ranking Minority Member; Alexander and Condotta.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Marsha Reilly (786-7135).

Background:

Award of Public Works Contracts.

Contracts for public works projects are generally awarded to the responsible bidder submitting the lowest responsive bid. A responsible bidder must be licensed; have a current state unified business identifier number, if applicable; have industrial insurance coverage for the bidder's employees working in Washington, an Employment Security Department number, and a state excise tax registration number; and not be disqualified from bidding based on noncompliance with licensing requirements, noncompliance with state apprenticeship requirements, or prevailing wage violations.

Resident Contractor Preferences.

Resident contractor preference laws give residents a bidding advantage over nonresident contractors. Often such statutes mandate that public works contracts be awarded to resident contractors when their bids are not more than a certain percent higher than the bids of nonresident contractors. While resident contractor laws have been challenged, the majority of courts have upheld these laws.

Reciprocal Contractor Preference Laws.

Some states have reciprocal contractor preference laws. These laws apply a preference only against contractors from states with a contractor preference law in place, applying the same degree of discrimination against nonresident contractors that the nonresident's state applies against out-of-state contractors.

Summary of Amended Bill:

The Department of General Administration (GA) must conduct a survey to determine which states provide a preference for their resident contractors on public works projects. The survey must be completed by November 1, 2011, and the GA must submit a report detailing the results of the survey to the appropriate committees of the Legislature by December 1, 2011. The report must also include recommendations necessary to implement the intent of the act.

The GA must distribute the survey results to all state and local agencies that have the authority to procure public works, as well as the requirements contained in the act. The reciprocity provisions do not take effect until the GA adopts rules and procedures. In any bidding process for public works in which a bid is received from a nonresident contractor from a state that provides a percentage bidding preference, a comparable percentage disadvantage must be applied to the bid of that nonresident contractor.

A nonresident contractor from a state that provides a preference is defined as a contractor who: (1) is not registered or licensed, or otherwise legally authorized to perform public works construction in Washington; and (2) at the time of bidding on a public works project, does not have a physical office located in Washington.

If any part of the act is in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state or municipality, the conflicting part of the act is inoperative.

Amended Bill Compared to Second Substitute Bill:

The amendment strikes the underlying bill and makes the following changes: eliminates the two-step survey process; requires a report of the survey, along with recommendations necessary to implement the intent of the act, be submitted to the appropriate committees of the Legislature by December 1, 2011; requires that a nonresident contractor from a state that provides a percentage preference receive an equitable percentage disadvantage to his or her bid; requires the GA to adopt rules and procedures to implement reciprocity provisions, and clarifies that reciprocity provisions do not apply until rules and procedures are adopted; and provides a definition for nonresident contractor.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill has had an interesting path and an interesting change. It came about as a concept to generate jobs for our citizens and resident contractors. There are a lot of out-of-state contractors with out-of-state crews doing work in our state and taking advantage of our state's benefits. The bill was redrafted to address preferences provided in other states. Several states do have preference laws. Because of the concern of providing preferences, the bill was redrafted as a reciprocity law.

The bill needs to be amended to require contractors to use the E-Verify program on their employees. Several counties currently require E-Verify of their employees. People who use illegal labor have an unfair advantage over others.

The building trades are in favor of the bill as amended. It is a good way to employ more Washington citizens, and a better investment of capital. Workers' compensation is going to out-of-state workers. The bill offers a fair treatment in response to those states that offer preferences. Building is the foundation of our economy. Twenty-two states provide preferences to their contractors, and 16 states have reciprocity laws. The bill puts Washington on the same footing as other states. Contractors, and their workers, come from

all over the United States because Washington has a stronger economy and there is no state income tax. The bill will put Washington contractors and workers on even footing with other states.

The bill has taken a huge turn, but a good turn. Its opponents argued that the original provisions of the bill interfere with commerce clauses and reciprocal laws. There are three types of preferences: absolute preferences, percentage preferences, and tie-bid preferences. Idaho offers a 95 percent preference for their workers. The bill requires the GA to do what they already do for procurement.

While the GA appreciates the changes reflected in the substitute version of the bill, it suggests that a definition of an in-state contractor be provided in the bill, which would add clarity for conducting the survey. The GA proposes that it provide a report to the Legislature with recommendations for legislation. The survey the GA does now is for procurement, and does not always include contracting for public works.

The bill is about fair play and not lending government credit. That is what happens when out-of-state contractors have preferences. Different states have different costs, and there should be a fair playing field. An E-Verify requirement should be added. E-Verify is a no-fee program sponsored by the federal government. The Department of Labor and Industries pays for medical procedures for workers from other states and other countries. The jobs that we do have here should be for legal citizens.

(With concerns) The bill is substantially different than originally proposed. However, there are some issues that still need work, such as a definition of an in-state contractor, when the statute becomes effective, and issues regarding requirements for federal funding. There are risks and consequences regarding how the law will be applied. The Washington Ports have some concerns with the bill, but appreciate the underlying concept. Implementation of reciprocity provisions should not take place until after the survey. There is generally a lack of clarity in the bill. There are concerns with how the bill might affect bid protests and other unintended consequences. The GA should provide a report to the Legislature, rather than legislation, in order to allow for stakeholder input.

(Opposed) None.

Persons Testifying: (In support) Senator Conway, prime sponsor; Jack Tipping; Robin Roy; Terri Tilton, Washington State Building and Construction Trades Council; Nicole Grant, Certified Electrical Workers of Washington; Randy Loomans, International Union of Operating Engineers Local 302; John Lynch, Department of General Administration; Craig Keller; and Steve Ross.

(With concerns) Van Collins, Associated General Contractors; Ginger Eagle, Washington Public Ports Association; and Ashley Probart, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON CAPITAL BUDGET

Majority Report: Do pass without amendment by Committee on State Government & Tribal Affairs. Signed by 6 members: Representatives Dunshee, Chair; Ormsby, Vice Chair; Jinkins, Lytton, Moeller and Tharinger.

Minority Report: Do not pass. Signed by 4 members: Representatives Zeiger, Assistant Ranking Minority Member; Asay, Pearson and Smith.

Staff: Steve Masse (786-7115).

Summary of Recommendation of Committee On Capital Budget Compared to Recommendation of Committee On State Government & Tribal Affairs:

The bill as passed the Capital Budget Committee requires the Department of General Administration (GA) to conduct a survey in two steps to determine which states provide a preference on public works projects to resident contractors. Based on the survey results, the GA will recommend draft legislation that will require a comparable advantage be given to in-state contractors on public works projects in the event a bid is received from a nonresident contractor from a state that provides a preference to resident contractors.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 26, 2011.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The unemployment rate for the construction industry is still very high in Washington. Giving in-state contractors an advantage helps them and provides a level playing field when bidding against out-of-state contractors that have rules for giving in-state contractors preference.

(In support with concerns) There is no clear definition of how the reciprocal will be applied, and how in-state and out-of-state contractors are determined.

(Other) This will create more work for contracting offices, and may lead to more claims from out-of-state contractors. It will cost more in fees and potential claims.

(Opposed) None.

Persons Testifying: (In support) Nicole Grant, Certified Electrical Workers of Washington; Rebecca Johnson, Washington State Labor Council; and David Johnson, Washington State Building and Construction Trades Council.

(In support with concerns) Randy Loomans, International Union of Operating Engineers Local 302.

(Other) Van Collins, Associated General Contractors; Ginger Eagle, Washington Public Ports Association; and Sean Eagan, Port of Tacoma.

Persons Signed In To Testify But Not Testifying: None.