

E2SHB 1521 - S COMM AMD

By Committee on State Government, Tribal Relations & Elections

ADOPTED AND ENGROSSED 3/5/20

1 Strike everything after the enacting clause and insert the
2 following:

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

11 The legislature finds that prior to July 1, 2005, state agencies
12 and institutions of higher education were prohibited from contracting
13 out for services regularly and historically provided by classified
14 state employees. Effective July 1, 2005, the personnel system reform
15 act of 2002 lifted the prohibition, authorizing state agencies and
16 institutions of higher education to contract out for services
17 customarily and historically provided by classified state employees.
18 It is therefore the intent of the legislature that this act be
19 applied only to government services that, on or after July 1, 2005,
20 have been customarily and historically performed by state employees
21 in the classified service under chapter 41.06 RCW.

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

24 (1) If any department, agency, or institution of higher education
25 ((may purchase)) intends to contract for services ((, including
26 services)) that, on or after July 1, 2005, have been customarily and
27 historically provided by, and would displace or relocate, employees
28 in the classified service under this chapter, a department, agency,
29 or institution of higher education may do so by contracting with
30 individuals, nonprofit organizations, businesses, employee business
31 units, or other entities if the following criteria are met:

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

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

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

14 (B) An estimate of the cost of performance of the services if
15 contracted out, including the cost of administration of the program
16 and allocating sufficient employee staff time and resources to
17 monitor the contract and ensure its proper performance by the
18 contractor;

19 (C) The reason for proposing to contract out, including the
20 objective the agency would like to achieve; and

21 (D) The reasons for the determination made under (e) of this
22 subsection.

23 (ii) When the contract will result in termination of state
24 employees or elimination of state positions, the comprehensive impact
25 assessment may also include an assessment of the potential adverse
26 impacts on the public from outsourcing the contract, such as loss of
27 employment, effect on social services and public assistance programs,
28 economic impacts on local businesses and local tax revenues, and
29 environmental impacts;

30 (b) The invitation for bid or request for proposal contains
31 measurable standards for the performance of the contract;

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

38 ~~((c) The contract with an entity other than an employee business~~
39 ~~unit includes a provision requiring the entity to consider employment~~
40 ~~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) The agency, department, or institution of higher education
12 must post on its web site the request for proposal, the contract or a
13 statement that the agency, department, or institution of higher
14 education did not move forward with contracting out, and the
15 comprehensive impact assessment pursuant to subsection (1) of this
16 section.

17 (b) The agency, department, or institution of higher education
18 must maintain the information in (a) of this subsection in its files
19 in accordance with the record retention schedule under RCW 40.14.060.

20 (3) Every five years or upon completion of the contract,
21 whichever comes first, the agency, department, or institution of
22 higher education must prepare and maintain in the contract file a
23 report, which must include at a minimum the following information:

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

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

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

32 (4) In addition to any other terms required by law, the terms of
33 any agreement to contract out a service pursuant to this section must
34 include terms that address the following:

35 (a) The contract's contract management provision must allow
36 review of the contractor's performance;

37 (b) The contract's termination clauses must allow termination of
38 the contract if the contractor fails to meet the terms of the
39 contract, including failure to meet performance standards or failure
40 to provide the services at the contracted price;

1 (c) The contract's damages provision must allow recovery of
2 direct damages and, when applicable, indirect damages that the
3 agency, department, or institution of higher education incurs due to
4 the contractor's breach of the agreement;

5 (d) If the contractor will be using a subcontractor for
6 performance of services under the contract, the contract must allow
7 the agency, department, or institution of higher education to obtain
8 information about the subcontractor, as applicable to the performance
9 of services under the agreement; and

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

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

16 ~~((3) Contracting for services that is expressly mandated by the~~
17 ~~legislature or was authorized by law prior to July 1, 2005, including~~
18 ~~contracts and agreements between public entities, shall not be~~
19 ~~subject to the processes set forth in subsections (1), (4), and (5)~~
20 ~~of this section))~~ (6) When contracting out for services as authorized
21 in this section the agency, department, or institution of higher
22 education must ensure firms adhere to the values of the state of
23 Washington under RCW 49.60.030, which provide its citizens freedom
24 from discrimination. Any relationship with a potential or current
25 industry partner that is found to have violated RCW 49.60.030 by the
26 attorney general shall not be considered and must be immediately
27 terminated unless:

28 (a) The industry partner has fulfilled the conditions or
29 obligations associated with any court order or settlement resulting
30 from that violation; or

31 (b) The industry partner has taken significant and meaningful
32 steps to correct the violation, as determined by the Washington state
33 human rights commission.

