



Legislative Fiscal Bureau

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April 19, 2010

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Substitute Amendment 2 to 2009 Assembly Bill 792: State Contractual Services and False Claims

Assembly Bill 792 (AB 792) would: (a) require agencies to submit information relating to the amount of contracted labor and related costs as part of biennial budget requests; (b) require the Department of Administration (DOA) to provide information relating to contracted labor and related costs as part of the biennial budget; (c) modify the treatment of cost-benefit analysis; (d) provide for electronic notification of certain bids; (e) make certain requirements for the filling vacant state jobs with contracted labor; (f) create penalties for individuals that make claims against the state for products or services not provided; (g) allow individuals to file claims against those making false claims; and (h) require certain Department of Transportation (DOT) inspection duties be conducted by DOT rather than by contract.

Assembly Bill 792 was introduced on March 2, 2010, and referred to the Assembly Committee on Labor. On March 24, 2010, the Assembly Committee recommended adoption of Assembly Substitute Amendment 1 to AB 792 on a 7 to 1 vote, and recommended passage as amended on a 5 to 3 vote. On March 30, 2010, the bill was referred to the Joint Committee on Finance. It should be noted that SB 447, initially a companion bill to AB 792 has also been referred to the Joint Committee on Finance. That bill, as amended by SA 1 and SA 2 was recommended for passage by the Senate Committee on Ethics Reform and Government Operations. On April 6, 2010, Assembly Substitute Amendment 2 (ASA 2) to AB 729 was introduced. It is the understanding of this office that the bills' authors intend to ask the Finance Committee to address the provisions of ASA 2 to AB 792. Therefore, this memorandum describes ASA 2 to AB 792.

CURRENT LAW

Biennial Budget Agency Request Data. Under current law, by September 15 of each even-numbered year, all executive branch agencies must prepare and forward to the Department of Administration and the Legislative Fiscal Bureau the following program and financial information: (a) a clear statement of the purpose or goal for each program or subprogram; (b) clear statements of specific objectives and performance measures used by the agency to assess progress toward achievement of these objectives; (c) proposed plans to implement the objectives and the estimated resources needed to carry out the proposed plans; (d) a statement of legislation required to implement proposed programmatic and financial plans; (e) all fiscal or other information relating to such agencies that the secretary or the Governor requires on forms prescribed by the Secretary of DOA; and (g) data on lapses and fund transfers relating to unfunded retirement liability debt service.

As part of the biennial state budget process, the DOA Secretary must prepare a report that contains the following information: (a) actual and estimated receipts of the state government for the current and the succeeding biennia, by fund and source; (b) actual and estimated disbursements of the state government from all operating funds during the current biennium and of the requests of agencies and the recommendations of the Governor for the succeeding biennium; (c) condition of all state operating funds at the close of the preceding fiscal year and the estimated condition at the close of the current year; (d) total estimated disbursements during each year of the succeeding biennium compare with the estimated receipts, and the additional revenues, if any, needed to defray the estimated expenses of the state; (e) actual and estimated receipts and disbursements of each department and of all state aids and activities during the current biennium, the departmental estimates and requests, and the recommendations of the Governor for the succeeding biennium; (f) estimated general purpose revenue receipts and expenditures in the biennium following the succeeding biennium based on recommendations in the budget bill or bills; (g) any explanatory matter which in the judgment of the Governor or the Secretary of DOA will facilitate the understanding by the members of the Legislature of the state financial condition and of the budget requests and recommendations; (h) the tax exemption report provided by the Department of Revenue (DOR), together with the purposes and approximate costs in lost revenue of each new or changed tax exemption device provided in the proposed budget; (i) the property tax estimate provided by DOR; and (j) a comparison of the state's budgetary surplus or deficit according to generally accepted accounting principles, as reported in any audited financial report prepared by DOA for the most recent fiscal year, and the estimated change in the surplus or deficit based on recommendations in the biennial budget bill or bills.

Contractual Services and Cost-Benefit Analysis. Under current law, DOA or its agents may contract for services which can be performed more economically or efficiently by such contract. The Department of Administration must, by rule, prescribe uniform procedures for determining whether services are appropriate for contracting. Certain agencies are allowed to directly contract for specific services.

Currently, DOA must promulgate rules for the procurement of contractual services, including, but not limited to, rules prescribing approval and monitoring processes for contractual service contracts, a requirement for agencies to conduct a uniform cost-benefit analysis of each proposed contractual service with an estimated cost in excess of \$25,000. The rules must prescribe requirements for agencies to review periodically, and before any renewal, the appropriateness of renewing or continuing a contract involving an estimated expenditure of more than \$25,000. Agencies that request approval of contracted employees must submit written justification to DOA, including a description of the contractual services to be procured, justification of need, justification for not contracting with other agencies, a specific description of the scope of contractual services to be performed, and justification for the procurement process if a process other than competitive bidding is to be used.

Under current law, the Director of the Office of State Employment Relations (OSER), prior to award, under conditions established by DOA rule, must review contracts for contractual services in order to ensure that agencies do the following: (a) properly utilize the services of state employees; (b) evaluate the feasibility of using limited-term appointments prior to entering into a contract for contractual services; and (c) do not enter into any contract for contractual services in conflict with any collective bargaining agreement.

The Department of Administration must promulgate rules to assure that the process used for selection of persons to perform contractual services includes: (a) a review of the independence and relationship, if any, of the contractor to employees of the agency; (b) disclosure of any former employment of the contractor or employees of the contractor with the agency; and (c) a procedure to minimize the likelihood of selection of a contractor who provides or is likely to provide services to industries, client groups or individuals who are the object of state regulation or the recipients of state funding to a degree that the contractor's independence would be compromised.

