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SECOND SUBSTITUTE HOUSE BILL 3274

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State of Washington                      60th Legislature                      2008 Regular Session

By House Appropriations Subcommittee on General Government & Audit Review (originally sponsored by Representatives Simpson, Hudgins, Upthegrove, Hunter, Santos, and Kenney)

READ FIRST TIME 02/07/08.

1            AN ACT Relating to improving public contracting for public port  
2 districts; amending RCW 53.08.120, 39.30.020, 39.04.010, and 53.12.270;  
3 reenacting and amending RCW 39.04.155; adding a new section to chapter  
4 53.08 RCW; adding a new chapter to Title 53 RCW; creating a new  
5 section; and prescribing penalties.

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

7            **Sec. 1.** RCW 53.08.120 and 2000 c 138 s 210 are each amended to  
8 read as follows:

9            (1) All material and work required by a port district not meeting  
10 the definition of public work in RCW 39.04.010(4) may be procured in  
11 the open market or by contract and all work ordered may be done by  
12 contract or day labor.

13            (2)(a) All such contracts for work meeting the definition of  
14 "public work" in RCW 39.04.010(4), the estimated cost of which exceeds  
15 two hundred thousand dollars, shall be awarded using a competitive bid  
16 process. The contract must be ((let)) awarded at public bidding upon  
17 notice published in a newspaper of general circulation in the district  
18 at least thirteen days before the last date upon which bids will be  
19 received, calling for ((sealed)) bids upon the work, plans and

1 specifications for which shall then be on file in the office of the  
2 commission for public inspection. The same notice may call for bids on  
3 such work or material based upon plans and specifications submitted by  
4 the bidder. The competitive bidding requirements for purchases or  
5 public works may be waived pursuant to RCW 39.04.280 if an exemption  
6 contained within that section applies to the purchase or public work.

7 ~~((However))~~ (b) For all contracts related to work meeting the  
8 definition of "public work" in RCW 39.04.010(4) that are estimated at  
9 two hundred thousand dollars or less, a port district may let contracts  
10 using the small works roster process under RCW 39.04.155 in lieu of  
11 ~~((calling))~~ advertising for ~~((sealed))~~ bids. Whenever possible, the  
12 managing official shall invite at least one proposal from a minority  
13 contractor who shall otherwise qualify under this section.

14 When awarding such a contract for work, when utilizing proposals  
15 from the small works roster, the managing official shall give weight to  
16 the contractor submitting the lowest and best proposal, and whenever it  
17 would not violate the public interest, such contracts shall be  
18 distributed equally among contractors, including minority contractors,  
19 on the small works roster.

20 **Sec. 2.** RCW 39.30.020 and 1974 ex.s. c 74 s 1 are each amended to  
21 read as follows:

22 In addition to any other remedies or penalties contained in any  
23 law, municipal charter, ordinance, resolution or other enactment, any  
24 municipal officer by or through whom or under whose supervision, in  
25 whole or in part, any contract is made in ~~((wilful))~~ willful and  
26 intentional violation of any law, municipal charter, ordinance,  
27 resolution or other enactment requiring competitive bidding, including  
28 consulting, architectural, engineering, or other services, upon such  
29 contract shall be held liable to a civil penalty of not less than three  
30 hundred dollars and may be held liable, jointly and severally with any  
31 other such municipal officer, for all consequential damages to the  
32 municipal corporation. If, as a result of a criminal action, the  
33 violation is found to have been intentional, the municipal officer  
34 shall immediately forfeit his or her office. For purposes of this  
35 section, "municipal officer" ~~((shall))~~ means an "officer" or "municipal  
36 officer" as those terms are defined in RCW 42.23.020(2).

1        NEW SECTION.    **Sec. 3.**    A new section is added to chapter 53.08 RCW  
2 to read as follows:

3        By January 1, 2010, each port with more than ten million dollars in  
4 annual gross revenues, excluding grant and loan funds, shall maintain  
5 a database on a public web site of all contracts, including public  
6 works and personal services. At a minimum, the database shall identify  
7 the contractor, the purpose of the contract, effective dates and  
8 periods of performance, the cost of the contract and funding source,  
9 any modifications to the contract, and whether the contract was  
10 competitively procured or awarded on a sole source basis.

