

HOUSE BILL REPORT

EHB 1846

As Passed House:

April 11, 2023

Title: An act relating to addressing vessel procurement at the Washington state ferries.

Brief Description: Addressing vessel procurement at the Washington state ferries.

Sponsors: Representatives Fey, Barkis, Lekanoff, Ramel, Hutchins, Tharinger and Caldier.

Brief History:

Committee Activity:

Transportation: 3/20/23, 4/4/23 [DP].

Floor Activity:

Passed House: 4/11/23, 93-4.

Brief Summary of Engrossed Bill

- Requires the Washington State Department of Transportation (WSDOT) to contract for up to five new hybrid diesel-electric vessels that can carry up to 144 vehicles, using a one or two contract procurement approach to potentially accelerate vessel delivery.
- Requires that the contract(s) must be for a minimum of two vessels, with options for up to five vessels.
- Exempts the procurement from the existing ferries-specific design-build statutes.
- Specifies that the WSDOT must establish and apply evaluation criteria beyond low price to meet other best value and highest scored proposal objectives.
- Requires the WSDOT to establish a credit of 13 percent of the bid price for ferry vessels constructed in the State of Washington, which must be adjusted to reflect the proportion of the construction that occurs with the state.

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.

- Requires the WSDOT to require that contractors meet state apprenticeship and stormwater requirements or other state or federal equivalents, where such equivalents exist.
- Requires contractors located within the state to meet the requirements of the small business enterprise enforceable goals and modifies that program to develop contractual remedies in the absence of good faith efforts by a contractor.

HOUSE COMMITTEE ON TRANSPORTATION

Majority Report: Do pass. Signed by 29 members: Representatives Fey, Chair; Donaghy, Vice Chair; Paul, Vice Chair; Timmons, Vice Chair; Barkis, Ranking Minority Member; Hutchins, Assistant Ranking Minority Member; Low, Assistant Ranking Minority Member; Robertson, Assistant Ranking Minority Member; Berry, Bronoske, Chapman, Cortes, Dent, Doglio, Duerr, Entenman, Goehner, Griffey, Hackney, Klicker, Mena, Orcutt, Ramel, Ramos, Schmidt, Taylor, Volz, Walsh and Wylie.

Staff: Beth Redfield (786-7140).

Background:

Generally, public agencies are required to contract on a competitive basis for public works and award the contract to the lowest responsible bidder.

Public agencies are required to have the approval of the Capital Project Advisory Review Board to pursue alternative contracting procedures, such as design-build and general contractor/construction management. These methods of procurement allow the contractor to perform more than just the construction of a public works project, including design work, construction support services, or construction management. Selection of the contracting firm may be based on factors other than low bid and may include the negotiation of a maximum allowable construction cost.

When purchasing new ferries, the Washington State Department of Transportation (WSDOT) may only use a prescribed design-build process which consists of three phases. Throughout the phases the WSDOT must employ an independent owner's representative to serve as a third-party intermediary to communicate with bidders and the successful proposer, perform project quality oversight, manage change order requests, and ensure contract adherence. Phase one includes the evaluation and selection of prequalified proposers, phase two is the preparation and review of technical design proposals, and phase three is the submission and evaluation of bids. Upon completing the bid evaluation, the WSDOT may select the responsive and responsible proposer that offers the lowest total fixed price bid for all vessels.

The request for proposal (RFP) must include a requirement that the vessels be constructed in Washington (Build in Washington). If all responses to the initial RFP are greater than 5 percent above the engineer's estimate for the project, the WSDOT must reject all proposals and issue a subsequent RFP not subject to the Build in Washington requirement.

The 2022 Supplemental Transportation Appropriations Act directed the Joint Legislative Audit and Review Committee (JLARC) to conduct an independent review of the Washington State Ferries (WSF) system's design-build contracting process for hybrid-electric vessels and to recommend best practices and updates to existing statutes to implement the recommendations. The review was also required to evaluate opportunities in the contracting process to decrease vessel construction costs and ensure operational efficiencies.

