

HOUSE BILL REPORT

EHB 1836

As Passed House:

March 12, 2009

Title: An act relating to public works involving off-site prefabrication.

Brief Description: Regarding public works involving off-site prefabrication.

Sponsors: Representatives Ormsby, Wood, Dunshee, Campbell, Moeller, Van De Wege, Simpson, Driscoll, Chase and Conway.

Brief History:

Committee Activity:

Commerce & Labor: 2/10/09, 2/20/09 [DP].

Floor Activity

Passed House: 3/12/09, 61-36.

Brief Summary of Engrossed Bill

- Requires contractors on public works projects estimated to cost over \$1 million to submit lists of specified information regarding certain prefabricated items produced outside Washington to the awarding agency and to the Department of Labor and Industries (Department).
- Requires contractors who produce certain prefabricated items outside Washington for public works projects estimated to cost over \$1 million to submit certified payroll records to the awarding agency and to the Department upon request of an interested party.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

Minority Report: Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Chandler and Crouse.

Staff: Joan Elgee (786-7106)

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:

Under Washington's prevailing wage law, wages paid to laborers, workers, and mechanics on public works projects of the state or political subdivisions must be not less than the prevailing rate of wage in the same trade or occupation in the locality within the state where the labor is performed. The Washington State Supreme Court has held that the prevailing wage law applies to the off-site manufacture of prefabricated items for use on a particular project. The prevailing wage law, however, does not apply to work performed outside Washington.

Contractors and subcontractors on public works projects must submit to the awarding agency an "intent" to pay prevailing wage and an "affidavit" that prevailing wages have been paid before certain payments are made.

By rule, the Department of Labor and Industries (Department) requires contractors and subcontractors on public works projects to keep accurate payroll records. Within 10 days after a contractor or subcontractor receives a written request from an interested party or the Department, the contractor or subcontractor must file a certified copy of the payroll records with the awarding agency and with the Department.

Contractors or subcontractors who fail to file required statements or records under prevailing wage laws are subject to a civil penalty of \$500 and may not bid on any public works contracts until the penalty is paid. A second violation within a five-year period bars the contractor or subcontractor from bidding on public works contracts for one year.

Summary of Engrossed Bill:

Until December 31, 2011, information about certain items produced outside Washington under public works projects estimated to cost over \$1 million must be provided to the awarding agency and to the Department of Labor and Industries (Department).

List.

Public works contracts estimated to cost over \$1 million must contain a provision requiring contractors and subcontractors to submit a certified list to the awarding agency and to the Department regarding any off-site, prefabricated, nonstandard, project-specific items produced under each contract and produced outside Washington. The list must provide: (1) a general description of the item; (2) the name and address of the contractor or subcontractor; (3) the name and address of the contractor or subcontractor producing the item; and (4) the federal employer identification number of the contractor or subcontractor producing the item. The list must be submitted within 10 days of delivery of the item.

The failure to file a list is a failure to file a record under prevailing wage penalty provisions. However, no penalty may be imposed for a first violation if the list is filed within a reasonable time as determined by the Department.

Certified Payroll.

Public works contracts estimated to cost over \$1 million must contain a provision requiring all contractors and subcontractors producing off-site, prefabricated, nonstandard, project

specific items outside Washington to file certified copies of payroll records with the awarding agency and the Department within 10 days of request of an interested party. The contract must state that the contractor producing the items consents to Washington jurisdiction for purposes of enforcement of the requirement. A contractor who fails to include the payroll records requirement in a contract is subject to a civil penalty of \$1,000 for each second or subsequent failure to comply.

The failure to file certified payroll records is a failure to file a record under prevailing wage provisions.

General.

"Off-site, prefabricated, nonstandard, project-specific items" means products or items that are: (1) made primarily of architectural or structural precast concrete, fabricated steel, pipe and pipe systems, or sheet metal and sheet metal duct work; (2) produced specifically for the public work and not considered to be regularly available shelf items; (3) produced or manufactured by labor expended to assemble or modify standard items; and (4) produced at an off-site location.

The provisions do not apply to entities responsible for supplying the materials to the manufacturers, fabricators, or employers that will be used to complete, construct, or assemble the product, products, or items prior to their delivery to the public works site.

The Department of General Administration must develop standard contract language regarding the list and certified payroll requirements and post the language on the agency's website. The lists, payroll records, and certifications must be on forms made available by the Department.

An awarding agency aware of incidences of noncompliance with the requirements to submit the list and payroll records must report such incidences to the Department.

The provisions apply to contracts entered on or after September 1, 2009, and expire December 31, 2011.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is this year's version of the transparency awareness and contractor fairness bill. The issue especially affects border areas. This bill gathers limited data over a time-specific period to establish a baseline of the competition. Washington state contractors are not able to compete with out-of-state contractors who do not have to pay prevailing wage. Awarding agencies and their governing bodies and taxpayers need to know where tax dollars are being spent. Contractors and employers are moving out of state.

A Capital Projects Advisory Review Board group has been working on this issue. Substantial changes have been made. The bill has been pared down to the highest priced items and there is a sunset clause. If subcontracted to an in-state employer who is already subject to prevailing wage, that subcontractor does not need to be listed. If a contractor is subcontracting to Montana, then the contractor would have to provide the list with a bid. The provisions do not apply to any Washington state fabricator or contractor. A third party may request payroll records for the out-of-state contractor.

(With concerns) The bill could potentially create higher costs for public works. Collecting the detailed information will result in higher overhead costs. Some contractors may choose not to bid because of the requirements. The bill is silent on who will analyze and report on the requirements. The bill sends three different messages as to when the lists must be obtained: before work is done, before final acceptance, or before release of retainage. This could result in higher bids.

(Opposed) This is a confusing bill and won't do what the proponents want. The bill will be the subject of litigation. A contractor could be subject to penalty for not submitting the lists but it is not clear who provides the lists. In one section, contractors must provide the lists of out-of-state work but in another section, contractors who pay prevailing wage are not required to provide the lists. It creates a per se violation for failure to submit payroll records through a bootstrap argument without due process. Enforcement is a problem because it would have to be done down the chain of privity to reach an out-of state contractor and it's not clear the state can do that. The opponents understand the intent and are sympathetic but there are lots of questions. Creating lists is costly. It's not clear what certification means.

(Information only) The fiscal note is somewhat indeterminate because this is a new area.

Persons Testifying: (In support) Representative Ormsby, prime sponsor; Mark Riker, Sheet Metal Workers Local 66; and Dave Johnson, Washington State Building and Construction Trades Council.

(With concerns) Mike Purdy, University of Washington.

(Opposed) Van Collins, Associated General Contractors; and Larry Stevens, Mechanical Contractors Association and National Electrical Contractors Association.

(Information only) Dave Soma, Department of Labor and Industries.

Persons Signed In To Testify But Not Testifying: None.