Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Commerce & Labor Committee

HB 2257

Brief Description: Requiring state contracts to be in the state's best interests.

Sponsors: Representatives Williams, Conway, Morrell and Wood.

Brief Summary of Bill

- Specifies that the legislature and state agencies should spend tax dollars in a responsible manner that is consistent with the nation's and the state's best interests.
- Also specifies that the legislature and state agencies should consider certain indirect benefits that may be achieved when entering into state contracts for goods and services.

Hearing Date:

Staff: Jill Reinmuth (786-7134).

Background:

State Procurement

The State of Washington contracts with individuals and companies outside of state government to provide certain services to the state and its residents. The state's purchasing authority is generally organized into categories based on the type of service. These categories include the following:

- Personal services. This term refers to professional or technical expertise provided by a consultant to accomplish a specific study or project;
- Purchased services. These services are ones provided by a vendor to accomplish routine, continuing and necessary functions;
- Information services. These services include data processing, telecommunications, office automation, and computerized information systems;
- Public works. This term refers to the construction, repair, or alteration of buildings and other real property;
- Highway design and construction. This term includes both architectural and engineering services, as well as construction services related to highways; and
- Printing services. This term refers to the production of printed materials.

In addition, beginning July 1, 2005, the state may contract for services historically and traditionally provided by state employees, so long as the state complies with the contracting out provisions of the Civil Service Reform Act of 2002.

Laws governing state procurement that give preference to domestic goods or prohibit purchasing foreign goods have been challenged on one or more grounds. These include arguments that such laws are: (1) invalid exercises of state power under the Foreign Commerce Clause and/or the Foreign Affairs Power; (2) preempted by federal law; or (3) in violation of international agreements on government procurement.

Foreign Commerce Clause

The U.S. Constitution reserves to Congress the power "to regulate Commerce with foreign Nations, ..." The U.S. Supreme Court has struck down state laws that regulate commerce in a manner that promotes businesses in the state at the expense of businesses in other states or foreign countries. However, the U.S. Supreme Court has also recognized that, when a state acts as a market participant, rather than a market regulator, it is not subject to the restraints of the Commerce Clause. Other federal and state courts, relying on the "market participant doctrine," have generally upheld state "Buy American" laws.

Foreign Affairs Power

With regard to foreign policy, the federal government also has exclusive authority. The U.S. Supreme Court has said that the President has the "lead role" as well as "a degree of independent authority to act." The Court has struck down at least one state law as an "intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress."

Federal Preemption

The U.S. Supreme Court has found that state laws in conflict with federal laws or with foreign policies and diplomatic objectives of the President and Congress are preempted.

International Agreements

The Agreement on Government Procurement (GPA) is one of many WTO agreements to which the United States is a party, and is one of several agreements that apply to Washington and certain other states. The GPA is a plurilateral agreement, meaning that only some WTO members are parties to the agreement. For example, Ghana, India, Mexico, and the Philippines are members of the WTO, but are not parties to the GPA.

In Washington, state agencies subject to the GPA include certain executive branch agencies such as the Department of General Administration and the Department of Transportation, as well as state universities. State contracts subject to the GPA include contracts of $477,000 or more for goods and services, and contracts of $6,725,000 or more for construction services.

Article III of the GPA deals with national treatment and non-discrimination. It provides, in part that:

- Parties to the agreement must give the products, services and suppliers of other parties treatment no less favorable than that accorded to domestic products, services and suppliers;

- Parties must not treat locally-established suppliers less favorably than other suppliers on the basis of foreign affiliation or ownership; and
- Parties must not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied.

According to the WTO Analytical Index for the GPA, there are no decisions of competent WTO bodies interpreting this article of the GPA. (In 1994 the European Union and Japan filed formal complaints against the United States in the WTO, claiming that Massachusetts' Burma law violated certain provisions of the GPA. In 1999, at the request of the European Union and Japan, these proceedings were suspended. Later, they automatically lapsed.)

Under the federal Uruguay Rounds Agreement Act (Act), Congress approved the World Trade Organization (WTO) agreement and other agreements annexed to that agreement, including the Agreement on Government Procurement. The Act provides that no state law may be declared invalid on the ground that it is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for that purpose. The Act also sets forth procedures for dispute resolutions involving other WTO members and legal actions by the United States against states to declare state laws invalid as inconsistent with any of the Uruguay Round Agreements.

Laws and Executive Orders in Other States

Laws relating to offshore outsourcing of state contracts have been enacted in at least six states (Alabama, Colorado, Illinois, Indiana, North Carolina, and Tennessee). Executive orders or directives relating to offshore outsourcing of state contracts have been issued by the governors of at least six states (Alaska, Michigan, Minnesota, Missouri, New Jersey, and North Carolina). These laws and executive orders and directives address offshore outsourcing of state contracts in various ways, including:

- Limiting the authority of state agencies to enter into contracts for services that will be performed at sites outside the United States;
- Authorizing state agencies to give price preferences on contracts for services that will be performed within the state;
- Encouraging state agencies to enter into contracts for services that will be performed within the state;
- Requiring state agencies to consider economic and other impacts of contracts for services that will be performed at sites outside the United States; and
- Requiring contractors and subcontractors to disclose information about contracts for services performed at sites outside the United States.

Summary of Bill:

The legislature and state agencies should spend tax dollars in a responsible manner that is consistent with the nation's and the state's best interests. The legislature and state agencies should consider certain indirect benefits that may be achieved when entering into state contracts for goods and services.

Rules Authority: The bill does not address the rule-making powers of an agency.

Appropriation: None.

Fiscal Note: Requested on March 1, 2005.

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