If the agency for which contractual services are performed under a contractual services agreement concludes that the performance was unsatisfactory, the agency must file with DOA an evaluation of the contractor's performance within 60 days after the completion of the contract. The Department of Administration must review these evaluations and promulgate rules prescribing procedures to assure that future contracts for contractual services are not awarded to contractors whose past performance is found to be unsatisfactory, to the extent feasible.

By October 15 of each year, DOA must submit to the Governor, the Joint Committee on Finance, the Joint Legislative Audit Committee, and the Chief Clerk of each house of the Legislature, a report concerning the number, value and nature of contractual service procurements authorized for each agency during the preceding fiscal year. The report must also include, the following relating to agency procurements for the preceding fiscal year: (a) a summary of the cost-benefit analyses completed by agencies; and (b) recommendations for elimination of unneeded contractual service procurements and for consolidation or re-solicitation of existing contractual service procurements.

Under current state administrative code [ADM 10.15], any bidder, proposer, labor organization, or organization representing the appropriate certified state collective bargaining unit that is aggrieved in connection with a solicitation or a notice of intent to award a contract may protest to the procuring agency. The intent to protest must be provided in writing within five working days of the issuance of the solicitation or the letter of intent to award a contract. The actual protest letter must be provided within ten working days.

Exceptions to Low Bids. Currently, all orders awarded or contracts made by DOA for all materials, supplies, equipment, and contractual services to be provided to any agency, unless otherwise provided for, must be awarded to the lowest responsible bidder, taking into consideration life cycle cost estimates, when appropriate, the location of the agency, the quantities of the articles to be supplied, their conformity with the specifications, and the purposes for which they are required and the date of delivery.

If a vendor is not a Wisconsin producer, distributor, supplier or retailer and DOA determines that the state, foreign nation or subdivision in which the vendor is domiciled grants a preference to vendors domiciled in that state, nation or subdivision in making governmental purchases, DOA and any agency making purchases for the Legislature and the Courts must give a preference over that vendor to Wisconsin producers, distributors, suppliers and retailers, if any, when awarding the order or contract.

Bids may be received only in accordance with such specifications as are adopted by DOA. Any bid may be rejected. Whenever sealed bids are invited, each bid, with the name of the bidder, must be entered on a record, and each record with the successful bid indicated must, after the award or letting of the contract, be opened to public inspection. Where a low bid is rejected, a complete written record must be compiled and filed, giving the reason in full for such action. Any waiver of sealed, advertised bids allowed under current law, must be entered on a record kept by DOA and open to public inspection.

When the estimated cost exceeds \$25,000, DOA must invite bids to be submitted. The Department must either solicit sealed bids to be opened publicly at a specified date and time, or solicit bidding by auction to be conducted electronically at a specified date and time. When bids are invited, the notice inviting bids must be published as a class 2 notice or posted on the Internet at a site determined or approved by DOA. The bid opening or auction must occur at least seven days after the date of the last insertion of the notice or at least seven days after the date of posting on the Internet. The notice must specify whether sealed bids are invited or bids will be accepted by auction, and must give a clear description of the materials, supplies, equipment, or contractual services to be purchased, the amount of any bond, share draft, check, or other draft to be submitted as surety with the bid or prior to the auction, and the date and time that the public opening or the auction will be held.

Contracts for engineering services, architectural services, construction work costing more than \$10,000, or limited trades work costing more than \$30,000 is exempt from the general

procurement requirements [ss. 16.705 and 16.75 of the statutes].

Filling of Vacant Positions. The DOA Secretary may withhold funding for any classified or unclassified position, as well as the funding for part-time or limited-term employees until such time as the Secretary determines that the filling of the position or the expending of funds is consistent with the positions and funding amounts approved by the Legislature.

Participation in a Proceeding. Under current law, parties to a legal dispute may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

SUMMARY OF SUBSTITUTE AMENDMENT

Biennial Budget Agency Request Data. In addition to the requirements under current law, the substitute amendment would require executive branch agencies, as part of their biennial budget requests, to provide the following: (a) the total amount of contracted positions, including the number of service hours and recurring service rate payments, providing services for the agency that are paid from the agency's base level funding and an identification of the appropriation or appropriations used to fund the contracted positions; (b) the total amount of agency base level funding used to pay for contracted positions under (a); and (c) the amount of funding requested for contracted positions identified under (a) and an identification of the appropriation or appropriations that will be used to fund the contracted positions. In preparing this information, agencies would have to use actual salary and service hour data, if available. If such data were not available, the agency could use estimates as long as they do not rely on state employee data. The source of any estimate would have to be provided.

Under the substitute amendment, the DOA Secretary would have to provided the following information as part of a report currently filed for the biennial budget: (a) a statement of the number of contracted positions providing services for each state agency that are paid from base level resources and the appropriations from which the positions are paid; (b) a statement of the total amount of each state agency's base level funding used to pay for contracted positions; and (c) a statement of the amount of funding requested by state agencies for contracted positions and an identification of the appropriations used to fund these positions.

A provision similar to those described above was included by the Legislature in 2009 Enrolled Assembly Bill 75, but was vetoed by the Governor in signing 2009 Act 28 (the 2009-11 biennial budget). According to the veto message, the Governor would order state agencies to review contractor hiring practices in order to help meet across-the-board budget reductions. The veto message also stated that "to ensure that contractor positions are not replacing workers who have been laid off or furloughed, and the use of private contractor position is appropriate, I am

creating a centralized review process with aid from the newly formed Division of Legal Services, the state Bureau of Procurement, and of the Office of State Employment Relations." The Governor stated his belief that this provision would be limiting and burdensome to state agencies.

Contractual Services and Cost-Benefit Analysis. The substitute amendment would modify current law by stating that DOA or its agents could contract for services only if at least two of the following conditions apply: (a) the services can be performed more economically by contract; (b) after considering the expertise of current full-time positions (whether vacant or filled) it is determined that the services can be done more efficiently by contract; and (c) when considering timeliness of delivery, the services can be performed more efficiently by contract. The substitute amendment would create an exemption for this requirement for contracts that last less than one year and that are nonrenewable. The substitute amendment would prohibit the automatic renewal of a contract.

