
Government Operations & Elections Committee

HB 2743

Brief Description: Protecting taxpayers by providing for accountability and transparency in government contracting.

Sponsors: Representatives S. Hunt, Green, Appleton, Sullivan, Reykdal, Hudgins, Bergquist, Jinkins, Sawyer, Sells, Ormsby, Riccelli, Fitzgibbon, Robinson, Fey, Roberts, Pollet and Freeman.

Brief Summary of Bill

- Requires agencies to prepare a written record of the basis of the decision and "comprehensive impact assessment" when contracting out to purchase services that were formerly provided by public employees.
- Requires agencies to file with the Department of Enterprise Services (DES) the written basis of decision and reports on contractor's performance.
- Specifies inclusion of a number of contract terms in agreements to contract out.
- Requires the DES to develop model terms for performance-based contracts, including a term to facilitate recovery of public employee staff time spent bringing a contract into compliance.
- Mandates debarment of contractors under certain circumstances.
- Makes changes to existing law requiring the DES to identify services that can be contracted out at reduced cost, authorizing this only when taxpayers will save 10 percent or more.
- Amends a provision governing contractor ethics to provide that a contractor may not use public resources for private benefit or gain.
- Requires the Joint Legislative Audit and Review Commission to review the performance of certain contracts in which public sector employee services have been outsourced.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Hearing Date: 2/4/14

Staff: Jasmine Vasavada (786-7301).

Background:

"Contracting out"

The 2011 legislation that reorganized and consolidated state government central service agencies included a number of provisions directed at expanding the contracting out of state services. At the beginning of each fiscal biennium through June 30, 2018, the Office of Financial Management (OFM) shall conduct a review of the programs and services that are performed by the Department of Enterprise Services (DES) to determine whether the program or service may be performed by the private sector in a more cost-efficient and effective manner. As part of the review, the OFM shall select up to six activities or services that could potentially be provided by the private sector in a cost-effective and efficient manner. Priority for selection shall be given to agency activities or services that are significant, ongoing functions. The OFM may consult with affected industry stakeholders in making its decision on which activities to contract out.

The "contracting out" procurement process must contain measurable standards for the performance of the contract. The OFM must consider the consequences and potential mitigation of improper or failed performance by the contractor. If service cannot be provided at a lower rate or more efficiently, the OFM will notify the DES, and the DES may cancel the bid. If the bid is cancelled, the OFM must notify the legislative fiscal committees. The DES, with the OFM, must establish a contract monitoring process to measure contract performance, costs, service, delivery, quality, and other contract standards, and cancel contracts that do not meet those standards. No contract may be renewed without a review of these measures. The OFM must report on the results of these examinations biennially to the Legislature, providing information also on any procurement process that does not result in a contract for the services. The Joint Legislative and Audit Review Committee (JLARC) will conduct a performance audit of the implementation of contracting for services at the DES and report to the Legislature by January 1, 2018. The legislation specified that the OFM must review bulk printing in the first round. The OFM also selected mail services outside of Thurston County and web services for review.

Contract Management Policies and Transparency.

The DES adopts policies and procedures for effective and efficient management of contracts by all state agencies. These include procedures for selecting potential contractors based on their qualifications, performance measures, model contract terms to ensure contract performance and compliance with state and federal standards, and procedures and criteria for terminating contracts. Agencies must provide on an annual basis a list of all contracts that the agency has entered into or renewed. The DES must maintain a list of all contracts entered into by agencies.

Performance-Based Contracts.

Agencies, to the extent practicable, should enter into performance-based contracts that identify expected deliverables and performance measures or outcomes. Performance-based contracts may include, but are not limited to, either consequences or incentives or both to ensure that the agreed upon value to the state is received. Payment for goods and services under performance-based contracts should be contingent on the customer achieving performance outcomes.

Debarment.

"Debar" means to prohibit a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract during a specified period of time.

The Director of the DES has the authority to, but is not required to, debar any contractor based on a finding of one or more of the following causes:

- conviction of a criminal offense as an incident to obtaining a public or private contract or subcontract, or in the performance of such contract;
- conviction under state or federal law for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty;
- conviction under state or federal antitrust laws arising out of the submission of bids or proposals;
- two or more violations within the previous five years of the Federal Labor Relations Act;
- violation of contract provisions of a character regarded by the Director to justify debarment action, including deliberate failure without good cause to perform the contract, or a recent record of failure to perform or of unsatisfactory performance with the terms of one or more contracts;
- violation of ethical standards; or
- any other serious or compelling cause to affect responsibility as a state contractor, including debarment by another governmental entity.

A decision to debar must be issued by the Director in writing and must state the reasons for the action taken, and must inform the debarred contractor of his or her rights to judicial or administrative review.

Contractor Ethics.