11        NEW SECTION.    **Sec. 4.**    The legislature hereby establishes a policy  
12 of open competition for all personal service contracts entered into by  
13 port districts unless specifically exempted under this chapter. It is  
14 further the intent to provide differentiation between the competitive  
15 procurement procedures for personal and professional services  
16 contracts.

17        NEW SECTION.    **Sec. 5.**    The definitions in this section apply  
18 throughout this chapter unless the context clearly requires otherwise.

19        (1) "Commission" means the elected oversight body of an individual  
20 port.

21        (2) "Competitive solicitation" means a documented formal process  
22 providing an equal and open opportunity to qualified parties and  
23 culminating in a selection based on criteria, in which criteria other  
24 than price may be the primary basis for consideration. The criteria  
25 may include such factors as the consultant's fees or costs, ability,  
26 capacity, experience, reputation, responsiveness to time limitations,  
27 responsiveness to solicitation requirements, quality of previous  
28 performance, and compliance with statutes and rules relating to  
29 contracts or services.

30        (3) "Consultant" means an independent individual or firm  
31 contracting with a port to perform a service or render an opinion or  
32 recommendation according to the consultant's methods and without being  
33 subject to the control of the port except as to the result of the work.  
34 The port monitors progress under the contract and authorizes payment.

35        (4) "Emergency" means a set of unforeseen circumstances beyond the  
36 control of the port that either:

1 (a) Present a real, immediate threat to the proper performance of  
2 essential functions; or

3 (b) May result in material loss or damage to property, bodily  
4 injury, or loss of life if immediate action is not taken.

5 (5) "Evidence of competition" means documentation demonstrating  
6 that the port has solicited responses from multiple firms in selecting  
7 a consultant.

8 (6) "Personal service" means professional or technical expertise  
9 provided by a consultant to accomplish a specific study, project, task,  
10 or other work statement which may not reasonably be required in  
11 connection with a public works project meeting the definition in RCW  
12 39.04.010(4). "Personal service" does not include purchased services  
13 as defined under subsection (8) of this section or professional  
14 services procured using the competitive selection requirements in  
15 chapter 39.80 RCW.

16 (7) "Personal service contract" means an agreement, or any  
17 amendment thereto, with a consultant for the rendering of personal  
18 services to the port.

19 (8) "Purchased services" means services provided by a vendor to  
20 accomplish routine, continuing, and necessary functions. "Purchased  
21 services" includes, but is not limited to, services for equipment  
22 maintenance and repair; operation of a physical plant; security;  
23 computer hardware and software maintenance; data entry; key punch  
24 services; and computer time-sharing, contract programming, and  
25 analysis.

26 (9) "Sole source" means a consultant providing professional or  
27 technical expertise of such a unique nature that the consultant is  
28 clearly and justifiably the only practicable source to provide the  
29 service. The justification shall be based on the uniqueness of the  
30 service, sole availability at the location required, or warranty or  
31 defect correction service obligations of the consultant.

32 NEW SECTION. **Sec. 6.** All personal service contracts shall be  
33 entered into pursuant to competitive solicitation, except for:

- 34 (1) Emergency contracts;  
35 (2) Sole source contracts;  
36 (3) Contract amendments;

1 (4) Contracts between a consultant and a port of less than fifty  
2 thousand dollars. However, contracts of fifty thousand dollars or  
3 greater but less than two hundred thousand dollars shall have  
4 documented evidence of competition. Ports shall not structure  
5 contracts to evade these requirements; and

6 (5) Other specific contracts or classes or groups of contracts  
7 exempted from the competitive solicitation process by the commission  
8 when it has been determined that a competitive solicitation process is  
9 not appropriate or cost-effective.

10 NEW SECTION. **Sec. 7.** Emergency contracts shall be filed with the  
11 commission and made available for public inspection within seven  
12 working days following the commencement of work or execution of the  
13 contract, whichever occurs first. Documented justification for  
14 emergency contracts shall be provided to the commission when the  
15 contract is filed.