The substitute amendment would modify the current threshold for cost benefit analysis from \$25,000 to \$50,000. The Department of Administration would be required to establish rules requiring cost-benefit analysis and continued appropriateness reviews to compare the cost of using a current employee (including consideration of a potential employee if the position is vacant) who is providing, or who would provide, the service, to the cost of using an employee under contract. The comparison would have to include all relevant costs including the salary and fringe benefit costs, costs of training necessary to fulfill the task, materials, inspections, unemployment insurance, transitional costs, liability insurance, overhead, facility costs, taxes, and other incidental costs.

The substitute amendment would also require DOA to establish rules that would require each agency that contracts for services under the procurement process to periodically audit their cost-benefit analysis or continued appropriateness reviews and contracts that were required to be completed. Cost-benefit analysis and appropriateness reviews would not be required for the following: (a) services that state or federal law requires to be performed by contract; (b) services that are incidental to the purchase of the commodity; (c) services that are substantially dissimilar to services performed by state employees or that state employees have not performed historically and are not able to perform without significant retraining or investment in infrastructure and capital; and (d) services that must be performed per a contract, license, or warranty by the original equipment manufacturer or publisher unless the contract, license, or warranty has expired or is no longer valid. If a cost-benefit analysis or a continued appropriateness review is not required under (c), DOA would be required to include the services that were exempted as part of its current annual report regarding the number, value and nature of contractual service procurements authorized for each agency during the proceeding fiscal year. Cost-benefit analysis and continued appropriateness reviews could not be conducted by contract. The substitute amendment would also prohibit disclosure of a cost-benefit analysis to a bidder prior to the issuance of a letter of intent to contract.

Under the substitute amendment, for engineering and architectural services that are currently exempt from general procurement laws, an engineer or architect employed by DOA would be newly required to determine whether the project could be completed more efficiently and effectively with state employees before a contract could be approved.

The substitute amendment would also modify current law provisions related to the contracting for engineering services by the Department of Transportation. Under current law, DOT may enter into contracts for engineering services, consulting, surveying, or other specialized services. Each proposed contract that involves an estimated expenditure of more than \$25,000 is subject to a cost-benefit analysis, conducted in accordance with standards prescribed by rule by DOT. Such contracts are exempt, however, from current law provisions applicable generally to state agencies under s. 16.705 of the statutes, which include: (a) requirements that the contract be subject to cost-benefit analysis according to standards developed by DOA; (b) a required review by the Office of State Employment Relations to ensure that the contracting agency is properly utilizing state employees, has evaluated the feasibility of using limited term appointments prior to entering into the contract, and that the proposed contract for services does not conflict with collective bargaining agreements; (c) required reviews of the independence and relationship, if any, of the contractor to employees of the agency and measures designed to minimize the likelihood of the selection of a contractor with certain conflicts of interest; (d) required contractor performance reviews submitted to DOA in the event of unsatisfactory performance; and (e) annual summary reporting requirements.

The substitute amendment would make DOT contracts for engineering services, consulting, surveying, or other specialized services subject to the provisions of s. 16.705 of the statutes, as amended by the substitute amendment, except for the procedures related to the protest of the contract by an aggrieved party. However, the substitute amendment would specify that DOT would not be required to submit any proposed contractual services to, or obtain approval of any such engagement of services from DOA before using engineering services. The Department of Administration would have no oversight over DOT engineering service contracts. Instead, DOT would be responsible for ensuring that engineering services conform to the relevant statutory requirements.

The substitute amendment would allow any person submitting a bid for proposal or a labor organization that is certified under subchapters V and VI of Chapter 111 of the statutes as a representative of the appropriate bargaining unit that is aggrieved by a solicitation for bids or by a letter of intent to contract to protest to the soliciting agency. The protesting party would have seven working days after the solicitation or the letter (whichever is appropriate) to file written notice of intent to protest. The written protest would have to be provided to the agency within 12 working days.

The substitute amendment would specify that the Division of Legal Services within DOA must promulgate rules on the following: (a) actions by any person performing the contractual services that would result in the agency for which contractual services are performed recovering any

expenditures for those contractual services that the agency paid to the person performing the contractual services; (b) standard performance measures, including quantifiable benchmark indicators, to evaluate contractual services; and (c) signing bonuses, reimbursements, and per diem costs included in all contracts for contractual services. Under the substitute amendment, all contracts must provide notice of these rules.

If the cost of contractual services exceeds \$25,000, and the original bid is exceeded by 10% or more, then additional amounts could not be paid unless the agency using the contractual services notifies the Governor and the Joint Committee on Finance on the amount of the excess payments above the original bid and the reason for the increase. This provision would not apply to contractual services purchased for the University of Wisconsin (UW) System and UW System campuses and institutions for research or instructional purposes as determined by the UW System or the appropriate campus or institution.

No person performing contractual services would be allowed to increase the salary of an employee if that increase resulted in greater agency expenditures than was proposed in the original contract. The salary increase provision would not apply to salary increases that were in accordance with collective bargaining agreements.

The substitute amendment would require agencies that had contracted for contractual services to evaluate those services using standard performance and benchmark indicators rules created by the Division of Legal Services. If the contract is deemed unsatisfactory using one of these methods, then the agency would be required to submit that information to DOA within 60 days of the completion of the agreement. Contracts could not be renewed without completion of this evaluation. The Department of Administration would have to review these evaluations and prescribe rules to assure that future contractual services are not awarded to contractors whose past performance was found unsatisfactory, to the extent feasible.

Exceptions to Low Bids. The substitute amendment would require the contracting agency to electronically send the successful bidder a letter of intent to contract and to send electronic copies of the letter to all bidders.

