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**SUBSTITUTE HOUSE BILL 1897**

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**State of Washington 65th Legislature 2018 Regular Session**

**By** House Technology & Economic Development (originally sponsored by Representatives Gregerson, Santos, and Stanford)

AN ACT Relating to ensuring fairness and compliance with public works and procurement practices; amending RCW 39.19.020, 39.19.060, 39.19.080, 39.19.090, 39.19.200, 39.19.250, 39.04.155, and 39.12.040; adding a new section to chapter 39.19 RCW; prescribing penalties; and repealing RCW 39.19.100 and 39.19.110.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec.**  RCW 39.19.020 and 1996 c 69 s 4 are each amended to read as follows:

((~~Unless the context clearly requires otherwise,~~)) The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Advisory committee" means the advisory committee on minority and women's business enterprises.

(2) "Broker" means a person that provides a bona fide service, such as professional, technical, consultant, brokerage, or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of a contract.

(3) "Contractor" means an individual or entity granted state certification and awarded either a direct contract with an agency or an indirect contract as a subcontractor to perform a service or provide goods.

(4) "Debar" means 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.

(5) "Director" means the director of the office of minority and women's business enterprises.

((~~(4)~~)) (6) "Educational institutions" means the state universities, the regional universities, The Evergreen State College, and the community colleges.

((~~(5)~~)) (7) "Goals" means annual overall agency goals, expressed as a percentage of dollar volume, for participation by minority and women-owned and controlled businesses and shall not be construed as a minimum goal for any particular contract or for any particular geographical area. It is the intent of this chapter that such overall agency goals shall be achievable and shall be met on a contract-by-contract or class-of-contract basis.

((~~(6)~~)) (8) "Goods and/or services" includes professional services and all other goods and services.

((~~(7)~~)) (9) "Office" means the office of minority and women's business enterprises.

((~~(8)~~)) (10) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons.

((~~(9)~~)) (11) "Procurement" means the purchase, lease, or rental of any goods or services.

((~~(10)~~)) (12) "Public works" means all work, construction, highway and ferry construction, alteration, repair, or improvement other than ordinary maintenance, which a state agency or educational institution is authorized or required by law to undertake.

((~~(11)~~)) (13) "State agency" includes the state of Washington and all agencies, departments, offices, divisions, boards, commissions, and correctional and other types of institutions.

**Sec.**  RCW 39.19.060 and 1996 c 288 s 28 are each amended to read as follows:

(1) Each state agency and educational institution shall comply with the annual goals established for that agency or institution under this chapter for public works and procuring goods or services. This chapter applies to all public works and procurement by state agencies and educational institutions, including all contracts and other procurement under chapters 28B.10, 39.04, ((~~39.29~~)) 39.26, 43.19, and 47.28 RCW.

(2) Each state agency shall adopt a plan, developed in consultation with the director and the advisory committee, to ((~~insure~~)) ensure that minority and women-owned businesses are afforded the maximum practicable opportunity to directly and meaningfully participate in the execution of public contracts for public works and goods and services. The plan shall include specific measures the agency will undertake to increase the participation of certified minority and women-owned businesses.

(3) Of all state agencies and educational institutions, the office must annually identify those: (a) In the lowest quintile of utilization of minority and women-owned contractors as a percentage of all contracts issued by the agency; (b) in the lowest quintile of the dollar value awarded to minority and women-owned contractors as a percentage of the dollar value of all contracts issued by the agency; and (c) that are performing significantly below their established goals, as determined by the office. The office must meet with each identified agency to review its plan and identify available tools and actions for increasing participation.

(4) The office shall annually notify the governor, the state auditor, and the joint legislative audit and review committee of all agencies and educational institutions not in compliance with this chapter.

