

HOUSE BILL REPORT

E2SHB 1521

As Passed House:
February 5, 2020

Title: An act relating to protecting taxpayers by providing for accountability and transparency in government contracting.

Brief Description: Providing for accountability and transparency in government contracting.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Dolan, Harris, Valdez, Frame, Caldier, MacEwen, Griffey, Blake, Sells, Tarleton, Fitzgibbon, Ryu, Kilduff and Ormsby).

Brief History:

Committee Activity:

State Government & Tribal Relations: 1/29/19, 2/5/19 [DPS];

Appropriations: 2/21/19, 2/28/19 [DP2S(w/o sub SGOV)].

Floor Activity:

Passed House: 2/5/20, 65-32.

Brief Summary of Engrossed Second Substitute Bill

- Narrows the application of the contracting-out requirements under statute to only contracts for services that have been customarily and historically provided by classified employees on or after July 1, 2005.
- Creates additional criteria, with exemptions, for contracting out, including a comprehensive impact assessment, maintenance of certain records, and additional terms in agreements to contract out.
- Modifies uniform policies and procedures on contract management maintained by the Department of Enterprise Services, including policies and procedures related to contract termination, minority- and women-owned business participation, performance monitoring, and cost recovery.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL RELATIONS

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: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Gregerson, Chair; Pellicciotti, Vice Chair; Appleton, Dolan and Hudgins.

Minority Report: Do not pass. Signed by 4 members: Representatives Walsh, Ranking Minority Member; Goehner, Assistant Ranking Minority Member; Mosbrucker and Smith.

Staff: Jason Zolle (786-7124).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government & Tribal Relations. Signed by 21 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Bergquist, 2nd Vice Chair; MacEwen, Assistant Ranking Minority Member; Caldier, Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Jinkins, Macri, Pettigrew, Pollet, Ryu, Senn, Springer, Stanford, Sullivan, Tarleton and Tharinger.

Minority Report: Do not pass. Signed by 9 members: Representatives Stokesbary, Ranking Minority Member; Rude, Assistant Ranking Minority Member; Chandler, Dye, Hoff, Kraft, Steele, Sutherland and Ybarra.

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

Staff: Meghan Morris (786-7119).

Background:

Contracting Out.

Prior to July 1, 2005, state agencies and institutions of higher education were prohibited from contracting out for services regularly and historically provided by classified employees. Employees in classified services include state employees not specifically exempt from the state civil service statute. Beginning July 1, 2005, the Personnel System Reform Act of 2002 lifted the prohibition and authorized state agencies and institutions of higher education to purchase services, including services traditionally and historically provided by state employees in classified service, if the following criteria are met:

- the request for proposal contains measurable performance standards;
- the contract contains a provision to require the contracted entity to consider employment of state employees who may be displaced by the contract;
- a contract monitoring process is established to measure contract performance and to cancel contracts not meeting standards;
- there is a determination that contracts would lead to savings or efficiencies; and
- classified service employees are allowed to provide alternative solutions to purchasing the services by contract and, in the event those solutions are not approved, form employee business units and bid for the contract.

Certain entities and contracts are exempt from these criteria, such as contracts for services expressly mandated by the Legislature, printing services, and certain contracts by the Department of Enterprise Services (DES) and Consolidated Technology Services Agency.

Contract Management Policies and Procedures.

The DES must adopt policies and procedures for effective and efficient management of contracts by 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, executing contracts using electronic signatures, and procedures and criteria for terminating contracts. Agencies must provide, on an annual basis, a list of contracts that the agency has entered into or renewed.

The DES must maintain a list of all contracts entered into by agencies. Agencies are encouraged to enter into performance-based contracts that identify expected deliverables and performance measures or outcomes. Payment for goods and services under performance-based contracts should be contingent on the customer achieving performance outcomes.

To provide the maximum practicable opportunity for increased participation by minority- and women-owned and controlled businesses in public works and agency procurement, goals are established in statute for each state agency. 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.

