
HOUSE BILL 1370

State of Washington 53rd Legislature 1993 Regular Session

By Representatives Ludwig, Heavey, Orr, Bray, Veloria, King and G. Cole

Read first time 01/25/93. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to public works subletting and subcontracting;
2 amending RCW 18.27.200; adding a new chapter to Title 39 RCW; and
3 prescribing penalties.

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

5 NEW SECTION. **Sec. 1.** Unless the context clearly requires
6 otherwise, the definitions in this section apply throughout this
7 chapter.

8 (1) "Public work," "municipality," and "state" have the meanings
9 given in RCW 39.04.010.

10 (2) "Prime contractor" means the contractor who contracts directly
11 with the awarding agency.

12 (3) "Subcontractor" means a contractor, within the meaning of
13 chapter 18.27 RCW, who contracts directly with the prime contractor.

14 NEW SECTION. **Sec. 2.** Any prime contractor making a bid to perform
15 a public work shall list in the bid:

16 (1) The name and business address of each subcontractor who: (a)
17 Will perform work or labor or render service to the prime contractor on
18 the public work, or (b) under subcontract to the prime contractor,

1 specially fabricates and installs a portion of the work or improvement
2 according to detailed drawings contained in the plans and
3 specifications, in an amount in excess of one-half of one percent of
4 the prime contractor's total bid, or (c) in the case of bids or offers
5 for the construction of streets or highways, including bridges, bids in
6 excess of one-half of one percent of the prime contractor's total bid
7 or ten thousand dollars, whichever is greater.

8 (2) The portion of the work that will be done by each
9 subcontractor. The prime contractor shall list only one subcontractor
10 for each portion as is defined by the prime contractor in his or her
11 bid.

12 NEW SECTION. **Sec. 3.** Circumvention by a general contractor who
13 bids as a prime contractor, of the requirement under section 2 of this
14 act to list his or her subcontractors, by the device of listing another
15 contractor who will in turn sublet portions constituting the majority
16 of the work covered by the prime contract, shall be considered a
17 violation of this chapter and shall subject that prime contractor to
18 the penalties set forth in sections 10 and 11 of this act.

19 NEW SECTION. **Sec. 4.** If a prime contractor fails to specify a
20 subcontractor or if a prime contractor specifies more than one
21 subcontractor for the same portion of work to be performed under the
22 contract in excess of one-half of one percent of the prime contractor's
23 total bid, the prime contractor guarantees that he or she is fully
24 qualified to perform that portion himself or herself, and that the
25 prime contractor shall perform that portion himself or herself.

26 If after award of contract, the prime contractor subcontracts,
27 except as provided for in section 5 of this act, any portion of the
28 work, the prime contractor shall be subject to the penalties named in
29 section 11 of this act.

30 NEW SECTION. **Sec. 5.** No prime contractor whose bid is accepted
31 shall:

32 (1) Substitute any person as subcontractor in place of the
33 subcontractor listed in the original bid, except upon approval of the
34 awarding agency in the following situations:

35 (a) When the subcontractor listed in the bid after having had a
36 reasonable opportunity to do so fails or refuses to execute a written

1 contract when that written contract, based upon the general terms,
2 conditions, plans, and specifications for the project involved or the
3 terms of that subcontractor's written bid, is presented to the
4 subcontractor by the prime contractor;

5 (b) When the listed subcontractor becomes bankrupt or insolvent;

6 (c) When the listed subcontractor fails or refuses to perform his
7 or her subcontract;

8 (d) When the listed subcontractor fails or refuses to meet the bond
9 requirements of the prime contractor as set forth in section 9 of this
10 act;

11 (e) When the prime contractor demonstrates to the awarding agency,
12 subject to section 7 of this act, that the name of the subcontractor
13 was listed as the result of an inadvertent clerical error;

14 (f) When the listed subcontractor is not licensed pursuant to
15 chapter 18.27 RCW; or

16 (g) When the awarding agency determines that the work performed by
17 the listed subcontractor is substantially unsatisfactory and not in
18 substantial accordance with the plans and specifications, or that the
19 subcontractor is substantially delaying or disrupting the progress of
20 the work.

