

27h3

Gov Agency: Administration—Exemption from Buying from Work Centers for the Severely Handicapped

Recommendations:

Paper No. 182 Alternative 3

Comments: The governor wants to waive the requirement regarding the state purchase of goods and services from certified work centers if doing so would interfere with federal competitive procurement requirements. This is apparently important to Sen. Wirch who has a work center in his district. Sen. Moen's committee recommended that the Committee maintain current law on a unanimous vote. Probably best to go with Alt. 3.

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Joint Committee on Finance

Paper #182

Exemption from Buying from Work Centers for the Severely Handicapped (DOA -- General Statutory Provisions)

[LFB 1999-01 Budget Summary: Page 76, #5]

CURRENT LAW

Under current state procurement law governing agency purchases, or purchases made for an agency, preference must be given to work centers for severely handicapped individuals. The State Use Board maintains a list of approved work centers and goods and services that are available from these centers. State agencies are generally directed to purchase any such goods or services from these centers if they are produced or available from these centers. Certain goods are exempted from these requirements. Agencies may also obtain written certificates of exception from the State Use Board under certain conditions.

GOVERNOR

Authorize the Secretary of DOA to waive, at the request of any state agency, the procurement requirements that provide preference for state agency purchase of goods and services from designated work centers for the employment of severely handicapped individuals if such a preference contravenes competitive requirements under federal law or regulations applicable to that purchase.

DISCUSSION POINTS

1. DOA is responsible for promulgating rules for and generally administering the procurement statutes. The State Use Board, which is attached to DOA, is responsible for overseeing state agency procurements from work centers for severely handicapped individuals. That statute governs agency purchase, or purchases made for a state agency and requires that preference be given to purchasing available goods or services from designated work centers. DOA administers

this program by working with the agencies and the State Use Board to match state contracts with work centers.

2. The State Use Board was created by 1989 Wisconsin Act 345 to oversee the program for state purchases from work centers for the severely handicapped. The Board consists of eight members who are appointed by the Governor and serve four-year terms. Members represent state agencies, work centers and the public. The Board's responsibilities include identifying goods and services that state agencies can procure from work centers, establishing the eligibility of work centers for the program, credentialing individual work centers, and establishing and annually reviewing fair market prices for goods and services purchased from the centers. The Board also serves as a review body for complaints and appeals from work centers and other interested parties concerning the awarding, continuing or terminating of state contracts with work centers.

3. To qualify as a certified work center, the organization must be a non-profit entity or a unit of a county government with a workforce composed of at least 75% persons who are severely handicapped individuals and must be operated for the purpose of carrying out a rehabilitative program. As of June, 1998, there were 62 Board-certified work centers that employed approximately 2,600 individuals with severe disabilities.

4. A state agency must purchase desired goods or services from a work center when a work center is able to satisfy the agency's needs. The Board sets the prices for work centers goods and services based on fair market prices. The determination of fair market prices includes consideration of the requirements for meeting specifications, delivery time and other conditions of the purchase order that would otherwise apply to a non-certified work center vendor. If two or more work centers are able to provide the same commodity or service, each work center is offered an opportunity to submit a bid. The work center with the lowest bid that satisfies the agency's needs is awarded the purchase order.

5. The work center requirement does not apply to: (a) printing and stationary purchases; (b) goods produced by another state institution; (c) goods produced by prison industries; and (d) major procurements. Agencies may also obtain written certificates of exception from the Board if both of the following conditions are met: (a) the work center cannot furnish the material, supply, equipment, or service in the time period specified in the order; and (b) the material, supply, equipment, or service is available from commercial sources in quantities and at an earlier time than the item or items is available from the designated work center. The Board may also issue an agency a certificate authorizing an agency to procure materials, supplies, equipment, or services from a commercial source if the quantity involved is insufficient for the work center to provide economically.

6. In 1997-98, state agencies purchased \$5,634,200 of goods and services from work centers certified by the Board. Custodial services were the primary service that work centers provided to state agencies, representing almost \$5 million of the total amount purchased from work centers. These services include maintaining and cleaning state buildings, maintaining state grounds including several of the state highway and interstate rest areas and stuffing inserts for agency

mailings. Work center product sales to state agencies included: brushes, disposable mop heads, floor pads for cleaning machines, brooms and launderable dust mops, award plaques, some models of re-manufactured toner cartridges and ball point pens and pencils.

7. The Governor's proposal is to allow the Secretary of DOA, upon request of an agency, to waive the requirement of an agency to use a work center if doing so contravenes competitive requirements under federal law or regulations applicable to that purchase. At the DOA agency briefing before the Committee, Secretary Bugher indicated that DHFS requested this statutory change because of problems that arose between a work center and DHFS over a Medicaid eyeglass contract.

8. In a March 8, 1999, letter to Representative Kelso describing the reason for the proposing the statutory change, DHFS Secretary Leean indicated that work centers are not always appropriate for the purchase of large volume, federally-regulated procurements. Secretary Leean stated in his letter that federal competitiveness requirements and the delivery and timeliness requirements of some federal regulated medicaid contracts necessitate a statutory change to allow the agency to forego using work centers. Secretary Leean's letter stated that the proposed budget language is intended to allow DHFS to except its "target, federally regulated medicaid contracts from the list of set-aside commodities available to sheltered work centers for production."