16 NEW SECTION. **Sec. 8.** (1) Sole source contracts shall be filed  
17 with the commission and made available for public inspection prior to  
18 the proposed starting date of the contract. Documented justification  
19 for sole source contracts shall be provided to the commission when the  
20 contract is filed. For sole source contracts of fifty thousand dollars  
21 or more, documented justification shall include evidence that the port  
22 attempted to identify potential consultants.

23 (2) Ports shall ensure that the costs, fees, or rates negotiated in  
24 filed sole source contracts of fifty thousand dollars or more are  
25 reasonable.

26 NEW SECTION. **Sec. 9.** A port commissioner or employee shall not  
27 expend any funds for personal service contracts subject to this chapter  
28 unless the port has complied with the competitive procurement and other  
29 requirements of this chapter. The port commissioner or employee  
30 executing the personal service contracts is responsible for compliance  
31 with the requirements of this chapter. Willful and intentional failure  
32 to comply with the requirements of this chapter subjects the port  
33 commissioner or employee to a civil penalty in the amount of three  
34 hundred dollars. A consultant who knowingly violates this chapter in  
35 seeking or performing work under a personal services contract is

1 subject to a civil penalty of three hundred dollars or twenty-five  
2 percent of the amount of the contract, whichever is greater. The state  
3 auditor is responsible for auditing violations of this chapter through  
4 its regular financial and accountability audits. The attorney general  
5 is responsible for prosecuting violations of this chapter.

6 NEW SECTION. **Sec. 10.** (1) Substantial changes in the scope of  
7 work specified in the contract or which are substantial additions to  
8 the scope of work specified in the formal solicitation document shall  
9 be submitted to the commission for a determination as to whether the  
10 change warrants the work to be awarded as a new contract.

11 (2) An amendment or amendments to personal service contracts, if  
12 the value of the amendment or amendments, whether singly or  
13 cumulatively, exceeds fifty percent of the value of the original  
14 contract must be filed with the commission and made available for  
15 public inspection prior to the proposed starting date of services under  
16 the amendments.

17 NEW SECTION. **Sec. 11.** This chapter does not apply to:

18 (1) Contracts specifying a fee of less than fifty thousand dollars;

19 (2) Contracts awarded to companies that furnish a service where the  
20 tariff is established by the utilities and transportation commission or  
21 other public entity;

22 (3) Intergovernmental agreements awarded to any governmental  
23 entity, whether federal, state, or local and any department, division,  
24 or subdivision thereof;

25 (4) Contracts awarded for services to be performed for a standard  
26 fee, when the standard fee is established by the contracting agency or  
27 any other governmental entity and a like contract is available to all  
28 qualified applicants;

29 (5) Contracts for services that are necessary to the conduct of  
30 collaborative research if prior approval is granted by the funding  
31 source;

32 (6) Contracts for professional services which are entered into  
33 under chapter 39.80 RCW; and

34 (7) Contracts for the employment of expert witnesses for the  
35 purposes of litigation or legal services to supplement the expertise of  
36 port staff.

1        NEW SECTION.    **Sec. 12.**    (1) The municipal research services center,  
2        in cooperation with the Washington public ports association, shall  
3        develop guidelines for the effective and efficient management of  
4        personal service contracts by all ports.    The guidelines must, at a  
5        minimum, include:

6            (a) Accounting methods, systems, measures, and principles to be  
7        used by ports and consultants;

8            (b) Precontract procedures for selecting potential consultants  
9        based on their qualifications and ability to perform;

10           (c) Incorporation of performance measures and measurable benchmarks  
11        in contracts, and the use of performance audits;

12           (d) Uniform contract terms to ensure contract performance and  
13        compliance with port, state, and federal standards;

14           (e) Proper payment and reimbursement methods to ensure that the  
15        port receives full value for taxpayer moneys, including cost  
16        settlements and cost allowance;

17           (f) Postcontract procedures, including methods for recovering  
18        improperly spent or overspent moneys for disallowance and adjustment;

19           (g) Adequate contract remedies and sanctions to ensure compliance;

20           (h) Monitoring, fund tracking, risk assessment, and auditing  
21        procedures and requirements;

22           (i) Financial reporting, record retention, and record access  
23        procedures and requirements;

24           (j) Procedures and criteria for terminating contracts for cause or  
25        otherwise; and

26           (k) Any other subject related to effective and efficient contract  
27        management.

