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Joint Committee on Finance

Paper #126

Cost-Benefit Analysis Exceptions, Business Ownership Certifications, and Bidders List (DOA -- Procurement)

[LFB 2013-15 Budget Summary: Page 48, #4; Page 49, #6; and Page 51 #9]

CURRENT LAW

Cost-Benefit Analysis. Under state statute, the Department of Administration (DOA) or agents to which DOA has delegated authority may contract for services which can be performed more economically or efficiently by contract. The threshold for performance of cost-benefit analyses and continued appropriateness reviews, which are the basis for evaluating efficiency of services, is \$25,000.

Business Ownership Certifications. In Wisconsin, for a business to be certified as a disabled veteran-owned business, the veteran business owner must have a service-connected disability rating of at least 30 percent. Currently, certifications of disabled veteran-owned businesses and woman-owned businesses from entities other than DOA are not accepted. The Department is required to conduct an investigation to certify disabled veteran-owned businesses. Certifications of minority businesses are accepted if issued by a Wisconsin agency, another state, the federal government, or a private business expertise in certifying such businesses, if the private business uses substantially similar procedures as those used by DOA.

The Department must: (a) attempt to ensure that 5% of the total amount expended for procurement in each fiscal year is paid to minority businesses; and (b) make efforts to ensure that a portion of the total amount expended for procurement in each fiscal year is paid to disabled veteran-owned businesses. The Department may purchase materials, supplies, equipment, or contractual services from any minority or disabled veteran-owned business that is no more than 5% higher than the apparent low bid or competitive proposal, which in turn must be no more than 5% higher than the most advantageous proposal.

Bidders List. An agency to which the Department has delegated purchasing authority may

maintain a bidders list if authorized under the delegation of authority from DOA. The list must include the names and addresses of all persons who request to be notified of bids or competitive sealed proposals.

GOVERNOR

Cost-Benefit Analysis Exceptions. Exclude the following contractual services from requirements to perform a uniform cost-benefit analysis (in the case of a proposal) or continued appropriateness review (in the case of a renewal): (a) any contract for which the cost is estimated to be \$50,000 or less; (b) services that federal or state law requires to be performed by contract; (c) services that are incidental to the purchase of a commodity; (d) services that must be provided under a contract, license, or warranty, by the original equipment manufacturer or publisher; (e) services that cannot be performed by state employees because the state lacks the required infrastructure; (f) services that are expected to be completed within 12 months; and (g) web-based software application services that are delivered and managed remotely.

Changes to statutory language relating to cost-benefit analyses and continued appropriateness reviews would first apply to cost-benefit analyses and continued appropriateness reviews required on the effective date of the bill.

Business Ownership Certifications. Modify the definition of disabled veteran so that an award from the U.S. Department of Veterans Affairs of a service-connected disability rating of at least 20 percent would qualify a veteran-owned business to be considered a disabled veteran-owned business.

Permit DOA to accept, without conducting an investigation, certifications of disabled veteran-owned businesses, woman-owned businesses, and minority businesses that have been issued by: (a) an agency or municipality in Wisconsin or another state; (b) a federally recognized American Indian tribe; (c) the federal government; or (d) a private business with expertise in certifying such businesses, if the private business uses substantially similar procedures as those used by DOA.

The bill would allow disabled veteran-owned, woman-owned and minority businesses to be certified as such businesses for state procurement purposes without a state investigation if the businesses are certified by an organization identified above.

Bidders List. Disallow delegated agencies from maintaining a separate bidders list.

DISCUSSION POINTS

1. The administration identified a number of procurement policy changes under its "Procurement Reform Initiative." According to the administration, the impetus for the reform initiative was to respond to the University of Wisconsin System's desire for greater flexibility relating to procurement. State agency expenditure data from 2010-11 show that the UW System accounts for just over 40% of total state agency procurement expenditures. The State Bureau of

Procurement, UW System, University of Wisconsin-Madison, and DOA's Division of Legal Services initiated an analysis of current law, administrative code, and procurement policies, which was utilized in the development of the Governor's 2013-15 budget recommendations.

Cost-Benefit Analysis Exceptions

2. Under state statute, DOA or agents to which it has delegated authority may contract for services which can be performed more economically or efficiently by contract. This restriction does not apply to: (a) contract entered into by the Volunteer Fire Fighter and Emergency Medical Technician Service Award Board; or (b) the Department of Corrections, in the case of global positioning system tracking services.

