

HOUSE BILL REPORT

HB 1306

As Reported by House Committee On:

Innovation, Community & Economic Development, & Veterans
Appropriations

Title: An act relating to equity and efficiencies in public works procurement including modifying small works roster requirements.

Brief Description: Addressing equity and efficiencies in public works procurement including modifying small works roster requirements.

Sponsors: Representatives Tharinger, Steele, Reed, Pollet and Leavitt.

Brief History:

Committee Activity:

Innovation, Community & Economic Development, & Veterans: 1/24/23, 1/27/23 [DP];
Appropriations: 2/9/23, 2/20/23 [DPS].

Brief Summary of Substitute Bill

- Modifies small-works roster procedures.
- Requires the Department of Commerce to create a statewide small-works roster by June 30, 2024.
- Requires the Office of Minority and Women's Business Enterprises to adopt rules governing a public works small business certification program.
- Requires the Capital Projects Advisory Review Board to periodically review construction cost escalation data, roster utilization, and other appropriate data and metrics, and make recommendations to the Legislature on adjustments to contracting thresholds.
- Requires the Department of Enterprise Services to develop and make available on its public-facing website templates for bid invitations,

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.

bidding, and contracting.

HOUSE COMMITTEE ON INNOVATION, COMMUNITY & ECONOMIC DEVELOPMENT, & VETERANS

Majority Report: Do pass. Signed by 15 members: Representatives Ryu, Chair; Donaghy, Vice Chair; Rule, Vice Chair; Volz, Ranking Minority Member; Barnard, Assistant Ranking Minority Member; Chambers, Christian, Corry, Cortes, Paul, Senn, Shavers, Street, Waters and Ybarra.

Staff: Cassie Jones (786-7303).

Background:

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

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.

Small-Works Roster.

For public-works projects estimated to cost \$350,000 or less, state agencies and authorized local governments (agencies) 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. Agencies must publicly advertise the roster at least once per year in a newspaper of general circulation within the jurisdiction, soliciting the names of eligible contractors.

Agencies must adopt procedures to secure quotations from contractors on the roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder. A contract awarded from a small-works roster need not be advertised. Quotations may be invited from all appropriate contractors on the appropriate small-works roster. As an alternative, quotations may be invited from at least five contractors on the small-works roster in a manner that will equitably distribute the opportunity among contractors on the roster. If the estimated cost of the work is from \$250,000 to \$350,000, an agency that chooses to solicit bids from less than all the appropriate contractors must also notify the remaining contractors on the appropriate small-works roster that quotations on the work are being sought.

For projects awarded under the small-works roster process, the agency 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 agency 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, agencies may use the limited public-works process to award contracts. Under the limited public-works process, the agency solicits bids from at least three contractors from the appropriate small-works roster and awards the contract to the lowest responsible bidder. The agency must equitably distribute opportunities for limited public-works projects among contractors willing to perform in the geographic work area.

An agency must 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 agency 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. The agency retains the right of recovery against the contractor for any payments made on the contractor's behalf.

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.

Capital Projects Advisory Review Board.

The Capital Projects Advisory Review Board (CPARB), in the Department of Enterprise Services (DES), was created to provide evaluation of public capital projects construction processes, including the impact of contracting methods on project outcomes, and to advise the Legislature on policies related to public-works delivery methods and alternative public-works contracting procedures. The CPARB members are required to be knowledgeable or have experience in state and federal laws, rules, and best practices concerning public contracting for minority-, women-, and veteran-owned businesses and small businesses. The CPARB must reflect the gender, racial, ethnic, and geographic diversity of the state, including the interests of persons with disabilities.

In addition to evaluating public-works contract procedures, CPARB appoints members to the Project Review Committee to certify public bodies to use alternative contracting procedures, such as design-build (DB), general contractor/construction manager (GC/CM), or both, and to approve the use of DB or GC/CM procedures on a project-by-project basis.

The CPARB has a duty to develop and recommend policies to encourage competition and to further enhance the quality, efficiency, and accountability of and equitable participation by disadvantaged business enterprises and make recommendations regarding best practices, expansion, continuation, elimination, or modification of the alternative public-works contracting methods, including specific recommendations for reducing barriers for and increasing participation by disadvantaged business enterprises.

