

2SHB 1096 - H AMD 1142

By Representatives Orcutt, Hasegawa, Kenney

ADOPTED 02/13/2010

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature finds that it is in the
4 state's economic interest and serves a public purpose to promote and
5 facilitate the fullest possible participation by Washington businesses
6 of all sizes in the process by which goods and services are purchased
7 by the state. The legislature further finds that large businesses have
8 the resources to participate fully and effectively in the state's
9 purchasing system, and because of many factors, including economies of
10 scale, the purchasing system tends to create a preference in favor of
11 large businesses and to disadvantage small businesses. The legislature
12 intends, therefore, to assist, to the maximum extent possible, small
13 businesses to participate in order to enhance and preserve competitive
14 enterprise and to ensure that small businesses have a fair opportunity
15 to be awarded contracts or subcontracts for goods and services
16 purchased by the state.

17 NEW SECTION. **Sec. 2.** A new section is added to chapter 43.19 RCW
18 to read as follows:

19 (1) To facilitate the participation of small business in the
20 provision of goods and services purchased by purchasing agencies for
21 the use only of the respective agency, including purchases under
22 chapters 39.29 and 43.105 RCW, the purchasing agency must:

23 (a) Apply a preference in the award of contracts for goods and
24 services as follows:

25 (i) A preference to small business bidders that is five percent of
26 the lowest responsible bidder meeting specifications; and

27 (ii) A preference to in-state business bidders that are not small
28 businesses but who provide for small business subcontractor

1 participation in the contract that may be up to five percent of the
2 lowest responsible bidder meeting specifications, determined according
3 to rules adopted by the purchasing agency;

4 (b) Give assistance to small businesses by:

5 (i) Providing technical assistance that would be reasonably
6 expected to mitigate barriers that result from experience requirements
7 related to the contract;

8 (ii) Allowing for alternative methods for meeting any inventory
9 level requirements related to the contract; and

10 (iii) Assisting small businesses with the qualification application
11 required under RCW 43.19.1908.

12 (2) Small business bidders qualified under this chapter shall have
13 precedence over other business bidders so that the application of any
14 bidder preference for which another business bidder may be eligible by
15 law does not result in the denial of the contract award to a small
16 business bidder. This subsection applies if the small business bidder
17 is the lowest responsible bidder, as well as if the small business is
18 eligible for the contract award as the result of the small business
19 bidder preference applied under this section.

20 (3) The preferences under subsection (1)(a) of this section may not
21 be awarded to a noncompliant bidder and may not be used to achieve any
22 applicable minimum bidding requirements. The preferences may be used
23 only in evaluating bids or proposals for awards. In no instance may
24 the increase be paid to a bidder whose bid is accepted.

25 (4)(a) This section applies to a purchasing agency's purchase of
26 goods and services to the maximum extent consistent with international
27 trade agreement commitments and with applicable requirements of federal
28 law. If a purchasing agency determines that compliance with this
29 section may conflict with international trade agreement commitments or
30 with federal requirements that are a prescribed condition to the
31 allocation of federal funds to the state or if such compliance would
32 otherwise conflict with federal law, the purchasing agency shall
33 suspend the preference granted under this section only to the extent
34 necessary to eliminate the conflict. A finding by one purchasing
35 agency does not affect the application of this section to purchases by
36 another purchasing agency or in another circumstance.

37 (b) Rules adopted under this section must meet federal requirements

1 that are a necessary condition to the receipt of federal funds by the
2 state.

3 (c) A purchasing agency may suspend the preference granted under
4 this section for purchases made through a multistate contracting
5 consortium, but the suspension is prohibited if it is done for the
6 purpose of avoiding the application of the preference required under
7 this section.

8 (5)(a) A business that is given the preference provided for in this
9 section based on false information provided or on material information
10 withheld, and which by reason of the information, or lack thereof, has
11 been awarded a contract to which it would not otherwise have been
12 entitled:

13 (i) Must pay the state an assessment equal to the difference
14 between the contract amount and what the state's cost would have been
15 if the contract had been properly awarded;

16 (ii) In addition to the amount specified in this subsection (5)(a)
17 and except as provided in (b) of this subsection, must pay a civil
18 penalty of ten percent of the amount of the contract involved or one
19 thousand dollars, whichever is less; and

20 (iii) Is ineligible to directly or indirectly transact any business
21 with the state for a period of not less than six months and not more
22 than three years, as determined under criteria adopted by the affected
23 purchasing agency. This ineligibility shall apply to the principals of
24 the business and any subsequent businesses formed by those principals.

25 (b) In addition to being subject to the penalties under (a)(i) and
26 (iii) of this subsection, a business that knowingly and with intent to
27 defraud makes a false statement or fails to provide or conceals, or
28 attempts to conceal, material information for the purpose of obtaining,
29 or aiding another in obtaining, a preference under this section is
30 subject to a civil penalty of ten percent of the amount of the contract
31 involved or ten thousand dollars, whichever is greater.

32 (c)(i) A business subject to sanction under this subsection may
33 request, within thirty days of the date of issuance of the notice of
34 sanction, a hearing conducted pursuant to chapter 34.05 RCW.