28        (2) The municipal research services center shall submit a status  
29        report on the guidelines required by subsection (1) of this section to  
30        the governor and the appropriate standing committees of the legislature  
31        no later than December 1, 2008.

32        (3) The Washington public ports association shall publish a  
33        guidebook for use by ports containing the guidelines developed under  
34        subsection (1) of this section.

35        (4) The municipal research services center and the Washington  
36        public ports association shall each make the guidelines available on  
37        their web sites.

1        NEW SECTION.    **Sec. 13.**    (1) A port entering into or amending  
2 personal service contracts shall follow the policies adopted by the  
3 commission, which shall be based on guidelines developed pursuant to  
4 section 12 of this act.

5        (2) This section applies to ports entering into or renewing  
6 contracts after January 1, 2010.

7        NEW SECTION.    **Sec. 14.**    The Washington public ports association  
8 shall provide a training course for port personnel responsible for  
9 executing and managing personal service contracts. The course must  
10 contain training on effective and efficient contract management under  
11 the guidelines established under section 12 of this act. Port  
12 districts shall require port employees responsible for executing or  
13 managing personal service contracts to complete the training course to  
14 the satisfaction of the commission.

15        **Sec. 15.**    RCW 39.04.010 and 2007 c 133 s 1 are each amended to read  
16 as follows:

17        The definitions in this section apply throughout this chapter  
18 unless the context clearly requires otherwise.

19        (1) "Award" means the formal decision by the state or municipality  
20 notifying a responsible bidder with the lowest responsive bid of the  
21 (~~state~~) state's or municipality's acceptance of the bid and intent to  
22 enter into a contract with the bidder.

23        (2) "Contract" means a contract in writing for the execution of  
24 public work for a fixed or determinable amount duly awarded after  
25 advertisement and competitive bid, or a contract awarded under the  
26 small works roster process in RCW 39.04.155.

27        (3) "Municipality" means every city, county, town, port district,  
28 district, or other public agency authorized by law to require the  
29 execution of public work, except drainage districts, diking districts,  
30 diking and drainage improvement districts, drainage improvement  
31 districts, diking improvement districts, consolidated diking and  
32 drainage improvement districts, consolidated drainage improvement  
33 districts, consolidated diking improvement districts, irrigation  
34 districts, or other districts authorized by law for the reclamation or  
35 development of waste or undeveloped lands.



1 (4) "Public work" means all work, construction, alteration, repair,  
2 or improvement other than ordinary maintenance, executed at the cost of  
3 the state or of any municipality, or which is by law a lien or charge  
4 on any property therein. All public works, including maintenance when  
5 performed by contract shall comply with chapter 39.12 RCW. "Public  
6 work" does not include work, construction, alteration, repair, or  
7 improvement performed under contracts entered into under RCW  
8 36.102.060(4) or under development agreements entered into under RCW  
9 36.102.060(7) or leases entered into under RCW 36.102.060(8).

10 (5) "Responsible bidder" means a contractor who meets the criteria  
11 in RCW 39.04.350.

12 (6) "State" means the state of Washington and all departments,  
13 supervisors, commissioners, and agencies of the state.

14 **Sec. 16.** RCW 39.04.155 and 2007 c 218 s 87, 2007 c 210 s 1, and  
15 2007 c 133 s 4 are each reenacted and amended to read as follows:

16 (1) This section provides uniform small works roster provisions to  
17 award contracts for construction, building, renovation, remodeling,  
18 alteration, repair, or improvement of real property that may be used by  
19 state agencies and by any local government that is expressly authorized  
20 to use these provisions. These provisions may be used in lieu of other  
21 procedures to award contracts for such work with an estimated cost of  
22 two hundred thousand dollars or less. The small works roster process  
23 includes the limited public works process authorized under subsection  
24 (3) of this section and any local government authorized to award  
25 contracts using the small works roster process under this section may  
26 award contracts using the limited public works process under subsection  
27 (3) of this section.