9. Based on the written comments from Secretary Leean regarding the specific situation which occasioned the request for the proposed exemption language and the actual proposed statutory language, it could be argued that there are two distinct questions that may be raised. The first is whether there is protection for agencies from having to comply with the State Use Board purchasing preference requirements when a work center may not be able to meet the agency's delivery requirements. The second question goes to the proposed language itself which appears to reference solely the ability of an agency (DHFS in the current instance) to comply with competitive requirements of any applicable federal law or rules related to proposed purchases.

10. Federal regulations typically include language that programs administered by a state are required to include competitive bidding as part of the procurement process. The federal Department of Health and Human Services has a requirement that all procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. This competitive requirement is one argument that DHFS advanced for why the statutory language allowing a waiver from the DOA is necessary.

11. However, several observations may be made regarding the competition requirement. First, the federal DHSS Regional Director of the State Operations has indicated that while competition and low bid proposals are encouraged under federal procurement rules, a state may request a waiver. In the case of the eyeglass contract, DHFS did not request a waiver from the regional office. Second, the federal DHSS regulations that require competition also include the authority for a state to choose a vendor that is most advantageous to the state based upon considerations of price, quality, and other factors considered. Third, according to the DOA procurement office, there are other states that are using prison industries, without a competitive bid,

to do Medicaid eyeglass work.

12. While the state does not require competitive bidding when an agency uses a work center, the state statutes do require that work centers provide their services at a fair market price. The Board is required to maintain a price list of fair market prices for the products and services available from a work center. If work centers' prices are challenged as non-competitive, it is the responsibility of the Board to examine the prices to ensure that the costs being charged are at a fair market price.

13. It is worth noting that an analogous federal organization to the State Use Board exists and that federal agencies are required to purchase products and services from qualified non-profit organizations that employ severely disabled individuals. The federal program is called the JWOD Program (named after the Javits-Wagner-O'Day Act), and a JWOD Committee maintains a list of procurement items that federal agencies are required to purchase from without requiring a competitive bid. While the existence of a similar federal program does not ensure that a federal agency would provide a waiver for the state, it does provide a federal precedent for the practice.

14. The second concern raised by the DHFS Secretary was the ability of the work centers to meet production deadlines, particularly in regard to large volume purchase requirements under the federal Medicaid program. The statutes already authorize the State Use Board to issue exemptions to an agency if a work center cannot furnish a product which it offers within the period specified and the product is available from commercial services in the quantities and at an earlier time than the item or items are available from each center. If a work center fails to comply with the terms of an order, the agency is required by statute to make every effort to negotiate adjustments before canceling the order. However, the Board will suspend the eligibility of the work center if the quality of work provided by the work center is not satisfactory to the agency. In the case of the Medicaid eyeglass contract, the deadlines were state-developed requirements and therefore they would not have been impacted by the proposed statutory change.

15. In a letter to the Governor dated April 20, 1999, the State Use Board stated that DHFS did not avail itself of the opportunity to appeal directly to the Board, as is allowed under the statutes. The State Use Board concluded that the appropriate appeal and investigative procedures available to agencies were not used in this case. The Board has further argued that the language proposed by the Governor would create a redundant level of approval and would add confusion to the current administration of the program.

16. The Senate Committee on Health, Utilities and Veterans and Military Affairs passed a motion unanimously recommending deletion of the Governor's proposal. The Senate Committee on Health, Utilities and Veterans and Military Affairs presented a member's view that if passed, the Governor's recommendation would have an adverse impact on the work centers and that current law already provides for a significant number of exceptions to the work preference requirement.

17. An alternative to providing the Secretary of DOA with the proposed waiver authority would be to instead be to provide the Board with the additional waiver authority as

proposed by the Governor. As noted above, the Board already has the authority to provide waivers in certain circumstances and adding this alternative to that authority would maintain the current program administrative arrangement but add the additional specific exception criterion.

18. Alternatively, the argument could be made that existing waiver authority of the Board is adequate and that no additional waivers need be created.

ALTERNATIVES

1. Approve the Governor's recommendation to authorize the Secretary of the Department of Administration to waive the state statutory requirement regarding the purchase by state agencies of goods and services from certified work centers if doing so would contravene federal competitive procurement requirements.

2. Modify the Governor's recommendation to provide the State Use Board with the proposed authority to waive the state statutory requirements regarding the purchase by state agencies of goods and services from certified work centers if doing so would contravene federal competitive procurement requirements.

3. Maintain current law.

Prepared by: David Worzala

MO# Alt 3

2	BURKE	Y	N	A
	DECKER	Y	N	A
	JAUCH	Y	N	A
	MOORE	Y	N	A
	SHIBILSKI	Y	N	A
	PLACHE	Y	N	A
	COWLES	Y	N	A
	PANZER	Y	N	A
1	GARD	Y	N	A
	PORTER	Y	N	A
	KAUFERT	Y	N	A
	ALBERS	Y	N	A
	DUFF	Y	N	A
	WARD	Y	N	A
	HUBER	Y	N	A
	RILEY	Y	N	A

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