SENATE BILL REPORT
2SHB 2743

As of March 3, 2014

Title: An act relating to protecting taxpayers by providing for accountability and transparency in government contracting.

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

Sponsors: House Committee on Appropriations (originally sponsored by Representatives S. Hunt, Green, Appleton, Sullivan, Reykdal, Hudgins, Bergquist, Jinkins, Sawyer, Sells, Ormsby, Riccelli, Fitzgibbon, Robinson, Fey, Roberts, Pollet and Freeman).

Brief History: Passed House: 2/14/14, 53-44.
Committee Activity: Governmental Operations: 2/27/14.

SENATE COMMITTEE ON GOVERNMENTAL OPERATIONS

Staff: Karen Epps (786-7424)

Background: The Department of Enterprise Services (DES) provides a variety of support services to state agencies, other governmental entities, and nonprofits. DES combines services from the former departments of General Administration and Printing, and sections of the former departments of Personnel and Information Services (DIS). Several divisions from the Office of Financial Management (OFM) are also part of the new agency.

Legislation from the 2011 session directed OFM to examine on a biennial basis which services within DES might be performed by the private sector. OFM must select up to six activities each biennium for DES to competitively bid to the private sector. OFM may consult with affected industry stakeholders in making its decision on which activities to contract out. If service cannot be provided at a lower rate and more efficiently, OFM will notify DES, and DES may cancel the bid. If the bid is cancelled, OFM must notify the legislative fiscal committees. DES, with 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. OFM must report on the results of these examinations biennially to the Legislature. The Joint Legislative and Audit Review Committee (JLARC) must 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 from 2011 also directed DES with effecting the reform and consolidation of state procurement practices and providing a report to the Governor with procurement reform recommendations by December 31, 2011. Legislation reflecting these recommendations was enacted in 2012. DES is tasked with oversight of state procurement of goods and services. Agencies must provide DES with a list of all contracts that the agency entered into or renewed on an annual basis. DES must maintain a list of all contracts entered into by agencies.

DES may debar a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract for a period up to three years as a result of certain offenses or misconduct relating to contracts. Debarment 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. A decision to debar must be issued by the Director of DES in writing and must state the reasons for the action taken, and must inform the debarred contractor of the contractor's rights to judicial or administrative review.

The Office of Minority and Women's Business Enterprises (OMWBE) certifies businesses owned and controlled by minorities, women, and socially and economically disadvantaged persons for participation in several public works and procurement programs. The purpose of this certification was to help historically under-used businesses to get contracts with state and local agencies and schools. The programs are intended to increase participation by certified businesses.

Summary of Bill: Prior to issuing a request for a proposal to contract with a private sector entity or nonprofit organization for 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 the following:
- 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;
- a statement of performance objectives; and
- 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 services that have been customarily and historically provided by a public employee or employees, including the comprehensive impact assessment and an itemization of performance standards. If an agreement with the private sector entity or nonprofit organization is reached, the agency must file the written record with DES. Upon completion of the contract, or every five years if the contract is not yet completed, the agency must file a report with DES documenting the contractor's performance, itemizing contract extensions and change orders, and stating remedial actions and costs of such actions. The terms of an agreement to contract out services that have been customarily and historically provided by public employees must include the following:
- a cancellation clause allowing the state agency to cancel the contract if quality standards or budget specifications are not met;
- terms ensuring periodic review of performance of the contract;

- terms requiring the contractor to compensate the agency for public employees' hours expended to achieve performance of a contract that failed inspection, was not completed on time, or was not completed consistent with quality standards;
- a requirement that the contractor provide the contractors and subcontractors' names and license numbers, if applicable, and a list of individuals performing the services under the contract to the agency; and
- a waiver of confidentiality of, and agreement to provide to the agency upon request, basic financial information related to the contract.

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. DES must include procedures to ensure compliance with the OMWBE chapter in its precontract procedures for selecting potential contractors based on their qualifications and ability to perform.

The provisions requiring OFM to identify six central service functions each biennium that might be performed by the private sector are amended. In considering whether an activity can be performed by the private sector at a reduced cost and with greater efficiency, 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. DES may only contract an activity to the private sector if it will afford taxpayers a cost savings of 10 percent or more of the contract value.

OFM's biennial report to the Legislature must include any unanticipated costs incurred as a result of contracting an activity to the private sector and an estimate of staff hours devoted by employees of OFM and DES in conducting the required program review. In conducting the required audit, JLARC's analysis must, at a minimum, include the following:

- an estimate of the cost of performance of the selected activities, if the activities had been performed by public employees;
- 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;
- an analysis of the extent to which performance objectives were achieved by outsourcing the contract; and
- an assessment of potential adverse impacts on the public of outsourcing the contract.

The Director of DES must debar a contractor where there has been a finding of one or more of the following causes:

- a 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;
- a 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, 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;

- a 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 a court of competent jurisdiction.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Outsourcing must be done right, must be done well, and must be done responsibly in order to protect taxpayers. This bill includes some of the best practices in contract management. Regardless of who is doing the work, whether public or private, this bill moves in the right direction to make sure that services are high quality and cost effective. This bill contains outstanding fiscal prudence and stewardship of taxpayer funds. The bill requires a thorough and rigorous analysis of costs, impacts, and risks before decisions are made. It includes all contract costs, the costs of the contracting process, the costs of robust contract oversight, and an assessment of risks and potential cost overruns. The requirement of a 10 percent savings is one of the most important features of the bill. Other governments use these thresholds to establish clear, objective metrics to guarantee that the decision to outsource will actually generate savings and cover the costs of overhead, oversight, and cost overruns. The bill emphasizes performance, accountability, and oversight. The bill provides for regular monitoring, auditing, and performance metrics, and guarantees that taxpayers are getting what they pay for in the contract. This bill includes the monitoring of compliance and adds up those costs to verify that the savings and the performance standards materialize. This bill requires contractors to pay for the public employee time to fix contractor problems when the contractor fails to meet deadlines. This bill provides strong sanctions and debarment provisions. Outsourcing brings low bids, cost overruns, change orders, and new bid requests, so the 10 percent provides a cushion to cover the state in those instances. This bill will save more money than it will cost the state. This bill will result in more transparent and more accountable purchasing decisions.

CON: This bill is very anti-small business and very anti-taxpayer. In 2012 the Legislature passed legislation establishing DES and established both in its intent and in its operation to focus on contracting out to small business. It encouraged and facilitated contracting out to small business. This bill goes in the exact opposite direction. The 10 percent preference that is in the bill is very frustrating to the small business community and very anti-small business. This bill is bad for taxpayers in that it eliminates the ability for taxpayers to save money on services that are provided by state employees currently. It is not really 10 percent because when it is contracted out the contractor pays sales tax and business and occupation tax on the contract. This means that the difference is actually more than 20 percent. This bill adds additional costs on top of the more than 20 percent by adding contracting costs as well. It is not added into the state employee side of things the cost to manage state employees. This is an unbalanced bill and is bad policy.

Persons Testifying: PRO: Donald Cohen, In The Public Interest; Jeanine Livingston, WA Federation of State Employees.

CON: Gary Smith, Independent Business Assn.