34 ~~((4))~~ (7) Competitive contracting shall be implemented as
35 follows:

36 (a) At least ninety days prior to the date the contracting
37 agency, department, or institution of higher education requests bids
38 from private entities for a contract for services provided by
39 ((classified)) employees, the contracting agency, department, or
40 institution of higher education shall notify the ((classified))

1 employees whose positions or work would be displaced by the contract.
2 The employees shall have sixty days from the date of notification to
3 offer alternatives to purchasing services by contract, and the
4 agency, department, or institution of higher education shall consider
5 the alternatives before requesting bids.

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

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

15 (d) The director of enterprise services, with the advice and
16 assistance of the office of financial management, shall, by rule,
17 establish procedures to ensure that bids are submitted and evaluated
18 in a fair and objective manner and that there exists a competitive
19 market for the service. Such rules shall include, but not be limited
20 to: (i) Prohibitions against participation in the bid evaluation
21 process by employees who prepared the business unit's bid or who
22 perform any of the services to be contracted; (ii) provisions to
23 ensure no bidder receives an advantage over other bidders and that
24 bid requirements are applied equitably to all parties; and (iii)
25 procedures that require the contracting agency, department, or
26 institution of higher education to receive complaints regarding the
27 bidding process and to consider them before awarding the contract.
28 Appeal of an agency's, department's, or institution of higher
29 education's actions under this subsection is an adjudicative
30 proceeding and subject to the applicable provisions of chapter 34.05
31 RCW, the administrative procedure act, with the final decision to be
32 rendered by an administrative law judge assigned under chapter 34.12
33 RCW.

34 (e) An employee business unit's bid must include the fully
35 allocated costs of the service, including the cost of the employees'
36 salaries and benefits, space, equipment, materials, and other costs
37 necessary to perform the function. An employee business unit's cost
38 shall not include the state's indirect overhead costs unless those
39 costs can be attributed directly to the function in question and
40 would not exist if that function were not performed in state service.

1 (f) A department, agency, or institution of higher education may
2 contract with the department of enterprise services to conduct the
3 bidding process.

4 ~~((5))~~ (8)(a) As used in this section:

5 ~~((a))~~ (i) "Employee business unit" means a group of employees
6 who perform services to be contracted under this section and who
7 submit a bid for the performance of those services under subsection
8 ~~((4))~~ (7) of this section.

9 ~~((b))~~ (ii) "Indirect overhead costs" means the pro rata share
10 of existing agency administrative salaries and benefits, and rent,
11 equipment costs, utilities, and materials associated with those
12 administrative functions.

13 ~~((e))~~ (iii) "Competitive contracting" means the process by
14 which ~~((classified))~~ employees of a department, agency, or
15 institution of higher education compete with businesses, individuals,
16 nonprofit organizations, or other entities for contracts authorized
17 by subsection (1) of this section.

18 ~~((6))~~ (b) Unless otherwise specified, for the purpose of this
19 act, "employee" means state employees in the classified service under
20 this chapter except employees in the Washington management service as
21 defined under RCW 41.06.022 and 41.06.500.

22 (9) The processes set forth in subsections (1)(a), (2), (3), and
23 (4)(a) through (d) of this section do not apply to contracts:

24 (a) Awarded for the purposes of or by the department of
25 transportation;

26 (b) With an estimated cost of contract performance of twenty
27 thousand dollars or less;

28 (c) With an estimated cost of contract performance that exceeds
29 five hundred thousand dollars for public work as defined by RCW
30 39.04.010; or

31 (d) Relating to mechanical, plumbing as described in chapter
32 18.106 RCW, and electrical as described in chapter 19.28 RCW,
33 procured to install systems for new construction or life-cycle
34 replacement with an estimated cost of contract performance of
35 seventy-five thousand dollars or more.

36 (10) The processes set forth in subsections (1)~~((7))~~ through (4),
37 ~~((7))~~, and ~~((5))~~ (8) of this section do not apply to:

38 (a) RCW 74.13.031~~((5))~~ (6);

39 (b) The acquisition of printing services by a state agency; and

1 (c) (~~Contracting for services or activities by the department of~~
2 ~~enterprise services under RCW 43.19.008 and the department may~~
3 ~~continue to contract for such services and activities after June 30,~~
4 ~~2018~~) Contracts for services expressly mandated by the legislature,
5 including contracts for fire suppression awarded by the department of
6 natural resources under RCW 76.04.181, or authorized by law prior to
7 July 1, 2005, including contracts and agreements between public
8 entities.

9 (~~(7)~~) (11) The processes set forth in subsections (1) ~~(7)~~
10 through (4), (7), and (~~(5)~~) (8) of this section do not apply to the
11 consolidated technology services agency when contracting for services
12 or activities as follows:

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

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

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

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

27 (b) After reasonable notice to the contractor and reasonable
28 opportunity for that contractor to be heard, the director has the
29 authority to debar a contractor for cause from consideration for
30 award of contracts. The debarment must be for a period of not more
31 than three years.