35 (ii) If a business fails to pay an assessment or civil penalty
36 after it has become final and not subject to further appeal, or after
37 the court has entered final judgment in favor of the state, the
38 attorney general may recover the assessment or penalty by action in the

1 appropriate superior court. In such action, the validity and
2 appropriateness of the final order imposing the assessment or penalty
3 shall not be subject to review.

4 (d) Civil penalties collected under (a)(ii) and (b) of this
5 subsection must be deposited in the small business bidding preference
6 account created in section 3 of this act.

7 (6) As used in this section:

8 (a) "Purchasing agencies" are limited to the department of general
9 administration, the department of information services, and the
10 department of transportation.

11 (b) "In-state business" means a business that has its principal
12 office located in Washington and its officers domiciled in Washington.

13 (c) "Small business" means an in-state business, including a sole
14 proprietorship, corporation, partnership, or other legal entity, that:

15 (i) Certifies, under penalty of perjury, that it is owned and operated
16 independently from all other businesses and has either (A) fifty or
17 fewer employees, or (B) a gross revenue of less than seven million
18 dollars annually as reported on its federal income tax return or its
19 return filed with the department of revenue over the previous three
20 consecutive years; or (ii) is certified under chapter 39.19 RCW.

21 (7) Each purchasing agency must, in consultation with each other,
22 adopt rules necessary to implement this section.

23 (8) Each December 1st, beginning with a preliminary report on
24 December 1, 2010, the department of general administration, in
25 consultation with the department of information services and the
26 department of transportation, shall report to the governor and the
27 appropriate committees of the legislature on the preference program
28 under this section. Annual reports must include information about the
29 program's progress in increasing the number of small businesses
30 participating in state contracts, the number of contracts under which
31 preferences were given, and the characteristics of small businesses
32 that participated in the program.

33 (9) This section applies to contracts awarded on or after November
34 1, 2010, but before July 1, 2014.

35 (10) This section expires December 31, 2014.

36 NEW SECTION. **Sec. 3.** A new section is added to chapter 43.19 RCW
37 to read as follows:

1 (1) The small business bidding preference account is created in the
2 custody of the state treasurer. All receipts from civil penalties
3 collected under section 2 of this act must be deposited into the
4 account. Expenditures from the account may be used only toward
5 defraying the costs of adjudications that occur under section 2 of this
6 act. Only the director of the office of financial management or the
7 director's designee may authorize expenditures from the account on the
8 request of the director of general administration, the director of
9 information services, or the secretary of transportation, or their
10 respective designees. The account is subject to allotment procedures
11 under chapter 43.88 RCW, but an appropriation is not required for
12 expenditures.

13 (2) This section expires July 1, 2015.

14 **Sec. 4.** RCW 39.29.050 and 1983 c 120 s 12 are each amended to read
15 as follows:

16 All contracts entered into under this chapter (~~on or after~~
17 ~~September 1, 1983,~~) are subject to the requirements established under:

18 (1) Section 2 of this act, with respect to the departments of
19 general administration, information services, and transportation; and

20 (2) On or after September 1, 1983, chapter 39.19 RCW.

21 **Sec. 5.** RCW 43.19.1901 and 1987 c 434 s 23 are each amended to
22 read as follows:

23 The term "purchase" as used in RCW 43.19.190 through 43.19.200, and
24 as they may hereafter be amended, shall include leasing or renting(~~(+~~
25 ~~PROVIDED, That)~~). However, the purchasing, leasing, or renting of
26 electronic data processing equipment shall not be included in the term
27 "purchasing" if and when such transactions are otherwise expressly
28 provided for by law, except that such purchasing, leasing, or renting
29 by the departments of general administration, information services, and
30 transportation is subject to section 2 of this act.

31 (~~The acquisition of job services and all other services for the~~
32 ~~family independence program under chapter 74.21 RCW shall not be~~
33 ~~included in the term "purchasing" under this chapter.))~~

34 NEW SECTION. **Sec. 6.** If any provision of this act or its

1 application to any person or circumstance is held invalid, the
2 remainder of the act or the application of the provision to other
3 persons or circumstances is not affected."

4 Correct the title.

EFFECT: The amendment:

(1) Reduces the small business bidding preference from 7 percent to 5 percent;

(2) Adds that businesses certified by the Office of Minority and Women's Business Enterprises are also within the definition of "small business";

(3) Clarifies that only three agencies (the purchasing agencies) are participating in the small bidding preference pilot;

(4) Adds authority for an affected purchasing agency to suspend the bidding preference to the extent necessary to eliminate conflicts with requirements for funding or federal law;

(5) Allows suspension of the bidding preference on purchases made through a multistate contracting consortium, if not done for the purpose of avoiding the bidding preference;

(6) Requires that civil penalties imposed for violations of the bidding preference requirements be deposited in a new unappropriated account, to be used only for defraying the costs of adjudications under the bidding preference pilot;

(7) Adds a state severability clause; and

(8) Makes other technical and clarifying changes.

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