**Sec.**  RCW 39.19.080 and 1987 c 328 s 5 are each amended to read as follows:

((~~(1)~~)) A person, firm, corporation, business, union, or other organization shall not:

((~~(a)~~)) (1) Prevent or interfere with a contractor's or subcontractor's compliance with this chapter, or any rule adopted under this chapter;

((~~(b)~~)) (2) Submit false or fraudulent information to the state concerning compliance with this chapter or any such rule;

((~~(c)~~)) (3) Fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or retaining or attempting to obtain or retain certification as a minority or women's business enterprise for the purpose of this chapter;

((~~(d)~~)) (4) Knowingly make a false statement, whether by affidavit, verified statement, report, or other representation, to a state official or employee for the purpose of influencing the certification or denial of certification of any entity as a minority or women's business enterprise;

((~~(e)~~)) (5) Knowingly obstruct, impede, or attempt to obstruct or impede any state official or employee who is investigating the qualification of a business entity that has requested certification as a minority or women's business enterprise;

((~~(f)~~)) (6) Fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain public moneys to which the person is not entitled under this chapter; or

((~~(g)~~)) (7) Knowingly make false statements that any entity is or is not certified as a minority or women's business enterprise for purposes of obtaining a contract governed by this chapter.

((~~(2) Any person or entity violating this chapter or any rule adopted under this chapter shall be subject to the penalties in RCW 39.19.090. Nothing in this section prevents the state agency or educational institution from pursuing such procedures or sanctions as are otherwise provided by statute, rule, or contract provision.~~))

**Sec.**  RCW 39.19.090 and 1987 c 328 s 6 are each amended to read as follows:

(1)(a) If a person, firm, corporation, or business does not comply with any provision of this chapter ((~~or~~)) other than RCW 39.19.080, or does not comply with a contract requirement established under this chapter, the state may ((~~withhold payment, debar the contractor, suspend, or terminate the contract and subject~~)) impose one or more of the following penalties: Withholding payment, decertifying the contractor, debarring the contractor, suspending or terminating the contract, or subjecting the contractor to civil penalties of up to ten percent of the amount of the contract or up to five thousand dollars for each violation. ((~~The office shall adopt, by rule, criteria for the imposition of penalties under this section. Wilful~~))

(b) If a person, firm, corporation, or business commits any of the activities prohibited in RCW 39.19.080, the state must impose one or more of the following penalties: Withholding payment, decertifying the contractor, debarring the contractor for a period between one and three years, terminating the contract, or subjecting the contractor to civil penalties of between two and ten percent of the amount of the contract or between one and five thousand dollars for each violation.

(c) In addition to any other penalties imposed, willful repeated violations, exceeding a single violation, ((~~may~~)) must disqualify the contractor from further participation in state contracts for a period of ((~~up to~~)) three years. A willful violation includes a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact, with the specific intent of obtaining, continuing, or increasing benefits under this chapter.

(2) An apparent low-bidder must be in compliance with the contract provisions required under this chapter as a condition precedent to the granting of a notice of award by any state agency or educational institution.

(3) The office shall follow administrative procedures under chapter 34.05 RCW in determining a violation and imposing penalties under this chapter. The office shall adopt by rule criteria for the imposition of penalties under this section. The rule may incorporate the debarment process authorized for the department of enterprise services in RCW 39.26.200.

(4)(a) An investigation unit is established within the office for the purpose of detecting and investigating fraud and violations of this chapter. The office must employ qualified personnel for the unit.

(b) The director and the investigation unit are authorized to receive criminal history record information that includes nonconviction data for any purpose associated with the investigation of fraud or for violations of this chapter. Dissemination or use of nonconviction data for purposes other than that authorized in this section is prohibited.

(c) For the purpose of any investigation or proceeding under this chapter, the director or the director's designee may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records that the director or the director's designee deems relevant or material to the inquiry.

(d) Subpoenas issued under this section may be enforced under RCW 34.05.588.