The JLARC preliminary report recommended that the Legislature should consider revising state law to allow alternatives that increase ferry acquisition speed and value to the state. In particular, the JLARC noted that currently WSF must select the vessel contractor based on low bid, rather than use a best value approach which allows the consideration of other factors beneficial to the state. The JLARC also noted that state law does not allow the WSF to use faster procurement approaches that still encourage in-state construction. The JLARC found that at least 12 states offer in-state preferences and apply those preferences during bid selection, rather than after a lengthy technical design proposal process.

To increase small business participation in ferry vessel procurement, the WSDOT administers a small business enterprise enforceable goals program. The program establishes enforceable goals for prime contractors to subcontract with small business enterprises. Contract goals are a percentage of the contract award amounts. Prime contractors unable to meet the enforceable goal must submit evidence of good faith efforts to meet the contract goals.

Summary of Engrossed Bill:

The WSDOT is required to contract for up to five new hybrid diesel-electric vessels that can carry up to 144 vehicles, using a one or two contract procurement approach to potentially accelerate vessel delivery. The WSDOT must make available the design for the 144-vehicle hybrid electric Olympic class vessel to potential bidders. Incentives may be awarded by the WSDOT to bidders who: offer design modifications that lower the minimum number of crew needed to staff the vessel in accordance with United States Coast Guard requirements; incorporate materials, technologies, or other features that lower life-cycle maintenance and operations costs; accelerate the proposed delivery schedule; or make other improvements determined to be beneficial by the WSDOT. The WSDOT may allow for exceptions to the 144 vehicle capacity in cases where efficiencies are met which lower staff requirements or life-cycle costs.

The contract(s) must be for a minimum of two vessels, with options for up to five vessels, and are exempt from the ferries-specific design-build procurement statutes. The contract(s) may employ the following procurement methods: design-build as authorized in the general alternative procurement statutes, design-bid-build, or lease with an option to buy. The terms of a lease plan must be approved by the Governor and the appropriate committees of the Legislature and are subject to the availability of amounts appropriated for this specific purpose.

To the extent possible, the WSDOT must establish and apply evaluation criteria beyond low bid to meet other best value and highest scored proposal objectives.

The WSDOT must award a credit of 13 percent of the bid price for bid proposals for vessels constructed in the state of Washington, which must be adjusted to reflect the proportion of the construction of the vessels which occurs within the state. This credit reflects the amount of economic and revenue loss to the state of Washington from constructing vessels outside the state of Washington and the additional costs of transport, potential delay, and owner oversight incurred for construction at shipyards located outside the state of Washington.

The WSDOT must require that contractors meet state apprenticeship requirements or other state or federal equivalents, where such equivalents exist. The WSDOT must also require that contractors meet state stormwater requirements or other state or federal equivalents, where such equivalents exist.

Contracts eligible for the use of federal funds must comply with federal disadvantaged business enterprise targets.

Contractors located within the state must meet the requirements of the small business enterprise enforceable goals program. The WSDOT must develop contractual remedies in the absence of good faith efforts by a contractor and participating small businesses must be certified by the Office of Minority and Women's Business Enterprises.

The WSDOT must employ third-party experts that report to the WSF to serve as a supplementary resource. The experts must:

