
SUBSTITUTE HOUSE BILL 1851

State of Washington

65th Legislature

2017 Regular Session

By House Transportation (originally sponsored by Representatives Dolan, Harris, Hudgins, MacEwen, Kilduff, Haler, Robinson, Bergquist, Fitzgibbon, Doglio, Pollet, Ormsby, and Stanford)

READ FIRST TIME 02/24/17.

1 AN ACT Relating to protecting taxpayers by providing for
2 accountability and transparency in government contracting; amending
3 RCW 39.26.180, 43.19.008, and 39.26.200; adding a new section to
4 chapter 39.26 RCW; and creating new sections.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** It is the intent of the legislature to
7 increase transparency and accountability of public contracts by
8 requiring better evaluation of contract performance. Such evaluation
9 should include an assessment of whether decisions to "contract out"
10 government goods and services to the private sector are achieving
11 their stated objectives. In addition, it is the intent of the
12 legislature to ensure that public contractors given access to state
13 resources are held to ethical standards consistent with public
14 values.

15 NEW SECTION. **Sec. 2.** A new section is added to chapter 39.26
16 RCW to read as follows:

17 (1) Prior to issuing a request for a proposal under this chapter
18 to contract out to purchase from a private sector entity or nonprofit
19 organization goods and services that have been customarily and
20 historically provided by a public employee or employees, an agency

1 must conduct a comprehensive impact assessment if the estimated cost
2 of contract performance is greater than twenty thousand dollars. The
3 requirements of this section apply to contracts entered under this
4 chapter and do not apply to contracts awarded under alternate
5 procurement statutes.

6 (a) To assist the agency in determining whether the decision to
7 contract out is beneficial, the comprehensive impact assessment must
8 include at a minimum the following analysis:

9 (i) An estimate of the cost of performance of the service by
10 public employees, including the fully allocated costs of the service,
11 the cost of the employees' salaries and benefits, space, equipment,
12 materials, and other costs necessary to perform the function. The
13 estimate shall include the state's indirect overhead costs that can
14 be specifically attributed to delivering the goods and services over
15 the period of the proposed contract;

16 (ii) An estimate of the cost of performance of the goods and
17 services if contracted out, including the cost of allocating
18 sufficient public employee staff time and resources to monitor the
19 contract or project plan and ensure its proper performance by the
20 contractor or public agency; and

21 (iii) A statement of the performance objectives to be achieved by
22 contracting with a private sector, nonprofit entity or an agency
23 providing the work.

24 (b) The comprehensive assessment may also include an assessment
25 of the potential impacts on the public from outsourcing the contract,
26 such as gain or loss of employment, effect on social services and
27 public assistance programs, economic impacts on local businesses and
28 local tax revenues, and environmental impacts.

29 (2) Upon completion of the comprehensive impact assessment
30 required under subsection (1) of this section a written record must
31 be prepared:

32 (a) If an agency decides to contract out a good or service that
33 has been customarily and historically provided by public employees,
34 the agency must prepare a written record of the basis of the decision
35 and provide it to the department. The written record must include the
36 comprehensive impact assessment and an itemization of performance
37 standards contained in the contract or project plan.

38 (b) If an agency decides to provide the good or service through
39 public employees, the agency must prepare a written record of the
40 basis of the decision and provide it to the department. The written

1 record must include the comprehensive impact assessment and a
2 quantifiable analysis demonstrating the agency's ability to meet or
3 exceed performance standards based on the current goods or services.

4 (c) The agency must maintain the written record in the agency's
5 files for five years or the term of the contract, whichever is
6 longer.

7 (3) Every five years or upon completion of the contract or
8 completion of the service by an agency, whichever comes first, the
9 agency must prepare and file with the department a report, which must
10 include at a minimum the following information:

11 (a) Documentation of the contractor's or agency's performance as
12 measured by the itemized performance standards;

13 (b) Itemization of any contract or project extensions or change
14 orders made by the contractor or agency that resulted in a change in
15 the dollar value or cost of the contract; and

16 (c) A report of any remedial actions that were taken to enforce
17 compliance with the contract or agency project plan, together with an
18 estimate of the cost incurred by the public in enforcing such
19 compliance.