(e) The investigation unit must annually:

(i) Conduct a site review of a minimum of three percent of persons, firms, corporations, or businesses awarded a contract under this chapter;

(ii) Submit a response for all complaints for investigation made by an external agency to the agency submitting the complaint;

(iii) Develop and implement a process for prioritizing and conducting thorough investigations of persons, firms, corporations, or businesses identified by an external complaint and determined to be the highest priority for the agency; and

(iv) Develop and implement a process for prioritizing and conducting thorough investigations of persons, firms, corporations, or businesses internally identified and determined to be the highest priority for the agency.

(5) The procedures and sanctions in this section are not exclusive; nothing in this section prevents the state agency or educational institution administering the contracts from pursuing such procedures or sanctions as are otherwise provided by statute, rule, or contract provision.

NEW SECTION. **Sec.**  A new section is added to chapter 39.19 RCW to read as follows:

(1) The director or director's designee may apply for and obtain a superior court order approving and authorizing a subpoena in advance of its issuance. The application may be made in the county where the subpoenaed person resides or is found, or the county where the subpoenaed documents, records, or evidence are located, or in Thurston county. The application must:

(a) State that an order is sought under this section;

(b) Adequately specify the documents, records, evidence, or testimony; and

(c) Include a declaration made under oath that an investigation is being conducted for a lawfully authorized purpose related to an investigation within the office's authority and that the subpoenaed documents, records, evidence, or testimony are reasonably related to an investigation within the office's authority.

(2) When an application under this section is made to the satisfaction of the court, the court must issue an order approving the subpoena. An order under this subsection constitutes authority of law for the agency to subpoena the documents, records, evidence, or testimony.

(3) The director or director's designee may seek approval and a court may issue an order under this section without prior notice to any person, including the person to whom the subpoena is directed and the person who is the subject of an investigation. An application for court approval is subject to the fee and process set forth in RCW 36.18.012(3).

**Sec.**  RCW 39.19.200 and 1993 c 195 s 1 are each amended to read as follows:

The minority and women's business enterprises account is created in the custody of the state treasurer. All receipts from RCW 39.19.210, 39.19.220, and 39.19.230 and civil penalties imposed under RCW 39.19.090 shall be deposited in the account. Expenditures from the account may be used only for the purposes defraying all or part of the costs of the office in administering this chapter. Only the director or the director's designee may authorize expenditures from the account. Moneys in the account may be spent only after appropriation.

**Sec.**  RCW 39.19.250 and 2009 c 348 s 2 are each amended to read as follows:

(1) For the purpose of annual reporting on progress required by ((~~section 1 of this act~~)) this chapter, each state agency and educational institution shall submit data to the office and the office of minority and women's business enterprises on the participation by qualified minority and women-owned and controlled businesses in the agency's or institution's contracts and other related information requested by the director. The director of the office of minority and women's business enterprises shall determine the content and format of the data and the reporting schedule, which must be at least annually.

(2) The office must develop and maintain a list of contact people at each state agency and educational institution ((~~that is~~)) who are able to present to hearings of the appropriate committees of the legislature its progress in carrying out the purposes of chapter 39.19 RCW.

(3) The office must submit a report aggregating the data received from each state agency and educational institution, and the information identified and actions taken under RCW 39.19.060(3) and 39.19.090(4), to the legislature and the governor.

**Sec.**  RCW 39.04.155 and 2015 c 225 s 33 are each amended to read as follows:

(1) This section provides uniform small works roster provisions to award contracts for construction, building, renovation, remodeling, alteration, repair, or improvement of real property that may be used by state agencies and by any local government that is expressly authorized to use these provisions. These provisions may be used in lieu of other procedures to award contracts for such work with an estimated cost of ((~~three~~)) five hundred thousand dollars or less. The small works roster process includes the limited public works process authorized under subsection (3) of this section and any local government authorized to award contracts using the small works roster process under this section may award contracts using the limited public works process under subsection (3) of this section.

