
ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1851

State of Washington

65th Legislature

2018 Regular Session

By House State Government, Elections & Information Technology
(originally sponsored by Representatives Dolan, Harris, Hudgins,
MacEwen, Kilduff, Haler, Robinson, Bergquist, Fitzgibbon, Doglio,
Pollet, Ormsby, and Stanford)

READ FIRST TIME 02/01/18.

1 AN ACT Relating to protecting taxpayers by providing for
2 accountability and transparency in government contracting; amending
3 RCW 41.06.142 and 39.26.200; adding a new section to chapter 39.26
4 RCW; adding a new section to chapter 44.28 RCW; and creating a new
5 section.

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

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

15 **Sec. 2.** RCW 41.06.142 and 2011 1st sp.s. c 43 s 408 are each
16 amended to read as follows:

17 (1) Any department, agency, or institution of higher education
18 may purchase services, including services that have been customarily
19 and historically provided by employees in the classified service
20 under this chapter or by employees included in the Washington

1 management service as defined in RCW 41.06.022 and 41.06.500, by
2 contracting with individuals, nonprofit organizations, businesses,
3 employee business units, or other entities if the following criteria
4 are met:

5 (a) A comprehensive impact assessment is completed by the agency,
6 department, or institution of higher education to assist it in
7 determining whether the decision to contract out is beneficial.

8 (i) The comprehensive impact assessment must include at a minimum
9 the following analysis:

10 (A) An estimate of the cost of performance of the service by
11 employees, including the fully allocated costs of the service, the
12 cost of the employees' salaries and benefits, space, equipment,
13 materials, and other costs necessary to perform the function. The
14 estimate must not include the state's indirect overhead costs unless
15 those costs can be attributed directly to the function in question
16 and would not exist if that function were not performed in state
17 service;

18 (B) An estimate of the cost of performance of the services if
19 contracted out, including the cost of allocating sufficient employee
20 staff time and resources to monitor the contract and ensure its
21 proper performance by the contractor; and

22 (C) A statement of the performance objectives to be achieved by
23 contracting with a private sector or nonprofit entity.

24 (ii) The comprehensive assessment may also include an assessment
25 of the potential adverse impacts on the public from outsourcing the
26 contract, such as 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 (b) The invitation for bid or request for proposal contains
30 measurable standards for the performance of the contract;

31 ~~((b))~~ (c) Employees ((in the classified service)) whose
32 positions or work would be displaced by the contract are provided an
33 opportunity to offer alternatives to purchasing services by contract
34 and, if these alternatives are not accepted, compete for the contract
35 under competitive contracting procedures in subsection ((4)) (7) of
36 this section;

37 ~~((c) The contract with an entity other than an employee business~~
38 ~~unit includes a provision requiring the entity to consider employment~~
39 ~~of state employees who may be displaced by the contract;))~~

1 (d) The department, agency, or institution of higher education
2 has established a contract monitoring process to measure contract
3 performance, costs, service delivery quality, and other contract
4 standards, and to cancel contracts that do not meet those standards;
5 and

6 (e) The department, agency, or institution of higher education
7 has determined that the contract results in savings or efficiency
8 improvements. The contracting agency, department, or institution of
9 higher education must consider the consequences and potential
10 mitigation of improper or failed performance by the contractor.

11 (2)(a) An agency, department, or institution of higher education
12 must prepare a written record of the basis of the decision to
13 contract out a service that has been customarily and historically
14 provided by employees. The written record must include the
15 comprehensive impact assessment under subsection (1)(a) of this
16 section, an itemization of performance standards contained in the
17 contract pursuant to subsection (1)(b) of this section, an
18 explanation of why alternatives were not accepted pursuant to
19 subsection (1)(c) of this section, and an explanation of the
20 determinations and the considerations made under subsection (1)(e) of
21 this section.

22 (b) Upon entering an agreement to contract out for a service that
23 has been customarily and historically provided by employees, the
24 agency, department, or institution of higher education must provide
25 the written record of the basis of the agency's decision to the
26 department of enterprise services and the office of financial
27 management. The department of enterprise services must post the
28 reports on its web site.

29 (c) The agency, department, or institution of higher education
30 must maintain the written record in the agency's files in accordance
31 with the record retention schedule under RCW 40.14.060.

32 (3) Every five years or upon completion of the contract,
33 whichever comes first, the agency, department, or institution of
34 higher education must prepare and file with the department of
35 enterprise services a report, which must include at a minimum the
36 following information:

37 (a) Documentation of the contractor's performance as measured by
38 the itemized performance standards;

39 (b) Itemization of any contract extensions or change orders that
40 resulted in a change in the dollar value or cost of the contract; and

1 (c) A report of any remedial actions that were taken to enforce
2 compliance with the contract, together with an estimate of the cost
3 incurred by the agency, department, or institution of higher
4 education in enforcing such compliance.