20 (4) In addition to any other terms required by law, the terms of
21 any agreement to contract out a service that has been customarily and
22 historically provided by public employees, and the terms of any scope
23 of service to be performed by public employees, must include the
24 following:

25 (a) A cancellation clause allowing the agency to cancel a
26 contract or project if the contractor or agency fails to meet quality
27 standards or budget specifications;

28 (b) Terms ensuring periodic review of performance of the contract
29 on a semiannual basis or more frequently;

30 (c) Terms requiring the contractor or agency to compensate the
31 agency or appropriate state budget for public sector employees' hours
32 expended in achieving full performance of a contract that has failed
33 inspection, that the contractor or agency has failed to complete on
34 schedule, or that has not been completed by the contractor or agency
35 in a manner that is consistent with quality standards;

36 (d) A term requiring the contractor or agency to make available
37 to the agency or department the following information at the start of
38 the contract's term and updated each fiscal year:

39 (i) The name and license number, if applicable, of the contractor
40 and all subcontractors; and

1 (ii) A list of individuals or entities performing or providing
2 the goods or services under the contract, reflected as full-time
3 equivalent positions, including the hourly wage rate for each
4 position, and the status of the individual as an employee,
5 subcontractor, independent contractor, or consultant; and

6 (e) A waiver of confidentiality of, and agreement to provide to
7 the agency upon request, basic financial information related to the
8 contract, other than financial, commercial, or proprietary
9 information specifically exempted from disclosure to the public under
10 RCW 42.56.270.

11 **Sec. 3.** RCW 39.26.180 and 2012 c 224 s 20 are each amended to
12 read as follows:

13 (1) The department must adopt uniform policies and procedures for
14 the effective and efficient management of contracts or agency project
15 plans by all state agencies. The policies and procedures must, at a
16 minimum, include:

17 (a) Precontract procedures for selecting potential contractors or
18 agencies based on their qualifications and ability to perform,
19 including procedures to ensure compliance with chapter 39.19 RCW,
20 providing for participation of minority and women-owned businesses;

21 (b) Model complaint and protest procedures;

22 (c) Alternative dispute resolution processes;

23 (d) Incorporation of performance measures and measurable
24 benchmarks in contracts or agency project plans;

25 (e) Model contract terms to ensure contract or agency performance
26 and compliance with state and federal standards, including terms to
27 facilitate recovery of the costs of public employee staff time that
28 must be expended to bring a contract or project plan into substantial
29 compliance;

30 (f) Executing contracts using electronic signatures;

31 (g) Criteria for contract or project plan amendments;

32 (h) Postcontract or postproject procedures;

33 (i) Procedures and criteria for terminating contracts or project
34 plans for cause or otherwise, including procedures and criteria for
35 terminating performance-based contracts or project plans that are not
36 achieving performance standards whether being executed by a
37 contractor or agency; and

38 (j) Any other subject related to effective and efficient contract
39 or project plan management.

1 (2) An agency may not enter into a contract or project plan under
2 which the contractor or agency could charge additional costs to the
3 agency, the department, the joint legislative audit and review
4 committee, or the state auditor for access to data generated under
5 the contract or project plan. A contractor or agency under such a
6 contract or project plan must provide access to data generated under
7 the contract or project plan to the contracting agency or department,
8 the joint legislative audit and review committee, and the state
9 auditor.

10 (3) To the extent practicable, agencies should enter into
11 performance-based contracts or performance-based project plans
12 whether with external contractors or via the agency. Performance-
13 based contracts identify expected deliverables and performance
14 measures or outcomes. Performance-based contracts also use
15 appropriate techniques, which may include, but are not limited to,
16 either consequences or incentives or both to ensure that agreed upon
17 value to the state is received. Payment for goods and services under
18 performance-based contracts should be contingent on the contractor or
19 agency achieving performance outcomes. Agencies or the department
20 must monitor performance-based contracts or project plans at least on
21 a semiannual basis to ensure that all aspects of the contract are
22 being properly performed and that performance standards are being
23 achieved.

24 (4) An agency and contractor may execute a contract using
25 electronic signatures.

26 (5) As used in subsection (2) of this section, "data" includes
27 all information that supports the findings, conclusions, and
28 recommendations of the contractor's or agency's reports, including
29 computer models and the methodology for those models.

30 **Sec. 4.** RCW 43.19.008 and 2011 1st sp.s. c 43 s 104 are each
31 amended to read as follows:

32 (1) The executive powers and management of the department, and
33 oversight through review or audit by the office of financial
34 management, the joint legislative audit and review committee, or
35 state auditor, shall be administered as described in this section.

