

HOUSE BILL REPORT

HB 1915

As Reported by House Committee On:
State Government
Appropriations

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: Representatives S. Hunt, Harris, MacEwen, Walkinshaw, Sells, Goodman, Moscoso, Reykdal, Robinson, Kilduff, Fitzgibbon, Hayes, Hudgins, Tarleton, Appleton, Ormsby, Pollet and Bergquist.

Brief History:

Committee Activity:

State Government: 2/12/15, 2/18/15 [DP];

Appropriations: 2/26/15, 2/9/16 [DPS].

Brief Summary of Substitute Bill

- Requires agencies to prepare a written record of the basis of the decision and a 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 decisions and reports on contractors' performance.
- Requires inclusion of a number of contract terms in agreements to contract out.
- Specifies additional procedures, terms, and criteria that the DES must include in uniform policies and procedures for agency management of contracts.
- Allows the DES to fine or debar a contractor, or both fine and debar.
- Requires the DES to identify services that can be contracted out at reduced cost.

HOUSE COMMITTEE ON STATE GOVERNMENT

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.

Majority Report: Do pass. Signed by 4 members: Representatives S. Hunt, Chair; Bergquist, Vice Chair; Appleton and Gregory.

Minority Report: Do not pass. Signed by 3 members: Representatives Holy, Ranking Minority Member; Van Werven, Assistant Ranking Minority Member; Hawkins.

Staff: Marsha Reilly (786-7135).

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) is required to conduct a review of the programs and services 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. In consultation with affected industry stakeholders, the OFM is required to select up to six activities or services that potentially could be provided by the private sector.

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 reports on the results of these examinations biennially to the Legislature, providing information on any procurement process that does not result in a contract for the services. The Joint Legislative Audit and Review Committee (JLARC) shall conduct a performance audit of the implementation of contracting for services at the DES and report to the Legislature by January 1, 2018.

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.

The Director of the DES (Director) has the authority to debar a 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;
- 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, a recent record of failure to perform, or 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, must state the reasons for the action taken, and must inform the debarred contractor of his or her rights to judicial or administrative review.

Minority and Women's Business Enterprises.

To provide the maximum practicable opportunity for increased participation by minority- and women-owned and controlled businesses in public works and agency procurement, the Legislature has established goals for state agencies. If necessary to meet these goals, contracts may be awarded to the next lowest responsible bidder, or all bids may be rejected and new bids obtained, if the lowest responsible bidder does not meet the goals established for a particular contract under the Office of Minority and Women's Business Enterprises law.

Ethics.

The ethics laws that apply to all state officers and employees relating to limitations on gifts also apply 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 services customarily and historically provided by a public employee or employees, an agency must conduct a comprehensive impact assessment. This assessment must include:

- 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, 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.

Agreements to contract out 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. 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, the JLARC's analysis must, at a minimum, include:

- 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.

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.

In its precontract procedures for selecting potential contractors, the DES must include procedures to ensure compliance with the Office of Minority and Women Business Enterprises chapter.

Debarment.

Under the same procedures used to debar a contractor, the Director is authorized to impose a fine on a contractor for cause in replacement of, or in addition to, debarment.

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.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) This bill provides accountability and transparency in contracting out. It should save money. It sets up a more structured process than was required under the bill from last year. There are always contracts that do not go as planned. The cost of contracting out for some services is more costly according to state audits, because it takes time for employees to fix mistakes that a contractor has made. The state contracts out for more services that it provides in-house. The 2013 report on contracting out identified many failures and recommended ways to avoid these failures. The provisions in the bill address ways to improve contracting out.

There are too many examples of how contracting out has gone wrong. Government services must be of high quality with a low price. It is important to ask the right questions at the beginning of the process, for example, what the contract will cover, how much it will cost, and potential overruns. Contract costs must be calculated in the beginning and should include the monitoring process. Clear reporting requirements and clear oversight are valuable to every contract.

(With concerns) There are concerns about fining, in addition to debarment, and that the bill does not apply to public works contracting.

(Opposed) None.

Persons Testifying: (In support) Representative S. Hunt, prime sponsor; Adrienne Thompson, Professional and Technical Employees Local 17; Alia Griffins, Washington Federation of State Employees; and Robert Lawson, In the Public Interest.

(With concerns) Larry Stevens, Mechanical Contractors Association and National Electrical Contractors Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 21 members: Representatives Dunshee, Chair; Ormsby, Vice Chair; Wilcox, Assistant Ranking Minority Member; Cody, Fitzgibbon, Hansen, Harris, Hudgins, S. Hunt, Jinkins, Kagi, Lytton, MacEwen, Pettigrew, Robinson, Sawyer, Senn, Springer, Sullivan, Tharinger and Walkinshaw.

Minority Report: Do not pass. Signed by 10 members: Representatives Chandler, Ranking Minority Member; Parker, Assistant Ranking Minority Member; Buys, Dent, Haler, Magendanz, Schmick, Stokesbary, Taylor and Van Werven.

Minority Report: Without recommendation. Signed by 1 member: Representative Condotta.

Staff: Meghan Morris (786-7119).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On State Government:

The substitute bill by the Appropriations Committee:

- replaces the word "justified" with "beneficial" when an agency is determining whether to contract out;
- adds to the requirements for the agency's comprehensive impact assessment to incorporate an estimate of the cost of performing the service to include employee salaries and benefits, space, equipment, materials, and other costs necessary to perform the function;
- prohibits the cost estimate from including overhead unless directly attributable to the function;
- allows the Department of Enterprise Services to contract with a vendor to provide service if a cost saving or an efficiency would be achieved; and
- makes some technical corrections to accommodate statutory changes from last session and corrects the reference to the National Labor Relations Act.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) Sometimes contracting-out state work makes sense, and sometimes it does not. However, state agencies do not always analyze whether or not contracting out is the best option. House Bill 1915 provides a basic framework for transparency and accountability. Agencies would be required to prove that contracting out saves money, promotes efficiency, and cannot reasonably be done by state workers. The bill also ensures contracts are held to clearly established performance standards. House Bill 1915 will protect Washington taxpayers from unethical procurement contracts and ensure state agencies get the best bang for their buck. Taxpayers should know how tax dollars are spent, and there should be a well-defined consistent process for contracting. On the front end, we should know exactly what we are agreeing to buy and at what price. Mid-contract, we should know how the process is going and be able to identify problems so we can fix them before they are more costly. And on the back end, we should evaluate whether the product was of expected quality, if it was a good value, and if we should buy it again.

In 2014 the House passed a goods and services procurement reform bill, which died in the Senate. This version includes changes to address the raised concerns. The interested parties have worked together on additional language to compare the public in-house costs versus the private contract costs and make the pre-contract evaluation less burdensome.

(Opposed) None.

Persons Testifying: Eric González, Washington State Labor Council; and Alia Griffing, Washington Federation of State Employees.

Persons Signed In To Testify But Not Testifying: None.