

HOUSE BILL REPORT

HB 1897

As Reported by House Committee On:
Technology & Economic Development

Title: An act relating to ensuring fairness and compliance with public works and procurement practices.

Brief Description: Concerning ensuring fairness and compliance with public works and procurement practices.

Sponsors: Representatives Gregerson, Santos and Stanford.

Brief History:

Committee Activity:

Technology & Economic Development: 2/8/17, 2/14/17, 1/10/18, 1/25/18 [DPS].

Brief Summary of Substitute Bill

- Requires the Office of Minority and Women's Business Enterprises (OMWBE) to annually identify state agencies and educational institutions with low levels of participation by minority and women owned businesses in the execution of public contracts.
- Establishes an investigation unit within the OMWBE.
- Repeals the authority of the Attorney General to investigate and enforce compliance with certain requirements regarding contracts with minority and women-owned businesses.
- Modifies small-works roster and limited public-works process requirements.

HOUSE COMMITTEE ON TECHNOLOGY & ECONOMIC DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Morris, Chair; Kloba, Vice Chair; Tarleton, Vice Chair; Smith, Ranking Minority Member; Doglio, Fey, Harmsworth, Hudgins, Santos, Slatter and Wylie.

Minority Report: Do not pass. Signed by 5 members: Representatives DeBolt, Assistant Ranking Minority Member; Manweller, McDonald, Steele and Young.

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.

Minority Report: Without recommendation. Signed by 1 member: Representative Nealey.

Staff: Kirsten Lee (786-7133).

Background:

Office of Minority and Women's Business Enterprises.

The Office of Minority and Women's Business Enterprises (OMWBE) was created to provide minority and women-owned and controlled businesses with the maximum practicable opportunity for increased participation in public-works contracts and public contracts for goods and services.

Among other duties, the OMWBE must identify barriers to equal participation by qualified businesses in all state agency and educational contracts and must establish annual goals for participation by qualified businesses for each state agency and educational institution. The OMWBE is the sole authority in Washington for certifying minority, women-owned, and socially and economically disadvantaged business enterprises. Certified business enterprises are listed in the OMWBE database, which is used by cities, counties, state agencies, transportation, and educational institutions to source small and diverse firms for potential contracting opportunities.

Prohibited Activities.

Certain activities with respect to certification of and contracts with minority and women-owned businesses are prohibited. A person, firm, corporation, business, union, or other organization may not:

- prevent or interfere with a contractor's compliance with the OMWBE-related laws and rules;
- submit false or fraudulent information;
- fraudulently obtain, retain, or attempt to obtain or retain certification;
- knowingly make a false statement to a state official or employee for the purpose of influencing certification or denial of certification;
- knowingly obstruct, impede, or attempt to obstruct or impede any state official or employee who is investigating the qualification of a business entity applying for certification;
- fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain public monies to which the person is not entitled; or
- knowingly make false statements that an entity is or is not certified for purposes of obtaining a contract.

Enforcement.

The state may impose penalties for violations of the OMWBE-related laws and rules, including for acts of misrepresentation and fraud used to obtain or retain certification, as well as violations of contract requirements. For any violation, the state may withhold payment, debar the contract, suspend or terminate the contract, and impose civil penalties of up to 10 percent of the contract amount or up to \$5,000.

For a willful and repeated violation, a contractor may be disqualified from state contracts for a period of up to three years. The OMWBE must adopt rules that identify criteria for the imposition of penalties.

The Attorney General may enforce laws and rules with respect to the OMWBE programs and certification procedures. The Attorney General may conduct investigations by compelling the production of documents, oral testimony, and answers to interrogatories and may file for civil injunctive relief.

Small-Works Roster and the Limited Public-Works Process.

Public work includes all work, construction, alteration, and repair or improvement other than ordinary maintenance that is executed at a cost to the state or a local government. For public works projects estimated to cost \$300,000 or less, state agencies and expressly authorized local governments may use the small-works roster process to award contracts. A small-works roster includes any responsible contractor who requests to be on the roster, which may be a single general list or lists for specialties or categories of work. Under the small-works process, instead of advertising the contract opportunity, the state agency or local government may solicit bids from at least five contractors on the appropriate small-works roster. After soliciting the bids, the state agency or local government awards the contract to the lowest responsible bidder.

