

# HOUSE BILL REPORT

## 2SSB 5268

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### As Passed House - Amended:

April 10, 2023

**Title:** An act relating to equity and efficiencies in public works procurement including modifying small works roster requirements.

**Brief Description:** Addressing equity and efficiencies in public works procurement including modifying small works roster requirements.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators Hasegawa, Warnick, Hunt, Keiser, Kuderer, Nguyen, Nobles, Saldaña, Valdez, Wagoner and Wilson, C.).

### Brief History:

#### Committee Activity:

Innovation, Community & Economic Development, & Veterans: 3/14/23, 3/17/23 [DP];

Appropriations: 3/31/23, 4/3/23 [DP].

#### Floor Activity:

Passed House: 4/10/23, 96-0.

### Brief Summary of Second Substitute Bill (As Amended by House)

- Modifies small-works roster procedures.
- Requires the Department of Commerce to create a statewide small-works roster by June 30, 2024.
- Requires the Office of Minority and Women's Business Enterprises to adopt rules governing a public works small business certification program.
- Requires the Capital Projects Advisory Review Board to periodically review construction cost escalation data, roster utilization, and other

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

appropriate data and metrics, and make recommendations to the Legislature on adjustments to contracting thresholds.

- Requires the Department of Enterprise Services to develop and make available on its public-facing website templates for bid invitations, bidding, and contracting.

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## HOUSE COMMITTEE ON INNOVATION, COMMUNITY & ECONOMIC DEVELOPMENT, & VETERANS

**Majority Report:** Do pass. Signed by 15 members: Representatives Ryu, Chair; Donaghy, Vice Chair; Rule, Vice Chair; Volz, Ranking Minority Member; Barnard, Assistant Ranking Minority Member; Chambers, Christian, Corry, Cortes, Paul, Senn, Shavers, Street, Waters and Ybarra.

**Staff:** Cassie Jones (786-7303).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass. Signed by 29 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Berg, Chopp, Connors, Davis, Dye, Fitzgibbon, Hansen, Harris, Lekanoff, Pollet, Riccelli, Rude, Ryu, Sandlin, Schmick, Senn, Simmons, Slatter, Springer, Steele, Stonier and Tharinger.

**Staff:** Emily Stephens (786-7157).

### **Background:**

#### Small-Works Roster and the Limited Public-Works Process.

Public works includes all work, construction, alteration, and repair or improvement, other than ordinary maintenance, that is a cost to the state or a local government. All public works must comply with the public works prevailing wage requirements.

#### *Small-Works Roster.*

For public-works projects estimated to cost \$350,000 or less, state agencies and authorized local governments (agencies) may use the small-works roster process to award contracts. A small-works roster includes any responsible contractor who requests to be on the roster, which may be a single general list or lists for specialties or categories of work. Agencies

must publicly advertise the roster at least once per year in a newspaper of general circulation within the jurisdiction, soliciting the names of eligible contractors.

Agencies must adopt procedures to secure quotations from contractors on the roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder. A contract awarded from a small-works roster need not be advertised. Quotations may be invited from all appropriate contractors on the appropriate small-works roster. As an alternative, quotations may be invited from at least five contractors on the small-works roster in a manner that will equitably distribute the opportunity among contractors on the roster. If the estimated cost of the work is from \$250,000 to \$350,000, an agency that chooses to solicit bids from less than all the appropriate contractors must also notify the remaining contractors on the appropriate small-works roster that quotations on the work are being sought.

For projects awarded under the small-works roster process, the agency may waive certain retainage requirements and assume liability for the contractor's nonpayment of taxes and of laborers, subcontractors, mechanics, material persons, and suppliers. The agency retains the right of recovery against the contractor for any payments made on the contractor's behalf. Recovery of unpaid wages and benefits must be the first priority of actions filed against the retainage.

#### *Limited Public-Works Process.*

For public-works projects estimated to cost less than \$50,000, agencies may use the limited public-works process to award contracts. Under the limited public-works process, the agency solicits bids from at least three contractors from the appropriate small-works roster and awards the contract to the lowest responsible bidder. The agency must equitably distribute opportunities for limited public-works projects among contractors willing to perform in the geographic work area.

An agency must maintain a list of the contractors contacted and awarded during the previous 24 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, the agency may waive payment, performance bond, and retainage requirements, thereby assuming the liability for the contractor's nonpayment of laborers, mechanics, subcontractors, material persons, suppliers, and taxes, increases, and penalties. The agency retains the right of recovery against the contractor for any payments made on the contractor's behalf.

