

HOUSE BILL REPORT

HB 2469

As Reported by House Committee On:
Innovation, Technology & Economic Development
Appropriations

Title: An act relating to small works rosters.

Brief Description: Concerning small works rosters.

Sponsors: Representatives Santos, Gregerson, Tharinger, Hudgins and Pollet.

Brief History:

Committee Activity:

Innovation, Technology & Economic Development: 1/21/20, 1/24/20 [DPS];
Appropriations: 2/5/20, 2/10/20 [DPS(ITED)].

Brief Summary of Substitute Bill

- Establishes an Audit and Review unit within the Office of Minority and Women's Business Enterprises (OMWBE) to detect and investigate fraud and violations relating to the certification of, and contracts with, minority- and women-owned businesses.
- Modifies requirements related to the small-works roster and limited public-works process.
- Requires the 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.
- Repeals the Office of the Attorney General's authority to investigate and enforce compliance with minority- and women-owned business contract requirements.

HOUSE COMMITTEE ON INNOVATION, TECHNOLOGY & ECONOMIC DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass.
Signed by 9 members: Representatives Hudgins, Chair; Kloba, Vice Chair; Smith, Ranking

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 Member; Boehnke, Assistant Ranking Minority Member; Entenman, Slatter, Tarleton, Van Werven and Wylie.

Staff: Kyle Raymond (786-7190).

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.

The OMWBE is the sole authority in Washington for certifying minority- and women-owned, and socially and economically disadvantaged, business enterprises. Certified business enterprises are listed in the OMWBE database. Cities, counties, state agencies, transportation, and educational institutions use the database to source small and diverse firms for potential contracting opportunities.

Among other duties, the OMWBE must identify barriers to equal participation by qualified businesses in all state agency and educational contracts, and the OMWBE must establish annual participation goals by qualified businesses for each state agency and educational institution.

Prohibited Activities. Certain activities relating 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. For any violation, the state may: (1) withhold payment; (2) debar, suspend, or terminate the contract; or (3) impose civil penalties of up to 10 percent of the contract amount or up to \$5,000 per violation.

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 Office of the Attorney General (AGO) may enforce laws and rules with respect to the OMWBE programs and certification procedures. The AGO may conduct investigations and may file for civil injunctive relief.

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

Public works includes all work, construction, alteration, and repair or improvement, other than ordinary maintenance, that is a cost to the state or a local government. All public works must comply with the public works prevailing wage requirements under Chapter 39.12 RCW.

Small-Works Roster. For public works projects estimated to cost \$350,000 or less, state agencies and 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 solicits bids from at least five contractors on the small-works roster. If the estimated cost of the work is from \$250,000 to \$350,000, a state agency or local government may solicit bids from less than all the appropriate contractors. If bids are solicited from less than five contractors, notification must be provided to the remaining contractors on the appropriate small works roster that quotations on the work are being sought. The state agency or local government awards the contract to the lowest responsible bidder.

When using the small-works roster for a project, state agencies and local governments must attempt to 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.

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.

Limited Public-Works Process. For public works projects estimated to cost less than \$50,000, state agencies and authorized local governments may use the limited public-works process to award contracts. 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.

Public works projects awarded through the limited public-works process are exempt from certain small works roster process requirements and are exempt from the requirement that contracts be awarded after advertisement.

When using the 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 willing to perform in the geographic area.

A state agency or authorized local government is required to maintain a list of the contractors contacted and awarded during the previous 24 months under the limited public-works process, including the name of the contractor, the contractor's registration number, the amount of the contract, a brief description of the type of work performed, and the date the contract was awarded.

For limited public-works projects, the state agency or local government may waive payment, performance bond, and retainage requirements, thereby assuming the liability for the contractor's nonpayment of laborers, mechanics, subcontractors, material persons, suppliers, and taxes, increases, and penalties.

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 that are registered contractors.

Retainage. Retainage refers to a portion of the contractor's payment that is withheld by the contracting agency until the project is complete, and the portion is limited to 5 percent of the payment amount. 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.

Department of Enterprise Services.

The Department of Enterprise Services (DES) manages procurement of goods and services for state agencies. The DES is, in part, responsible for developing 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.

Microbusinesses are independently owned and operated business entities with an annual gross revenue of less than \$1 million.

Minibusinesses are independently owned and operated business entities with an annual gross revenue between \$1 million and \$3 million.

Summary of Substitute Bill:

Office of Minority and Women's Business Enterprises.

Agency Identification. The Office of Minority and Women's Business Enterprises (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.