3. For the purpose of evaluating the state's capacity to perform the services economically or efficiently relative to contractual service providers, DOA is required to prescribe by rule uniform procedures for determining whether services are appropriate for contracting. In the case of a proposed use of contractual services, the requesting agency must apply a uniform cost-benefit analysis comparing the cost of the contractual service provider relative to the cost if state employees were to provide the services. The analysis methodology is defined to meet the uniformity requirement and presented through: (a) a cost-benefit analysis project summary form; and (b) cost-benefit analysis financial information Excel workbook (formatted for the analysis).

4. The project summary form that agencies complete in submitting a contractual services application asks a series of open-ended questions requesting particulars relating to the project under consideration, including: (a) a written justification for the request; (b) the availability in the market of vendors that can perform the service; (c) the quality and nature of services required; (d) risk management to provide for any failure to perform; (e) timelines; (f) technical expertise; (g) legal barriers such as federal mandates, state statutes, and administrative rules that apply; and (h) alternatives to contracting that have been considered. Under current law, a cost-benefit analysis is not required if the cost of the services is \$25,000 or less. In addition to the cost-benefit analysis requirement for proposed projects, agencies are required to periodically review the continued appropriateness of contracting before renewal of a contract. The threshold for this requirement is also \$25,000.

5. The administration argues that in certain cases, an in-depth analysis of the costs and benefits of contracting is not appropriate. The exceptions recommended under the bill for contract proposals and renewals are: (a) any service contract for which the cost is estimated to be \$50,000 or less; (b) services that federal or state law requires to be performed by contract; (c) services that are incidental to the purchase of a commodity; (d) services that must be provided under a contract, license, or warranty, by the original equipment manufacturer or publisher; (e) services that cannot be performed by state employees because the state lacks the required infrastructure; (f) services that are expected to be completed within 12 months; and (g) web-based software application services that are delivered and managed remotely.

6. According to DOA, the cost-benefit analysis threshold is associated with the bid threshold, which was increased from \$25,000 to \$50,000 under 2011 Act 32. As a result of the change, purchases under \$50,000 can be done using the simplified bidding process. Further, the

administration argues that because procurements for services under \$50,000 are "often done by program staff who are unfamiliar with the purchasing requirements and procedures that accompany higher dollar purchases," having a cost-benefit analysis threshold that differs from the bid threshold can confuse staff and vendors, and "adds another layer of complexity to the process." In addition, DOA notes that few contractual services would be affected by the threshold change. In 2011-12, of 400 cost-benefit analyses, fewer than 30 were performed for services between \$25,000 and \$50,000.

7. The administration indicates that the remaining cost-benefit analysis exceptions are recommended for services that: (a) cannot be practically or legally performed by state employees (services required by federal or state law to be contracted, services that must be provided by the original manufacturer under warranty, and services for which the state lacks required infrastructure); (b) are component parts of a product being purchased (services incidental to the purchase of a commodity and web-based software application services delivered and managed remotely); or (c) are not integral to the core functions of state government (specialized services that are expected to be completed within 12 months). Because the purpose of the cost-benefit analysis requirement is to evaluate whether contractual services would be performed more economically or efficiently than if performed by state employees, to the extent that services cannot be performed by state employees, the analysis is redundant.

8. Certain services are required by federal or state law to be performed by contract. For instance, state employees are prohibited by state statute from performing banking services. Services that are incidental to the purchase of a commodity include delivery or customer service provided for the purchase of a product. Some services, such as computer repair, must be provided under a contract, license, or warranty, by the original equipment manufacturer or publisher. Services that cannot be performed by state employees because the state lacks the required infrastructure include services such as removal, treatment, and disposal of hazardous waste. According to DOA, the state does not have employees that can perform this work. In addition, the administration argues that services that are expected to be completed within 12 months tend to be specialized projects, often not integral to the core functions of state government. The example DOA provides for services expected to be completed within 12 months is heating plant coal elevator repair services. Finally, web-based software application services that are delivered and managed remotely are often provided as a component part of purchased software. In other words, in some cases the state cannot purchase software without also purchasing services.