#### *Retainage.*

Retainage refers to a portion of the contractor's payment that is withheld by the contracting agency until the project is complete, and the portion is limited to 5 percent of the payment

amount. The retainage is used to satisfy claims that a person, such as a laborer or supplier, may have under the contract and to pay any taxes or penalties that may be due from the contractor.

#### Capital Projects Advisory Review Board.

The Capital Projects Advisory Review Board (CPARB), in the Department of Enterprise Services (DES), was created to provide evaluation of public capital projects construction processes, including the impact of contracting methods on project outcomes, and to advise the Legislature on policies related to public-works delivery methods and alternative public-works contracting procedures. The CPARB members are required to be knowledgeable or have experience in state and federal laws, rules, and best practices concerning public contracting for minority-, women-, and veteran-owned businesses and small businesses. The CPARB must reflect the gender, racial, ethnic, and geographic diversity of the state, including the interests of persons with disabilities.

In addition to evaluating public-works contract procedures, CPARB appoints members to the Project Review Committee to certify public bodies to use alternative contracting procedures, such as design-build (DB), general contractor/construction manager (GC/CM), or both, and to approve the use of DB or GC/CM procedures on a project-by-project basis.

The CPARB has a duty to develop and recommend policies to encourage competition and to further enhance the quality, efficiency, and accountability of and equitable participation by disadvantaged business enterprises and make recommendations regarding best practices, expansion, continuation, elimination, or modification of the alternative public-works contracting methods, including specific recommendations for reducing barriers for and increasing participation by disadvantaged business enterprises.

#### Department of Enterprise Services.

The Department of Enterprise Services (DES) manages procurement of goods and services for state agencies. The DES is, in part, responsible for developing procurement policies and procedures that encourage and facilitate the purchase of goods and services from Washington small businesses, microbusinesses, minibusinesses, and minority- and women-owned businesses to the maximum extent practicable.

#### Office of Minority and Women's Business Enterprises.

The Office of Minority and Women's Business Enterprises (OMWBE) was created to provide minority- and women-owned and controlled businesses with the maximum practicable opportunity for increased participation in public-works contracts and public contracts for goods and services. The OMWBE is the sole authority in Washington for certifying minority- and women-owned business enterprises. Certified business enterprises are listed in the OMWBE database. Cities, counties, state agencies, transportation, and

educational institutions use the database to source small and diverse firms for potential contracting opportunities. Among other duties, the OMWBE must identify barriers to equal participation by qualified businesses in all state agency and educational contracts, and the OMWBE must establish annual participation goals by qualified businesses for each state agency and educational institution.

### **Summary of Amended Bill:**

An agency may utilize a statewide small-works roster or create and maintain one or more small-works rosters for different categories of anticipated work. The agency must require contractors desiring to be placed on the small-works roster to indicate if they meet the definition of women- and minority-owned businesses, veteran-owned businesses, or small businesses. At least once per year, the agency must provide the OMWBE directory of certified firms a notice of the existence of the roster and solicit contractors for the roster. The contractors must agree and be able to receive notifications via email.

Agencies must document good faith efforts annually implementing the following:

- After an award is made, the bid quotations obtained must be recorded, publicly available, and available by request.
- An agency must publish a list of small-works contracts awarded and contractors contacted for direct negotiation.

An agency contracting through a small-works roster must invite bids notifying all contractors on the applicable roster that have indicated interest in performing work in the applicable geographical area.

For small public works with an estimated cost of less than \$150,000, an agency is encouraged to and may direct contract with small businesses before direct contracting with other contractors on the appropriate small-works roster without a competitive process under specified rules:

- If there are six or more contractors meeting the definition of small business on the applicable roster, the agency must direct contract with one of those small businesses on the applicable roster that have indicated interest in performing work in the applicable geographical area. The agency must rotate through the contractors on the appropriate small-works roster and must, when qualified contractors are available from the roster who may perform the work or deliver the services within the budget described in the notice or request for proposals, utilize different contractors on different projects.
- If there are five or less contractors meeting the definition of small business on the applicable roster, the agency may direct contract with any contractor on the applicable roster.

When utilizing direct contracting, an agency must notify small, minority, women, or veteran-owned businesses on the applicable roster. Each agency engaging in direct

contracting must also establish a women-, minority-, and veteran-owned business and small business utilization plan. An agency engaging in direct contracting may not favor certain contractors on the appropriate small-works roster by repeatedly awarding contracts without documented attempts to direct contract with other contractors on the appropriate small-works roster.

For small public works contracts under \$5,000, there is no requirement for retainage or performance bonds.

