

# HOUSE BILL REPORT

## HB 3274

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### As Reported by House Committee On:

Local Government

Appropriations Subcommittee on General Government & Audit Review

**Title:** An act relating to improving public contracting for public port districts.

**Brief Description:** Addressing public contracting by public port districts.

**Sponsors:** Representatives Simpson, Hudgins, Upthegrove, Hunter, Santos and Kenney.

### Brief History:

#### Committee Activity:

Local Government: 2/1/08, 2/5/08 [DPS];

Appropriations Subcommittee on General Government & Audit Review: 2/7/08[DP2S(w/o sub LG)].

### Brief Summary of Second Substitute Bill

- Clarifies the applicability of public works competitive contracting provisions to public port districts.
- Requires that a port district commission establish by resolution the conditions under which competitive bid requirements may be waived.
- Creates a personal services competitive solicitation chapter for public port districts to cover consultant services and other personal services that must be procured by port districts.
- Provides accountability requirements for public port district contracting.

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## HOUSE COMMITTEE ON LOCAL GOVERNMENT

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Simpson, Chair; Takko, Vice Chair; Warnick, Ranking Minority Member; Schindler, Assistant Ranking Minority Member; Eddy, Nelson and Schmick.

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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 a part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** Tracey Taylor (786-7196).

**Background:**

In 1911 the Legislature authorized the Port District Act allowing citizens to create port districts. Today, there are 75 port districts in Washington.

**General Powers and Authority of Port Districts**

Port districts are authorized for the purpose of acquisition, construction, maintenance, operation, development, and regulation of harbor improvements, rail or motor vehicle transfer and terminal facilities, water and air transfer and terminal facilities, or any combination of these facilities.

Among the general powers granted to ports are the following:

- to acquire land, property, leases, and easements;
- to condemn property and exercise the power of eminent domain;
- to develop lands for industrial and commercial purposes;
- to impose taxes, rates, and charges;
- to sell or otherwise convey rights to property; and
- to construct and maintain specified types of park and recreation facilities.

**Governance of Port Districts**

Port districts are governed by a board of commissioners consisting of either three or five members in accordance with specified statutory criteria. Port commissioners are nominated either by commissioner district or, under certain circumstances, at-large. In all districts, port commissioners are elected at-large. Subject to voter approval, a port district with five commissioners may be authorized to have two commissioners who are both nominated and elected at-large.

**Public Contracting Processes**

Public entities, including port districts, must use the public works contracting provisions for all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or municipality, or which is by law a lien or charge on any property therein. A contract is awarded based on a formal decision by the state or municipality notifying the responsible bidder with the lowest responsive bid of the state or municipality's acceptance of the bid and intent to enter into a contract with the bidder. However, a public entity may use the small works roster for construction, building, renovation, remodeling, alteration, repair, or improvement of real property with an estimated cost of \$200,000 or less. Under this process, quotations are solicited from at least five small works roster contractors, unless the estimated cost is between \$100,000 and \$200,000, in which case all qualified contractors on the roster must be notified.

Public entities can use the procurement process under Chapter 39.80 RCW for professional services rendered by any person, other than an employee of the agency, contracting to perform activities within the professional practice in Chapters 18.08 (Architects), 18.43 (Engineers & Land Surveyors) or 18.96 (Landscape Architects) RCW. The agency negotiates a contract with the most qualified firm for architectural and engineering services at a price which the

agency determines is fair and reasonable to the agency. In making its determination, the agency must take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof.

State agencies use competitive solicitation for personal service contracts. Personal services include professional or technical expertise provided by a consultant to accomplish a specific study, project, task, or other work statement. It does not include architect and engineer services procured under Chapter 39.80 RCW. Competitive Solicitation is a documented formal process providing an equal and open opportunity to qualified parties and culminating in selection based on criteria which may include such factors as the consultant's fees or costs, ability, capacity, experience, reputation, responsiveness to time limitations, responsiveness to solicitation requirements, quality of previous performance, and compliance with statutes and rules relating to contracts or services.

### **2007 Performance Audit by the State Auditor's Office**

Pursuant to Initiative 900, the State Auditor's Office, with the private firms of Cotton & Company and CDR Consultants, audited the Port of Seattle. The audit scope included all construction projects and related consulting agreements from January 2004 through March 2007.

The audit identified significant and widespread issues related to contracting and contract management by the Port of Seattle and made 51 recommendations to address these conditions. Among the 51 recommendations are several statutory changes the auditor's recommend to the Legislature. Found in Appendix C of the Washington State Auditor's Performance Audit Report: Port of Seattle Construction Management of December 20, 2007 (Report No. 100008), these recommendation include:

- clarifying that competition requirements apply to consulting and other services;
- clarifying that penalties for violations of competitive contract laws apply to the procurement of consulting and other services;
- addressing whether state and local governments have wide latitude regarding sole source contracts for goods and services; and
- revising the small works roster contract procedures to remove port district exemption.