Under current law, DOA, when a bid is invited (including competitive sealed proposals), must invite those bids through a Class 2 notice or and Internet posting. The substitute amendment would instead allow Class 2 posting, but require an Internet posting.

Filling of Vacant Positions. The substitute amendment would specify that in a fiscal year in which the executive branch is prohibited from hiring employees to fill vacant positions or its employees are required to serve unpaid leave of absence, an agency could not enter into, renew or extend any contractual service with private contractors or consultants for the remainder of that fiscal year for the performance of services of agency employees who would have performed the services had they been hired or had they not taken unpaid leave. The substitute amendment

would create an exemption from this provision in the assignment of counsel by the Office of the State Public Defender.

Under the substitute amendment, an executive branch agency could submit a written request to the Joint Committee on Finance to allow for the hiring of contractual services to fill the duties of vacant or on leave employees. This request would be subject to 14-day passive review procedures.

The provision would not apply to contractual services funded with federal stimulus funds, if the DOA Secretary determined that a deadline imposed by the federal government for the expenditure of funds, could not be met without the letting, renewing or extension of such a contract or a cost-benefit analysis showed that the contractual service would be more cost-effective and efficient than having state employees perform the service.

The above provision was included by the Legislature in 2009 Enrolled Assembly Bill 75, but was vetoed by the Governor in signing 2009 Act 28. According to the veto message: "While I concur that state agencies should be reviewing and limiting, where appropriate, the use of private contractor positions, I am vetoing these provisions because use of private contractor positions should be reviewed across all state agencies, not just the executive branch and because these provisions are administratively burdensome."

False Claims -- Penalties for False Claims. The false claim provisions, under the substitute amendment would be limited to the contracts and orders that are subject to DOA contractual services procurement authority and the authority it may delegate to other agencies [s. 16.705 of the statutes]. In addition, the substitute amendment's false claim provisions would apply to prevailing wage for the following: (a) wage rate for state work [s. 103.49 of the statutes]; and (b) highway contracts [s. 103.50 of the statutes]. If false claims were made in regards to prevailing wage, then the entire contract would be subject to false claim provisions.

The substitute amendment would create a forfeiture (civil penalty) for anyone who knowingly presents or causes to be presented to a state agency (including the Legislature and the Courts) a false claim for payment of the following: (a) construction work or limited trades work under contract; (b) engineering or architectural services under contract; or (c) materials, supplies, equipment, or services under the contract or order. Under the substitute amendment, the forfeiture would be not less than \$5,000 nor more than \$10,000 per incident, plus three times the amount of the damages that were sustained by the state or local unit of government (or would have been sustained), whichever amount is greater, as a result of the false claim.

The Attorney General would be allowed to bring an action on behalf of a state agency to recover any forfeiture as a result of a false claim regarding a contract for construction, execution, repair, remodeling, or improvement of a public work or building or for the furnishing of supplies, equipment, material, or professional or contractual services of any kind.

The substitute amendment would also allow local units of government to seek forfeitures from contractors of not less than \$5,000 nor more than \$10,000 per incident, plus three times the amount of the damages that were sustained by the state or local unit of government (or would have been sustained), whichever amount is greater, as a result of the false claim. False claims would be subject to agreements under *public contracts*, which would be defined as construction, execution, repair, remodeling, or improvement of a public work or building or for the furnishing of supplies, equipment, material, or professional or contractual services of any kind.

Under the substitute amendment, the false claim provisions would apply to purchases made under DOA's general procurement authority (Subchapter IV of Chapter 16 of the statutes). Current law exempts certain contractual services from various aspects of the procurement code. The substitute amendment would specifically exempt the following contracts, services, and commodity purchases that are not part of DOA's general procurement authority from all the proposed false claim provisions: (a) legal or investment counsel retained by the State of Wisconsin Investment Board (SWIB); (b) maintenance and repair of land or buildings owned by SWIB; and (c) employment of professionals, contractors, or other agents necessary to evaluate or operate any property managed by SWIB.

The substitute amendment would exempt the following from false claims provisions of the substitute amendment that allows the state, or others persons on behalf of the state, to file a claim: (a) Department of Transportation (DOT) engineering services; (b) DOT negotiations for highway right-of-way; (c) DOT highway improvement project contracts with private firms or counties; (d) DOT contracts with counties and municipalities for highway improvements; (e) DOT railroad and utility relocation contracts; and (f) DOT transportation assistance contracts for railroads, urban mass transit, specialized transportation, and harbors;

The substitute amendment would exempt the Department of Workforce Development contracts with attorneys hired to represent the interests of the Uninsured Employers Fund from false claim provisions for materials, supplies, equipment, or services.

The new penalty provisions would first apply to all claims presented or caused on effective date of the substitute amendment.

False Claims -- Civil Suits on Behalf of the State. The substitute amendment would specify that an individual that does any of the following would be liable to the state for at least \$5,000 but not more than \$10,000, plus three times the amount of damages sustained by the state: (a) knowingly presenting or causing the presentation of a false claim for payment or approval; (b) knowingly making, using or causing a false record or statement to obtain approval or payment of a false claim; (c) conspiring to defraud the state by obtaining allowance or payment of a false claim, or by knowingly making or using, or causing to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state; (d) having possession, custody, or control of property used or to be used by the state and knowingly delivering or causing to be delivered less property than the amount for which the person receives a certificate or receipt; (e) being authorized to make or deliver a document

certifying receipt of property that is used or to be used by the state, knowingly makes or delivers a receipt that falsely represents the property that is used or to be used; (f) knowingly buying or receiving as a pledge for payment of an obligation or debt for the state property from any person who lawfully may not sell or pledge the property; (g) knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease any obligation to pay or transmit money or property to the state; and (h) benefiting from the submission of a false claim to any officer, employee, or agent of the state, or to any contractor, grantee, or other recipient of state resources, knowing that the claim is false, and failing to disclose the false claim to the state within a reasonable time after becoming aware of the false claim.

