

SENATE BILL REPORT

2SHB 3274

As Reported By Senate Committee On:
Government Operations & Elections, February 28, 2008

Title: An act relating to improving public contracting for public port districts.

Brief Description: Addressing public contracting by public port districts.

Sponsors: House Committee on Apps Subcom GG (originally sponsored by Representatives Simpson, Hudgins, Upthegrove, Hunter, Santos and Kenney).

Brief History: Passed House: 2/15/08, 93-1.

Committee Activity: Government Operations & Elections: 2/28/08 [DPA-WM, DNP, w/oRec].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Fairley, Chair; Oemig, Vice Chair; Roach, Ranking Minority Member; Benton and McDermott.

Minority Report: Do not pass.

Signed by Senator Kline.

Minority Report: That it be referred without recommendation.

Signed by Senator Pridemore.

Staff: Sharon Swanson (786-7447)

Background: In 1911 the Legislature authorized the Port District Act allowing citizens to create port districts. Today, there are 75 port districts in Washington.

General Powers and Authority of Port Districts. Port districts are authorized for the purpose of acquisition, construction, maintenance, operation, development, and regulation of harbor improvements, rail or motor vehicle transfer and terminal facilities, water and air transfer and terminal facilities, or any combination of these facilities. Among the general powers granted to ports are the following:

- to acquire land, property, leases, and easements;
- to condemn property and exercise the power of eminent domain;
- to develop lands for industrial and commercial purposes;
- to impose taxes, rates, and charges;
- to sell or otherwise convey rights to property; and

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- to construct and maintain specified types of park and recreation facilities.

Governance of Port Districts. Port districts are governed by a board of commissioners consisting of either three or five members in accordance with specified statutory criteria. Port commissioners are nominated either by commissioner district or, under certain circumstances, at-large. In all districts, port commissioners are elected at-large. Subject to voter approval, a port district with five commissioners may be authorized to have two commissioners who are both nominated and elected at-large.

Public Contracting Processes. Public entities, including port districts, must use the public works contracting provisions for all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or municipality, or which is by law a lien or charge on any property therein. A contract is awarded based on a formal decision by the state or municipality notifying the responsible bidder with the lowest responsive bid of the state or municipality's acceptance of the bid and intent to enter into a contract with the bidder. However, a public entity may use the small works roster for construction, building, renovation, remodeling, alteration, repair, or improvement of real property with an estimated cost of \$200,000 or less. Under this process, quotations are solicited from at least five small works roster contractors, unless the estimated cost is between \$100,000 and \$200,000, in which case all qualified contractors on the roster must be notified.

Public entities can use the procurement process under Chapter 39.80 RCW for professional services rendered by any person, other than an employee of the agency, contracting to perform activities within the professional practice in Chapters 18.08 (Architects), 18.43 (Engineers & Land Surveyors) or 18.96 (Landscape Architects) RCW. The agency negotiates a contract with the most qualified firm for architectural and engineering services at a price which the agency determines is fair and reasonable to the agency. In making its determination, the agency must take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof.

State agencies use competitive solicitation for personal service contracts. Personal services include professional or technical expertise provided by a consultant to accomplish a specific study, project, task, or other work statement. It does not include architect and engineer services procured under Chapter 39.80 RCW. Competitive Solicitation is a documented formal process providing an equal and open opportunity to qualified parties and culminating in selection based on criteria which may include such factors as the consultant's fees or costs, ability, capacity, experience, reputation, responsiveness to time limitations, responsiveness to solicitation requirements, quality of previous performance, and compliance with statutes and rules relating to contracts or services.

2007 Performance Audit by the State Auditor's Office. Pursuant to Initiative 900, the State Auditor's Office, with the private firms of Cotton & Company and CDR Consultants, audited the Port of Seattle. The audit scope included all construction projects and related consulting agreements from January 2004 through March 2007.

The audit identified significant and widespread issues related to contracting and contract management by the Port of Seattle and made 51 recommendations to address these conditions. Among the 51 recommendations are several statutory changes the auditor's recommend to the

Legislature. Found in Appendix C of the Washington State Auditor's Performance Audit Report: Port of Seattle Construction Management of December 20, 2007 (Report No. 100008), these recommendation include:

- clarifying that competition requirements apply to consulting and other services;
- clarifying that penalties for violations of competitive contract laws apply to the procurement of consulting and other services;
- addressing whether state and local governments have wide latitude regarding sole source contracts for goods and services; and
- revising the small works roster contract procedures to remove port district exemption.