21 Prior to approval of the prime contractor's request for the
22 substitution, the awarding agency shall give notice in writing to the
23 listed subcontractor of the prime contractor's request to substitute
24 and of the reasons for the request. The notice shall be served by
25 certified or registered mail to the last known address of the
26 subcontractor. The subcontractor shall have five working days within
27 which to submit written objections to the substitution to the awarding
28 agency. Failure to file these written objections shall constitute the
29 listed subcontractor's consent to the substitution.

30 If written objections are filed, the awarding agency shall give
31 notice in writing, of at least five working days, to the listed
32 subcontractor of a hearing by the awarding agency on the prime
33 contractor's request for substitution.

34 (2) Permit any subcontract to be voluntarily assigned or
35 transferred or allow it to be performed by anyone other than the
36 original subcontractor listed in the original bid, without the consent
37 of the awarding agency.

1 (3) Subcontract any portion of the work in excess of one-half of
2 one percent of the prime contractor's total bid as to which his or her
3 original bid did not designate a subcontractor, except:

4 (a) In the performance of "change orders" causing changes or
5 deviations from the original contract; or

6 (b) In cases of public emergency or necessity, after a written
7 finding of the emergency or necessity by the awarding agency.

8 NEW SECTION. **Sec. 6.** No subcontractor listed by a prime
9 contractor under section 2 of this act as furnishing and installing
10 carpeting, shall voluntarily sublet his or her subcontract with respect
11 to any portion of the labor to be performed unless he or she specified
12 the subcontractor in his or her bid for that subcontract to the prime
13 contractor.

14 NEW SECTION. **Sec. 7.** (1) The prime contractor as a condition to
15 assert a claim of inadvertent clerical error in the listing of a
16 subcontractor shall within two working days after the time of the prime
17 bid opening by the awarding agency give written notice to the awarding
18 agency and copies of that notice to both the subcontractor he or she
19 claims to have listed in error and the intended subcontractor who had
20 bid to the prime contractor prior to bid opening.

21 (2) Any listed subcontractor who has been notified by the prime
22 contractor in accordance with this section as to an inadvertent
23 clerical error shall be allowed six working days from the time of the
24 prime bid opening within which to submit to the awarding agency and to
25 the prime contractor written objection to the prime contractor's claim
26 of inadvertent clerical error. Failure of the listed subcontractor to
27 file the written notice within the six working days shall be primary
28 evidence of his or her agreement that an inadvertent clerical error was
29 made.

30 (3) The awarding agency shall, after a public hearing as provided
31 in section 5 of this act and in the absence of compelling reasons to
32 the contrary, consent to the substitution of the intended
33 subcontractor:

34 (a) If (i) the prime contractor, (ii) the subcontractor listed in
35 error, and (iii) the intended subcontractor each submit an affidavit to
36 the awarding agency along with such additional evidence as the parties
37 may wish to submit that an inadvertent clerical error was in fact made,

1 provided that the affidavits from each of the three parties are filed
2 within eight working days from the time of the prime bid opening; or

3 (b) If the affidavits are filed by both the prime contractor and
4 the intended subcontractor within the specified time but the
5 subcontractor whom the prime contractor claims to have listed in error
6 does not submit within six working days, to the awarding agency and to
7 the prime contractor, written objection to the prime contractor's claim
8 of inadvertent clerical error as provided in this section.

9 (4) If the affidavits required under subsection (3) of this section
10 are filed by both the prime contractor and the intended subcontractor
11 but the listed subcontractor has, within six working days from the time
12 of the prime bid opening, submitted to the awarding agency and to the
13 prime contractor written objection to the prime contractor's claim of
14 inadvertent clerical error, the awarding agency shall investigate the
15 claims of the parties and shall hold a public hearing as provided in
16 section 5 of this act to determine the validity of those claims. Any
17 determination made shall be based on the facts contained in the
18 declarations submitted under penalty of perjury by all three parties
19 and supported by testimony under oath and subject to cross-examination.
20 The awarding agency may, on its own motion or that of any other party,
21 admit testimony of other contractors, any bid registries or
22 depositories, or any other party in possession of facts which may have
23 a bearing on the decision of the awarding agency.

