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**ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1851**

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**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)

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

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

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

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

(1) Any department, agency, or institution of higher education may purchase services, including services that have been customarily and historically provided by employees in the classified service under this chapter or by employees included in the Washington management service as defined in RCW 41.06.022 and 41.06.500, by contracting with individuals, nonprofit organizations, businesses, employee business units, or other entities if the following criteria are met:

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

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

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

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

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

(ii) The comprehensive assessment may also include an assessment of the potential adverse impacts on the public from outsourcing the contract, such as loss of employment, effect on social services and public assistance programs, economic impacts on local businesses and local tax revenues, and environmental impacts;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) As used in this section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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