Department of Enterprise Services.

The 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.

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 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.

Summary of Bill:

Small-Works Roster Process.

An agency may utilize a statewide small-works roster or create and maintain one or more small-works rosters for different categories of anticipated work. The agency must require contractors desiring to be placed on the small-works roster to indicate if they meet the definition of women- and minority-owned business, veteran-owned business, or small businesses. At least once per year, the agency must provide the OMWBE directory of

certified firms a notice of the existence of the roster and solicit contractors for the roster. The contractors must agree and be able to receive notifications via email.

Agencies must document good faith efforts annually implementing the following:

- After an award is made, the bid quotations obtained must be recorded, publicly available, and available by request.
- An agency must publish a list of small-works contracts awarded and contractors contacted for direct negotiation.

An agency contracting through a small-works roster must invite bids notifying all contractors on the applicable roster that have indicated interest in performing work in the applicable geographical area.

For small public works with an estimated cost of less than \$150,000, an agency is encouraged to and may direct contract with small businesses before direct contracting with other contractors on the appropriate small-works roster without a competitive process under specified rules:

- If there are six or more contractors meeting the definition of small business on the applicable roster, the state agency must direct contract with one of those small businesses on the applicable roster that have indicated interest in performing work in the applicable geographical area.
- If there are five or less contractors meeting the definition of small business on the applicable roster, the state agency or authorized local government may direct contract with any contractor on the applicable roster.

Each agency engaging in direct contracting must establish a women-, minority-, and veteran-owned business and small business utilization plan. An agency engaging in direct contracting may not favor certain contractors on the appropriate small-works roster by repeatedly awarding contracts without documented attempts to direct contract with other contractors on the appropriate small-works roster.

For small public-works contracts under \$5,000, there is no requirement for retainage or performance bonds.

Statewide Small-Works Roster.

The Department of Commerce (Commerce), through the Municipal Research and Services Center (MRSC), must develop a statewide small-works roster by June 30, 2024. The MRSC must develop criteria for the statewide roster with collaboration from affected state and local agencies. The roster must have features to filter the roster by different specialties, categories of anticipated work, or geographic areas served by contractors. The roster must also indicate whether the contractor is designated as a small business. Commerce must provide funding to the MRSC as appropriated to maintain and publicize a small-works roster, and work with MRSC to notify state and local governments authorized to use small-

works rosters of the statewide roster authority and provide guidance on how to use the authority. State agencies and authorized local governments using small-works rosters must establish procedures for implementation.

Capital Projects Advisory Review Board.

Beginning in 2025 and every five years thereafter, the CPARB must review construction cost escalation data for Washington state, readily available in industry publications, roster utilization, and other appropriate data and metrics, and make recommendations to the appropriate committees of the Legislature on adjustments to contracting thresholds.

Department of Enterprise Services.

The DES must develop and make available on its public-facing website templates for bid invitations, bidding, and contracting that may be used by state agencies, authorized local governments, and contractors. A provision is eliminated that required the DES to conduct a survey and compile the results into a list of which states provide a bidding preference on public-works contracts for their resident contractors.

Office of Minority and Women's Business Enterprises.

The OMWBE must adopt rules governing the development and maintenance of a public-works small business certification program.

Other Provisions.

"Small business" is defined as a business meeting the certification criteria for size, ownership, control, and personal net worth adopted by the OMWBE. References to disadvantaged businesses enterprise are replaced with small and women-, minority-, or veteran-owned businesses throughout statutes relating to the CPARB and alternative public-works contracting. For port districts and irrigation districts, the limit for small-works contracting is increased from \$300,000 to \$350,000.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Sections 31 and 35 of the bill contain an emergency clause and take effect July 1, 2023. The remainder of the bill takes effect on July 1, 2024.

Staff Summary of Public Testimony:

(In support) This bill was unanimously adopted and recommended by CPARB which is

comprised of members of very diverse voices. The bill applies to both state and local governments and does require additional work to be done by OMWBE to create the small business certification. All minority- and women-owned businesses will automatically be entered into that system. The small business certification will be based upon the current standards for OMWEB certification but will be gender and race neutral. There is also a periodic threshold review by CPARB. The parity on the small-works limit is to make sure that all agencies have the \$350,000 limit. These changes are important to make sure that the process works. It will take a full year to implement the small works and small business changes, but the parity for the small-works limit will go into effect in July of 2023.