The small-works roster process also allows for a limited public-works process for projects estimated to cost \$35,000 or less. Under the limited public-works process, the state agency or local government solicits bids from at least three contractors from the appropriate small-works roster and awards the contract to the lowest responsible bidder. For limited public-works projects, the state agency or local government may waive payment, performance bond, and retainage requirements. "Retainage" means a portion, not to exceed 5 percent, of the contractor's payment that is withheld by the contracting agency until the project is complete. The retainage is used to satisfy claims that a person, such as a laborer or supplier, may have under the contract and to pay any taxes or penalties that may be due from the contractor. In instances where retainage is not waived, certain notice of completion requirements apply that require the Department of Revenue, Employment Security Department, and Department of Labor and Industries to certify, upon completion of a contract of over \$35,000, that the contractor has paid all taxes, increases, and penalties due before retained funds are released.

A state agency or local government may use the limited public-works process to solicit and award small-works roster contracts to small businesses that are registered as contractors with gross revenues of \$1 million or less. When using the small-works or limited public-works processes for a project, state agencies and local governments must attempt to equitably distribute opportunities for the project among the listed contractors.

For public works contracts in excess of \$10,000, contractors and subcontractors must submit a Statement of Intent to Pay Prevailing Wages, which includes the contractor's registration certificate number, the prevailing wage for each classification of worker for the project, and how many workers are anticipated to work on the project. When retainage is not waived for these contracts, the contractor and subcontractors must submit an Affidavit of Wages Paid for retained funds to be released after final acceptance of the project. When retainage is waived, only contractors or subcontractors of public improvement contracts funded in whole or in

part by federal transportation funds, are required to provide an Affidavit of Wages Paid to the state, county, municipality, or other public body prior to acceptance of the public works project.

Department of Enterprise Services.

The Department of Enterprise Services (DES) manages procurement of goods and services for state agencies. Among its duties and responsibilities is the development of procurement policies and procedures that encourage and facilitate the purchase of goods and services from Washington small businesses, microbusinesses, minibusinesses, and minority and women-owned businesses to the maximum extent practicable.

"Microbusiness" means any business entity that has an annual gross revenue of less than \$1 million.

"Minibusiness" means any business entity that has an annual gross revenue of between \$1 million and \$3 million.

Summary of Substitute Bill:

Office of Minority and Women's Business Enterprises.

The OMWBE must annually identify the state agencies and educational institutions that are:

- in the lowest quintile of utilization of minority and women-owned contractors as a percentage of all contracts issued by the agency;
- in the lowest quintile of dollar value awarded to minority and women-owned contractors as a percentage of the dollar value of all contracts issued by the agency; and
- performing significantly below their established goals.

The OMWBE must meet with each identified agency to review the agency's plan and identify tools for increasing participation by qualified businesses.

Enforcement.

The penalties for violations of the OMWBE-related laws and rules are modified. If a person, firm, corporation, business, union, or other organization engages in activity that is expressly prohibited, the state must impose one or more of the following penalties:

- withholding payment;
- decertifying the contractor;
- debarring the contractor for a period of between one and three years;
- terminating the contract; or
- subjecting the contractor to civil penalties of between 2 and 10 percent of the amount of the contract, or between \$1,000 and \$5,000 for each violation.

If a person or other business entity engages in an activity that does not comply with other provisions or with a contract requirement, the state maintains discretion as to whether similar penalties should be imposed. If the state decides to impose penalties due to noncompliance

with other provisions or contract requirements, there is no minimum amount for civil penalties.

If a contractor commits willful, repeated violations, the contractor must be debarred from state contracting for three years, in addition to any other penalties imposed. A willful violation includes a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact, with the intent of impacting benefits that are awarded.

The Attorney General's enforcement authority is eliminated. Civil penalties are deposited into the OMWBE's account in the custody of the State Treasurer.

The following definitions are added:

"Contractor" means an individual or entity granted state certification and awarded either a direct contract with an agency or an indirect contract as a subcontractor to perform a service or provide goods.

"Debar" means to prohibit a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract during a specified period of time as set forth in a debarment order.

Investigation Unit.

A unit is established within the OMWBE to detect and investigate fraud and other violations. Qualified personnel are to be employed, and the Director of the OMWBE (Director) and unit personnel may receive criminal record information associated with investigations.