Summary of Bill (Recommended Amendments): Public Contracting – In General. All public works projects by a port district (the estimated cost of which exceeds \$200,000) must be bid using a competitive bid process under the public work statutes in Chapter 39.04 RCW; however, a port district may use the small works roster for projects with an estimated cost of less than \$200,000.

Beginning January 1, 2010, all port districts, with gross revenues that exceed \$10 million (excluding loans and grants), must maintain a database on a public website of all contracts.

Each port district commission (Commission) must establish by resolution the policies by which the competitive bid requirements may be waived.

Consulting, architectural, engineering, and other services, are added to the remedies and penalties section of the public contracting title. Therefore, the willful and intentional violation of any law, charter, ordinance, resolution, or rule requiring competitive bidding, including consulting, architectural, engineering, and other services, must subject a municipal officer or the officer's staff to a civil penalty of not less than \$300. The municipal officer (or the officer's staff) may also be held liable, jointly and severally, for all consequential damages to the municipal corporation.

Competitive Contracting for Personal Service Contracts. A new chapter is created in the port districts title similar to Chapter 39.29 RCW which governs state agency personal service contracting. This new chapter requires competitive solicitation for personal service contracts, including consultants. "Competitive solicitation" means a documented formal process providing an equal and open opportunity to qualified parties and culminating in selection based on criteria. Criteria other than price may be the primary basis for selection. The criteria may include ability, capacity, experience, reputation, and other factors. Exceptions to the competitive solicitation requirement exist if it is: an emergency contract; a sole source contract; a contract of less than \$50,000. However, the port district must show competition for contracts between \$50,000 and \$250,000; and other contracts exempted by the Office of Financial Management (OFM).

Substantial changes in the scope of work of a personal service contract must be referred to OFM for a determination on whether the change warrants the work to be awarded as a new contract. An amendment or series of amendments that cumulatively exceed 50 percent of the value of the original contract must be filed with OFM and made available for public inspection prior to the effective date.

Certain types of contracts are exempted from competitive solicitation under the new chapter. These exceptions include intergovernmental agreements, architects' and engineers' contracts, and contracts for a fee less than \$50,000. In the case of an emergency contract, the contract must be filed with OFM within seven working days following the commencement of work or execution of the contract, whichever is first.

Sole source contracts must be filed with OFM and made available for public inspection prior to the proposed starting date of the contract. Documented justification for sole source contracts must be provided to OFM.

Commissioners or employees must not authorize any personal service contracts without complying with the chapter. Failure to comply with the chapter subjects Commissioners and port district employees to a \$300 penalty. A consultant who knowingly violates the chapter is subject to a civil penalty of \$300 or 25 percent of the contract, whichever is greater.

Accountability Provisions. The Municipal Research and Services Center (MRSC), in cooperation with the Washington Public Ports Association (WPPA) is required to adopt guidelines for the effective and efficient management of personal service contracts by all port districts. After January 1, 2010, a port entering into or amending personal service contracts must follow policies adopted by the Commission, which must be based on the guidelines. In addition, WPPA is required to provide training for port district personnel responsible for contract execution and management.

The bill is null and void unless funded in the budget.

EFFECT OF CHANGES MADE BY GOVERNMENT OPERATIONS & ELECTIONS COMMITTEE (Recommended Amendments): A new section is added requiring, in the procurement of public work consultant planning services relating to a facility outside of a port district's jurisdictional boundaries, a port district with responsibility for the future property development and use to prepare and implement a communications plan within 60 days after contracting with a site planning consultant. The communications plan must be reasonably calculated to provide property owners and other affected and interested individuals information for review and comment.

Sections 7, 8, 9, and 11 are changed to take oversight jurisdiction from the individual ports commissions and place oversight with OFM.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 6, 2008.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Recommended Amendments: PRO: The amendments to the bill address the concerns of the auditors but the bill still has a way to go. It is important that this bill keeps moving forward and the dialogue continues.

OTHER: There is concern with the striking amendment. A different striking amendment was circulated yesterday and this striker needs to be reviewed in depth as it contains significant

changes. It is very important that this bill keep moving but there still needs to be quite a bit of work. OFM is not the appropriate entity to have oversight and authority over the contracting decisions of ports.

Persons Testifying: PRO: Senator Karen Fraser; Cliff Webster, Architectural & Engineers Legislative Council; Stan Bowman, American Institute of Architects Washington Council; Sean Eagan, Port of Tacoma.

OTHER: Henry Yates, Port of Seattle; Eric Johnson, Washington Public Ports Association.