



New Competitive Contracting Rules Reflect WPC Recommendations

Substitute House Bill 1268, enacted in 2002, authorizes competitive contracting for services traditionally provided by state employees. The new law directs the Department of General Administration to adopt rules governing the competitive contracting process. Under the new law, state agencies can begin contracting with private enterprise on July 1, 2005. The new rules, which will govern contracting for all state services currently provided by state employees, are still subject to the collective bargaining agreements negotiated by state employee unions. The Governor begins negotiating new agreements in the summer of 2004.

Under the new rules, when a state agency decides to solicit bids from private contractors for performing a traditional state-employee job, the affected state employees may create what is called an employee business unit, or EBU. The EBU can then bid, as if it were a private contractor, to provide the service. This is why it is called competitive contracting, not privatization or contracting-out – because state employees compete against private contractors to see who can provide the highest quality service at the lowest cost.

Washington Policy Center (WPC) was actively involved in the development of the new rules. We facilitated a meeting between Department of General Administration staff and Geoffrey Segal, a nationally recognized privatization expert from the Reason Foundation. We also submitted two sets of formal comments illustrating ways the new rules could be changed and improved.

Following is a list of some of the changes recommended by WPC that were incorporated in the new rules, along with a few key recommendations that were not included in the final draft.

The Rule includes the following positive changes:

Defining a Competitive Market. The definition of a Competitive Market was improved to better define how an agency determines if adequate private competition exists for providing a particular government service. This definition is important to avoid appeals from state employees who are displaced by the new private competitor. While the adopted definition is not perfect, it will help prevent frivolous appeals and unnecessary delay in awarding a contract.

Controlling the cost of EBU Resource Plans. The original draft rules did not include adequate checks against unlimited use of state resources by potentially displaced workers who are developing a bid. The adopted rules require state agencies to determine the total resources available for potentially displaced workers at the outset of the competitive contracting process. Agency managers also have the ability to grant or deny requests for additional resources. This will help prevent state employees from gaining an unfair advantage over private competition through unlimited use of state resources.

Managing entrepreneurial EBUs. The new rules establish guidelines for allowing Employee Business Units to compete for contracts outside the scope of their original work as state employees. In some circumstances, state agencies may benefit by allowing EBUs to implement entrepreneurial tactics to win more work.

Avoiding conflicts in bid development. The new rules only allow potential bidders, whether state employees or contractors, to provide technical assistance during bid development. This provision will limit, but not eliminate, a potential problem with conflict of interest.

Potential Bidder and Responsible Bidder. The definition of Potential Bidder and Responsible Bidder were standardized to better protect against complaints, appeals and lawsuits from parties without standing in the competitive contracting process. These definitions are important because they are used to define who has standing for filing appeals at different times during the bid process.

Contract management costs. In the original draft rules, agencies were required to add the cost of administering a contract with a private firm to the final bid price provided by the private contractor. There was no similar provision that would consider oversight and administrative costs if the Employee Business Unit wins the bid. In the new rules, the agencies are required to estimate contract management costs for both circumstances.

Sections of the Rule that could still be improved:

Prohibiting costly prevailing wage requirements. The new rules do not prohibit state agencies from requiring that private contractors pay prevailing wage. Requiring contractors to pay prevailing wage may unnecessarily limit the cost advantage of some private competitors.

Requiring contractors to hire displaced state employees. The new rules do not make it clear that private contractors are not required to hire displaced state workers. The rule clouds the issue by requiring contracts to include a provision, “Requiring an entity other than an employee business unit to consider employment of state employees who may be displaced by the contract.”

Additional Considerations:

Allowing private competition for state services is a key component of any plan to improve government services and reduce cost. Implementation of the rule proposed by the Department of General Administration is a good step in the right direction. Much work still needs to be done.

In particular, two key components remain unresolved. First is the collective bargaining negotiation process. The new rules do not protect against the Governor's negotiators bargaining away the ability of state managers to competitively contract. Competitive contracting could also be watered down with wage and workplace restrictions like prevailing wage or ergonomics.

Additionally, the new rules only grant Legislative approval for the cost of the contracts, not the workplace-related provisions. Under the direction of Gary Moore (who is the Governor's chief negotiator and a former head of the Washington Federation of State Employees, one of the state's largest labor unions) the state could agree to restrictive contract provisions that continue to discourage competitive contracting.

Of similar importance is the leadership role required of state agency heads. Without clear guidance from above, agency managers will be less likely to put work up for bid. With strong executive branch and agency leadership that understands the vital role of private competition, state taxpayers can benefit from the innovation and improvement that so often results from competition, and that nearly every other state has already implemented to help maintain quality while reducing cost.

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