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HOUSE BILL 2154

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State of Washington

61st Legislature

2009 Regular Session

By Representative Chase

Read first time 02/11/09. Referred to Committee on State Government & Tribal Affairs.

1 AN ACT Relating to prohibiting work under state contracts from  
2 being performed at locations outside the United States; amending RCW  
3 39.29.008, 41.06.142, and 43.19.1911; adding a new section to chapter  
4 43.19 RCW; adding a new section to chapter 39.29 RCW; and creating new  
5 sections.

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

7 NEW SECTION. **Sec. 1.** It is essential that the legislature and  
8 state agencies spend tax dollars in a manner that is both responsible  
9 and consistent with the economic interests of the state and the nation.  
10 The legislature and state agencies should, therefore, consider indirect  
11 benefits that may be achieved when entering into contracts for public  
12 works, personal services, purchased services, information services,  
13 highway design and construction, and materials, supplies, and  
14 equipment. These benefits include, but are not limited to, job  
15 creation, capital investment, and economic stimulus.

16 **Sec. 2.** RCW 39.29.008 and 1993 c 433 s 6 are each amended to read  
17 as follows:

18 Personal services may be procured only to resolve a particular

1 agency problem or issue or to expedite a specific project that is  
2 temporary in nature. An agency may procure personal services only if  
3 it documents that: (1) The service is critical to agency  
4 responsibilities or operations, or is mandated or authorized by the  
5 legislature; (2) sufficient staffing or expertise is not available  
6 within the agency to perform the service; and (3) other qualified  
7 public resources are not available to perform the service. Except as  
8 provided in section 6 of this act, services performed under a personal  
9 services contract, or under any subcontract awarded under the personal  
10 services contract, may not be performed at a location outside the  
11 United States.

12 **Sec. 3.** RCW 41.06.142 and 2008 c 267 s 9 are each amended to read  
13 as follows:

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

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

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

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

30 (d) Except as provided in section 6 of this act, services performed  
31 under the contract, or under any subcontract awarded under the  
32 contract, may not be performed at a location outside the United States;

33 (e) The department, agency, or institution of higher education has  
34 established a contract monitoring process to measure contract  
35 performance, costs, service delivery quality, and other contract  
36 standards, and to cancel contracts that do not meet those standards;  
37 and

1       (~~(e)~~) (f) The department, agency, or institution of higher  
2 education has determined that the contract results in savings or  
3 efficiency improvements. The contracting agency must consider the  
4 consequences and potential mitigation of improper or failed performance  
5 by the contractor.

6       (2) Any provision contrary to or in conflict with this section in  
7 any collective bargaining agreement in effect on July 1, 2005, is not  
8 effective beyond the expiration date of the agreement.

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

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

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

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

26       (c) The director of personnel, with the advice and assistance of  
27 the department of general administration, shall develop and make  
28 available to employee business units training in the bidding process  
29 and general bid preparation.

30       (d) The director of general administration, with the advice and  
31 assistance of the department of personnel, shall, by rule, establish  
32 procedures to ensure that bids are submitted and evaluated in a fair  
33 and objective manner and that there exists a competitive market for the  
34 service. Such rules shall include, but not be limited to: (i)  
35 Prohibitions against participation in the bid evaluation process by  
36 employees who prepared the business unit's bid or who perform any of  
37 the services to be contracted; (ii) provisions to ensure no bidder  
38 receives an advantage over other bidders and that bid requirements are

1 applied equitably to all parties; and (iii) procedures that require the  
2 contracting agency to receive complaints regarding the bidding process  
3 and to consider them before awarding the contract. Appeal of an  
4 agency's actions under this subsection is an adjudicative proceeding  
5 and subject to the applicable provisions of chapter 34.05 RCW, the  
6 administrative procedure act, with the final decision to be rendered by  
7 an administrative law judge assigned under chapter 34.12 RCW.

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

15 (f) A department, agency, or institution of higher education may  
16 contract with the department of general administration to conduct the  
17 bidding process.

18 (5) As used in this section:

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

22 (b) "Indirect overhead costs" means the pro rata share of existing  
23 agency administrative salaries and benefits, and rent, equipment costs,  
24 utilities, and materials associated with those administrative  
25 functions.

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

30 (6) The requirements of this section do not apply to RCW  
31 74.13.031(5).

32 **Sec. 4.** RCW 43.19.1911 and 2006 c 363 s 3 are each amended to read  
33 as follows:

34 (1) Preservation of the integrity of the competitive bid system  
35 dictates that after competitive bids have been opened, award must be  
36 made to that responsible bidder who submitted the lowest responsive bid

1 pursuant to subsections (7) and (9) of this section, unless there is a  
2 compelling reason to reject all bids and cancel the solicitation.