Under the substitute amendment, a court could assess between two and three times the amount of the damages sustained by the state to a person found responsible for such a violation, but would specify that the a forfeiture would not be assessed if all the following apply: (a) the person who commits the act, within 30 days, furnishes the Attorney General with all information known to the person about the false claim acts; (b) the person fully cooperates with any investigation of the acts; and (c) when the person supplies information to the Attorney General, no criminal prosecution or civil or administrative enforcement action had begun regarding the false claim, and the person had no knowledge about an existing investigation into such an act.

The substitute amendment would specify that the false claims provisions would not apply to Chapters 70 through 79 of the Statutes. These chapters address property taxes, income and franchise taxes, estate taxes, land sold for taxes, public utility taxes, motor fuel and aviation fuel taxes, and revenue sharing.

The substitute amendment would allow individuals (a *qui tam* plaintiff) to bring suit on behalf of the state for violation of the false claim provisions and require the plaintiff to provide a copy of the complaint to the Attorney General, disclosing substantially all material evidence and information known to the plaintiff. The substitute amendment would specify that the complaint would also be provided to the court *in camera* (outside of a court session) and require the files to be sealed for 60 days from the date of filing, and not be provided to the defendant until ordered by a court.

The substitute amendment would require the Department of Justice to investigate possible false claims against the state. Within 60 days from the date served, the Attorney General would be allowed to intervene in the action. The Attorney General would be allowed, for good cause, to ask a court to seal the complaint for a longer period. The Attorney General would have to do one of the following while the file is sealed: (a) proceed with an alternate remedy under an administrative proceeding, which would be prosecuted by the state; or (b) notify the court that action will not be taken by the Attorney General, allowing the original plaintiff to precede with the action. Under an alternative remedy of an alleged false claim, the Attorney General would be allowed to conduct an administrative proceeding to assess a civil forfeiture. Under such a case, the plaintiff would have the same rights as under a court proceeding. The substitute amendment would be exempted from the current statutes regarding the commencement of a civil procedure.

Under current law, a civil action commences when a summons of the complaint naming the defendant is filed with the court.

The substitute amendment would specify that, if the action is valid, only the plaintiff or the state could intervene or bring legal action while the original action is pending. If the Attorney General seeks an alternative remedy, the plaintiff would be required to prove all essential elements of the cause of the action or complaint, including damages by a preponderance of the evidence. If the state acts on the case, as brought forward by the plaintiff, then the plaintiff would remain as a party in the complaint. However, the state would not be limited to actions brought by the plaintiff. If an alternative remedy is sought, the state would have the primary responsibility in the prosecution. Under the substitute amendment, the state could move for dismissal of the action for good cause, notwithstanding an objection from the plaintiff, if all the following apply: (a) the state is a party to the suit; (b) the plaintiff was served a copy of the state's motion; and (c) the plaintiff is provided an opportunity to oppose the motion before a court or the administrative agency before the proceeding is conducted.

The substitute amendment would allow the Attorney General to compromise and settle an action before a court or an administrative proceeding to which the state is a party, notwithstanding an objection of the plaintiff, if the following apply: (a) the Governor approves; (b) the plaintiff is granted a hearing in which he or she can present evidence in opposition to the settlement; and (c) the settlement is fair, reasonable and adequate considering the relevant circumstances pertaining to the violation.

False Claims -- Participation in the Proceeding. Under the substitute amendment, a court could restrict participation by the plaintiff, if the state shows that the plaintiff would interfere or unduly delay the prosecution of the action or proceeding, or would result in consideration of repetitious or irrelevant evidence or evidence presented for the purposes of harassment. Under the substitute amendment, a court would be allowed to limit the following if such restrictions are found to be warranted: (a) the number of witnesses the plaintiff may call; (b) the length of the testimony of the witnesses; (c) the cross-examination of the witnesses; and (d) the participation of the plaintiff in the prosecution of the action or the proceeding. In cases where the state is a party, the substitute amendment would allow the defendant to petition the court to restrict the role of the plaintiff in the case or proceeding if the actions of the plaintiff would result in harassment or would cause the defendant undue burden or unnecessary expense. The substitute amendment specifies that the court would review the false claim provisions in determining who could participate in the case, rather than current law civil procedures that dictate mandatory and discretionary intervention [under Chapter 803 of the statutes].

If the state does not participate in an action, the substitute amendment would allow the Attorney General to request copies of all pleadings and deposition transcripts, at the cost of the state. If the plaintiff initiates prosecution of the action, a court, without limiting the status and rights of that person, would be allowed to permit the state to intervene at a later date if the state shows good cause for the proposed intervention.

The substitute amendment would specify that if the Attorney General, in an out-of-court proceeding, shows that the proceeding would interfere with the state's ongoing investigation or prosecution of a criminal or civil matter arising out of the same facts, a court could stay such discovery in whole or in part for a period of not more than 60 days. Under the substitute amendment, a court could extend the period of any such stay upon further showing by the Attorney General that the state has pursued the criminal or civil investigation of the matter with reasonable diligence and the proposed discovery in the action brought under the false claim proceeding would interfere with the ongoing criminal or civil investigation or prosecution.

The substitute amendment would exempt the discovery provision from the normal scope of discovery in civil cases.

The substitute amendment would specify that a judgment of guilty entered in a criminal action, in which the defendant is charged with fraud or making false statements, would prevent the defendant from denying the essential elements as the offense in a false claim proceeding, if the cases involve the same elements of criminal action.