36 (2) The executive head and appointing authority of the department
37 is the director. The director is appointed by the governor, subject
38 to confirmation by the senate. The director serves at the pleasure of
39 the governor. The director is paid a salary fixed by the governor in

1 accordance with RCW 43.03.040. If a vacancy occurs in the position of
2 director while the senate is not in session, the governor shall make
3 a temporary appointment until the next meeting of the senate at which
4 time he or she shall present to that body his or her nomination for
5 the position.

6 (3) The director may employ staff members, who are exempt from
7 chapter 41.06 RCW, and any additional staff members as are necessary
8 to administer this chapter, and such other duties as may be
9 authorized by law. The director may delegate any power or duty vested
10 in ((him or her)) the position by chapter 43, Laws of 2011 1st sp.
11 sess. or other law, including authority to make final decisions and
12 enter final orders in hearings conducted under chapter 34.05 RCW.

13 (4) The internal affairs of the department are under the control
14 of the director in order that the director may manage the department
15 in a flexible and intelligent manner as dictated by changing
16 contemporary circumstances. Unless specifically limited by law, the
17 director has complete charge and supervisory powers over the
18 department. The director may create the administrative structures as
19 the director deems appropriate, except as otherwise specified by law,
20 and the director may employ personnel as may be necessary in
21 accordance with chapter 41.06 RCW, except as otherwise provided by
22 law.

23 (5) Until June 30, ((2018)) 2019, at the beginning of each fiscal
24 biennium, unless the joint legislative audit and review committee or
25 the state auditor is otherwise directed to do so in the omnibus
26 operating budget, the office of financial management shall conduct a
27 review of the programs, goods, and services that are performed by the
28 department to determine whether the program, goods, or services may
29 be performed by the private sector in a more cost-efficient and
30 effective manner than being performed by the department. In
31 conducting this review, the office of financial management shall:

32 (a) Examine the existing activities currently being performed by
33 the department, including but not limited to an examination of goods
34 or services for their performance, cost compared to revenue impact,
35 staffing, capital requirements, and mission. Programs may be broken
36 down into discrete goods, services, or activities or reviewed as a
37 whole; and

38 (b) Examine the activities to determine which specific goods or
39 services are available in the marketplace and what potential for
40 efficiency gains or savings exist.

1 (i) As part of the review in this subsection (5), the office of
2 financial management shall select up to six activities, goods, or
3 services that have been determined as an activity that may be
4 provided by the private sector in a cost-effective and efficient
5 manner(~~(, including for the 2011-2013 fiscal biennium the bulk~~
6 ~~printing services)~~). The office of financial management may consult
7 with affected industry stakeholders in making its decision on which
8 activities to contract for goods or services. Priority for selection
9 shall be given to agency activities, goods, or services that are
10 significant, ongoing functions or projects with an initial project
11 plan of two hundred fifty thousand dollars or more.

12 (ii) The office of financial management must consider the
13 consequences and potential mitigation of improper or failed
14 performance by the contractor or agency, if the activity was
15 performed by public employees.

16 (iii) For each of the selected activities, the department or
17 agency shall use a request for information, request for proposal, or
18 other procurement process to determine if a contract for the activity
19 would result in the activity being provided at a reduced cost and
20 with greater efficiency. This must include, but is not limited to,
21 consideration of the cost of the agency staff time and resources that
22 may be required to monitor and ensure proper performance of the
23 contract by the contractor or project plan by the agency.

24 (iv) The request for information, request for proposal, or other
25 procurement process must contain measurable standards for the
26 performance of the contract.

27 (v) If contracting out will afford taxpayers a cost savings or
28 efficiency, the department may contract with one or more vendors to
29 provide the service as a result of the procurement process.

30 (vi) If the office of financial management determines via the
31 procurement process that the activity cannot be provided by the
32 private sector at a reduced cost and greater efficiency, the
33 department of enterprise services may cancel the procurement without
34 entering into a contract and shall promptly notify the legislative
35 fiscal committees of such a decision along with the cost analysis and
36 basis for the decision.

37 (vii) The department of enterprise services, in consultation with
38 the office of financial management, must establish a contract or
39 project plan monitoring process to measure contract or project plan
40 performance, costs, service delivery quality, and other contract or

1 project plan standards, and to cancel contracts or projects that do
2 not meet those standards. No contracts or project extensions,
3 expansions, future upgrades, or phases may be renewed without a
4 review of these measures.

