

SENATE BILL REPORT

E2SHB 1521

As Reported by Senate Committee On:
State Government, Tribal Relations & Elections, February 21, 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: Passed House: 2/05/20, 65-32.

Committee Activity: State Government, Tribal Relations & Elections: 2/13/20, 2/21/20 [DPA-WM, DNP].

Brief Summary of Amended Bill

- Narrows the application of contracting out requirements to contracts for services customarily and historically provided by classified employees on or after July 1, 2005.
- Establishes new requirements, with exemptions, for services contracted out.
- Modifies uniform policies and procedures on contract management.

SENATE COMMITTEE ON STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Hasegawa and Takko.

Minority Report: Do not pass.
Signed by Senators Zeiger, Ranking Member; Muzzall, Assistant Ranking Member.

Staff: Melissa Van Gorkom (786-7491)

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.

Background: Contract Management. The Department of Enterprise Services (DES) is responsible for the oversight of the state's procurement of goods and services, 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.

Contracting Out. Beginning July 1, 2005, under the state civil service law, a department, agency, or institution of higher education may contract out for services, including services traditionally and historically provided by state employees, if the following are met:

- the request for proposal must contain measurable standards for the performance;
- employees being displaced are allowed to provide alternative solutions to purchasing services by contract and, in the event those solutions are not approved, bid for the contract using competitive bidding procedures;
- the contract contains a provision requiring the entity to consider employing displaced employees;
- contract monitoring and termination procedures are established; and
- there is a determination that the contract would lead to savings or efficiencies.

Certain entities and contracts are exempt from this criteria, such as, contracts for services expressly mandated by the Legislature, or authorized by law prior to July 1, 2005; printing services; and certain contracts by DES, Department of Children, Youth, and Families, and Consolidated Technology Services agency.

Summary of Amended Bill: Contracting Out. Any department, agency, or institution of higher education may contract out for services customarily and historically provided by employees in classified service on or after July 1, 2005, if they complete a comprehensive impact assessment. The assessment must include an estimate of the cost of performance of the service both by state employees and if contracted out, and the reason for proposing to contract out and determining that the contract results in savings or efficiency improvements. The assessment may also include potential adverse impacts on the public from outsourcing the contract when the contract will result in termination of a state employee or elimination of a state position.

When contracting out for services an agency, department or institution of higher education must ensure firms adhere to the freedom from discrimination act. Any relationship with a potential or current industry partner that has found to have violated the freedom from discrimination act by the attorney general must not be considered and must immediately terminated until the industry partner has fulfilled the conditions or obligations, or taken significant and meaningful steps to correct the violation.

An agency, department, or institute of higher education must prepare and maintain in accordance with the state retention schedule, and post on its website the:

- request for proposal, contract, or statement that the agency, department, or institute of higher education did not move forward with contracting out; and
- comprehensive impact assessment.

Terms of any agreement to contract out services must include:

- a termination clause;
- a contract management provision to allow review of the contractor's performance;
- a damage provision to allow recovery of direct damages and when applicable indirect damages incurred due to the contractor's breach of the agreement;
- ability to obtain information about subcontractors under the contract as applicable to the performance of services under the agreement; and
- a provision requiring the contractor consider employment of displaced employees.

Upon completion of the contract, or every five years if not yet completed, the agency, department, or institution of higher education must prepare and maintain in the contract file a report that contains:

- documentation of the contractor's performance as measured by the itemized performance standards;
- an itemization of any contract extensions or change orders that result in a change in the dollar value or cost of the contract; and
- remedial actions that were taken to enforce compliance with the contract and estimate costs incurred in enforcing such compliance.

The following contracts are exempt from this criteria:

- contracts for the purposes of or by the Department of Transportation;
- contracts with an estimated cost of contract performance of \$20,000 or less;
- mechanical, plumbing and electrical contracts procured to install systems for new construction or life-cycle replacement with an estimated contract performance of \$75,000 or more; and
- public work contracts with an estimated cost of contract performance that exceeds \$500,000.

The bill specifies that contracts for fire suppression awarded by the Department of Natural Resources are contracts expressly mandated by the Legislature and therefore also exempt. The exemptions for DES are removed.