28 (2)(a) A state agency or authorized local government may create a  
29 single general small works roster, or may create a small works roster  
30 for different specialties or categories of anticipated work. Where  
31 applicable, small works rosters may make distinctions between  
32 contractors based upon different geographic areas served by the  
33 contractor. The small works roster or rosters shall consist of all  
34 responsible contractors who have requested to be on the list, and where  
35 required by law are properly licensed or registered to perform such  
36 work in this state. A state agency or local government establishing a  
37 small works roster or rosters may require eligible contractors desiring

1 to be placed on a roster or rosters to keep current records of any  
2 applicable licenses, certifications, registrations, bonding, insurance,  
3 or other appropriate matters on file with the state agency or local  
4 government as a condition of being placed on a roster or rosters. At  
5 least once a year, the state agency or local government shall publish  
6 in a newspaper of general circulation within the jurisdiction a notice  
7 of the existence of the roster or rosters and solicit the names of  
8 contractors for such roster or rosters. In addition, responsible  
9 contractors shall be added to an appropriate roster or rosters at any  
10 time they submit a written request and necessary records. Master  
11 contracts may be required to be signed that become effective when a  
12 specific award is made using a small works roster.

13 (b) A state agency establishing a small works roster or rosters  
14 shall adopt rules implementing this subsection. A local government  
15 establishing a small works roster or rosters shall adopt an ordinance  
16 or resolution implementing this subsection. Procedures included in  
17 rules adopted by the department of general administration in  
18 implementing this subsection must be included in any rules providing  
19 for a small works roster or rosters that is adopted by another state  
20 agency, if the authority for that state agency to engage in these  
21 activities has been delegated to it by the department of general  
22 administration under chapter 43.19 RCW. An interlocal contract or  
23 agreement between two or more state agencies or local governments  
24 establishing a small works roster or rosters to be used by the parties  
25 to the agreement or contract must clearly identify the lead entity that  
26 is responsible for implementing the provisions of this subsection.

27 (c) Procedures shall be established for securing telephone,  
28 written, or electronic quotations from contractors on the appropriate  
29 small works roster to assure that a competitive price is established  
30 and to award contracts to the lowest responsible bidder, as defined in  
31 RCW 39.04.010. Invitations for quotations shall include an estimate of  
32 the scope and nature of the work to be performed as well as materials  
33 and equipment to be furnished. However, detailed plans and  
34 specifications need not be included in the invitation. This subsection  
35 does not eliminate other requirements for architectural or engineering  
36 approvals as to quality and compliance with building codes. Quotations  
37 may be invited from all appropriate contractors on the appropriate  
38 small works roster. As an alternative, quotations may be invited from

1 at least five contractors on the appropriate small works roster who  
2 have indicated the capability of performing the kind of work being  
3 contracted, in a manner that will equitably distribute the opportunity  
4 among the contractors on the appropriate roster. However, if the  
5 estimated cost of the work is from one hundred thousand dollars to two  
6 hundred thousand dollars, a state agency or local government(~~(, other~~  
7 ~~than a port district,)~~) that chooses to solicit bids from less than all  
8 the appropriate contractors on the appropriate small works roster must  
9 also notify the remaining contractors on the appropriate small works  
10 roster that quotations on the work are being sought. The government  
11 has the sole option of determining whether this notice to the remaining  
12 contractors is made by: (i) Publishing notice in a legal newspaper in  
13 general circulation in the area where the work is to be done; (ii)  
14 mailing a notice to these contractors; or (iii) sending a notice to  
15 these contractors by facsimile or other electronic means. For purposes  
16 of this subsection (2)(c), "equitably distribute" means that a state  
17 agency or local government soliciting bids may not favor certain  
18 contractors on the appropriate small works roster over other  
19 contractors on the appropriate small works roster who perform similar  
20 services.

21 (d) A contract awarded from a small works roster under this section  
22 need not be advertised.

23 (e) Immediately after an award is made, the bid quotations obtained  
24 shall be recorded, open to public inspection, and available by  
25 telephone inquiry.

