
HOUSE BILL 2405

State of Washington

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By Representatives Romero, Hudgins, Haigh, Conway, Cooper, Chase, Ormsby, Upthegrove, Simpson, G., Hunt, Cody, Darneille, Campbell, Kenney, Dunshee, Wood, Nixon, Moeller, Morrell, Rockefeller, Clibborn, Kagi, Lantz and Schual-Berke

Read first time 01/14/2004. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to requiring personal service, purchased service,
2 and civil service contracts to be performed by citizens of the United
3 States or persons authorized by federal law to work in the United
4 States; amending RCW 39.29.008, 41.06.142, and 43.19.1911; and
5 providing an effective date.

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

7 **Sec. 1.** RCW 39.29.008 and 1993 c 433 s 6 are each amended to read
8 as follows:

9 Personal services may be procured only to resolve a particular
10 agency problem or issue or to expedite a specific project that is
11 temporary in nature. An agency may procure personal services only if
12 it documents that:

13 (1) The service is critical to agency responsibilities or
14 operations, or is mandated or authorized by the legislature;

15 (2) Sufficient staffing or expertise is not available within the
16 agency to perform the service; and

17 (3) Other qualified public resources are not available to perform
18 the service.

1 All work under a personal services contract, or under any
2 subcontract awarded under the personal services contract, must be
3 performed by citizens of the United States or persons authorized by
4 federal law to work in the United States.

5 **Sec. 2.** RCW 41.06.142 and 2002 c 354 s 208 are each amended to
6 read as follows:

7 (1) Any department, agency, or institution of higher education may
8 purchase services, including services that have been customarily and
9 historically provided by employees in the classified service under this
10 chapter, by contracting with individuals, nonprofit organizations,
11 businesses, employee business units, or other entities if the following
12 criteria are met:

13 (a) The invitation for bid or request for proposal contains
14 measurable standards for the performance of the contract;

15 (b) Employees in the classified service whose positions or work
16 would be displaced by the contract are provided an opportunity to offer
17 alternatives to purchasing services by contract and, if these
18 alternatives are not accepted, compete for the contract under
19 competitive contracting procedures in subsection (4) of this section;

20 (c) The contract with an entity other than an employee business
21 unit includes a provision requiring the entity to consider employment
22 of state employees who may be displaced by the contract;

23 (d) All work under the contract, or under any subcontract awarded
24 under the contract, must be performed by citizens of the United States
25 or persons authorized by federal law to work in the United States;

26 (e) The department, agency, or institution of higher education has
27 established a contract monitoring process to measure contract
28 performance, costs, service delivery quality, and other contract
29 standards, and to cancel contracts that do not meet those standards;
30 and

31 ((+e)) (f) The department, agency, or institution of higher
32 education has determined that the contract results in savings or
33 efficiency improvements. The contracting agency must consider the
34 consequences and potential mitigation of improper or failed performance
35 by the contractor.

36 (2) Any provision contrary to or in conflict with this section in

1 any collective bargaining agreement in effect on July 1, 2005, is not
2 effective beyond the expiration date of the agreement.

3 (3) Contracting for services that is expressly mandated by the
4 legislature or was authorized by law prior to July 1, 2005, including
5 contracts and agreements between public entities, shall not be subject
6 to the processes set forth in subsections (1) and (4) through (6) of
7 this section.

8 (4) Competitive contracting shall be implemented as follows:

9 (a) At least ninety days prior to the date the contracting agency
10 requests bids from private entities for a contract for services
11 provided by classified employees, the contracting agency shall notify
12 the classified employees whose positions or work would be displaced by
13 the contract. The employees shall have sixty days from the date of
14 notification to offer alternatives to purchasing services by contract,
15 and the agency shall consider the alternatives before requesting bids.

16 (b) If the employees decide to compete for the contract, they shall
17 notify the contracting agency of their decision. Employees must form
18 one or more employee business units for the purpose of submitting a bid
19 or bids to perform the services.