Contract Management. The bill specifies that DES uniform policies and procedures must include:

- precontract procedures to ensure compliance with requirements regarding minority and women-owned business participation;
- model terms to facilitate recovery of the costs of public employee staff time that must be expended to bring a contract into substantial compliance;
- procedures and criteria for terminating performance-based contracts not achieving performance standards; and
- a requirement that agencies, departments, and institutions of higher education monitor performance-based contracts to ensure the contract is being performed properly and that performance standards are being achieved.

Other Provisions. It is clarified that the basis for fining or debaring a contractor may be two or more violations of the National Labor Relations Act, rather than the Federal Labor Relations Act, within five years.

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

EFFECT OF STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS COMMITTEE AMENDMENT(S):

- Requires the agency, department, or institution of higher education to not consider, or immediately terminate any relationship or potential relationship with an industry partner that has been found to have violated the freedom from discrimination act by the attorney general until any conditions or obligations associated with any court order or settlement are fulfilled, or significant and meaningful steps are taken to correct the violation.
- Exempt mechanical, plumbing, and electrical contracts procured to install systems for new construction or life-cycle replacement with an estimated cost of \$75,000 or more.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Engrossed Second Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: Generally businesses spend 70 to 80 percent of money on salaries, so in 2008 when the economy fell, the state balanced the state budget on the backs of our employees. This bill is trying to get back to where we were in 2008 for state employment and contracts lost over this period of time. Stakeholders got together over the interim to have conversations and find a way to write the bill so that it makes sense for everyone. The most recent amendment exempts public works over \$500,000 to be done by outside contractors because the state employees do not do that work, they do general maintenance and repairs. The piece that was not included but proposed today is amendment to address contracts beyond \$75,000 for mechanical engineering and plumbing jobs so this work can be done by the contractors. These changes thread the needle to address the concerns regarding the bill. The building trades concerns regarding amount of work available to members for work contracted out have been addressed with the public works exemption and the new proposed exemption for the bill. Not all jobs contracted out use the process that DES uses, currently the processes vary. The bill provides an overarching process that is the same through state government and higher education institutions so the public can see the math and the reasons for contracting out. This process duplicates what is already in place and skinnies down the process so that it is not so onerous. There are many examples of the need for employees to fix things that were contracted out and it does not end up saving money. This goes a long way to ensure tax dollars are used wisely.

CON: This bill is not about accountability, it is about growing government sector employment and giving an advantage to government by requiring a flawed cost benefit analysis that underestimates government costs while guessing at industry pricing. Private contracts include overhead and other costs which would not be considered in the cost by the state and so those costs won't be accurately reflected in a cost by cost comparison. This is especially true for architectural and engineering companies where the scope of work and price are negotiated after the procurement process is initiated. Architects and engineers are not exempt from the bill and fall into the \$20,000 to \$500,000 contract category. Architects and engineers do a lot of work that falls in this dollar amount and should be exempt. Quality is not considered under this process. Architecture contracts are consider qualification first and not cost. Only qualified electric workers should be doing this work for safety reasons. The comprehensive assessment process will slow down projects and increase cost. The bill will adversely impact small business that will have to jump through hoops and have a smaller pool of projects to bid on. It will hurt women and minority owned businesses the most. The current process is transparent for construction projects in the state.

OTHER: The additional requirements surrounding the agencies decision under the bill could have an adverse impact on contracting out. In order to maintain university campuses it is important to have both in house workers and contractors to address project needs. There are concerns that this may unintentionally apply to a number of projects and we would appreciate language to clarify and reduce the impact. Appreciate the \$500,000 threshold for construction but the service work we do is not addressed in the bill. The new proposed amendment would further address concerns to also allow maintenance to ensure warranties and proper operation of the complicated systems.

Persons Testifying: PRO: Representative Laurie Dolan, Prime Sponsor; Matt Zuvich, Washington Federation of State Employees; Neil Hartman, Washington State Building and Construction Trades Council; Seamus Petrie, Washington Public Employees Association.

CON: Van Collins, American Council of Engineering Companies of Washington; and Washington Construction Industry Council; Kirsten Smith, American Institute of Architects —Washington Council; Brent Ludeman, National Electrical Contractors Association.

OTHER: Chris Mulick, Washington State University; Morgan Hickel, University of Washington; Michael Transue, Mechanical Contractors Association of Western Washington; Kathleen Collins, Sheet Metal and Air Conditioning Contractors of Western Washington.

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