9. According to DOA, the purpose of the exceptions is to: (a) avoid confusion relating to differing thresholds for bidding and cost-benefit analysis; and (b) reduce the burden placed on agencies in requesting approval of contractual service proposals under specific circumstances the administration deems reasonable. Exceptions include services that cannot be provided by state employees as well as services that the administration considers small-scale, specialized, or a component part of a product being purchased. The Committee could, therefore, approve all seven exceptions recommended by the Governor. [Alternative A1]

10. On the other hand, it could be argued that burden is relative to one's perspective. If the Committee wishes to exercise caution in providing exceptions to the required analysis, it could choose to modify the provision to exclude only the services that cannot be practically or legally

performed by state employees, or are a component part of a product being purchased. This would include: (a) services that federal or state law requires to be performed by contract; (b) services that are incidental to the purchase of a commodity; (c) services that must be provided under a contract, license, or warranty, by the original equipment manufacturer or publisher; (d) services that cannot be performed by state employees because the state lacks the required infrastructure; and (e) web-based software application services that are delivered and managed remotely. Under this alternative, the cost-benefit analysis threshold would remain at \$25,000 and services that are expected to be completed within 12 months would not be excluded from the requirement. [Alternative A2]

11. Alternatively, it could be argued that providing no exceptions would, to some degree, ensure the consistent and fair treatment of all agencies' project proposals. The Committee could, therefore, delete the provision. [Alternative A3]

Business Ownership Definitions and Certifications

12. In Wisconsin, for a business to be certified as a disabled veteran-owned business, the veteran business owner must have a service-connected disability rating of at least 30 percent, awarded by the U.S. Department of Veterans Affairs. However, according to DOA, the standard used by the federal government to certify a disabled veteran is a rating of 20 percent.

13. Currently, certifications of disabled veteran-owned businesses and woman-owned businesses from entities other than DOA are not accepted. Further, DOA is required to conduct an investigation to certify disabled veteran-owned businesses. Certifications of minority businesses are accepted if issued by a Wisconsin agency, another state, the federal government, or a private business with the above qualifications. Under the bill, a disabled veteran-owned business certification would not require an investigation by DOA if issued by: (a) an agency or municipality in Wisconsin or another state; (b) a federally recognized American Indian tribe; (c) the federal government; or (d) a private business with expertise in certifying such businesses, if the private business uses substantially similar procedures as those used by DOA. In addition, certifications from such entities would be accepted by DOA for woman-owned businesses and minority businesses.

14. Of the three certification types, only the disabled veteran-owned business certification requires an investigation. In relation to the investigation of such businesses, the U.S. Attorney's Office has prosecuted veteran-owned business verification (certification) fraud cases in several states, including Illinois. According to the U.S. Department of Veterans Affairs, the "VA Office of Inspector General is committed to protecting the rights of the Service Disabled Veteran Entrepreneur community by vigorously investigating and seeking prosecution of those who deprive these Veterans who have earned the right to set-aside government contracts."

15. According to the administration, the uniformity of the bill's statutory language across the three business types was intended to treat disabled veteran-owned businesses, woman-owned businesses, and minority businesses equally. The Committee could choose to approve the Governor's recommendation to treat the businesses in a similar manner, and permit certification of disabled veteran-owned businesses owned by veterans with a 20 percent disability rating. [Alternative B1]

16. However, given the identified risk of fraudulent representation which harms legitimate disabled veteran-owned businesses, noted in discussion point #14, the Committee may wish to consider retaining some of the stricter language that exists under current law. Currently, there are private certifications of woman-owned businesses and minority businesses that DOA wishes to accept, specifically through the Wisconsin Supplier Development Council and the Women's Business Enterprise National Council. However, DOA has not found a private business that certifies disabled veteran-owned businesses. The Committee could modify the Governor's recommendation by removing only the allowance of private business certification of disabled veteran-owned businesses without an investigation. Under this alternative, the disability rating would be lowered to 20 percent, expanded certification of disabled veteran-owned businesses by public entities including tribes, and treatment of woman-owned and minority businesses would be retained. [Alternative B2]

17. Alternatively, the Committee may wish to only modify the definition of disabled veteran to include veterans awarded a 20 percent service-connected disability rating by the U.S. Department of Veterans Affairs. This would allow veteran business owners with a lower service-connected disability rating to be certified as a disabled veteran-owned business and receive the benefits of the certification, including preferential treatment under state purchasing rules. Under this alternative, an investigation by DOA would still be required as it is under current law. Further, provisions relating to woman-owned or minority businesses would be deleted. [Alternative B3]

18. On the other hand, if the Committee wished to maintain current law as it relates to the certification of disabled veteran-owned businesses, but also wished to make certification of woman-owned and minority businesses less burdensome and more consistent between business types, it could choose to delete provisions relating only to disabled veteran-owned businesses. [Alternative B4]

19. Finally, the Committee could choose to delete all provisions relating to business definitions and certifications for procurement purposes, thus maintaining current law. [Alternative B5]

Maintenance of Bidders List

20. The State Bureau of Procurement maintains a bidders list through VendorNet, which offers a central registration system for vendors wishing to do business with the state. Registered vendors provide information relating to the company and the goods and services it provides, which is then stored in the central statewide vendor database for inclusion in the bidder list. Registered vendors are automatically notified of all state agency procurement bid solicitations in the vendor's area of interest.