20 (c) The director of personnel, with the advice and assistance of
21 the department of general administration, shall develop and make
22 available to employee business units training in the bidding process
23 and general bid preparation.

24 (d) The director of general administration, with the advice and
25 assistance of the department of personnel, shall, by rule, establish
26 procedures to ensure that bids are submitted and evaluated in a fair
27 and objective manner and that there exists a competitive market for the
28 service. Such rules shall include, but not be limited to: (i)
29 Prohibitions against participation in the bid evaluation process by
30 employees who prepared the business unit's bid or who perform any of
31 the services to be contracted; (ii) provisions to ensure no bidder
32 receives an advantage over other bidders and that bid requirements are
33 applied equitably to all parties; and (iii) procedures that require the
34 contracting agency to receive complaints regarding the bidding process
35 and to consider them before awarding the contract. Appeal of an
36 agency's actions under this subsection is an adjudicative proceeding
37 and subject to the applicable provisions of chapter 34.05 RCW, the

1 administrative procedure act, with the final decision to be rendered by
2 an administrative law judge assigned under chapter 34.12 RCW.

3 (e) An employee business unit's bid must include the fully
4 allocated costs of the service, including the cost of the employees'
5 salaries and benefits, space, equipment, materials, and other costs
6 necessary to perform the function. An employee business unit's cost
7 shall not include the state's indirect overhead costs unless those
8 costs can be attributed directly to the function in question and would
9 not exist if that function were not performed in state service.

10 (f) A department, agency, or institution of higher education may
11 contract with the department of general administration to conduct the
12 bidding process.

13 (5) As used in this section:

14 (a) "Employee business unit" means a group of employees who perform
15 services to be contracted under this section and who submit a bid for
16 the performance of those services under subsection (4) of this section.

17 (b) "Indirect overhead costs" means the pro rata share of existing
18 agency administrative salaries and benefits, and rent, equipment costs,
19 utilities, and materials associated with those administrative
20 functions.

21 (c) "Competitive contracting" means the process by which classified
22 employees of a department, agency, or institution of higher education
23 compete with businesses, individuals, nonprofit organizations, or other
24 entities for contracts authorized by subsection (1) of this section.

25 (6) The joint legislative audit and review committee shall conduct
26 a performance audit of the implementation of this section, including
27 the adequacy of the appeals process in subsection (4)(d) of this
28 section, and report to the legislature by January 1, 2007, on the
29 results of the audit.

30 **Sec. 3.** RCW 43.19.1911 and 2003 c 136 s 6 are each amended to read
31 as follows:

32 (1) Preservation of the integrity of the competitive bid system
33 dictates that after competitive bids have been opened, award must be
34 made to that responsible bidder who submitted the lowest responsive bid
35 pursuant to subsections (7) and (9) of this section, unless there is a
36 compelling reason to reject all bids and cancel the solicitation.

1 (2) Every effort shall be made to anticipate changes in a
2 requirement before the date of opening and to provide reasonable notice
3 to all prospective bidders of any resulting modification or
4 cancellation. If, in the opinion of the purchasing agency, division,
5 or department head, it is not possible to provide reasonable notice,
6 the published date for receipt of bids may be postponed and all known
7 bidders notified. This will permit bidders to change their bids and
8 prevent unnecessary exposure of bid prices. In addition, every effort
9 shall be made to include realistic, achievable requirements in a
10 solicitation.

11 (3) After the opening of bids, a solicitation may not be canceled
12 and resolicited solely because of an increase in requirements for the
13 items being acquired. Award may be made on the initial solicitation
14 and an increase in requirements may be treated as a new acquisition.