Summary of Engrossed Second Substitute Bill:

Contracting Out.

The application of the contracting out requirements under statute is narrowed to apply only to contracts for services that have been customarily and historically provided by classified employees on or after July 1, 2005.

The following additional criteria must be met before the department, agency, or institution of higher education contracts for services:

- A comprehensive impact assessment is completed by the department, agency, or institution of higher education which must include:
 - an estimate of the cost of performance of the service if done by employees;
 - an estimate of the cost of performance of the service if contracted out;
 - the reason for proposing to contract out; and
 - the reasons for determining that the contract results in savings are efficiency improvements.
- When the contract will result in termination of state employees or elimination of state positions, the comprehensive impact assessment may include an assessment of potential adverse impacts on the public from outsourcing the contract.

Departments, agencies, or institutions of higher education must also:

- post on their website the request for proposal, the contract or a statement of the decision to not move forward with contracting out, and the comprehensive impact assessment;

- prepare and maintain in the contract file, every five years or upon completion of the contract, a report that contains:
 - documentation of the contractor's performance measured by itemized performance standards;
 - an itemization of any contract extensions or change orders that resulted in the cost of the contract; and
 - remedial actions that were taken to enforce compliance with the contract and the estimate of the cost incurred by the department, agency, or institution of higher education in enforcing such compliance; and
- include specified terms in any agreement to contract for a service.

Previously exempt contracts relating to the DES's activities are now subject to the contracting out requirements.

The following contracts are exempt from the additional criteria for contracting out, as well as the requirements above relating to posting information on a website, maintaining specified records, and including certain terms in contracts for service:

- contracts awarded for the purposes of or by the Department of Transportation;
- contracts with an estimated cost of contract performance of \$20,000 or less; and
- contracts with an estimated cost of contract performance that exceeds \$500,000 for public work.

The bill specifies that contracts for fire suppression awarded by the Department of Natural Resources are contracts expressly mandated by the Legislature, and are therefore also exempt from all statutory contracting out provisions.

The new provisions under the bill only apply prospectively and do not impact contracts in effect prior to the enactment of the bill.

Contract Management Policies and Procedures.

The uniform policies and procedures for management of contracts are modified to include: precontract procedures to ensure compliance with minority- and women-owned business participation; model terms to facilitate recovery of the costs of employee staff time expended to achieve substantial compliance; and procedures and criteria for terminating contracts that are not achieving performance standards. Agencies must monitor performance-based contracts to ensure that all aspects are being properly performed and that performance standards are being achieved.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available. New fiscal note requested February 6, 2020.

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

Staff Summary of Public Testimony (State Government & Tribal Relations):

(In support) This bill is about management making more thoughtful decisions. When management in state agencies decide whether to keep a state job in house or contract it out, the natural inclination is to contract out when there are dollars available to do so. This bill would require management to make thoughtful decisions about when and what to contract out. The bill is effective on contracts prospectively only, and would only apply to jobs traditionally done by the state since July 1, 2005. July 1, 2005, is when unions were formed and when the state was first allowed to contract out. That date was put in the bill to prevent the requirements under the bill from being applied to jobs traditionally done by the state prior to July 1, 2005.

The bill would also require management to oversee the contract and make sure that it is done well. The bill protects taxpayer funds by holding contractors who fail to meet conditions of a state contract accountable. For example, at Western State Hospital (Western), there was an issue with contracting out for workers who ended up not being supervised by their agency and arrived untrained and unscreened. The contracting out process allowed Western to avoid employing qualified staff. This contributed to Western losing federal funding because it did not meet federal standards. Another example is subcontracts for court-ordered visits awarded by the Department of Social and Human Services (DSHS). The contractors have at times submitted incomplete reports or case notes that have been cut and pasted without noting important information such as information relating to allergies. This places children's safety at risk.