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

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

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

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

23 (b) Specifications, terms, conditions, or requirements have been  
24 revised;

25 (c) The supplies or services being contracted for are no longer  
26 required;

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

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

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

35 (g) No responsive bid has been received from a responsible bidder;  
36 or

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

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

3 (6) After the opening of bids, an agency may not reject all bids  
4 and enter into direct negotiations to complete the planned acquisition.  
5 However, the agency can enter into negotiations exclusively with the  
6 lowest responsible bidder in order to determine if the lowest  
7 responsible bid may be improved. Until December 31, 2009, for  
8 purchases requiring a formal bid process the agency shall also enter  
9 into negotiations with and may consider for award the lowest  
10 responsible bidder that is a vendor in good standing, as defined in RCW  
11 43.19.525. An agency shall not use this negotiation opportunity to  
12 permit a bidder to change a nonresponsive bid into a responsive bid.

13 (7) In determining the lowest responsible bidder, the agency shall  
14 consider any preferences provided by law to Washington products and  
15 vendors and to RCW 43.19.704, and further, may take into consideration  
16 the quality of the articles proposed to be supplied, their conformity  
17 with specifications, the purposes for which required, and the times of  
18 delivery. Except as provided in section 6 of this act, services  
19 performed under a contract for services, or under any subcontract  
20 awarded under a contract for services, may not be performed at a  
21 location outside the United States.

22 (8) Each bid with the name of the bidder shall be entered of record  
23 and each record, with the successful bid indicated, shall, after  
24 letting of the contract, be open to public inspection. Bid prices  
25 shall not be disclosed during electronic or web-based bidding before  
26 the letting of the contract.

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

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

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

33 (c) Whether the bidder can perform the contract within the time  
34 specified;

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

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

1 (f) Such other information as may be secured having a bearing on  
2 the decision to award the contract: PROVIDED, That in considering bids  
3 for purchase, manufacture, or lease, and in determining the "lowest  
4 responsible bidder," whenever there is reason to believe that applying  
5 the "life cycle costing" technique to bid evaluation would result in  
6 lowest total cost to the state, first consideration shall be given by  
7 state purchasing activities to the bid with the lowest life cycle cost  
8 which complies with specifications. "Life cycle cost" means the total  
9 cost of an item to the state over its estimated useful life, including  
10 costs of selection, acquisition, operation, maintenance, and where  
11 applicable, disposal, as far as these costs can reasonably be  
12 determined, minus the salvage value at the end of its estimated useful  
13 life. The "estimated useful life" of an item means the estimated time  
14 from the date of acquisition to the date of replacement or disposal,  
15 determined in any reasonable manner. Nothing in this section shall  
16 prohibit any state agency, department, board, commission, committee, or  
17 other state-level entity from allowing for preferential purchase of  
18 products made from recycled materials or products that may be recycled  
19 or reused.

20 NEW SECTION. **Sec. 5.** A new section is added to chapter 43.19 RCW  
21 to read as follows:

22 Except as provided in section 6 of this act, all materials,  
23 supplies, and equipment purchased under this chapter may not be  
24 produced in a location outside the United States.

25 NEW SECTION. **Sec. 6.** A new section is added to chapter 39.29 RCW  
26 to read as follows:

27 (1) The prohibitions against services being performed at locations  
28 outside the United States in RCW 39.29.008, 41.06.142, and 43.19.1911  
29 and materials, supplies, and equipment being produced at such locations  
30 in section 5 of this act does not apply if the director of the office  
31 of financial management determines that the only practicable location  
32 where the services may be performed or the materials, supplies, and  
33 equipment may be produced is clearly and justifiably a location outside  
34 the United States. This exception to the prohibition may apply, by way  
35 of illustration and not as a limitation, to services related to the  
36 establishment and operation of foreign offices created for the purpose

1 of promoting overseas trade and commerce, research projects conducted  
2 by faculty at state institutions of higher education, and study abroad  
3 programs offered by state institutions of higher education.

4 (2) By September 1st of each year, the director of the office of  
5 financial management shall provide the house of representatives  
6 commerce and labor committee and the senate labor, commerce, and  
7 consumer protection committee, or their successor committees, with a  
8 list of contracts entered into in the previous fiscal year for which he  
9 or she determined that the only practicable location where the services  
10 could be performed or the materials, supplies, and equipment could be  
11 produced was clearly and justifiably a location outside the United  
12 States.

13 NEW SECTION. **Sec. 7.** If any provision of this act or its  
14 application to any person or circumstance is held invalid, the  
15 remainder of the act or the application of the provision to other  
16 persons or circumstances is not affected.

17 NEW SECTION. **Sec. 8.** If any part of this act is found to be in  
18 conflict with federal requirements that are a prescribed condition to  
19 the allocation of federal funds to the state, the conflicting part of  
20 this act is inoperative solely to the extent of the conflict and with  
21 respect to the agencies directly affected, and this finding does not  
22 affect the operation of the remainder of this act in its application to  
23 the agencies concerned. Rules adopted under this act must meet federal  
24 requirements that are a necessary condition to the receipt of federal  
25 funds by the state.

26 NEW SECTION. **Sec. 9.** This act does not apply to contracts entered  
27 into before July 1, 2010.

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