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### **Summary of Substitute Bill:**

#### **Public Contracting (In General)**

All public works projects by a port district, the estimated cost of which exceeds \$200,000, must be bid using a competitive bid process under the public work statutes in Chapter 39.04 RCW; however, a port district may use the small works roster for projects with an estimated cost of less than \$200,000.

Beginning January 1, 2010, all port districts, with gross revenues that exceed \$10 million (excluding loans and grants), must maintain a database on a public website of all contracts.

Each port district commission (Commission) must establish by resolution the policies by which the competitive bid requirements may be waived.

Consulting, architectural, engineering, and other services, are added to the remedies and penalties section of the public contracting title. This means the willful and intentional violation of any law, charter, ordinance, resolution, or rule requiring competitive bidding, including consulting, architectural, engineering, and other services, shall subject a municipal officer or his or her staff to a civil penalty of not less than \$300. He or she may also be held liable, jointly and severally, for all consequential damages to the municipal corporation.

### **Competitive Contracting for Personal Service Contracts**

A new chapter is created in the port districts title similar to Chapter 39.29 RCW which governs state agency personal service contracting. This new chapter requires competitive solicitation for personal service contracts, including consultants. "Competitive solicitation" means a documented formal process providing an equal and open opportunity to qualified parties and culminating in selection based on criteria. Criteria other than price may be the primary basis for selection. The criteria may include ability, capacity, experience, reputation, and other factors. Exceptions to the competitive solicitation requirement exist if it is: an emergency contract; a sole source contract; a contract of less than \$50,000, however, the port district must show competition for contracts between \$50,000 and \$250,000; and other contracts exempted by the Commission.

Substantial changes in the scope of work of a personal service contract must be referred to the Commission for a determination on whether the change warrants the work to be awarded as a new contract. An amendment or series of amendments that cumulatively exceed 50 percent of the value of the original contract must be filed with the Commission and made available for public inspection prior to the effective date. Certain types of contracts are exempted from competitive solicitation under the new chapter. These exceptions include contracts for a fee less than \$50,000, intergovernmental agreements, and architects' and engineers' contracts.

In the case of an emergency contract, the contract must be filed with the Commission within seven working days following the commencement of work or execution of the contract, whichever is first.

Sole source contracts must be filed with the Commission and made available for public inspection prior to the proposed starting date of the contract. Documented justification for sole source contracts shall be provided to the Commission.

Commissioners or employees must not authorize any personal service contracts without complying with the chapter. Failure to comply with the chapter subjects Commissioners and port district employees to a \$300 penalty. A consultant who knowingly violates the chapter is subject to a civil penalty of \$300 or 25 percent of the contract, whichever is greater.

### **Accountability Provisions**

The Municipal Research and Services Center (MRSC), in cooperation with the Washington Public Ports Association (WPPA) is required to adopt guidelines for the effective and efficient management of personal service contracts by all port districts. After January 1, 2010, a port

entering into or amending personal service contracts shall follow policies adopted by the Commission, which shall be based on the guidelines. In addition, the WPPA is required to provide training for port district personnel responsible for contract execution and management.

**Substitute Bill Compared to Original Bill:**

Consulting, architectural, engineering and other services are added to the remedies and penalties section for competitive bidding. The substitute restricts the contracts database on a public website to ports with more than \$10 million in gross revenues.

Several definitions are clarified including "competitive solicitation," "personal services," and "sole source." The parameters regarding when personal services may be procured by the port district are eliminated.

The monetary thresholds throughout the bill are increased. The threshold for the competitive solicitation of personal service contracts is increased from \$5,000 to \$50,000. The range requiring documented evidence of competition is increased from \$5,000 to \$20,000 to a new range of \$50,000 to \$250,000. The threshold requiring documented justification for sole source contracts is increased from \$20,000 to \$50,000. In addition, the threshold for a Commission review for reasonableness of costs, fees, and rates is increased from \$20,000 to \$50,000. In addition, the amount of time to file emergency contract is increased from three working days to seven working days.

Provisions relating to sole source contracts are modified. This includes eliminating the specific time period of at least 10 working days for filing and public inspection of sole source contracts before proposed starting date. The sole source contract must be filed and made available for public inspection prior to the starting date. The requirement that the Commission approve sole source contracts of \$20,000 or more before they become binding is deleted. Also, the requirement that the Commission approve sole source contracts for consultants who receive \$20,000 in contracts with the port district in a fiscal year is eliminated.