Although the bill is a positive step to ensure diligence in public contracting, agencies should: use all direct and indirect costs in its analysis; include quality, accessibility, and experience in the cost analysis; and include language around uniform guidance.

(Opposed) The problem that this bill is trying to fix would be solved just by bringing the contractor back to fix their work in cases where they did not meet the expectations of the contract. The problem is a management and oversight issue. Current law already requires agencies to address management issues. The problem can be addressed by putting a state agency in charge of overseeing requirements in current law. Although there were examples of failed contracts, there has not been a problem with architectural and engineering construction services. The bill would also negatively affect construction design services and maintenance. The bill would create an "us versus them" mentality and will create an expectation to not contract out. The proponents say that the bill is not trying to affect architectural and engineering contracts, or construction design and maintenance, but if that's the case there should be an exemption in the bill for those contracts.

Staff Summary of Public Testimony (Appropriations):

(In support) This is a bipartisan bill focused on doing the best work for taxpayers. There was a work group over the summer of state employee representatives, the Department of Enterprise Services, the Office of Financial Management, and contractors. As a result of those meetings, and an attempt to address substantive verifiable concerns, this bill is narrower in scope than last year's bill. Despite the narrowing of this bill, some in the business community still want a broad exemption, which defeats the purpose of the bill. Any business uses these common sense metrics to determine whether to contract out.

This bill highlights jobs customarily and historically performed by state employees. Our state employees are not architects, engineers, or mechanical contractors, nor do they complete large construction jobs. The bill keeps the status quo in place. The bill asks management at the agencies to do a better job of supervising the work. Before an agency contracts out, the bill requires an upfront analysis of an apples-to-apples comparison to see who will do the work more cheaply. It also requires contract monitoring, accountability, and transparency to ensure public money is being well spent. This creates uniformity throughout state government implementing best practices when it comes to outsourcing.

The fiscal note of the University of Washington is hard to defend and should not be taken seriously.

(Opposed) There was a lot of discussion about this bill, but there was no agreement met. There is only an exemption for contracts of \$20,000 or less, or over \$1 million, which is a big window for contracts that are not exempt from this bill. Although some say that the language "customarily and historically" protects businesses—for example, if state employees do not work on \$900,000 projects—but that window is still open and should be closed.

The intent of this bill is to protect employees who have worked in areas traditionally provided by the government, but large projects have not been done by state government. Architectural projects for the state have been done very well. Architects and engineers should be exempt from the bill. Architects and engineers have worked hard to establish a contract system where they are chosen based on their qualifications, not a cost comparison. Reverting back to a cost comparison will result in lower-quality work, and that was an issue in the past. It also does not make sense to base a contract for architecture on price, because it is impossible to know what the price of a project will be until an architect is hired to work on design. In addition, current legislative authority already addresses the issues that this bill tries to resolve because contract performance is already addressed in current law.

Persons Testifying (State Government & Tribal Relations): (In support) Representative Dolan, prime sponsor; Matt Zuvich, Kristina Johnson-Short, and Stacy South, Washington Federation of State Employees; Seamus Petrie, Washington Public Employees Association; and David Streeter, Washington Nonprofits.

(Opposed) Jerry VanderWood, Associated General Contractors of Washington; Van Collins, American Council of Engineering Companies of Washington and Architects & Engineers Legislative Council; Kirsten Smith, American Institute of Architects - Washington Council; and Michael Transue, Mechanical Contractors Association of Western Washington.

Persons Testifying (Appropriations): (In support) Representative Dolan, prime sponsor; Seamus Petrie, Washington Public Employees Association; and Dennis Eagle, Washington Federation of State Employees.

(Opposed) Jerry Vanderwood, Associated General Contractors and Washington Construction Industry Council; Kirsten Smith, American Institute of Architects; Van Collins, American Council of Engineering Companies of Washington; and Michael Transue, Mechanical Contractors Association of Western Washington.

Persons Signed In To Testify But Not Testifying (State Government & Tribal Relations):
None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.