- perform project quality oversight and report on a semi-annual basis to the Legislature and the Office of Financial Management;
- assist with the management of change order requests;
- advise on contract and technical matters; and
- possess knowledge of inland waterways, Puget Sound vessel operations, the propulsion systems of the new vessels, and the WSF operations.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) We have a borderline crisis with respect to having good, efficient, and new vessels in our ferry system. We suffer in terms of high maintenance costs and service disruptions because vessels do not hold up like they used to. A prior solicitation and contract with a Washington shipbuilder did not have successful results because there was not agreement on the price and who bears risk. Under current law, there is strong likelihood that the state will get a bid from shipyards that is 5 percent over the engineer's estimate, triggering the requirement for a national bid. Putting forward this proposal in the hopes of getting a cost-effective bid and it would be great if we get one from a Washington boat builder. The bill provides advantages to a Washington builder. The advantage to a Washington builder must be defensible or there may be a lawsuit. We need a bill to allow us to build the five vessels. This is a big step in the right direction. It should result in new ferries that are less costly to build and more economical to operate than the very expensive hybrid-electric design. The bill also revises the procurement process, which ought to bring a more competitive price; it is a good thing and long overdue. If it results in savings, the WSDOT should consider applying the process to the WSF's other new-build programs including the 124-car vessels in the 2040 Long Range Plan. Even though the bill makes important reforms, it still specifies hybrid-electric propulsion, which increases weight and complexity and results in higher costs. Proposers should be asked to provide a diesel powered version of the same hull design that would provide a baseline for calculating the cost per ton of reduced carbon emissions and also provide a lower-cost option should the hybrid-electric version come in at too high of a cost. A year from now you do not want to be back here looking at unaffordable bids. The WSF is forced to pay more than any other ferry system to build boats. This waste of taxpayer money is due to the protectionist Build in Washington program. In 2010 the WSF spent \$65 million apiece for 64-car vessels, which had been built in Mississippi for \$34 million each. That overspend continued with the Olympic Class, which cost about \$1 million per car space. British Columbia (BC) paid about half as much because they have boats built everywhere in the world. The Jones Act limits us to building in the United States. Studies have shown that Build in Washington has and will increase the costs per boat by about 50 percent while giving little if any long term benefit to our state. With \$1 billion approved for five boats, we could get seven boats if you pass this bill. The Department of Defense did major acquisition reform similar to the JLARC recommendations. A legacy contractor could not leverage commercial innovation and was slow in delivery. The WSF is in a similar place. Consider Vigor's very high bid last year. Consider that BC Ferries used best value to procure 6 hybrid vessels in 3 years. Ferry riders see that replacing aging boats is essential to sustaining service. The backlog of overdue work has increased 30 percent in the last five years. With only 21 WSF boats, that leaves only one backup boat and one for maintenance. Even with fully funded preservation there is not enough service time to get all the work done. The current procurement, with no delays, will take until 2031 or later to get our boats replaced. That is a long time for vessels to be on life support. This legislation will give WSF the tools to build affordable boats.

(Opposed) None.

(Other) Thirty years ago Build in Washington was enacted so that the state could meet minority and women business enterprise goals, prevailing wages, apprentice utilization standards, stricter worker health and safety regulations, and stricter environmental regulations and enforcement. Other states subsidize their shipyards and Washington does not. The benefits of business done in Washington include increased tax revenues to state and local governments, local economic development, and work for local suppliers, shipyards, and workers. Wage rates should be required to be consistent with Washington prevailing wages. Wage requirements should be clearly spelled out in the bill as well as worker health and safety and environmental protections. These boats should not be built at the expense of the workforce and businesses of Washington due to choices we have made to make Washington a better place to do business, live, and work. Multiple vessels have been successfully contracted on time and on budget in the Puget Sound region by multiple shipyards working together. We are concerned about the proposed change away from the Build in Washington statute. These ferry builds employ hundreds of skilled jobs and provide significant positive economic impact to families and communities in Washington. We thank you for the items outlined in the bill that allow Washington builders to compete with builders across the nation. It is a good start, but in current form the bill does not adequately account for significant factors such as prevailing wage costs, environmental protections, worker and health safety requirements, increased warranty and repair, added risk associated with construction in extreme weather areas, and economic loss to the state.

Persons Testifying: (In support) Representative Jake Fey, prime sponsor; Tom Thiersch, Ferry Advisory Committee; Walt Elliott, Kingston North Kitsap Rotary; and Charles Prestrud, Washington Policy Center.

(Other) Jeff DeVere, Nichols Brothers Boat Builders-Everett Ship Repair; and Gordon Baxter, Puget Sound Metal Trades Council and American Federation of Labor and Congress of Industrial Organizations.

Persons Signed In To Testify But Not Testifying: None.