False Claims -- Payments to the Plaintiff. The substitute amendment would specify that if the state goes forward in either a civil court proceeding or an alternate remedy proceeding, the plaintiff would be entitled to at least 15% but no more than 25% of the proceeds of the action or settlement of the claim depending on the plaintiff's contribution.

Under the substitute amendment, the plaintiff would be eligible for reasonable expenses necessary in bringing action together with the person's costs and reasonable actual attorney fees. The fees would be determined by the court or other adjudicator. The state would not be responsible for any of the expenses incurred by a plaintiff.

An individual, other than the plaintiff, that discloses specific information that is the primary evidence against the defendant, would be entitled to as much as 10% of the proceeds of the action or the settlement, depending on the significance of the information provided and at the discretion of the court.

If it is determined that the plaintiff is also the individual that planned or initiated the violation being reviewed by the proceeding, then the court could reduce the share of the awards to the plaintiff. If that person is convicted for criminal conduct, a court or other adjudicator must also dismiss the person as a party and deny any payments to the individual.

False Claims -- Miscellaneous Provisions. The substitute amendment would specify that no court would have jurisdiction over an action brought by a private person in a false claim case against a state public official if the action is based on information known to the Attorney General at the time of the action. Under the substitute amendment, no person could bring action in a false claim case based on allegations or transactions that are the subject to civil action or an

administrative proceeding to assess a civil forfeiture in which the state is a party if the action or proceeding was commenced prior to the date that the action is filed.

In addition, the substitute amendment would specify that no court would have jurisdiction over an action by a private person for false claims, if the action is based on public disclosure or allegations or transactions in a criminal action through one of the following: (a) a government report, hearing, audit, or investigation; or (b) from the news media, unless the person has personal knowledge of information on which the allegations or transactions are based and has voluntarily provided that information to the attorney general.

The substitute amendment would provide that a false claim could be dismissed only by order of a court. A court would be allowed to take into account the best interest of the parties and the requirements of the false claim provisions.

The substitute amendment would specify that a false claim action could be commenced within 10 years of the cause of the action or claim and would apply to all false claims that are within the 10-year statute of limitation, even if the action occurred before the provision is approved.

The remedies in the substitute amendment would additional to any other remedy provided under law or common law. The substitute amendment would specify that the provisions be liberally construed and applied to promote the public interest and the interests of the federal government relating to claims of the U.S. government, claims against the U.S. government, procurement protests, accounting and collections and audits and settlements.

False Claims -- Protections for State Employees. The substitute amendment would specify that any state employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against by his or her employer at a state agency or authority due to lawful actions taken by the employee, on behalf of the employee, or by others in furtherance of an action or claim filed under the false claim provisions, including investigation for, initiation of, testimony for, or assistance in an action or claim filed under the false claim provisions would be entitled to all necessary relief to make the employee whole. Such relief would, in each case, include the following: (a) reinstatement with the same seniority status that the employee would have had but for the discrimination; (b) double the amount of back pay; (c) interest on the back pay at the legal rate; and (d) compensation for any special damages sustained as a result of the discrimination, including costs and reasonable actual attorney fees. The substitute amendment would allow an employee to bring an action to obtain the relief to which the employee is entitled.

False Claims -- Definitions. Under the substitute amendment, *state agencies* would be defined (as under current law) as an office, department, agency, institution of higher education, association, society or other body in state government created or authorized to be created by the constitution or any law, which is entitled to expend moneys appropriated by law, including the Legislature and the Courts, but not including an authority.

Construction work (as under current law), would be defined under the substitute amendment, to include all labor and materials used in the framing and assembling of component parts in the erection, installation, enlargement, alteration, repair, moving, conversion, razing, demolition or removal of any appliance, device, equipment, building, structure or facility.

The substitute amendment would define *limited trade work* (as under current law) as the repair or replacement of existing equipment or building components with equipment or components of the same kind, if the work is not dependent upon the design services of an architect or engineer, and does not alter or affect the performance of any building system, structure, exterior walls, roof or exits, or the fire protection or sanitation of the building and includes decorative and surface material changes within a building and minor preventive maintenance to ancillary facilities such as drives, sidewalks and fences.

The substitute amendment would define *knowingly* (as under current law) as having actual knowledge of information, acting in deliberate ignorance of the truth or falsity of the information, or acting in reckless disregard of the truth or falsity of the information. Knowingly committing an act would not specifically indicate an intent to defraud.

Proceeds (as under current law) would be defined under the substitute amendment to include damages, civil penalties, surcharges, payments for costs of compliance, and any other economic benefit realized by this state as a result of an action or settlement of a claim.

SWIB's Purchasing Authority. The substitute amendment would also expand SWIB's current exemptions relating to reports to the Government Accountability Board (GAB), to state that SWIB would not have to report on the following arising out of the scope of the Board's investment authority: (a) legal or investment counsel retained by SWIB; (b) maintenance and repair of land or buildings owned by SWIB; and (c) employment of professionals, contractors, or other agents necessary to evaluate or operate any property managed by SWIB. This exemption would add to the current law exemption that relates to use of services in "assisting with investments."

Provisions Pertaining to the Department of Transportation. The substitute amendment would require DOT to promulgate administrative rules establishing a methodology to determine what percentage of the Department's work may be outsourced to non-DOT employees. The rules would have to set forth a process under which DOT could attain a sufficiently proficient staffing level so that no more than 50% of the Department's work is outsourced. DOT would have to begin promulgating these administrative rules no later than February 1, 2011, and would have to submit the proposed rules to the Legislative Council Staff no later than February 1, 2012.

On or before October 15 of each year, DOT would have to submit a report concerning the number, value, and nature of contractual engagements of engineering services during the preceding fiscal year. This report would be submitted to the Governor, the Joint Committee on Finance, the Joint Legislative Audit Committee, and the Chief Clerks of the Senate and Assembly (for

distribution to the appropriate standing committees). This report may be submitted, to the extent possible, with the contractual services report that DOA must submit under current law. With respect to the reported engagements of engineering services, the report would have to include a summary of cost-benefit analyses completed in compliance with DOT's administrative rules and recommendations for the elimination of unneeded engineering services contracts and for the consolidation or resolicitation of existing contracts.

