

HOUSE BILL REPORT

HB 1202

As Reported by House Committee On:
Innovation, Technology & Economic Development

Title: An act relating to ensuring fairness and compliance with public works and procurement practices.

Brief Description: Concerning ensuring fairness and compliance with public works and procurement practices.

Sponsors: Representatives Gregerson, Santos, Peterson, Stanford, Jinkins, Tarleton, Valdez, Ortiz-Self and Dolan.

Brief History:

Committee Activity:

Innovation, Technology & Economic Development: 1/23/19, 2/5/19 [DP].

Brief Summary of Bill

- Requires the Office of Minority and Women's Business Enterprises (OMWBE) to annually identify state agencies and educational institutions with low levels of participation by minority- and women-owned businesses in the execution of public contracts.
- Establishes an investigation unit within the OMWBE.
- Repeals the Office of the Attorney General's authority to investigate and enforce compliance with minority- and women-owned businesses contract requirements.
- Modifies the small-works roster and limited public works process requirements.

HOUSE COMMITTEE ON INNOVATION, TECHNOLOGY & ECONOMIC DEVELOPMENT

Majority Report: Do pass. Signed by 7 members: Representatives Hudgins, Chair; Kloba, Vice Chair; Smith, Ranking Minority Member; Morris, Slatter, Tarleton and Wylie.

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.

Minority Report: Do not pass. Signed by 2 members: Representatives Boehnke, Assistant Ranking Minority Member; Van Werven.

Staff: Kyle Raymond (786-7190).

Background:

Office of Minority and Women's Business Enterprises.

The Office of Minority and Women's Business Enterprises (OMWBE) was created to provide minority- and women-owned and controlled businesses with the maximum practicable opportunity for increased participation in public-works contracts and public contracts for goods and services.

The OMWBE is the sole authority in Washington for certifying minority- and women-owned, and socially and economically disadvantaged business enterprises. Certified business enterprises are listed in the OMWBE database. Cities, counties, state agencies, transportation, and educational institutions use the database to source small and diverse firms for potential contracting opportunities. Among other duties, the OMWBE must identify barriers to equal participation by qualified businesses in all state agency and educational contracts, and the OMWBE must establish annual participation goals by qualified businesses for each state agency and educational institution.

Prohibited Activities. Certain activities relating to certification of, and contracts with, minority and women-owned businesses are prohibited. A person, firm, corporation, business, union, or other organization may not:

- prevent or interfere with a contractor's compliance with the OMWBE-related laws and rules;
- submit false or fraudulent information;
- fraudulently obtain, retain, or attempt to obtain or retain certification;
- knowingly make a false statement to a state official or employee for the purpose of influencing certification or denial of certification;
- knowingly obstruct, impede, or attempt to obstruct or impede any state official or employee who is investigating the qualification of a business entity applying for certification;
- fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain public monies to which the person is not entitled; or
- knowingly make false statements that an entity is or is not certified for purposes of obtaining a contract.

Enforcement. The state may impose penalties for violations of the OMWBE-related laws and rules. For any violation, the state may withhold payment; debar, suspend or terminate the contract; and impose civil penalties of 2 to 10 percent of the contract amount or up to \$5,000.

For a willful and repeated violation, a contractor may be disqualified from state contracts for a period of up to three years. The OMWBE must adopt rules that identify criteria for the imposition of penalties. The Attorney General's Office (AGO) may enforce laws and rules with respect to the OMWBE programs and certification procedures.

The AGO may conduct investigations and may file for civil injunctive relief.

Small-Works Roster and the Limited Public-Works Process.

Public work includes all work, construction, alteration, and repair or improvement, other than ordinary maintenance, that is a cost to the state or a local government.

For public works projects estimated to cost \$300,000 or less, state agencies and expressly authorized local governments may use the small-works roster process to award contracts. A small-works roster includes any responsible contractor who requests to be on the roster, which may be a single general list or lists for specialties or categories of work. Under the small-works process, instead of advertising the contract opportunity, the state agency or local government solicits bids from at least five contractors on the small-works roster. The state agency or local government awards the contract to the lowest responsible bidder.

The small-works roster process also allows for a limited public-works process for projects estimated to cost \$35,000 or less. Under the limited public-works process, the state agency or local government solicits bids from at least three contractors from the appropriate small works roster and awards the contract to the lowest responsible bidder.

