

# HOUSE BILL REPORT

## HB 3187

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### As Reported by House Committee On:

Commerce & Labor

**Title:** An act relating to prohibiting work under state contracts from being performed at locations outside the United States.

**Brief Description:** Prohibiting work under state contracts from being performed at locations outside the United States.

**Sponsors:** Representatives Romero, Hudgins and Conway.

### Brief History:

#### Committee Activity:

Commerce & Labor: 2/5/04 [DPS].

#### Brief Summary of Substitute Bill

- Prohibits work under certain state contracts from being performed at locations outside the United States.
- Makes this prohibition applicable to state personal services, purchased services, and civil service.
- Makes this prohibition inapplicable if the Director of the Office of Financial Management determines that the only practicable location where the services may be performed is clearly and justifiably outside the United States.
- Also makes this prohibition inapplicable to goods procured under certain state contracts, and to certain state contracts entered into prior to July 1, 2005.

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### HOUSE COMMITTEE ON COMMERCE & LABOR

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Hudgins, Kenney and McCoy.

**Minority Report:** Do not pass. Signed by 4 members: Representatives McMorris, Ranking Minority Member; Condotta, Assistant Ranking Minority Member; Crouse and Holmquist.

**Staff:** Jill Reinmuth (786-7134).

**Background:**

State Procurement

The State of Washington contracts with individuals and companies outside of state government to provide certain services to the state and its residents. The state's purchasing authority is generally organized into categories based on the type of service. These categories include the following:

- Personal services. This term refers to professional or technical expertise provided by a consultant to accomplish a specific study or project;
- Purchased services. These services are ones provided by a vendor to accomplish routine, continuing and necessary functions;
- Information services. These services include data processing, telecommunications, office automation, and computerized information systems;
- Public works. This term refers to the construction, repair, or alteration of buildings and other real property;
- Highway design and construction. This term includes both architectural and engineering services, as well as construction services related to highways; and
- Printing services. This term refers to the production of printed materials.

In addition, beginning July 1, 2005, the state may contract for services historically and traditionally provided by state employees, so long as the state complies with the contracting out provisions of the Civil Service Reform Act of 2002.

Laws governing state procurement that give preference to domestic goods or prohibit purchasing foreign goods have been challenged on one or more grounds. These include arguments that such laws are: (1) invalid exercises of state power under the Foreign Commerce Clause and/or the Foreign Affairs Power; (2) preempted by federal law; or (3) in violation of international agreements on government procurement.

Foreign Commerce Clause

The U.S. Constitution reserves to Congress the power "to regulate Commerce with foreign Nations, ..." The U.S. Supreme Court has struck down state laws that regulate commerce in a manner that promotes businesses in the state at the expense of businesses in other states or foreign countries. However, the U.S. Supreme Court has also

recognized that, when a state acts as a market participant, rather than a market regulator, it is not subject to the restraints of the Commerce Clause. Other federal and state courts, relying on the "market participant doctrine," have generally upheld state "Buy American" laws.

### Foreign Affairs Power

With regard to foreign policy, the federal government also has exclusive authority. The U.S. Supreme Court has said that the President has the "lead role" as well as "a degree of independent authority to act." The Court has struck down at least one state law as an "intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress."

### Federal Preemption

The U.S. Supreme Court has found that state laws in conflict with federal laws or with foreign policies and diplomatic objectives of the President and Congress are preempted.

### International Agreements

The Agreement on Government Procurement (GPA) is one of many WTO agreements to which the United States is a party, and is one of several agreements that apply to Washington and certain other states. The GPA is a plurilateral agreement, meaning that only some WTO members are parties to the agreement. For example, Ghana, India, Mexico, and the Philippines are members of the WTO, but are not parties to the GPA.

In Washington, state agencies subject to the GPA include certain executive branch agencies such as the Department of General Administration and the Department of Transportation, as well as state universities. State contracts subject to the GPA include contracts of \$477,000 or more for goods and services, and contracts of \$6,725,000 or more for construction services.

Article III of the GPA deals with national treatment and non-discrimination. It provides, in part that:

- Parties to the agreement must give the products, services and suppliers of other parties treatment no less favorable than that accorded to domestic products, services and suppliers;
- Parties must not treat locally-established suppliers less favorably than other suppliers on the basis of foreign affiliation or ownership; and
- Parties must not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied.

According to the WTO Analytical Index for the GPA, there are no decisions of competent WTO bodies interpreting this article of the GPA. (In 1994 the European Union and Japan filed formal complaints against the United States in the WTO, claiming that Massachusetts' Burma law violated certain provisions of the GPA. In 1999, at the request of the European Union and Japan, these proceedings were suspended. Later, they automatically lapsed.)

