

SENATE BILL REPORT

SHB 1915

As of February 25, 2016

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

Brief History: Passed House: 2/12/16, 52-43.

Committee Activity: Commerce & Labor: 2/24/16.

SENATE COMMITTEE ON COMMERCE & LABOR

Staff: Jarrett Sacks (786-7448)

Background: Contracting Out. Any department, agency, or institution of higher education may purchase services, including services that have been customarily and historically provided by public employees, by contracting with the private sector or nonprofit organizations if the department, agency, or institution meets the following criteria:

- the invitation to bid contains measurable performance standards for the contract;
- the public employees who would be displaced are provided an opportunity to compete for the contract or offer alternatives to the contract;
- the contract includes a provision requiring the entity to consider employing state employees who may be displaced by the contract;
- the department, agency, or institution has contract monitoring processes; and
- the department, agency, or institution determines that the contract results in cost savings or efficiency improvements.

Contracting Out for DES Services. State law requires the Office of Financial Management (OFM) to conduct a review of 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. OFM chooses up to six activities or services per biennium that could be provided by the private sector.

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.

As part of the review, DES initiates a procurement process for the services OFM selects. The procurement process must contain measurable standards for the performance of the contract. In making its determination, OFM must consider the consequences and potential mitigation of improper or failed performance by the contractor. If OFM determines that the service cannot be provided at a lower rate or more efficiently by the private sector, DES may cancel the procurement process. DES and 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 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) will conduct a performance audit of the implementation of contracting for services at DES and report to the Legislature by January 1, 2018.

Contract Management. DES is responsible for the oversight of the state's procurement of goods and services, and adopts uniform policies and procedures for the effective and efficient management of contracts by all state agencies, and provides training on best practices for state procurement. Agencies must provide, on an annual basis, a list of all contracts that the agency has entered into or renewed to DES.

Agencies are encouraged to enter into performance-based contracts that identify expected deliverables and performance measures. Payment for goods and services under performance-based contracts should be contingent on the contractor meeting the performance measures or outcomes.

Summary of Bill: Contracting Out. Prior to issuing a request for a proposal to contract out services customarily and historically provided by public employees, an agency must conduct a comprehensive impact assessment. This assessment must include:

- an estimate of the cost of performance by public employees, including the cost of the employees' salaries and benefits, space, equipment, materials and other costs necessary to perform the function, not including overhead costs;
- an estimate of the cost of performance 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 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.

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.

Contracting Out for DES Services. The provisions requiring 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, 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 out if it will afford taxpayers a cost savings or achieve an efficiency. 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 OFM and 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:

- 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. 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, DES must include procedures to ensure compliance with the Office of Minority and Women Business Enterprises chapter.

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: The bill is good for transparency and accountability. Many times, when services are contracted out, they do not have performance

metrics. The bill would allow for an apples-to-apples comparison of contracting out versus keeping the services with the state.

CON: The bill tips the scales in favor of the public sector providing the services. The balancing does not take into account overhead for the public sector, technology advancement, nor does it incorporate costs of public entity mistakes. The phrase "customarily and historically" is ambiguous.

Persons Testifying: PRO: Joe Kendo, WA State Labor Council; Jeff Paulsen, WA Federation of State Employees; Rowland Thompson, Allied Daily Newspapers of Washington.

CON: Cliff Webster, Washington Construction Industry Council; Van Collins, American Council of Engineering Companies of WA and Architects & Engineers Legislative Council.

Persons Signed In To Testify But Not Testifying: No one.