For limited public works projects, the state agency or local government may waive payment, performance bond, and retainage requirements. "Retainage" means a portion, not to exceed 5 percent, of the contractor's payment that is withheld by the contracting agency until the project is complete. The retainage is used to satisfy claims that a person, such as a laborer or supplier, may have under the contract and to pay any taxes or penalties that may be due from the contractor. In instances where retainage is not waived, certain notice of completion requirements apply. The Department of Revenue, the Employment Security Department, and the Department of Labor and Industries are required to provide notice, upon completion of a contract of over \$35,000, that the contractor has paid all taxes, increases, and penalties due before retained funds are released.

A state agency or local government may use the limited public-works process to solicit and award small-works roster contracts to small businesses that are registered as contractors with gross revenues of \$1 million or less. When using the small-works or limited public-works processes for a project, state agencies and local governments must attempt to equitably distribute opportunities for the project among the listed contractors.

For public works contracts in excess of \$10,000, contractors and subcontractors must submit a Statement of Intent to Pay Prevailing Wages, which includes the contractor's registration certificate number, the prevailing wage for each worker classification, and how many workers are anticipated to work on the project. When retainage is not waived for these contracts, the contractor and subcontractors must submit an Affidavit of Wages Paid for retained funds to be released after final acceptance of the project. When retainage is waived, only contractors or subcontractors of public improvement contracts funded in whole or in part by federal transportation funds, are required to provide an Affidavit of Wages Paid to the state, county, municipality, or other public body prior to accepting the public works project.

Department of Enterprise Services.

The Department of Enterprise Services (DES) manages procurement of goods and services for state agencies. The DES is, in part, responsible for developing procurement policies and procedures that encourage and facilitate the purchase of goods and services from Washington small businesses, microbusinesses, minibusinesses, and minority and women-owned businesses to the maximum extent practicable. Microbusinesses are independently owned and operated business entities with an annual gross revenue of less than \$1 million. Minibusinesses are independently owned and operated business entities with an annual gross revenue between \$1 million and \$3 million.

Summary of Bill:

Office of Minority and Women's Business Enterprises.

The Office of Minority and Women's Business Enterprises (OMWBE) must annually identify the state agencies and educational institutions that are:

- in the lowest quintile of utilization of minority- and women-owned contractors as a percentage of all contracts issued by the agency;
- in the lowest quintile of dollar value awarded to minority- and women-owned contractors as a percentage of the dollar value of all contracts issued by the agency; and
- performing significantly below their established goals.

The OMWBE must meet with each identified agency to review the agency's plan and identify tools for increasing participation by qualified businesses.

Enforcement.

The penalties for violations of the OMWBE-related laws and rules are modified. If a person, firm, corporation, business, union, or other organization engages in activity that is expressly prohibited, the state must impose one or more of the following penalties:

- withholding payment;
- decertifying the contractor;
- debarring the contractor for a period of between one and three years;
- terminating the contract; or
- subjecting the contractor to civil penalties of between 2 and 10 percent of the amount of the contract, or between \$1,000 and \$5,000 for each violation.

If a person or other business entity engages in prohibited activities, the state maintains discretion as to whether similar penalties should be imposed. If the state decides to impose penalties due to noncompliance with other provisions or contract requirements, there is no minimum amount for civil penalties.

If a contractor commits willful, repeated violations, the contractor must be debarred from state contracting for three years, in addition to any other penalties imposed. A willful violation includes a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact, with the intent of impacting benefits that are awarded.

The Office of the Attorney General (AGO) enforcement authority is eliminated. Civil penalties are deposited into the OMWBE's account in the custody of the State Treasurer.

The following definitions are added:

- "Contractor" means an individual or entity granted state certification and awarded either a direct contract with an agency or an indirect contract as a subcontractor to perform a service or provide goods.
- "Debar" means to prohibit a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract during a specified period of time as set forth in a debarment order.

Investigation Unit.

The OMWBE establishes a unit to detect and investigate fraud and other violations. The OMWBE must employ qualified personnel who may receive criminal record information for investigations.

The Director of the OMWBE, or the Director's designee, may subpoena witnesses and is granted enforcement authority under the Administrative Procedures Act. The Director may apply for and obtain a superior court order approving and authorizing a subpoena in advance of its issuance. A superior court may issue an approval and authorization without prior notice to the person to whom the subpoena is directed or to the person who is the subject of the investigation.