(2)(a) A state agency or authorized local government may create a single general small works roster, or may create a small works roster for different specialties or categories of anticipated work. Where applicable, small works rosters may make distinctions between contractors based upon different geographic areas served by the contractor. The small works roster or rosters shall consist of all responsible contractors who have requested to be on the list, and where required by law are properly licensed or registered to perform such work in this state. A state agency or local government establishing a small works roster or rosters may require eligible contractors desiring to be placed on a roster or rosters to keep current records of any applicable licenses, certifications, registrations, bonding, insurance, or other appropriate matters on file with the state agency or local government as a condition of being placed on a roster or rosters. At least once a year, the state agency or local government shall publish in a newspaper of general circulation within the jurisdiction a notice of the existence of the roster or rosters and solicit the names of contractors for such roster or rosters. In addition, responsible contractors shall be added to an appropriate roster or rosters at any time they submit a written request and necessary records. Master contracts may be required to be signed that become effective when a specific award is made using a small works roster.

(b) A state agency establishing a small works roster or rosters shall adopt rules implementing this subsection. A local government establishing a small works roster or rosters shall adopt an ordinance or resolution implementing this subsection. Procedures included in rules adopted by the department of enterprise services in implementing this subsection must be included in any rules providing for a small works roster or rosters that is adopted by another state agency, if the authority for that state agency to engage in these activities has been delegated to it by the department of enterprise services under chapter 43.19 RCW. An interlocal contract or agreement between two or more state agencies or local governments establishing a small works roster or rosters to be used by the parties to the agreement or contract must clearly identify the lead entity that is responsible for implementing the provisions of this subsection.

(c) Procedures shall be established for securing telephone, written, or electronic quotations from contractors on the appropriate small works roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder, as defined in RCW 39.04.010. Invitations for quotations shall include an estimate of the scope and nature of the work to be performed as well as materials and equipment to be furnished. However, detailed plans and specifications need not be included in the invitation. This subsection does not eliminate other requirements for architectural or engineering approvals as to quality and compliance with building codes. Quotations may be invited from all appropriate contractors on the appropriate small works roster. As an alternative, quotations ((~~may~~)) must be invited from at least five contractors on the appropriate small works roster who have indicated the capability of performing the kind of work being contracted, in a manner that will equitably distribute the opportunity among the contractors on the appropriate roster. However, if the estimated cost of the work is from one hundred fifty thousand dollars to ((~~three~~)) five hundred thousand dollars, a state agency or local government that chooses to solicit bids from less than all the appropriate contractors on the appropriate small works roster must also notify the remaining contractors on the appropriate small works roster that quotations on the work are being sought. The government has the sole option of determining whether this notice to the remaining contractors is made by: (i) Publishing notice in a legal newspaper in general circulation in the area where the work is to be done; (ii) mailing a notice to these contractors; or (iii) sending a notice to these contractors by facsimile or other electronic means. For purposes of this subsection (2)(c), "equitably distribute" means that a state agency or local government soliciting bids may not favor certain contractors on the appropriate small works roster over other contractors on the appropriate small works roster who perform similar services.

(d) A contract awarded from a small works roster under this section need not be advertised.

(e) Immediately after an award is made, the bid quotations obtained shall be recorded, open to public inspection, and available by ((~~telephone inquiry~~)) electronic request.

(f) For projects awarded under the small works roster process established under this subsection, a state agency or authorized local government may waive the retainage requirements of RCW 60.28.011(1)(a), thereby assuming the liability for contractor's nonpayment of: (i) Laborers, mechanics, subcontractors, materialpersons, and suppliers; and (ii) taxes, increases, and penalties under Titles 50, 51, and 82 RCW that may be due from the contractor for the project. However, the state agency or local government has the right of recovery against the contractor for any payments made on the contractor's behalf. Recovery of unpaid wages and benefits are the first priority for actions filed against the retainage.

(3)(a) In lieu of awarding contracts under subsection (2) of this section, a state agency or authorized local government may award a contract for work, construction, alteration, repair, or improvement projects estimated to cost less than ((~~thirty-five~~)) one hundred fifty thousand dollars using the limited public works process provided under this subsection. Public works projects awarded under this subsection are exempt from the other requirements of the small works roster process provided under subsection (2) of this section and are exempt from the requirement that contracts be awarded after advertisement as provided under RCW 39.04.010.