5 (4) In addition to any other terms required by law, the terms of
6 any agreement to contract out a service that has been customarily and
7 historically provided by employees must include the following:

8 (a) A cancellation clause allowing the state agency to cancel a
9 contract if the contractor fails to meet quality standards or budget
10 specifications;

11 (b) Terms ensuring periodic review of performance of the
12 contract;

13 (c) Terms requiring the contractor to compensate the agency,
14 department, or institution of higher education for employees' hours
15 expended in achieving full performance of a contract that has failed
16 inspection, that the contractor has failed to complete on schedule,
17 or that has not been completed in a manner that is consistent with
18 quality standards;

19 (d) A term requiring the contractor to make available to the
20 agency, department, or institution of higher education the following
21 information at the start of the contract's term and updated each
22 fiscal year:

23 (i) The name and unified business identifier number, if
24 applicable, of the contractor and all subcontractors;

25 (ii) A list of individuals or entities performing the services
26 under the contract, reflected as full-time equivalent positions,
27 including the hourly wage rate for each position, and the status of
28 the individual as an employee of the contractor or subcontractor,
29 subcontractor, independent contractor, or consultant; and

30 (iii) An agreement that the contractor provide to the agency,
31 department, or institution of higher education upon request, basic
32 financial information related to the contract, other than financial,
33 commercial, or proprietary information specifically exempted from
34 disclosure to the public under RCW 42.56.270; and

35 (e) A provision requiring the entity to consider employment of
36 employees who may be displaced by the contract, if the contract is
37 with an entity other than an employee business unit.

38 (5) Any provision contrary to or in conflict with this section in
39 any collective bargaining agreement in effect on July 1, 2005, is not
40 effective beyond the expiration date of the agreement.

1 (~~(3)~~) (6) Contracting for services that is expressly mandated
2 by the legislature, including contracts for fire suppression awarded
3 by the department of natural resources under RCW 76.04.181, or was
4 authorized by law prior to July 1, 2005, including contracts and
5 agreements between public entities, shall not be subject to the
6 processes set forth in subsections (1)(~~7~~) through (4), (7), and
7 (~~(5)~~) (9) of this section.

8 (~~(4)~~) (7) Competitive contracting shall be implemented as
9 follows:

10 (a) At least ninety days prior to the date the contracting agency
11 requests bids from private entities for a contract for services
12 provided by (~~classified~~) employees, the contracting agency shall
13 notify the (~~classified~~) employees whose positions or work would be
14 displaced by the contract. The employees shall have sixty days from
15 the date of notification to offer alternatives to purchasing services
16 by contract, and the agency, department, or institution of higher
17 education shall consider the alternatives before requesting bids.

18 (b) If the employees decide to compete for the contract, they
19 shall notify the contracting agency, department, or institution of
20 higher education of their decision. Employees must form one or more
21 employee business units for the purpose of submitting a bid or bids
22 to perform the services.

23 (c) The department of enterprise services, with the advice and
24 assistance of the office of financial management, shall develop and
25 make available to employee business units training in the bidding
26 process and general bid preparation.

27 (d) The director of enterprise services, with the advice and
28 assistance of the office of financial management, shall, by rule,
29 establish procedures to ensure that bids are submitted and evaluated
30 in a fair and objective manner and that there exists a competitive
31 market for the service. Such rules shall include, but not be limited
32 to: (i) Prohibitions against participation in the bid evaluation
33 process by employees who prepared the business unit's bid or who
34 perform any of the services to be contracted; (ii) provisions to
35 ensure no bidder receives an advantage over other bidders and that
36 bid requirements are applied equitably to all parties; and (iii)
37 procedures that require the contracting agency, department, or
38 institution of higher education to receive complaints regarding the
39 bidding process and to consider them before awarding the contract.
40 Appeal of an agency's, department's, or institution of higher

1 education's actions under this subsection is an adjudicative
2 proceeding and subject to the applicable provisions of chapter 34.05
3 RCW, the administrative procedure act, with the final decision to be
4 rendered by an administrative law judge assigned under chapter 34.12
5 RCW.

6 (e) An employee business unit's bid must include the fully
7 allocated costs of the service, including the cost of the employees'
8 salaries and benefits, space, equipment, materials, and other costs
9 necessary to perform the function. An employee business unit's cost
10 shall not include the state's indirect overhead costs unless those
11 costs can be attributed directly to the function in question and
12 would not exist if that function were not performed in state service.

13 (f) A department, agency, or institution of higher education may
14 contract with the department of enterprise services to conduct the
15 bidding process.

16 ~~((+5))~~ (8) The department of enterprise services must maintain
17 uniform policies and procedures for the effective and efficient
18 management of contracts by all state agencies, pursuant to RCW
19 39.26.180. The department of enterprise services must also include in
20 the policy and procedures maintained:

21 (a) In the precontract procedures for selecting potential
22 contractors based on qualifications and ability to perform,
23 procedures to ensure compliance with chapter 39.19 RCW, providing for
24 participation of minority and women-owned businesses;

25 (b) In model contract terms to ensure contract performance and
26 compliance with state and federal standards, terms to facilitate
27 recovery of the costs of employee staff time that must be expended to
28 bring a contract into substantial compliance;

29 (c) In the procedures and criteria for terminating contracts,
30 procedures and criteria for terminating performance-based contracts
31 that are not achieving performance standards; and

32 (d) A requirement that agencies, departments, and institutions of
33 higher education monitor performance-based contracts to ensure that
34 all aspects of the contract are being properly performed and that
35 performance standards are being achieved.