No later than the first day of the seventh month beginning after the act's publication, DOT would have to submit a report on local road projects to the Joint Committee on Finance. This report would have to include recommendations on actions DOT and local governments can take to improve the efficiency, cost-effectiveness, and timeliness of local road construction projects. The report would also have to include proposed legislative changes to help implement the report's recommendations.

By February 1, 2011, the Department would have to submit a report on workload outsourcing to the Legislature. This report would cover any work under DOT's responsibility that the Department outsourced to non-DOT employees during the three previous fiscal years, including any projects for which the Department encumbered, expended, or otherwise committed any funding. This would include any work funded by the American Recovery and Reinvestment Act of 2009.

The substitute amendment would extend current law prevailing wage and hours of labor provisions to no-bid contracts that the Department enters into with counties or municipalities to perform improvement work on state highways. These provisions currently apply to contracts resulting from bids to perform such improvements. DOT is allowed to forego bids and contract directly with counties or municipalities where the project is located if the Department finds that this would be more feasible and advantageous than bidding the project.

FISCAL ESTIMATE

Neither the bill nor the substitute amendment provides an appropriation nor do they increase fees. As a result, any increased costs occurring in the 2009-11 biennium would need to be absorbed by the agencies within existing resources. Costs in subsequent biennia could be addressed in future budget deliberations. Fiscal estimates for the bill have been prepared by OSER, DOA, Department of Justice (DOJ), and the UW System. There has been no reestimate done for the substitute amendment.

Office of State Employment Relations

For the bill, the Office of State Employment Relations had indicates that there would be additional workload related to the promulgation of rules and the review of all contracts to insure that state employees are properly utilized. The bill would also require OSER to notify appropriate collective bargaining units relating to available contracts. These requirements would be eliminated under the substitute amendment.

Department of Administration

For the bill, DOA had estimated that it would need 3.5 procurement specialist positions and \$336,600 annually to certify agency cost-benefit analysis and continued appropriateness reviews of contracts. This provision was modified under the substitute amendment to specify that the contracting agency would have to periodically audit their cost-benefit analysis or continued appropriateness reviews, which would reduce the amount of workload under the bill and spread any costs among the various agencies.

The Department has also estimated, under the bill, that it would need 2.0 positions and \$158,800 annually to review the additional appeals that would be allowed under the bill. This would include 1.0 senior procurement specialist and 1.0 purchasing associate. This provision was also modified under substitute amendment to specify that only a labor organization certified to be the representative of the appropriate state collective bargaining unit that is aggrieved may protest.

For the bill, DOA estimated that there would be a one-time cost \$19,500 to modify the procurement system to track contracts that are more than 10% over budget and an additional 12.0 positions and \$802,100 annually to monitor contracts. The Department assumes that 5% of purchase orders for services over \$25,000 would have to be reviewed for an average of seven hours, totaling approximately 19,700 hours. Under the substitute amendment, agencies would still have to track contracts that are over \$25,000 and more than 10% over budget.

Finally, under the bill DOA estimated that 0.5 position at \$53,700 would be needed to maintain and monitor a list of contractors that would be ineligible for future contracts based on unsatisfactory agency evaluations on prior contracts. It could be noted that the Department is already required to review agency evaluations and promulgate rules prescribing procedures to assure that future contracts for contractual services are not awarded to contractors whose past performance is found to be unsatisfactory, to the extent feasible. However, the bill and the substitute amendment would newly prohibit the renewal of a contract until the evaluation was completed and require conformity to new rules that would be promulgated by the Division of Legal Services in DOA. This provision would not be modified under the substitute amendment.

Under the substitute amendment the threshold for agencies having to conduct a cost-benefit analysis would be increased from \$25,000 to \$50,000. To the extent that there are contracts between \$25,000 and \$50,000, there would be a decreased workload to state agencies. However, based on DOA contracts information for 2008-09, there are relatively few (three in DOA) contracts that are between those amounts.

The fiscal estimate submitted by DOA, for the bill, does not include any estimate of potential cost savings related to contractual services that could be realized by lower cost bidders in state services. In general, the bill could save state revenues by requiring state agencies to accept the results of cost-benefit analysis in regards to hiring state employees. This cost savings could occur in situations where state agencies have sufficient staffing authorization to fulfill a contracting bid.

However, if a contractual service requires an agency to expand state personnel, additional legislative approval would be needed. Under a contractual services agreement, by contract, private businesses could choose to add or subtract their workforce based on available work, and could bid accordingly. Similarly situated state agencies, however, would need to separately seek legislative approval in regards to state positions, appropriation authority and, potentially, the ability to accept revenue. This would apply to contractual services under the substitute amendment as well.

There are instances, under the bill and the substitute amendment, where state agency bidders who win the bids could cost more over the course of the bid. The bill and the substitute amendment would prohibit contract vendors who use non-union [employees not under a collective bargaining agreement] employees to increase wages, if that increase would result in costs in excess of the original bid. However, groups that use union employees, which would include almost all state agency bids, would be allowed to increase costs beyond the amounts of the original contract to account for contractual wage increases. Depending on the length of the contract and the amount of wage increases that are built into that original contract, this provision could allow unionized bidders to exclude wage increases, whereas non-union bidders would have to include all expected wage adjustments.

Department of Justice

The Department of Justice has submitted a fiscal note for AB 792, which indicates that there could potentially be a substantial workload increase related to the false claims provisions that would also be included under the substitute amendment. The Department indicated that it "is difficult to accurately estimate the number of false claims cases that would be handled by the department's Division of Legal Services and the level of division resources that would be necessary to process these kinds of cases."