21. The administration indicates that the purpose of disallowing delegated agencies from maintaining a separate bidders list is to make certain aspects of purchasing data uniform. According to DOA, this policy could be particularly beneficial in implementing an electronic procurement system. The administration argues that in order to effectively monitor and analyze agency spending patterns, volume, and product pricing, it is necessary for each vendor to have a single vendor name, consistent from agency to agency, and a single numeric vendor code associated with it. Currently,

data entry differs by agency, which results in varied spellings and numeric vendor codes for a single vendor, making the analysis and tracking of agency spending by vendor cumbersome. Based on the administration's arguments, the Committee could choose to approve the Governor's recommendation to disallow the maintenance of a procurement bidders list by agencies other than DOA. [Alternative C1]

ALTERNATIVES

A. Cost-Benefit Analysis Exceptions

A1. Approve the Governor's recommendation to exclude the following from cost-benefit analysis and continued appropriateness review requirements for contractual services: (a) any service contract for which the cost is estimated to be \$50,000 or less; (b) services that federal or state law requires to be performed by contract; (c) services that are incidental to the purchase of a commodity; (d) services that must be provided under a contract, license, or warranty, by the original equipment manufacturer or publisher; (e) services that cannot be performed by state employees because the state lacks the required infrastructure; (f) services that are expected to be completed within 12 months; and (g) web-based software application services that are delivered and managed remotely.

A2. Modify the provision to only exclude the following services from cost-benefit analysis and continued appropriateness review requirements: (a) services that federal or state law requires to be performed by contract; (b) services that must be provided under a contract, license, or warranty, by the original equipment manufacturer or publisher; and (c) services that cannot be performed by state employees because the state lacks the required infrastructure.

A3. Delete provision.

B. Business Ownership Definitions and Certifications

B1. Approve the Governor's recommendation to: (a) modify the definition of disabled veteran so that a service-connected disability rating of at least 20 percent would qualify a veteran-owned business to be considered a disabled veteran-owned business; (b) permit DOA to accept, without conducting an investigation, certifications of disabled veteran-owned businesses, woman-owned businesses, and minority businesses that have been issued by an agency or municipality in Wisconsin or another state, a federally recognized American Indian tribe, the federal government, or a private business with expertise in certifying such businesses, if the private business uses substantially similar procedures as those used by DOA.

B2. Modify the provision to only make the following changes: (a) modify the definition of disabled veteran so that a service-connected disability rating of at least 20 percent would qualify a veteran-owned business to be considered a disabled veteran-owned business; (b) permit DOA to accept, without conducting an investigation, certifications of disabled veteran-owned businesses that have been issued by an agency or municipality in Wisconsin or another state, a federally recognized American Indian tribe, or the federal government; and (c) permit DOA to accept, without conducting an investigation, certifications of woman-owned businesses and minority

businesses that have been issued by an agency or municipality in Wisconsin or another state, a federally recognized American Indian tribe, the federal government, or a private business with expertise in certifying such businesses, if the private business uses substantially similar procedures as those used by DOA. [Cannot be selected with Alternatives B3 or B4.]

B3. Modify the provision to only change the definition of disabled veteran so that a service-connected disability rating of at least 20 percent would qualify a veteran-owned business to be considered a disabled veteran-owned business. [Cannot be selected with Alternatives B2 or B4.]

B4. Modify the provision to permit DOA to accept, without conducting an investigation, certifications of, woman-owned businesses and minority businesses that have been issued by an agency or municipality in Wisconsin or another state, a federally recognized American Indian tribe, the federal government, or a private business with expertise in certifying such businesses, if the private business uses substantially similar procedures as those used by DOA. [Cannot be selected with Alternatives B2 or B3.]

B5. Delete provisions.

C. Maintenance of Bidders List

C1. Approve the Governor's recommendation to disallow state agencies other than DOA to maintain a procurement bidders list.

C2. Delete provision.

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