(b) For limited public works projects, a state agency or authorized local government shall solicit electronic or written quotations from a minimum of three contractors from the appropriate small works roster and shall award the contract to the lowest responsible bidder as defined under RCW 39.04.010. After an award is made, the quotations shall be open to public inspection and available by electronic request. A state agency or authorized local government ((~~shall attempt to~~)) must equitably distribute opportunities for limited public works projects ((~~equitably~~)) among contractors willing to perform in the geographic area of the work. A state agency or authorized local government shall maintain a list of the contractors contacted and the contracts awarded during the previous twenty-four 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, a state agency or authorized local government may waive the payment and performance bond requirements of chapter 39.08 RCW and the retainage requirements of ((~~chapter 60.28~~)) RCW 60.28.011(1)(a), thereby assuming the liability for the contractor's nonpayment of laborers, mechanics, subcontractors, materialpersons, suppliers, and taxes ((~~imposed under Title~~)), increases, and penalties imposed under Titles 50, 51, and 82 RCW that may be due from the contractor for the limited public works project, however the state agency or authorized local government shall have the right of recovery against the contractor for any payments made on the contractor's behalf.

(4) The breaking of any project into units or accomplishing any projects by phases is prohibited if it is done for the purpose of avoiding the maximum dollar amount of a contract that may be let using the small works roster process or limited public works process.

(5)((~~(a) A state agency or authorized local government may use the limited public works process of subsection (3) of this section to solicit and award small works roster contracts to small businesses that are registered contractors with gross revenues under one million dollars annually as reported on their federal tax return.~~

~~(b) A state agency or authorized local government may adopt additional procedures to encourage small businesses that are registered contractors with gross revenues under two hundred fifty thousand dollars annually as reported on their federal tax returns to submit quotations or bids on small works roster contracts.~~

~~(6) As used in this section,~~)) A state agency or authorized local government may use the limited public works process in this section to solicit and award small works roster contracts to minibusinesses and microbusinesses as defined under RCW 39.26.010 that are registered contractors.

(6) The department of enterprise services shall work with the municipal research and services center to notify local governments authorized to use small works rosters of this authority and to provide guidance on how to use the authority. The guidance may take the form of a manual provided to local governments.

(7) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Equitably distributes" means that 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.

(b) "State agency" means the department of enterprise services, the state parks and recreation commission, the department of natural resources, the department of fish and wildlife, the department of transportation, any institution of higher education as defined under RCW 28B.10.016, and any other state agency delegated authority by the department of enterprise services to engage in construction, building, renovation, remodeling, alteration, improvement, or repair activities.

(8) The joint legislative audit and review committee must review the implementation of the changes to the small works roster and limited public works processes in this section and report to the governor and appropriate committees of the legislature by December 1, 2019. The report must include recommendations for the furtherance of practices set out in this section and identify:

(a) Progress in the rates of participation of certain groups including, qualified minority and women-owned and controlled businesses, minibusinesses, and microbusinesses in the small works roster and limited public works contracting processes; and

(b) Barriers to improving the participation rate of qualified minority and women-owned and controlled businesses and the growth of minibusinesses and microbusinesses in the small works roster and limited public works contracting processes.

**Sec.**  RCW 39.12.040 and 2013 c 113 s 5 are each amended to read as follows:

(1)(a) Except as provided in subsection (2) of this section, before payment is made by or on behalf of the state, or any county, municipality, or political subdivision created by its laws, of any sum or sums due on account of a public works contract, it is the duty of the officer or person charged with the custody and disbursement of public funds to require the contractor and each and every subcontractor from the contractor or a subcontractor to submit to such officer a "Statement of Intent to Pay Prevailing Wages". For a contract in excess of ten thousand dollars, the statement of intent to pay prevailing wages must include:

(i) The contractor's registration certificate number; and

(ii) The prevailing rate of wage for each classification of workers entitled to prevailing wages under RCW 39.12.020 and the estimated number of workers in each classification.