15 (4) A solicitation may be canceled and all bids rejected before
16 award but after bid opening only when, consistent with subsection (1)
17 of this section, the purchasing agency, division, or department head
18 determines in writing that:

19 (a) Unavailable, inadequate, ambiguous specifications, terms,
20 conditions, or requirements were cited in the solicitation;

21 (b) Specifications, terms, conditions, or requirements have been
22 revised;

23 (c) The supplies or services being contracted for are no longer
24 required;

25 (d) The solicitation did not provide for consideration of all
26 factors of cost to the agency;

27 (e) Bids received indicate that the needs of the agency can be
28 satisfied by a less expensive article differing from that for which the
29 bids were invited;

30 (f) All otherwise acceptable bids received are at unreasonable
31 prices or only one bid is received and the agency cannot determine the
32 reasonableness of the bid price;

33 (g) No responsive bid has been received from a responsible bidder;
34 or

35 (h) The bid process was not fair or equitable.

36 (5) The agency, division, or department head may not delegate his
37 or her authority under this section.

1 (6) After the opening of bids, an agency may not reject all bids
2 and enter into direct negotiations to complete the planned acquisition.
3 However, the agency can enter into negotiations exclusively with the
4 lowest responsible bidder in order to determine if the lowest
5 responsible bid may be improved. Until December 31, 2007, for
6 purchases requiring a formal bid process the agency shall also enter
7 into negotiations with and may consider for award the lowest
8 responsible bidder that is a vendor in good standing, as defined in RCW
9 43.19.525. An agency shall not use this negotiation opportunity to
10 permit a bidder to change a nonresponsive bid into a responsive bid.

11 (7) In determining the lowest responsible bidder, the agency shall
12 consider any preferences provided by law to Washington products and
13 vendors and to RCW 43.19.704, and further, may take into consideration
14 the quality of the articles proposed to be supplied, their conformity
15 with specifications, the purposes for which required, and the times of
16 delivery. All work under a contract for services, or under any
17 subcontract awarded under a contract for services, must be performed by
18 citizens of the United States or persons authorized by federal law to
19 work in the United States.

20 (8) Each bid with the name of the bidder shall be entered of record
21 and each record, with the successful bid indicated, shall, after
22 letting of the contract, be open to public inspection.

23 (9) In determining "lowest responsible bidder", in addition to
24 price, the following elements shall be given consideration:

25 (a) The ability, capacity, and skill of the bidder to perform the
26 contract or provide the service required;

27 (b) The character, integrity, reputation, judgment, experience, and
28 efficiency of the bidder;

29 (c) Whether the bidder can perform the contract within the time
30 specified;

31 (d) The quality of performance of previous contracts or services;

32 (e) The previous and existing compliance by the bidder with laws
33 relating to the contract or services;

34 (f) Such other information as may be secured having a bearing on
35 the decision to award the contract: PROVIDED, That in considering bids
36 for purchase, manufacture, or lease, and in determining the "lowest
37 responsible bidder," whenever there is reason to believe that applying
38 the "life cycle costing" technique to bid evaluation would result in

1 lowest total cost to the state, first consideration shall be given by
2 state purchasing activities to the bid with the lowest life cycle cost
3 which complies with specifications. "Life cycle cost" means the total
4 cost of an item to the state over its estimated useful life, including
5 costs of selection, acquisition, operation, maintenance, and where
6 applicable, disposal, as far as these costs can reasonably be
7 determined, minus the salvage value at the end of its estimated useful
8 life. The "estimated useful life" of an item means the estimated time
9 from the date of acquisition to the date of replacement or disposal,
10 determined in any reasonable manner. Nothing in this section shall
11 prohibit any state agency, department, board, commission, committee, or
12 other state-level entity from allowing for preferential purchase of
13 products made from recycled materials or products that may be recycled
14 or reused.

15 NEW SECTION. **Sec. 4.** If any provision of this act or its
16 application to any person or circumstance is held invalid, the
17 remainder of the act or the application of the provision to other
18 persons or circumstances is not affected.

19 NEW SECTION. **Sec. 5.** (1) This act takes effect July 1, 2005.

20 (2) This act does not apply to contracts entered into by the state
21 prior to July 1, 2005.

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