The ethics laws that apply to all state officers and employees relating to limitations on gifts also applies to contractors who provide goods and services for, or on behalf of, the state. Any person or entity who seeks or may seek a contract with a state agency may not give, loan, transfer, or deliver to any person something of economic value that would cause a state officer or employee to be in violation of ethics laws pertaining to assisting in transactions, compensation for official duties or nonperformance, compensation for outside duties, gifts, or limitation on gifts.

Summary of Bill:

Contracting Out.

Prior to issuing a request for a proposal to contract out to purchase from a private sector entity or nonprofit organization services that have been customarily and historically provided by a public employee or employees, an agency must conduct a comprehensive impact assessment. This assessment must include: (1) an estimate of the cost of performance by public employees and by the contractor, including the cost of allocating sufficient public employee staff time and resources to monitor the contract and ensure its proper performance; (2) a statement of performance objectives; and (3) an assessment of potential adverse impacts on the public. The agency must prepare a written record of the basis of the decision to contract out, including the comprehensive impact assessment and an itemization of performance standards. If an agreement to contract out is reached, the agency must file the written record with the DES. Upon completion of the contract, or every five years if the contract is not yet completed, the agency must file a report with the DES documenting the contractor's performance, itemizing contract extensions and change orders, and stating remedial actions and costs of such actions. An agency

may contract out only upon complying with these provisions, the criteria for contracting out in RCW 41.06.142, and any other requirement established by law.

Agreements to contract must include a number of terms, including a cancellation clause, periodic performance review, compensation for public employee time expended in achieving full performance of the contract's objectives, employment and wage information about contractors and subcontractors, and a waiver of confidentiality with respect to basic financial information related to the contract.

The provisions requiring the OFM to identify six central service functions each biennium to potentially contract out are amended. In considering whether an activity can be contracted out at a reduced cost and with greater efficiency, the DES must consider the cost of the agency staff time and resources that may be required to monitor and ensure proper performance of the contract by the contractor. The DES may only contract out if it will afford taxpayers a cost savings of 10 percent or more of the contract value. The OFM's biennial report to the Legislature must include any unanticipated costs incurred as a result of contracting out and an estimate of staff hours devoted by employees of the OFM and the DES in conducting the required program review. In conducting the required audit of the performance of the "contracting out" provisions, JLARC's analysis must, at a minimum, include: (1) an estimate of the cost of performance of the selected activities, if the activities had been performed by public employees; (2) an estimate of the cost of performance of the contract by the contractor, including the cost of any change orders or contract revisions and the costs of allocating sufficient public employee staff time and resources to monitor the contract and ensure its proper performance by the contractor; (3) an analysis of the extent to which performance objectives were achieved by outsourcing the contract; and (4) an assessment of potential adverse impacts on the public of outsourcing the contract.

Contract Management Policies and Procedures.

The uniform policies and procedures for efficient management of contracts by all state agencies must include model terms to facilitate recovery of the costs of public employee staff time that must be expended to bring a contract into substantial compliance, as well as procedures and criteria for terminating performance-based contracts that are not achieving performance standards. Agencies must monitor performance-based contracts to ensure that all aspects of the contract are being properly performed and that performance standards are being achieved.

Debarment.

The statute authorizing the Director of DES to debar a contractor is amended to provide that the Director must debar a contractor where there has been a finding of one or more of the following causes:

- conviction within the previous five years for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
- conviction or a final determination in a civil action under state or federal statutes of fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, violation of the Federal False Claims Act or the state Medicaid Fraud False Claims Act, tax evasion, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a state

contractor, where such conviction of final determination occurred within the previous five years;

- conviction within the previous five years under state or federal antitrust statutes arising out of the submission of bids or proposals; or
- two or more violations within the previous five years of the National Labor Relations Act as determined by the National Labor Relations Board or court of competent jurisdiction;

Contractor Ethics.

A contractor who has access to public resources due to a contract with an agency may not use the public resources for private benefit or gain, except to the extent directly contemplated by and specified in the performance objectives of the contract.

Performance Review of Other Projects.

By December 31, 2015, and every two years thereafter, JLARC must review the performance of contracts related to two projects in which services historically and traditionally performed by public sector employees were outsourced to private sector or nonprofit entities. The purpose of the performance review is to determine the extent to which contracting these services out to the private sector has resulted in the savings, efficiencies, and performance objectives that were projected at the time that the outsourcing decision was made. The first two projects reviewed under this section must be: (1) the contract outsourced to the Washington Health Benefit Exchange Call Center; and (2) the Department of Licensing's utilization of private driving schools to administer driver's examinations. Upon request, the DES must provide JLARC a list of other contracts relating to services historically and traditionally performed by public sector employees. State agencies, including those who are parties to the projects listed above, the Employment Security Department, and the Department of Revenue, must provide to the joint committee any wage, employment, or other data requested, the disclosure of which is not otherwise prohibited by law.

Appropriation: None.

Fiscal Note: Requested on February 3, 2014.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.