In order to be subject to a penalty, the substitute bill requires a willful and intentional failure to comply with the competition requirements for contracts by a port commissioner or employee. In addition, the substitute bill corrects the drafting error and makes the penalties applicable to all port districts.

The substitute bill directs the State Auditor to audit for violations of the personal service contracting chapter through its regular financial and accountably audits.

Under the substitute bill, if there is a change in the scope of work specified in the contract or substantial additions to the scope of work specified in the formal solicitation documents, the changes must be submitted to the Commission for a determination if the change warrants a new contract be awarded. Contract amendments do not have to be approved by the Commission before becoming binding. In addition, the specific 10 working day filing period for amendments is deleted and the substitute bill only requires an amendment be filed prior to the

effective date if the amendment or amendments cumulatively exceed 50 percent of the original value of the contract.

Legal services are added to exceptions to personal services competitive solicitation provisions.

The substitute bill eliminates the requirement that personal service contracts be filed with the Commission and the Commission review of certain types of consultant contracts. The substitute bill deletes the requirement that ports maintain a publicly available list of all personal service contracts, including sole source and eliminates the annual report by the Washington Public Ports Association on personal service contracts. The substitute bill does not require that port districts provide information, as requested by the State Auditor, on personal service contracts for the preparation of summary reports.

Also, the substitute bill directs MRSC, in cooperation with the WPPA to develop guidelines for effective and efficient management of personal contracts. The guidelines will appear on both MRSC and WPPA's websites. However, port employees will no longer be required to complete the training in order to execute or manage personal service contracts.

Finally, the annual report by the State Auditor and the Attorney General on contract audit and investigative findings, enforcement actions, and the status of agency resolution is deleted.

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**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony:**

(In support) This bill is about improving transparency in government and create some common contracting rules. The genesis of the bill is the State Auditor's Report and Recommendations relating to a recent audit of the Port of Seattle. The audit makes it real clear that procedures and policies may have been a bit lax, but it also uncovered gaps in the statutory structure that may have caused some real confusion. This bill attempts to address the Auditor's Findings and Recommendations while still recognizing the ports role as an economic engine of Washington, especially in the competitive global market. It is a measured approach modeled after the state's personal services contracting chapter that applies to all state agencies, boards and commission, regardless of size. In creating this legal structure for all, we understand the need to keep in mind ports of all sizes – both large and small.

(In support with amendments) Supporting the intent of the legislation and wanting to be responsive to the audit, there are a few areas that can use improvement. The goal is to clarify the contracting procedures, increase accountability and increase transparency. However, the ports need to be able to consider qualifications and not just low price in selecting consultants.

The requirement that a bid be sealed should be eliminated in order to facilitate submissions via the Internet. Also, unlike state agencies, many of our small ports rely on local consultants to supplement staff on a regular basis; therefore, the bill should be amended to reflect this operational reality. In addition, requiring a waiting period for sole source contracts may make it impossible to retain a previous vendor to do a system enhancement.

(Opposed) None.

**Persons Testifying:** (In support) Representative Simpson, prime sponsor; and Chris Gower.

(In support with amendments) Eric Johnson, Washington Public Ports Association; Tay Yoshitani, Port of Seattle; and Janet Quimby, Port of Tacoma.

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

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## HOUSE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON GENERAL GOVERNMENT & AUDIT REVIEW

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Local Government. Signed by 14 members: Representatives Linville, Chair; Ericks, Vice Chair; Armstrong, Ranking Minority Member; Skinner, Assistant Ranking Minority Member; Alexander, Blake, Chandler, Kretz, Lantz, Lias, Miloscia, Morris, Nelson and Van De Wege.

**Staff:** Alex MacBain (786-7288).

### **Summary of Recommendation of Committee On Appropriations Subcommittee on General Government & Audit Review Compared to Recommendation of Committee On Local Government:**

A null and void clause was added, making the bill null and void unless funded in the budget.

**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on February, 6, 2008.

**Effective Date of Second Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed. However, the bill is null and void unless funded in the budget.

### **Staff Summary of Public Testimony:**

(In support with concerns) Generally supportive of the bill, but the substitute bill does raise concerns because several clauses have been added that weaken some of the protections included in the original bill. Maintaining sealed bids is important because sealed bids prevent mischief, collusion, and potential inappropriate behaviors between contract officers and bidders. The language related to the punishment of commissioners and officers raises concerns because it is weaker than current law. This is all about transparency and taxpayers

want to be able to see where ports are spending their money. Supportive of the bill, just don't want to see it weakened as it goes through the process.

(Opposed) None.

**Persons Testifying:** Chris Gower, resident of Olympia; and Henry Yates, Port of Seattle.

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