#### Statewide Small-Works Roster.

The Department of Commerce (Commerce), through the Municipal Research and Services Center (MRSC), must develop a statewide small-works roster by June 30, 2024. The MRSC must develop criteria for the statewide roster with collaboration from affected state and local agencies. The roster must have features to filter the roster by different specialties, categories of anticipated work, or geographic areas served by contractors. The roster must also indicate whether the contractor is designated as a small business. Commerce must provide funding to the MRSC as appropriated to maintain and publicize a small-works roster, and work with MRSC to notify state and local governments authorized to use small-works rosters of the statewide roster authority and provide guidance on how to use the authority. State agencies and authorized local governments using small-works rosters must establish procedures for implementation.

#### Capital Projects Advisory Review Board.

Beginning in 2025 and every five years thereafter, the CPARB must review construction cost escalation data for Washington, readily available in industry publications, roster utilization, and other appropriate data and metrics, and make recommendations to the appropriate committees of the Legislature on adjustments to contracting thresholds.

#### Department of Enterprise Services.

The DES must develop and make available on its public-facing website templates for bid invitations, bidding, and contracting that may be used by state agencies, authorized local governments, and contractors. A provision is eliminated that required the DES to conduct a survey and compile the results into a list of which states provide a bidding preference on public-works contracts for their resident contractors.

#### Office of Minority and Women's Business Enterprises.

The OMWBE must adopt rules governing the development and maintenance of a public-works small business certification program.

#### Other Provisions.

"Small business" is defined as a business meeting the certification criteria for size, ownership, control, and personal net worth adopted by the OMWBE. References to disadvantaged businesses enterprise are replaced with small, women-, minority-, or veteran-owned businesses throughout statutes relating to the CPARB and alternative public-works contracting. For port districts and irrigation districts, the limit for small-works contracting is increased from \$300,000 to \$350,000.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Sections 31 and 35 of the bill contain an emergency clause and take effect on July 1, 2023. The remainder of the bill contains multiple effective dates. Please see the bill.

**Staff Summary of Public Testimony (Innovation, Community & Economic Development, & Veterans):**

(In support) This bill is a request from the CPARB, a board on which many interests are represented. The CPARB supervises major public works that use alternative contracting procedures. This bill addresses small-works contracting and is a result of the consensus of the CPARB; all members of the CPARB support the bill. The purpose of it is to support small businesses in participating in public contracting. The bill removes a requirement that the DES provide a report on states that provide a preference for resident contractors; this provision was not discussed by the CPARB. Promoting in-state contractors is a good thing, so this tool should not be removed from the bill. The minority business community sees as a problem the threshold in the bill for direct contracting; if there are fewer than six contractors on the roster, any contractor can be used. That number should be four rather than six.

This bill will help small businesses get access to public works construction projects through the statewide small works roster, the small businesses certification program, and parity for ports and irrigations districts regarding small works. Certifying small businesses will create a fair and competitive process for public-works contracting because large businesses have a considerable advantage in the market. The statewide small-works roster will create one front door for business opportunity instead of businesses having to be put on a list for every jurisdiction. The bill provides a foundation for small and diverse businesses to create business history with bonding and insurance companies and public-works organizations to make them more competitive and able take advantage of growth opportunities.

The purpose behind striking the bid preference language was to remove outdated language that required the DES to conduct a survey in 2011 that has already been completed. Regarding the threshold of six businesses in direct contracting, if the number of contractors

on a roster is too low, a single contractor would unfairly benefit. Six was a consensus number. State agencies have created implementation plans for these policies and all the resources in the fiscal note will be needed to ensure success.

(Opposed) None.

**Staff Summary of Public Testimony (Appropriations):**

(In support) The creation of a small business certification is important to level the playing field in public works contracting. A statewide roster is important because small businesses currently need to sign up in 25 to 30 places to get on the small works roster. The bill standardizes, and creates parity among, small works roster statutes. The bill language was drafted unanimously with public engagement and took prior recommendations from the Capital Projects Advisory Review Board into account.

(Opposed) None.

**Persons Testifying (Innovation, Community & Economic Development, & Veterans):**

Senator Bob Hasegawa, prime sponsor; William Frare, Washington State Department of Enterprise Services; Janice Zahn, Capital Projects Advisory Review Board; and Josh Swanson, International Union of Operating Engineers, Local 302.

**Persons Testifying (Appropriations):** Janice Zahn, Capital Projects Advisory Review Board; William Frare; and Michael Transue, Mechanical Contractors Association of Western Washington.

**Persons Signed In To Testify But Not Testifying (Innovation, Community & Economic Development, & Veterans):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.