The investigation unit must annually conduct a site review of a minimum of 3 percent of contractors. The investigation unit must prioritize and conduct thorough investigations when an external complaint or internal concerns are received.

Small-Works Roster and the Limited Public-Works Process.

For the small-works roster process, the project cost threshold is increased to \$500,000. For projects awarded under the small-works roster process, a state agency or authorized local government may waive certain retainage requirements and assume liability for the contractor's nonpayment of taxes and of laborers, subcontractors, mechanics, material persons, and suppliers. The state agency or local government retains the right of recovery against the contractor for any payments made on the contractor's behalf. Recovery of unpaid wages and benefits must be the first priority of actions filed against the retainage.

For actions filed against the retainage, the state agency or local government must seek recovery of unpaid wages and benefits first. For the limited public-works process, the project cost threshold is increased to \$150,000. Updates are made to notice of completion requirements for projects where retainage is not waived. The Department of Revenue, the Employment Security Department (ESD), and the Department of Labor and Industries (L&I) must certify, upon completion of a contract up to \$150,000, that the contractor has paid all taxes, increases, and penalties due before retained funds are released. Additionally, when retainage is waived, contractors and subcontractors of limited public-works projects are required to submit an Affidavit of Wages Paid, confirming their payment of prevailing wages as required by their Statement of Intent to Pay Prevailing Wages, before there is final acceptance of the project. When retainage is waived, the ESD and the L&I may collect and recover taxes, increases, and penalties owed.

A state agency or authorized local government may use the limited public-works process to solicit and award small-works roster contracts to minibusinesses and microbusinesses. A state agency or authorized local government using the limited public-works process must equitably distribute opportunities for the project among the listed contractors. "Equitably distribute" means a state agency or authorized local government may not favor certain contractors on the appropriate small-works roster over other contractors on the same roster who perform similar services.

By December 1, 2020, the Joint Legislative Audit and Review Committee must review the small-works roster and limited public-works process changes and report the results to the Governor and appropriate legislative committees. The report must include recommendations to:

- further the practices of the small-works roster and limited public-works processes; and
- identify progress in the rates of participation and barriers to improving participation rates of qualified minority- and women-owned and controlled businesses, minibusinesses, and microbusinesses in the small-works roster and limited public-works processes.

Department of Enterprise Services.

The Department of Enterprise Services must work with the Municipal Research and Services Center to notify local governments authorized to use small-works rosters of this authority and to provide guidance on how to use the authority. The guidance may take the form of a manual.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) State contracting has increased over the past 10 years, and it is important to consider who is getting those contracts. Small businesses are a driving force in Washington's strong economy, and there needs to be account for how many businesses are certified. This bill widens economic opportunities, creates jobs, and supports innovation. The language in the bill is permissive, and local governments are not required to participate, which creates flexibility within public contracting. The economic prosperity of all Washington residents is what contributes to the prosperity of our state as a whole.

In the past, there have been news stories about companies falsely claiming they were women or employee owned, and these companies fraudulently collected millions of dollars in state contracts. The Office of Minority and Women's Business Enterprises (OMWBE) did not

have authority to investigate fraud and abuse complaints. This bill sets up this authority to investigate and establish disincentives for fraud.

The bill's changes to small-works roster procurement will help expand utilization of small minority and women-owned businesses, and the bill will expand opportunities for small contractors in public works contracts. Raising limits for small and limited public works is important for administrative efficiencies. The ability to waive retainage rights helps small and diverse firms remove barriers to the field.

The OMWBE is currently identifying and meeting with agencies and educational institutions with low spanned certified firms, and the codification of this requirement into law is supported.

(Opposed) None.

(Other) Increasing the threshold for the small-works roster is an important advancement in public policy. The small-works roster is a great efficiency measure for local governments when they do public works contracting. It is a good system. There are technical amendments that could perfect the bill, such as the requirement that state agencies must solicit bids from at least five people on the small-works roster. Some local and small communities may not have five contractors who are on the small-works roster.

Persons Testifying: (In support) Representative Gregerson, prime sponsor; Representative Santos; Eric Ffitch, Port of Seattle; Bill Frare, Department of Enterprise Services; and Lisa Van der Lugt, Office of Minority and Women's Business Enterprises.

(Other) Eric Johnson, Washington Public Ports Association.

Persons Signed In To Testify But Not Testifying: None.