5 (viii) The office of financial management shall prepare a
6 biennial report summarizing the results of the examination of the
7 agency's programs, goods, and services. In addition to the programs,
8 goods, and services examined and the result of the examination, the
9 report shall provide information on any procurement process that does
10 not result in a contract for the goods or services. The biennial
11 report must include updates reporting any unanticipated costs
12 incurred as a result of contracting out or from the agency providing
13 the goods or services pursuant to this section and an estimate of
14 staff hours devoted by employees of the office of financial
15 management and department of enterprise services in conducting the
16 program review required by this section. During each regular
17 legislative session held in odd-numbered years, the legislative
18 fiscal committees shall hold a public hearing on the report and the
19 department's activities under this section. This report must be made
20 available on the web site of the agency who was the subject of the
21 report.

22 (ix) The joint legislative audit and review committee shall
23 conduct an audit of the implementation of this subsection (5), and
24 report to the legislature by January 1, 2018, on the results of the
25 audit. The report must include an analysis and estimate of additional
26 costs or savings to taxpayers as a result of the contracting out or
27 project plan provisions. This analysis must, at a minimum, include
28 the following:

29 (A) An estimate of the cost of performance of the selected
30 activities, if the activities had been performed by public employees;

31 (B) An estimate of the cost of performance of the contract or
32 project plan by the contractor, including the cost of any change
33 orders, project plan, or contract revisions and the costs of
34 allocating sufficient public employee staff time and resources to
35 monitor the contract and ensure its proper performance by the
36 contractor;

37 (C) An analysis of the extent to which performance objectives
38 were achieved by outsourcing the contract or by having the agency
39 perform the activity; and

1 (D) An assessment of potential impacts on the public of
2 outsourcing the contract or by having the agency perform the
3 activities.

4 **Sec. 5.** RCW 39.26.200 and 2015 c 44 s 1 are each amended to read
5 as follows:

6 (1)(a) The director shall provide notice to the contractor of the
7 director's intent to either fine or debar with the specific reason
8 for either the fine or debarment. The department must establish the
9 debarment and fining processes by rule.

10 (b) After reasonable notice to the contractor and reasonable
11 opportunity for that contractor to be heard, the director has the
12 authority to debar a contractor for cause from consideration for
13 award of contracts. The debarment must be for a period of not more
14 than three years.

15 (2) The director may either fine or debar a contractor based on a
16 finding of one or more of the following causes:

17 (a) Conviction for commission of a criminal offense as an
18 incident to obtaining or attempting to obtain a public or private
19 contract or subcontract, or in the performance of such contract or
20 subcontract;

21 (b) Conviction or a final determination in a civil action under
22 state or federal statutes of fraud, embezzlement, theft, forgery,
23 bribery, falsification or destruction of records, receiving stolen
24 property, violation of the federal false claims act, 31 U.S.C. Sec.
25 3729 et seq., or the state medicaid fraud false claims act, chapter
26 74.66 RCW, or any other offense indicating a lack of business
27 integrity or business honesty that currently, seriously, and directly
28 affects responsibility as a state contractor;

29 (c) Conviction under state or federal antitrust statutes arising
30 out of the submission of bids or proposals;

31 (d) Two or more violations within the previous five years of the
32 (~~federal~~) national labor relations act as determined by the
33 national labor relations board or court of competent jurisdiction;

34 (e) Violation of contract provisions, as set forth in this
35 subsection, of a character that is regarded by the director to be so
36 serious as to justify debarment action:

37 (i) Deliberate failure without good cause to perform in
38 accordance with the specifications or within the time limit provided
39 in the contract; or

1 (ii) A recent record of failure to perform or of unsatisfactory
2 performance in accordance with the terms of one or more contracts,
3 however the failure to perform or unsatisfactory performance caused
4 by acts beyond the control of the contractor may not be considered to
5 be a basis for debarment;

6 (f) Violation of ethical standards set forth in RCW 39.26.020;
7 and

8 (g) Any other cause the director determines to be so serious and
9 compelling as to affect responsibility as a state contractor,
10 including debarment by another governmental entity for any cause
11 listed in regulations.

12 (3) The director must issue a written decision to debar. The
13 decision must:

- 14 (a) State the reasons for the action taken; and
- 15 (b) Inform the debarred contractor of the contractor's rights to
16 judicial or administrative review.

17 NEW SECTION. **Sec. 6.** This act may be known and cited as the
18 "taxpayer protection act."

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