

HOUSE BILL REPORT

HB 1259

As Reported by House Committee On:
Community & Economic Development

Title: An act relating to expanding public contracting opportunities for women and minority business enterprises by increasing the regulatory oversight and accountability of the office of minority and women's business enterprises.

Brief Description: Expanding public contracting opportunities for women and minority business enterprises by increasing the regulatory oversight and accountability of the office of minority and women's business enterprises.

Sponsors: Representatives Santos, Dolan, Ryu, Valdez, Fey, Ramel, Ortiz-Self, Hackney, Ramos, Kloba, Callan, Lekanoff, Macri, Gregerson, Slatter, Stonier and Harris-Talley.

Brief History:

Committee Activity:

Community & Economic Development: 1/26/21, 1/29/21 [DP].

Brief Summary of Bill

- Establishes an Audit and Review unit within the Office of Minority and Women's Business Enterprises (OMWBE) to detect and investigate fraud and violations pertaining to the certification of, and contracts with, minority- and women-owned businesses.
- Repeals the Office of the Attorney General's authority to investigate and enforce compliance with minority- and women-owned businesses contract requirements.
- Modifies requirements related to the small-works roster and limited public works process, including increasing the cost thresholds for eligible projects under each process.
- Requires the 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.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON COMMUNITY & ECONOMIC DEVELOPMENT

Majority Report: Do pass. Signed by 8 members: Representatives Ryu, Chair; Paul, Vice Chair; Boehnke, Ranking Minority Member; Frame, Johnson, J., Lovick, Rule and Taylor.

Minority Report: Do not pass. Signed by 2 members: Representatives Jacobsen and Kraft.

Minority Report: Without recommendation. Signed by 3 members: Representatives Chase, Assistant Ranking Minority Member; Corry and Sutherland.

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. 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 laws and rules pertaining to the certification of, and contracts with, minority- and women-owned businesses;
- 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 for applicable laws and rules. For any violation, the state may: (1) withhold payment; (2) debar, suspend, or terminate the contract; or (3) impose civil penalties of up to 10 percent of the contract amount or up to \$5,000 per violation.

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 Office of the Attorney General (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.

In general, public works includes all work, construction, alteration, and repair or improvement, other than ordinary maintenance, that is a cost to the state or a local government. All public works must comply with the public works prevailing wage requirements under Chapter 39.12 RCW.

Small-Works Roster. For public works projects estimated to cost \$350,000 or less, state agencies and 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. If the estimated cost of the work is from \$250,000 to \$350,000, a state agency or local government may solicit bids from less than all the appropriate contractors. If bids are solicited from less than five contractors, notification must be provided to the remaining contractors on the appropriate small-works roster that quotations on the work are being sought. The state agency or local government awards the contract to the lowest responsible bidder.

When using the small-works roster for a project, state agencies and local governments must attempt to 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.

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.

Limited Public-Works Process. For public works projects estimated to cost less than \$50,000, state agencies and authorized local governments may use the limited public-works process to award contracts. 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.

Public works projects awarded through the limited public-works process are exempt from certain small-works roster process requirements and are exempt from the requirement that contracts be awarded after advertisement.

When using the 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 willing to perform in the geographic area.

A state agency or authorized local government is required to maintain a list of the contractors contacted and awarded during the previous 24 months under the limited public-works process, including the name of the contractor, the contractor's registration number, the amount of the contract, a brief description of the type of work performed, and the date the contract was awarded.

For limited public-works projects, the state agency or local government may waive payment, performance bond, and retainage requirements, thereby assuming the liability for the contractor's nonpayment of laborers, mechanics, subcontractors, material persons, suppliers, and taxes, increases, and penalties.

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 that are registered contractors.

Retainage. Retainage refers to a portion of the contractor's payment that is withheld by the contracting agency until the project is complete, and the portion is limited to 5 percent of the payment amount. 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.

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:

Audit and Review Unit.

The OMWBE establishes an Audit and Review Unit (Unit) to detect and investigate fraud and other relating to the certification of, and contracts with, minority- and women-owned businesses. The AGO enforcement authority is repealed.

The Unit must respond to all complaints for investigation made by other agencies, and the Unit must develop processes to prioritize and conduct thorough investigations when an external complaint or internal concerns are received. The Unit must annually conduct a site review of a minimum of 3 percent of contractors.

Enforcement and Penalties. The penalties for violations of the applicable laws and rules are modified. If a person, firm, corporation, business, union, or other organization engages in activity that is an expressly prohibited activity, 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.

All civil penalties imposed must be deposited in the Minority and Women's Business Enterprises Account.

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 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.

"Debar" is defined as prohibiting 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.

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

The project cost threshold for which state agencies and authorized local governments may use the small-works roster process to award contracts is increased to \$500,000.

The range for which a state agency or local government may solicit bids from less than the appropriate contractors and is required to notify the remaining contractors on the roster of the quote being sought is changed from \$150,000 to \$500,000.

The project cost threshold for which state agencies and authorized local governments may use limited public-works process to award contracts is increased to \$150,000.

Agency Identification.

The 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.

The OMWBE must include the information identified and actions taken to the Legislature and the Governor in their annual report.

Appropriation: None.

Fiscal Note: Preliminary 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) The bill increases the regulatory oversight and accountability role of the OMWBE. The agency lacks the tools and authority to adequately fulfil their mission to

provide the maximum practicable opportunity for increased public works participation by minority and women-owned and controlled businesses. The bill clarifies the responsibility of the OMWBE by establishing investigatory powers to detect fraud and abuse. The change from the AGO to the OMWBE is needed because the AGO does not currently investigate these issues, despite having the authority to do so.

In the past, there have been significant problems with large companies creating fictitious minority- and women-owned businesses. The bill delineates the discretionary and mandatory penalties for violations involving willful misrepresentation or deception to secure public contracts. This will allow OMWBE to aid businesses that play by the rules and discipline those who cheat. The bill directs the OMWBE to work with each state agency to provide technical assistance and improve participation by minority- and women-owned businesses.

From 2010 to 2019, overall state spending on public contracts has increased by 120 percent. However, direct spending on certified minority- and women-owned businesses increased by less than 1 percent. Further, no category of minority-owned businesses successfully secured more than 1 percent of the total available contract dollars, and black and indigenous contractors received an even smaller portion of available funding while the number of contractors increased. The need for the technical assistance is crucial, particularly given current economic conditions.

(Opposed) None.

(Other) The OMWBE is supportive of the policy in the bill. However, this is a new body of work for the agency, and the fiscal impact created is not currently included in the Governor's budget. The bill requires the OMWBE to meet with agencies to review these plans and identify opportunities for improvement. The OMWBE currently does this work and is supportive of this requirement being codified into state law.

Persons Testifying:

(In support) Representative Santos, prime sponsor.

(Other) Joanna Eide, Office of Minority and Women's Business Enterprises.

Persons Signed In To Testify But Not Testifying: None.