24 NEW SECTION. **Sec. 8.** If a contractor who enters into a contract
25 with the state or a municipality for investigation, removal, or
26 remedial action, or disposal relative to the release or presence of a
27 hazardous material or hazardous waste fails to pay a subcontractor
28 operating as a hazardous waste hauler pursuant to chapters 81.80 and
29 46.48 RCW within ten days after the investigation, removal, or remedial
30 action, or disposal is completed, the subcontractor may serve a stop
31 notice upon the state or municipality.

32 NEW SECTION. **Sec. 9.** (1) It is the responsibility of each
33 subcontractor submitting bids to a prime contractor to be prepared to
34 submit a faithful performance and payment bond or bonds if so requested
35 by the prime contractor.

36 (2) In the event any subcontractor submitting a bid to a prime
37 contractor does not, upon the request of the prime contractor and at

1 the expense of the prime contractor at the established charge or
2 premium therefor, furnish to the prime contractor a bond or bonds
3 issued by an admitted surety wherein the prime contractor is named the
4 obligee, guaranteeing prompt and faithful performance of the
5 subcontract and the payment of all claims for labor and materials
6 furnished or used in and about the work to be done and performed under
7 the subcontract, the prime contractor may reject the bid and make a
8 substitution of another subcontractor subject to section 5 of this act.
9 The bond or bonds may be required at the expense of the subcontractor
10 only if the prime contractor in his or her written or published request
11 for subbids (a) specifies that the expense for the bond or bonds shall
12 be borne by the subcontractor and (b) clearly specifies the amount and
13 requirements of the bond or bonds.

14 NEW SECTION. **Sec. 10.** A prime contractor violating any of the
15 provisions of this chapter violates his or her contract and the
16 awarding agency may exercise the option, in its own discretion, of (1)
17 canceling his or her contract or (2) assessing the prime contractor a
18 penalty in an amount of not more than ten percent of the amount of the
19 subcontract involved. The penalty shall be deposited in the fund out
20 of which the prime contract is awarded. In any proceedings under this
21 section the prime contractor shall be entitled to a public hearing and
22 to five days' notice of the time and place thereof.

23 NEW SECTION. **Sec. 11.** Violation of this chapter by a contractor
24 subject to chapter 18.27 RCW constitutes grounds for infraction action
25 under chapter 18.27 RCW in addition to the penalties prescribed in
26 section 10 of this act.

27 NEW SECTION. **Sec. 12.** The failure on the part of a contractor to
28 comply with any provision of this chapter does not constitute a defense
29 to the contractor in any action brought against the contractor by a
30 subcontractor.

31 NEW SECTION. **Sec. 13.** Nothing in this chapter limits or
32 diminishes any rights or remedies, either legal or equitable, that:
33 (1) An original or substituted subcontractor may have against the
34 prime contractor, his or her successors, or assigns.

1 (2) The state or any municipality may have against the prime
2 contractor, his or her successors, or assigns, including the right to
3 take over and complete the contract.

4 NEW SECTION. **Sec. 14.** In counties with a population of seventy
5 thousand or more, the county legislative authority, when it is the
6 awarding agency, may delegate its functions under sections 5 and 10 of
7 this act to a hearing officer designated by the council.

8 The hearing officer shall make a written recommendation to the
9 county legislative authority. The council may adopt the recommendation
10 without further notice or hearing, or may set the matter for a de novo
11 hearing before the county legislative authority.

12 **Sec. 15.** RCW 18.27.200 and 1983 1st ex.s. c 2 s 1 are each amended
13 to read as follows:

14 An offer to do work, submission of a bid, or performance of any
15 work by a contractor who is not registered with the department of labor
16 and industries as required by this chapter, or a violation of chapter
17 39.-- RCW (sections 1 through 14 of this act) by a contractor subject
18 to this chapter is an infraction. Each day that a contractor works
19 without being registered as required by this chapter is a separate
20 infraction. Each worksite at which a contractor works without being
21 registered as required by this chapter is a separate infraction.

22 NEW SECTION. **Sec. 16.** Sections 1 through 14 of this act shall
23 constitute a new chapter in Title 39 RCW.

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