The Director or the Director's designee may subpoena witnesses and are granted enforcement authority under the Administrative Procedures Act. A process is created for the Director to apply for and obtain a superior court order approving and authorizing a subpoena in advance of its issuance. A superior court may issue an approval and authorization without prior notice to the person to whom the subpoena is directed or to the person who is the subject of the investigation.

The investigation unit must annually conduct a site review of a minimum of 3 percent of contractors and must prioritize and conduct thorough investigations of businesses when identified by an external complaint or internal concerns.

Small-Works Roster and the Limited Public-Works Process.

The project cost threshold under which a state agency or authorized local government may use the small-works roster process is increased to \$500,000. For projects awarded under the small-works roster process, a state agency or authorized local government may waive certain retainage requirements and assume liability for the contractor's nonpayment of taxes and of laborers, subcontractors, mechanics, material persons, and suppliers. The state agency or local government retains the right of recovery against the contractor for any payments made on the contractor's behalf. Recovery of unpaid wages and benefits must be the first priority of actions filed against the retainage.

The project cost threshold under which a state agency or authorized local government may use the limited public-works process is increased to \$150,000. Updates are made to notice of completion requirements for projects where retainage is not waived, requiring the Department of Revenue, Employment Security Department, and Department of Labor and Industries to certify, upon completion of a contract up to \$150,000, that the contractor has paid all taxes, increases, and penalties due before retained funds are released. Additionally, when retainage is waived, contractors and subcontractors of limited public-works projects are required to submit an Affidavit of Wages Paid, confirming their payment of prevailing wages as required by their Statement of Intent to Pay Prevailing Wages, before there is final acceptance of the project. Changes are made to allow the Employment Security Department and Department of Labor and Industries to collect and recover taxes, increases, and penalties owed when retainage is waived.

A state agency or authorized local government may use the limited public-works process to solicit and award small-works roster contracts to minibusinesses and microbusinesses. A state agency or authorized local government using the limited public-works process must equitably distribute opportunities for the project among the listed contractors.

"Equitably distribute" means a state agency or authorized local government may not favor certain contractors on the appropriate small-works roster over other contractors on the same roster who perform similar services.

By December 1, 2019, the Joint Legislative Audit and Review Committee (JLARC) must review the implementation of the changes to the small-works roster and limited public-works processes and report to the Governor and appropriate legislative committees. The report must include recommendations to further the practices of the small-works roster and limited public-works processes and identify progress in the rates of participation and barriers to improving participation rates of qualified minority and women-owned and controlled businesses, minibusinesses, and microbusinesses in the small-works roster and limited public-works processes.

Department of Enterprise Services.

The DES must work with the Municipal Research and Services Center to notify local governments authorized to use small-works rosters of this authority and to provide guidance on how to use the authority. The guidance may take the form of a manual.

Substitute Bill Compared to Original Bill:

The substitute bill: (1) retains current notice of completion requirements for limited public-works projects where retainage is not waived, which requires the Department of Revenue, Employment Security Department, and Department of Labor and Industries to certify, upon completion of a contract of over \$35,000, that the contractor has paid all taxes, increases, and penalties due before retained funds are released; (2) requires that an Affidavit of Wages Paid be filed before final payment or project acceptance is given when retainage or bonding requirements are waived in every instance of public works projects, not only in instances where retainage or bonding requirements are waived for public improvement contracts funded in whole or in part by federal transportation funds; (3) allows the Employment Security Department and the Department of Labor and Industries to collect and recover taxes,

increases, and penalties due for limited public-works projects, in instances where retainage has been waived by state agencies or local governments; and (4) makes the JLARC report on changes to the small-works and limited public-works processes due December 1, 2019, rather than December 1, 2018.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute 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 Small and Limited Public Works Roster processes are streamlined and efficient and gives business to women and minority owned businesses. Updating for reporting is requested to enable more time to gather required information.

(Opposed) None.

(Other) There are some technical changes needed to update project completion requirements to track with the change in threshold amounts and to allow the Department of Employment Security and Department of Labor and Industries to collect taxes, increases, and penalties owed, as the Department of Revenue is able to when retainage is waived.

Persons Testifying: (In support) Representative Gregerson, prime sponsor; and Bill Frare, Department of Enterprise Services.

(Other) Tammy Fellin, Department of Labor and Industries.

Persons Signed In To Testify But Not Testifying: None.