(b) Each statement of intent to pay prevailing wages must be approved by the industrial statistician of the department of labor and industries before it is submitted to the disbursing officer. Unless otherwise authorized by the department of labor and industries, each voucher claim submitted by a contractor for payment on a project estimate must state that the prevailing wages have been paid in accordance with the prefiled statement or statements of intent to pay prevailing wages on file with the public agency. Following the final acceptance of a public works project, it is the duty of the officer charged with the disbursement of public funds, to require the contractor and each and every subcontractor from the contractor or a subcontractor to submit to such officer an affidavit of wages paid before the funds retained according to the provisions of RCW 60.28.011 are released to the contractor. On a public works project where no retainage is withheld ((~~pursuant to RCW 60.28.011(1)(b)~~)), the affidavit of wages paid must be submitted to the state, county, municipality, or other public body charged with the duty of disbursing or authorizing disbursement of public funds prior to final acceptance of the public works project. If a subcontractor performing work on a public works project fails to submit an affidavit of wages paid form, the contractor or subcontractor with whom the subcontractor had a contractual relationship for the project may file the forms on behalf of the nonresponsive subcontractor. Affidavit forms may only be filed on behalf of a nonresponsive subcontractor who has ceased operations or failed to file as required by this section. The contractor filing the affidavit must accept responsibility for payment of prevailing wages unpaid by the subcontractor on the project pursuant to RCW 39.12.020 and 39.12.065. Intentionally filing a false affidavit on behalf of a subcontractor subjects the filer to the same penalties as are provided in RCW 39.12.050. Each affidavit of wages paid must be certified by the industrial statistician of the department of labor and industries before it is submitted to the disbursing officer.

(2) As an alternate to the procedures provided for in subsection (1) of this section, for public works projects of two thousand five hundred dollars or less and for projects where the limited public works process under RCW 39.04.155(3) is followed:

(a) An awarding agency may authorize the contractor or subcontractor to submit the statement of intent to pay prevailing wages directly to the officer or person charged with the custody or disbursement of public funds in the awarding agency without approval by the industrial statistician of the department of labor and industries. The awarding agency must retain such statement of intent to pay prevailing wages for a period of not less than three years.

(b) Upon final acceptance of the public works project, the awarding agency must require the contractor or subcontractor to submit an affidavit of wages paid. Upon receipt of the affidavit of wages paid, the awarding agency may pay the contractor or subcontractor in full, including funds that would otherwise be retained according to the provisions of RCW 60.28.011. Within thirty days of receipt of the affidavit of wages paid, the awarding agency must submit the affidavit of wages paid to the industrial statistician of the department of labor and industries for approval.

(c) A statement of intent to pay prevailing wages and an affidavit of wages paid must be on forms approved by the department of labor and industries.

(d) In the event of a wage claim and a finding for the claimant by the department of labor and industries where the awarding agency has used the alternative process provided for in this subsection (2), the awarding agency must pay the wages due directly to the claimant. If the contractor or subcontractor did not pay the wages stated in the affidavit of wages paid, the awarding agency may take action at law to seek reimbursement from the contractor or subcontractor of wages paid to the claimant, and may prohibit the contractor or subcontractor from bidding on any public works contract of the awarding agency for up to one year.

(e) Nothing in this section may be interpreted to allow an awarding agency to subdivide any public works project of more than two thousand five hundred dollars for the purpose of circumventing the procedures required by subsection (1) of this section.

NEW SECTION. **Sec.**  The following acts or parts of acts are each repealed:

(1)RCW 39.19.100 (Enforcement by attorney general—Injunctive relief) and 1987 c 328 s 12; and

(2)RCW 39.19.110 (Enforcement by attorney general—Investigative powers) and 1987 c 328 s 13.

**--- END ---**