This bill provides consistency in contracting opportunities across jurisdictions. On the lower end of contracting, retainage and bonding is waived. Those have been traditional barriers for small business contractors getting into small-works projects. The ability to collect unpaid wages is retained and protects the workers' rights. The ability to do direct contracting for projects under \$150,000 will help those that have been underutilized in the past. It will also increase efficiency. These policies will allow contractors to build their businesses and grow to take on larger projects more successfully. The goals of the bill are administrative efficiency and removal of barriers faced by diverse businesses while maintaining protections for workers' rights. It was a result of a lot of compromise. This is a very good bill for small business. Almost all minority-, women-, and veteran-owned businesses are a small business. Public-works contracting is daunting to most small businesses. Small public-works projects are a way for a small business to gain experience with the process.

This bill is an important first step in addressing equity in the small-works roster and ensuring that underutilized businesses have a chance to work on these projects. Less than 3 percent of state contracts go to minority- and women-owned firms. This bill creates more visibility for the state roster and will help increase opportunities for these firms. Allowing direct contracting is a step forward in increasing equity in public contracting for these underutilized firms. The OMWBE small business certification process will be important in ensuring that legitimate small businesses are able to participate in the process. There are concerns around the definition of small business being broad and the need to have six contractors rather than three, but these are technical changes that can be addressed. The CPARB has done a great job building consensus.

(Opposed) None.

Persons Testifying: James King, Independent Business Association; Janice Zahn, Capital Projects Advisory Review Board; Mark Riker, Washington State Building and Construction Trades Council; Paula Sardinias, Washington Build Back Black Alliance; and Bill Frare, Department of Enterprise Services.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 30 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Stokesbary, Ranking Minority Member; Corry, Assistant Ranking Minority Member; Berg, Chandler, Chopp, Connors, Couture, Davis, Dye, Fitzgibbon, Hansen, Harris, Lekanoff, Pollet, Riccelli, Rude, Ryu, Sandlin, Schmick, Senn, Simmons, Slatter, Springer, Steele, Stonier and Tharinger.

Staff: Emily Stephens (786-7157).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Innovation, Community & Economic Development, & Veterans:

The substitute bill:

- clarifies that all retainage requirements set forth in chapter 60.28 RCW apply to state agencies and authorized local governments awarding small-works projects;
- removes a provision that the Department of Enterprise Services must either adopt rules and procedures, or determine and announce that rules are not necessary, for a requirement regarding reciprocity for nonresident contractors;
- specifies that until July 1, 2024, a port district may use the existing small-works roster process, and beginning on July 1, 2024, may use the small-works roster process created in the bill;
- specifies that until July 1, 2024, all contract projects of less than the authorized amount for irrigation districts may use the existing small-works roster process, and beginning on July 1, 2024, may use the small-works roster process created in the bill; and
- adds a null and void clause, making the act null and void if specific funding for the act is not provided in the omnibus appropriations act by June 30, 2023.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: Sections 31 and 35 of the bill contain an emergency clause and take effect July 1, 2023. The remainder of the bill takes effect on July 1, 2024.

Staff Summary of Public Testimony:

(In support) When the Capital Projects Advisory Review Board (CPARB) was reinstated last year, it was asked to work on diversity and equity issues. The CPARB developed this legislation to address equity in contracting. It is difficult to enter the contracting business. The 21 members of the CPARB board unanimously supported the bill's language. The bill

removes the barriers to small businesses entering public works contracting. The small-works roster is an important way for a small business to enter the world of public works. Helping small businesses helps women-, minority-, and veteran-owned businesses. The bill prevents small businesses from having to join the small-works roster of many individual local governments by creating a single portal.

(Opposed) None.

Persons Testifying: Representative Steve Tharinger, prime sponsor; James King, Independent Business Association; and Janice Zahn, Capital Projects Advisory Review Board.

Persons Signed In To Testify But Not Testifying: None.