26 (3) In lieu of awarding contracts under subsection (2) of this  
27 section, a state agency or authorized local government may award a  
28 contract for work, construction, alteration, repair, or improvement  
29 projects estimated to cost less than thirty-five thousand dollars using  
30 the limited public works process provided under this subsection.  
31 Public works projects awarded under this subsection are exempt from the  
32 other requirements of the small works roster process provided under  
33 subsection (2) of this section and are exempt from the requirement that  
34 contracts be awarded after advertisement as provided under RCW  
35 39.04.010.

36 For limited public works projects, a state agency or authorized  
37 local government shall solicit electronic or written quotations from a  
38 minimum of three contractors from the appropriate small works roster

1 and shall award the contract to the lowest responsible bidder as  
2 defined under RCW 39.04.010. After an award is made, the quotations  
3 shall be open to public inspection and available by electronic request.  
4 A state agency or authorized local government shall attempt to  
5 distribute opportunities for limited public works projects equitably  
6 among contractors willing to perform in the geographic area of the  
7 work. A state agency or authorized local government shall maintain a  
8 list of the contractors contacted and the contracts awarded during the  
9 previous twenty-four months under the limited public works process,  
10 including the name of the contractor, the contractor's registration  
11 number, the amount of the contract, a brief description of the type of  
12 work performed, and the date the contract was awarded. For limited  
13 public works projects, a state agency or authorized local government  
14 may waive the payment and performance bond requirements of chapter  
15 39.08 RCW and the retainage requirements of chapter 60.28 RCW, thereby  
16 assuming the liability for the contractor's nonpayment of laborers,  
17 mechanics, subcontractors, materialpersons, suppliers, and taxes  
18 imposed under Title 82 RCW that may be due from the contractor for the  
19 limited public works project, however the state agency or authorized  
20 local government shall have the right of recovery against the  
21 contractor for any payments made on the contractor's behalf.

22 (4) The breaking of any project into units or accomplishing any  
23 projects by phases is prohibited if it is done for the purpose of  
24 avoiding the maximum dollar amount of a contract that may be let using  
25 the small works roster process or limited public works process.

26 (5)(a) A state agency or authorized local government may use the  
27 limited public works process of subsection (3) of this section to  
28 solicit and award small works roster contracts to small businesses that  
29 are registered contractors with gross revenues under one million  
30 dollars annually as reported on their federal tax return.

31 (b) A state agency or authorized local government may adopt  
32 additional procedures to encourage small businesses that are registered  
33 contractors with gross revenues under two hundred fifty thousand  
34 dollars annually as reported on their federal tax returns to submit  
35 quotations or bids on small works roster contracts.

36 (6) As used in this section, "state agency" means the department of  
37 general administration, the state parks and recreation commission, the  
38 department of natural resources, the department of fish and wildlife,

1 the department of transportation, any institution of higher education  
2 as defined under RCW 28B.10.016, and any other state agency delegated  
3 authority by the department of general administration to engage in  
4 construction, building, renovation, remodeling, alteration,  
5 improvement, or repair activities.

6 **Sec. 17.** RCW 53.12.270 and 1975 1st ex.s. c 12 s 1 are each  
7 amended to read as follows:

8 (1) The commission may delegate to the managing official of a port  
9 district such administrative powers and duties of the commission as it  
10 may deem proper for the efficient and proper management of port  
11 district operations. Any such delegation shall be authorized by  
12 appropriate resolution of the commission, which resolution must also  
13 establish guidelines and procedures for the managing official to  
14 follow.

15 (2) The commission shall establish, by resolution, policies to  
16 comply with RCW 39.04.280 that set forth the conditions by which  
17 competitive bidding requirements for public works contracts may be  
18 waived.

19 NEW SECTION. **Sec. 18.** Sections 4 through 14 of this act  
20 constitute a new chapter in Title 53 RCW.

21 NEW SECTION. **Sec. 19.** If specific funding for the purposes of  
22 this act, referencing this act by bill or chapter number, is not  
23 provided by June 30, 2008, in the omnibus appropriations act, this act  
24 is null and void.

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