Under the federal Uruguay Rounds Agreement Act (Act), Congress approved the World Trade Organization (WTO) agreement and other agreements annexed to that agreement, including the Agreement on Government Procurement. The Act provides that no state law may be declared invalid on the ground that it is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for that purpose. The Act also sets forth procedures for dispute resolutions involving other WTO members and legal actions by the United States against states to declare state laws invalid as inconsistent with any of the Uruguay Round Agreements.

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### **Summary of Substitute Bill:**

Services performed under certain state contracts, or under subcontracts awarded under such contracts, may not be performed at locations outside the United States. This prohibition applies to state personal services, purchased services, and civil service contracts.

This prohibition does not apply to goods procured under certain state contracts, or to certain state contracts entered into by the state prior to July 1, 2005.

This prohibition also does not apply if the director of the Office of Financial Management (OFM) determines that the only practicable location where the services may be performed is clearly and justifiably a location outside the United States. Annual reports from the director of OFM to the House Commerce & Labor Committee and the Senate Commerce & Trade Committee on such contracts are required.

### **Substitute Bill Compared to Original Bill:**

The types of state contracts subject to the prohibition are limited to state personal services, purchased services, and civil service contracts. The types of state contracts exempt from the prohibition include contracts for which the director of the Office of Financial Management (OFM) determines that the only practicable location where the services may be performed is clearly and justifiably a location outside the United States. Annual reports from the director of OFM to the House Commerce and Labor Committee and the Senate Commerce and Trade Committee on such contracts are required.

**Appropriation:** None.

**Fiscal Note:** Requested on February 5, 2004.

**Effective Date of Substitute Bill:** The bill contains an emergency clause and takes effect immediately, except section 3, relating to civil service contracts, which takes effect July 1, 2005.

**Testimony For:** (As presented for HB 2405 and HB 2768) There is a fear that, when contracting out is implemented, some jobs will be sent offshore where wages are significantly less and there are no benefits. What the Civil Service Reform Act envisioned was that local companies and economies would benefit from contracting out, not foreign companies. Small businesses cannot compete with substandard wage rates. Functions like contract management, case management, help lines, auditing, payroll, word processing, claims administration, and licensing could all be done offshore. There are concerns about the fairness and privacy and security. Sending these jobs offshore will exacerbate unemployment in Washington.

These jobs should be kept in Washington. Tax dollars should not be used to create jobs in other places. The state should use its buying power to invest in the state economy. The low cost bidder is not always the best deal. The Department of Social and Health Services says that 1 percent of certain calls go to India and Mexico. The Department of Licensing revamped its call centers and kept those jobs in Washington.

High tech workers are especially concerned, and have had experience with this practice. It is more widespread than is commonly known. Outsourcing work often results in low quality. Outsourcing work also results in data going to who knows who, and who knows where. There is the potential for serious security breaches.

It is hypocritical to give research and development tax breaks to the same companies that are shipping high tech jobs overseas. The Legislature needs to set clear policy and keep these jobs in Washington.

Sound stewardship of tax dollars is critical. The state should not send dollars overseas in the middle of a 36-month recession. Ten percent of high tech workers in the Puget Sound area are unemployed, but the state Health Care Authority is spending \$3 million on coding in India. There has been little or no job growth in the past two years, and leading employers are continuing to export jobs overseas. Washington employers cannot compete with employers in countries where there are no standards.

Hardworking people who played by the rules have lost their jobs. High tech workers were fully employable in past years, and are unemployable now. When high tech workers are out of work for a year or two, their skills quickly become outdated.

There are concerns about globalization and how it hurts the unemployed and the underemployed. State government and business must have the citizens of the state as their number one priority.

**Testimony Against:** (As presented for HB 2405 and HB 2768) It is not clear that this bill really advances the goals of retaining jobs and growing the economy. No one really knows what is going on. There is little data that documents the number of jobs that have been outsourced to foreign countries.

As a collection agency working to collect bad debts owed to the state, we have one offshore facility. We use it to work bad debts that we cannot afford to work here. If we did not work those debts from the offshore facility, they would be suspended and not worked at all. Of \$15 to \$20 million in bad debts owed to the state, we assign about \$150,000 in bad debts to the offshore facility. These bad debts simply cannot be worked economically in the state.

**Persons Testifying:** (In support of HB 2405 and HB 2768) Representative Romero, prime sponsor of HB 2405; Representative Hudgins, prime sponsor of HB 2768; Dennis Eagle, Washington State Federation of State Employees; Marcus Courtney, Washington Alliance of Technology Workers; Reverend Paul Benz, Lutheran Public Policy Office; and Chris Smith and Chris Dube, Communication Workers of America.

(Opposed of HB 2405 and HB 2768) Kris Tefft, Association of Washington Business; and Kevin Underwood, Alliance One, Inc.

**Persons Signed In To Testify But Not Testifying:** None.