The OMWBE must include the information identified and actions taken to the Legislature and the Governor in their annual report.

Audit and Review Unit. The OMWBE establishes an Audit and Review Unit (Unit) to detect and investigate fraud and other relating to the certification of, and contracts with, minority- and women-owned businesses.

The Director of the OMWBE, or the Director's designee, may subpoena witnesses and is granted enforcement authority under the Administrative Procedures Act. The Director may 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 Unit must annually conduct a site review of a minimum of 3 percent of contractors.

The Unit must respond to all complaints for investigation made by other agencies, and the Unit must develop processes to prioritize and conduct thorough investigations when an external complaint or internal concerns are received.

Penalties and 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 an expressly prohibited activity, 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 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.

Civil penalties are deposited into the OMWBE's account in the custody of the State Treasurer.

The Office of the Attorney General (AGO) enforcement authority is repealed.

"Debar" is defined as 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.

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

The project cost threshold for which state agencies and authorized local governments may use the small-works roster process to award contracts is increased to \$500,000.

The range for which a state agency or local government may solicit bids from less than the appropriate contractors and is required to notify the remaining contractors on the roster of the quote being sought is changed to \$150,000 to \$500,000.

The project cost threshold for which state agencies and authorized local governments may use limited public-works process to award contracts is increased to \$150,000.

The changes made to the small works roster and limited public-works process project cost threshold are effective July 1, 2021.

Substitute Bill Compared to Original Bill:

The effective date for the changes made to the small-works roster and limited public-works process project cost threshold is delayed to July 1, 2021.

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, except for section 8, relating to changes made to the small-works and limited public-work process project cost threshold, which takes effect July 1, 2021.

Staff Summary of Public Testimony:

(In support) The state is a steward of public dollars. Reporting from 2015 revealed certain minority- and women-owned businesses were operating as fronts. Also, less than 5 percent of state public contracting dollars flow to women- and minority-owned businesses. The bill provides technical assistance to our agencies to help expand their ability to reach into these affected communities.

The bill requires the Office of Minority and Women's Business Enterprises (OMWBE) to meet with agencies to review these plans and identify opportunities for improvement. The OMWBE currently does this work and is supportive of this requirement being codified into state law. The bill requires the OMWBE to establish an audit and investigatory unit, and the agency is supportive of this change.

Increasing the threshold under which the ports can use the small-works roster is consistent with work that the Port of Seattle has undertaken to use our role as a public contracting and to bring along businesses that may not otherwise enjoy access to these opportunities. In 2019, the Port Commission created its diversity in contracting initiative with a focus on expanding or contracting based, with a specific focus on selecting and increasing utilization of women- and minority-owned businesses in our contracting process. The goal under that diversity initiative is tripling the number of women firms with whom we contract, as well as increasing the percentage of dollars that we spend on those contracts, up to 15 percent within five years. Allowing greater use of the small-works roster is consistent with those efforts and will help us reach our goals.

(Opposed) None.

(Other) Ports should be included in the bill.

Persons Testifying: (In support) Representative Santos, prime sponsor; Joanna Eide, Office of Minority and Women's Business Enterprises; and Eric Ffitch, Port of Seattle.

(Other) Chris Herman, Washington Public Ports Association.

Persons Signed In To Testify But Not Testifying:

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Innovation, Technology & Economic Development be substituted therefor and the substitute bill do pass. Signed by 24 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Bergquist, 2nd Vice Chair; Caldier, Chopp, Cody, Corry, Dolan, Fitzgibbon, Hansen, Hudgins, Kilduff, Macri, Mosbrucker, Pettigrew, Pollet, Ryu, Senn, Springer, Steele, Sullivan, Tarleton, Tharinger and Ybarra.

Minority Report: Do not pass. Signed by 8 members: Representatives Stokesbary, Ranking Minority Member; Rude, Assistant Ranking Minority Member; Chandler, Dye, Hoff, Kraft, Schmick and Sutherland.

Staff: Michael Hirsch (786-7157).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Innovation, Technology & Economic Development:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 8, relating to changes made to the small-works and limited public-work process project cost threshold, which takes effect July 1, 2021.

Staff Summary of Public Testimony:

(In support) The OMWBE would only proactively audit firms that are certified by the OMWBE and receive state contracts. Other investigations would be from referrals and complaints. Investigations would focus on certification fraud. Debarment would not be handled by the OMWBE.

(Opposed) None.

Persons Testifying: Joanna Eide, Office of Minority and Women's Business Enterprises.

Persons Signed In To Testify But Not Testifying: None.