36 (9) As used in this section:

37 (a) "Employee business unit" means a group of employees who
38 perform services to be contracted under this section and who submit a
39 bid for the performance of those services under subsection ~~((+4))~~
40 (7) of this section.

1 (b) "Indirect overhead costs" means the pro rata share of
2 existing agency administrative salaries and benefits, and rent,
3 equipment costs, utilities, and materials associated with those
4 administrative functions.

5 (c) "Competitive contracting" means the process by which
6 ~~((classified))~~ employees of a department, agency, or institution of
7 higher education compete with businesses, individuals, nonprofit
8 organizations, or other entities for contracts authorized by
9 subsection (1) of this section.

10 ~~((+6+))~~ (d) "Employee" means state employees in the classified
11 service under this chapter and state employees included in the
12 Washington management service under RCW 41.06.022 and 41.06.500,
13 unless otherwise specified.

14 (10) The processes set forth in subsections (1)(a), (2), (3), and
15 (4)(a) through (d)(iii) of this section do not apply to contracts
16 awarded for the purposes of or by the department of transportation,
17 or to contracts with an estimated cost of contract performance of
18 twenty thousand dollars or less.

19 (11) The processes set forth in subsections (1)~~((7))~~ through (4),
20 (7), and ~~((+5+))~~ (9) of this section do not apply to:

21 (a) RCW 74.13.031~~((+5+))~~ (6); and

22 (b) The acquisition of printing services by a state agency~~((+and~~

23 ~~(c) Contracting for services or activities by the department of~~
24 ~~enterprise services under RCW 43.19.008 and the department may~~
25 ~~continue to contract for such services and activities after June 30,~~
26 ~~2018)).~~

27 ~~((+7+))~~ (12) The processes set forth in subsections (1)~~((7))~~
28 through (4), (7), and ~~((+5+))~~ (9) of this section do not apply to the
29 consolidated technology services agency when contracting for services
30 or activities as follows:

31 (a) Contracting for services and activities that are necessary to
32 establish, operate, or manage the state data center, including
33 architecture, design, engineering, installation, and operation of the
34 facility that are approved by the technology services board created
35 in RCW ~~((43.41A.070))~~ 43.105.285.

36 (b) Contracting for services and activities recommended by the
37 chief information officer through a business plan and approved by the
38 technology services board created in RCW ~~((43.41A.070))~~ 43.105.285.

1 **Sec. 3.** RCW 39.26.200 and 2017 3rd sp.s. c 1 s 996 are each
2 amended to read as follows:

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

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

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

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

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

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

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

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

34 (i) Deliberate failure without good cause to perform in
35 accordance with the specifications or within the time limit provided
36 in the contract; or

37 (ii) A recent record of failure to perform or of unsatisfactory
38 performance in accordance with the terms of one or more contracts,
39 however the failure to perform or unsatisfactory performance caused

1 by acts beyond the control of the contractor may not be considered to
2 be a basis for debarment;

3 (f) Violation of ethical standards set forth in RCW 39.26.020;

4 (g) Any other cause the director determines to be so serious and
5 compelling as to affect responsibility as a state contractor,
6 including debarment by another governmental entity for any cause
7 listed in regulations; and

8 (h) During the 2017-2019 fiscal biennium, the failure to comply
9 with a provision in a state master contract or other agreement with a
10 state agency that requires equality among its workers by ensuring
11 similarly employed individuals are compensated as equals.

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. 4.** A new section is added to chapter 39.26
18 RCW to read as follows:

19 An agency, department, or institution of higher education that
20 intends to contract out, or does contract out, for services
21 customarily and historically provided by employees in the classified
22 service defined in RCW 41.06.020 or employees included in the
23 Washington management service under RCW 41.06.022 and 41.06.500 must
24 follow procedures and meet criteria established under RCW 41.06.142.

25 NEW SECTION. **Sec. 5.** A new section is added to chapter 44.28
26 RCW to read as follows:

27 The joint legislative audit and review committee shall conduct a
28 program and fiscal review of the changes made by chapter . . . , Laws
29 of 2018 (this act). This program and fiscal review shall be completed
30 and a preliminary report prepared during the 2022 calendar year.
31 These reports shall be prepared in the manner set forth in RCW
32 44.28.071 and 44.28.075. Upon completion of its preliminary report,
33 the joint legislative audit and review committee shall transmit
34 copies of the report to the office of financial management and any
35 affected entities. The final report shall include the response, if
36 any, of the affected entities and the office of financial management
37 in the same manner as set forth in RCW 44.28.088, except the affected
38 entities and the office of financial management shall have sixty days

1 to respond to the report. The joint legislative audit and review
2 committee shall transmit the final report to the legislature, to the
3 state entities affected, to the governor, and to the state library.

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