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

34 (a) Conviction for commission of a criminal offense as an
35 incident to obtaining or attempting to obtain a public or private
36 contract or subcontract, or in the performance of such contract or
37 subcontract;

38 (b) Conviction or a final determination in a civil action under
39 state or federal statutes of fraud, embezzlement, theft, forgery,

1 bribery, falsification or destruction of records, receiving stolen
2 property, violation of the federal false claims act, 31 U.S.C. Sec.
3 3729 et seq., or the state medicaid fraud false claims act, chapter
4 74.66 RCW, or any other offense indicating a lack of business
5 integrity or business honesty that currently, seriously, and directly
6 affects responsibility as a state contractor;

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

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

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

15 (i) Deliberate failure without good cause to perform in
16 accordance with the specifications or within the time limit provided
17 in the contract; or

18 (ii) A recent record of failure to perform or of unsatisfactory
19 performance in accordance with the terms of one or more contracts,
20 however the failure to perform or unsatisfactory performance caused
21 by acts beyond the control of the contractor may not be considered to
22 be a basis for debarment;

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

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

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

32 (3) The director must issue a written decision to debar. The
33 decision must:

34 (a) State the reasons for the action taken; and

35 (b) Inform the debarred contractor of the contractor's rights to
36 judicial or administrative review.

37 **Sec. 4.** RCW 39.26.180 and 2012 c 224 s 20 are each amended to
38 read as follows:

1 (1) The department must adopt uniform policies and procedures for
2 the effective and efficient management of contracts by all state
3 agencies. The policies and procedures must, at a minimum, include:

4 (a) Precontract procedures for selecting potential contractors
5 based on their qualifications and ability to perform, including
6 procedures to ensure compliance with chapter 39.19 RCW, and providing
7 for participation of minority and women-owned businesses;

8 (b) Model complaint and protest procedures;

9 (c) Alternative dispute resolution processes;

10 (d) Incorporation of performance measures and measurable
11 benchmarks in contracts;

12 (e) Model contract terms to ensure contract performance and
13 compliance with state and federal standards, including terms to
14 facilitate recovery of the costs of employee staff time that must be
15 expended to bring a contract into substantial compliance, and terms
16 required under RCW 41.06.142;

17 (f) Executing contracts using electronic signatures;

18 (g) Criteria for contract amendments;

19 (h) Postcontract procedures;

20 (i) Procedures and criteria for terminating contracts for cause
21 or otherwise, including procedures and criteria for terminating
22 performance-based contracts that are not achieving performance
23 standards; ((and))

24 (j) A requirement that agencies, departments, and institutions of
25 higher education monitor performance-based contracts, including
26 contracts awarded pursuant to RCW 41.06.142, to ensure that all
27 aspects of the contract are being properly performed and that
28 performance standards are being achieved; and

29 (k) Any other subject related to effective and efficient contract
30 management.

31 (2) An agency may not enter into a contract under which the
32 contractor could charge additional costs to the agency, the
33 department, the joint legislative audit and review committee, or the
34 state auditor for access to data generated under the contract. A
35 contractor under such a contract must provide access to data
36 generated under the contract to the contracting agency, the joint
37 legislative audit and review committee, and the state auditor.

38 (3) To the extent practicable, agencies should enter into
39 performance-based contracts. Performance-based contracts identify
40 expected deliverables and performance measures or outcomes.

1 Performance-based contracts also use appropriate techniques, which
2 may include but are not limited to, either consequences or incentives
3 or both to ensure that agreed upon value to the state is received.
4 Payment for goods and services under performance-based contracts
5 should be contingent on the contractor achieving performance
6 outcomes.

7 (4) An agency and contractor may execute a contract using
8 electronic signatures.

9 (5) As used in subsection (2) of this section, "data" includes
10 all information that supports the findings, conclusions, and
11 recommendations of the contractor's reports, including computer
12 models and the methodology for those models.

13 NEW SECTION. **Sec. 5.** A new section is added to chapter 39.26
14 RCW to read as follows:

15 An agency, department, or institution of higher education that
16 intends to contract out, or does contract out, for services that, on
17 or after July 1, 2005, have been customarily and historically
18 performed by employees in the classified service defined in RCW
19 41.06.020 must follow procedures and meet criteria established under
20 RCW 41.06.142.

21 NEW SECTION. **Sec. 6.** This act is prospective and applies only
22 to contracts commenced on or after the effective date of this
23 section. Contracts in effect prior to the effective date of this
24 section remain unaffected by this act through their expiration date."

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25 On page 1, line 2 of the title, after "contracting;" strike the
26 remainder of the title and insert "amending RCW 41.06.142, 39.26.200,
27 and 39.26.180; adding a new section to chapter 39.26 RCW; and
28 creating new sections."

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