Drawing a possible parallel to the workload of, and resources provided to, DOJ's Medicaid Fraud Control and Elder Abuse Unit, however, DOJ identified a possible need for 13.0 additional FTE (3.0 attorneys, 3.0 investigators, 5.0 auditors, 1.0 legal secretary, and 1.0 support staff) at an annual cost of \$1,456,000. The Department went on to indicate that if the number and complexity of false claims cases would be less than its current law Medicaid workload that the cost of 3.0 additional attorneys and 1.0 additional legal secretary would be \$337,500 in the first year and \$304,300 annually thereafter.

Department of Transportation

The following provisions of the substitute amendment would have potential fiscal implications for the Department of Transportation: (a) the newly-created prerequisites to contracting for engineering services and various new reporting, review, auditing, and cost-benefit analysis requirements associated with contractual services, applying to DOA and its agents; (b) a requirement that the Department develop rules to establish procedures for measuring the amount of contractual services used by the Department and a process for attaining a staffing level so that no

more than 50% of the Department's work is outsourced; (c) a requirement that the Department produce an annual report on the Department's contractual engagements in the previous fiscal year; (d) a report containing recommendations for improving the local road construction process; and (e) a report on outsourcing of DOT work in the previous three fiscal years (2007-08 through 2009-10).

The Department of Transportation has prepared a fiscal estimate of Assembly Bill 792, but has not submitted an analysis of the substitute amendment. Nevertheless, many of the provisions pertaining to DOT in the original bill and in Senate Bill 447 (companion bill) are substantially similar to the provisions of the substitute amendment, so it is possible to reach some general conclusions on the potential costs associated with the substitute amendment.

In its fiscal estimate, the Department indicated that complying with the cost-benefit analysis and reporting requirements (including the annual outsourcing report requirement) would cost an estimated \$1,513,100 and require an additional 23.25 positions. This cost is associated with different cost-benefit analysis requirements, as well as requirements related to periodic reviews and audits of engineering contracts. The substitute amendment differs from the original bill by specifying that DOT, rather than DOA, would be responsible for the review and oversight of DOT's contracting process. Nevertheless, the Department indicates that the original cost estimate was generally associated with conforming with the cost-benefit and auditing requirements, and the changes made under the substitute amendment would not substantially affect the original estimate.

Senate Bill 447, as amended by two simple amendments, would require the Department to outsource no more than 50% of all work for which the Department is responsible by 2012 and no more than 30% by 2014. The substitute amendment would not include this requirement, but would require the Department to promulgate a rule establishing a process for attaining a staffing level sufficient to ensure that not more than 50% of the Department's work is outsourced (of the work that could potentially be outsourced). To the extent that DOT currently outsources more than 50% of departmental responsibilities, meeting the 50% goal could be accomplished by reducing its outsource contracts or by increasing its use of Department staff performing these functions (or some combination of these measures). The former approach would reduce the total amount of work conducted by the Department, while the latter could require the Legislature to authorize additional positions (unless the Department could fill a sufficient number of vacant positions to accomplish the work).

In its fiscal estimate for SB 447, the Department indicated that approximately 64% of highway engineering services are currently outsourced. Maintaining the same level of highway delivery capacity, but with only 50% outsourced, would require an additional 487 positions, according to the Department's estimates. It should be noted that the substitute amendment would require that the Department establish, by rule, a process for attaining the 50% outsource level, but would not actually provide positions for attaining this level and would not strictly require that the Department comply with this goal. The position and funding decisions necessary to meet this goal would have to be made by the Governor and Legislature in future legislative sessions.

It should also be noted that the 50% outsourcing threshold would apply to any of the Department's functions that could be outsourced, and would, therefore, apply to more than just highway engineering services, including highway construction, which is conducted entirely by contract. The Department's fiscal estimate notes that other functions could be affected by the 50% outsourcing threshold, but does not estimate specific effects for these other functions.

The Department's fiscal estimate does not indicate the net cost or savings associated with adding positions. To the extent that additional positions would offset work currently done by contract, the net cost or savings would depend upon whether the services in question can be done for a lower or higher cost with state employees than by contract, which may depend on several factors. For instance, the experience level of DOT staff in particular areas, training costs for new DOT employees, and costs associated with the oversight of engineering contracts would all have a bearing on the net costs or savings, and would vary depending upon the type of work that would be done by state staff instead of by contract. It should be noted that to the extent that DOT would be required or would decide to use state staff for work currently done by contract, the costs associated with the cost-benefit analysis and contract oversight would be reduced, affecting both contract-related costs incurred under current law as well as costs that would be incurred under the substitute amendment. That is, the Department's estimate of \$1,513,100, related to the new cost-benefit and auditing requirements, could be lower if the number of engineering contracts that the Department has is reduced.

In addition to the Department's estimate of costs related to other elements of SB 447, the Department estimated that the cost to produce a report on local roads, as required by the original bill and the substitute amendment, would be \$300,000, an amount that the Department indicates would be used to retain a contractor for the work. The Department indicates that the cost of producing a report on the Department's outsourcing over the past three fiscal years (a requirement that is included in the substitute amendment, but not the original bill) could be subsumed under the overall estimate of oversight and reporting requirements.

University of Wisconsin System

In its fiscal estimate for the bill, the UW System indicates that in order to implement the provisions of the bill, it would need an additional 13.6 GPR positions with \$1,170,700 GPR of annual funding. Staff from the UW System identify the large number of invoices and service contracts that the UW System is involved with each year as contributing to the potential workload associated with the bill. As an example, it is estimated that UW-Madison has 170,000 invoices per year and is involved with 22,000 service contracts. Staff at the UW System indicate that the changes made in the substitute amendment would reduce the fiscal effect of the bill to 11.0 GPR positions with \$963,000 GPR of annual funding.

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