

SENATE BILL REPORT

ESB 5457

As Passed Senate, January 24, 2020

Title: An act relating to the naming of subcontractors by prime contract bidders on public works contracts.

Brief Description: Naming of subcontractors by prime contract bidders on public works contracts.

Sponsors: Senators Keiser, Saldaña, Conway, Hasegawa, Hunt and Nguyen.

Brief History:

Committee Activity: State Government, Tribal Relations & Elections: 2/20/19, 2/21/19 [DP, w/oRec].

Floor Activity:

Passed Senate: 1/24/20, 31-16.

Brief Summary of Engrossed Bill

- Requires submission of the names of subcontractors for performance of work of structural steel installation and rebar installation within 48 hours.
- Allows substitution of a listed subcontractor for refusal or inability to provide a letter of bondability from a surety company.
- Requires the Capital Projects Advisory Review Board to evaluate current subcontractor listing policies and practices and submit a report to the Governor and Legislature by November 1, 2020.

SENATE COMMITTEE ON STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS

Majority Report: Do pass.

Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Hasegawa and Takko.

Minority Report: That it be referred without recommendation.

Signed by Senators Zeiger, Ranking Member; Bailey and Hawkins.

Staff: Melissa Van Gorkom (786-7491)

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.

Background: Public works include all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality. Most public works construction projects are procured using an architect selected by the public body. The architect develops the plans and specifications that contractors bid on through a competitive bidding process. The contract to perform the work described in the plans and specifications is awarded to a responsible bidder with the lowest responsive bid. Contractors that provide the bid are referred to as the prime contractor and they may subcontract portions of the work to other specialized contractors.

Current state law requires that for projects, except job order contracts, expected to cost over \$1 million the prime contractor identify certain subcontractors that will perform heating, ventilation and air conditioning; plumbing; and electrical work. If the prime contractor submits more than one subcontractor listed for each category of work, or fails to list subcontractors, then the prime contract bidder is considered nonresponsive and their bid is void. Substitution of a listed subcontractor in the furtherance of bid shopping or bid peddling before or after the award of the contract is prohibited, however, substitutions of a listed subcontractor may be made for the following reasons:

- refusal of the subcontractor to sign a contract with the prime contractor;
- bankruptcy or insolvency of the subcontractor;
- inability of the subcontractor to perform the requirements;
- inability of the subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work; or
- the subcontractor is barred from participating in the project as a result of a court order or summary judgement.

Capital Projects Advisory Review Board. The Capital Projects Advisory Review Board (CPARB) consists of 23 members, including four legislative ex-officio members, two from the House of Representatives, appointed by the Speaker of the House, and two from the Senate, appointed by the President of the Senate. CPARB provides an evaluation of public capital project construction processes, including the impact of contracting methods on project outcomes, and advises the Legislature on policies related to public works delivery methods.

Summary of Engrossed Bill: The prime contractor must name subcontractors for the work of structural steel installation and rebar installation on public works construction projects expected to cost over \$1 million, within 48 hours after the published bid submittal time.

A prime contractor may provide a substitution for a listed subcontractor due to the subcontractor's refusal or inability to provide a letter of bondability from a surety company.

CPARB must evaluate current subcontractor listing policies and practices and submit a report to the Governor and the appropriate committees of the Legislature by November 1, 2020, with recommendations on:

- appropriate expansion of the number of subcontractors listed in order to improve transparency and fairness without reducing competitive bidding and access to public works by minority and women-owned businesses; and
- possible project threshold and time frames for purposes of subcontractor listings for all scopes of work that are not required to list under law.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This only pertains to larger public works projects, not smaller ones. In some public works bids when bids come in at a low level but after the bid is accepted the contractor changes the subcontractors and things change in the project. Currently contractors can include a subcontractor bid and then bid shop after they receive a contract for a better deal which deprives the public of fair competition. Bid shopping hurts our subcontractors who are trying to make a living and provide opportunities for workers and apprentices. The money saved by bid shopping does not go back to the taxpayers, it is pocketed by the prime contractor. Subcontractor listing has a positive effect in deterring this practice which is shown in the results from the contracts that currently require this. The bill levels the playing field by listing subcontractors for all projects. Washington State makes great investments into apprenticeship and career connect, however all the training and preparations have no effect if there are no jobs. This bill would help determine the demands for apprenticeships and expand our workforce. It's a matter of transparency.

CON: This should be vetting through the Capital Projects Advisory Review Board to determine the right approach. Mandatory bid listing of all subcontractors is not the right approach as it has been demonstrated to not be a cost effective method. The trend is to go away from this type of approach, 40 states don't have mandatory listing of subcontractors and neither does the federal government. If subcontractors must be listed on a contract it will require a large amount of work for contractors. It is already difficult to figure out what bids are low and responsive and this would add additional complexity to this issue. This bill would not impact apprenticeships, the state has rules on apprenticeship utilization that are already in place, and it is the best interest of the contractors, whether they are the prime contractor or subcontractor to hire an apprentice because they cost less.

OTHER: Requiring submission of subcontractors will complicate the bidding process and will increase the risk and increase the likelihood of bid protests and bid rejections. It is unclear how this would apply to alternative projects such as design build because often times the work a subcontractor may do is not known at bid time. The contractor may have more than one first tier subcontractor performing work and so limiting the prime contractor to one subcontractor for each type of work may not be feasible or may drive up the cost.

Persons Testifying: PRO: Senator Karen Keiser, Prime Sponsor; Heather Kurtenbach, Ironworkers Local 86; Greg Christanson, Ironworkers Apprenticeship; Mark Struelli, Ironworkers; Mark Riker, Washington State Building and Construction Trades Council; Todd Mitchell, Heat and Frost Insulators Local 7; Greg Christiansen, Pacific Northwest Ironworkers; dale bright, laborers local 242.

CON: Jerry VanderWood, Associated General Contractors; Jake Jacobson, AGC and

Osborne Construction.

OTHER: Chris Christopher, WSDOT - State Construction Engineer.

Persons Signed In To Testify But Not Testifying: No one.