

HOUSE BILL REPORT

HB 2743

As Reported by House Committee On:
Government Operations & Elections
Appropriations

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

Brief Description: Protecting taxpayers by providing for accountability and transparency in government contracting.

Sponsors: Representatives S. Hunt, Green, Appleton, Sullivan, Reykdal, Hudgins, Bergquist, Jinkins, Sawyer, Sells, Ormsby, Riccelli, Fitzgibbon, Robinson, Fey, Roberts, Pollet and Freeman.

Brief History:

Committee Activity:

Government Operations & Elections: 2/4/14, 2/5/14 [DPS];

Appropriations: 2/10/14, 2/11/14 [DP2S(w/o sub GOE)].

Brief Summary of Second Substitute Bill

- Requires agencies to prepare a written record of the basis of the decision and a comprehensive impact assessment when contracting out to purchase services that were formerly provided by public employees.
- Requires agencies to file with the Department of Enterprise Services (DES) the written basis of decisions and reports on contractors' performance.
- Requires inclusion of a number of contract terms in agreements to contract out.
- Specifies additional procedures, terms, and criteria that the DES must include in uniform policies and procedures for agency management of contracts.
- Mandates debarment of contractors under certain circumstances.
- Makes changes to existing law requiring the DES to identify services that can be contracted out at reduced cost, including authorizing this only when taxpayers will save 10 percent or more.

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.

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives S. Hunt, Chair; Bergquist, Vice Chair; Carlyle, Orwall, Robinson and Van De Wege.

Minority Report: Do not pass. Signed by 5 members: Representatives Taylor, Ranking Minority Member; Young, Assistant Ranking Minority Member; Christian, Kretz and Manweller.

Staff: Jasmine Vasavada (786-7301).

Background:

"Contracting Out".

The 2011 legislation that reorganized and consolidated state government central service agencies included a number of provisions directed at expanding the contracting of out-of-state services. At the beginning of each fiscal biennium through June 30, 2018, the Office of Financial Management (OFM) shall conduct a review of the programs and services that are performed by the Department of Enterprise Services (DES) to determine whether the program or service may be performed by the private sector in a more cost-efficient and effective manner. As part of the review, the OFM shall select up to six activities or services that could potentially be provided by the private sector. Priority for selection shall be given to agency activities or services that are significant, ongoing functions. The OFM may consult with affected industry stakeholders in making its decision on which activities to contract out.

The "contracting out" procurement process must contain measurable standards for the performance of the contract. The OFM must consider the consequences and potential mitigation of improper or failed performance by the contractor. If service cannot be provided at a lower rate or more efficiently, the OFM will notify the DES, and the DES may cancel the bid. If the bid is cancelled, the OFM must notify the legislative fiscal committees. The DES, with the OFM, must establish a contract monitoring process to measure contract performance, costs, service, delivery, quality, and other contract standards, and cancel contracts that do not meet those standards. No contract may be renewed without a review of these measures. The OFM must report on the results of these examinations biennially to the Legislature, providing information also on any procurement process that does not result in a contract for the services. The Joint Legislative and Audit Review Committee (JLARC) shall conduct a performance audit of the implementation of contracting for services at the DES and report to the Legislature by January 1, 2018.

Contract Management Policies and Transparency.

The DES adopts policies and procedures for effective and efficient management of contracts by all 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, and procedures and criteria for terminating contracts. Agencies must provide on an annual basis a list of all contracts that

the agency has entered into or renewed. The DES must maintain a list of all contracts entered into by agencies.

Performance-Based Contracts.

Agencies, to the extent practicable, should enter into performance-based contracts that identify expected deliverables and performance measures or outcomes. Performance-based contracts may include, but are not limited to, either consequences or incentives or both to ensure that the agreed upon value to the state is received. Payment for goods and services under performance-based contracts should be contingent on the customer achieving performance outcomes.

Debarment.

"Debarment" means to prohibit a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract during a specified period of time. The Director of the DES has the authority to, but is not required to, debar any contractor based on a finding of one or more of the following causes:

- a conviction of a criminal offense as an incident to obtaining a public or private contract or subcontract, or in the performance of such contract;
- a conviction under state or federal law for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty;
- a conviction under state or federal antitrust laws arising out of the submission of bids or proposals;
- two or more violations within the previous five years of the Federal Labor Relations Act;
- a violation of contract provisions of a character regarded by the Director to justify debarment action, including deliberate failure without good cause to perform the contract, or a recent record of failure to perform or of unsatisfactory performance with the terms of one or more contracts;
- violation of ethical standards; or
- any other serious or compelling cause to affect responsibility as a state contractor, including debarment by another governmental entity.

A decision to debar must be issued by the Director of the DES in writing and must state the reasons for the action taken, and must inform the debarred contractor of his or her rights to judicial or administrative review.

Contractor Ethics.

The ethics laws that apply to all state officers and employees relating to limitations on gifts also applies to contractors who provide goods and services for, or on behalf of, the state. Any person or entity who seeks or may seek a contract with a state agency may not give, loan, transfer, or deliver to any person something of economic value that would cause a state officer or employee to be in violation of ethics laws pertaining to assisting in transactions, compensation for official duties or nonperformance, compensation for outside duties, gifts, or limitation on gifts.

Minority and Women's Business Enterprises.

To provide the maximum practicable opportunity for increased participation by minority- and women-owned and controlled businesses in participating in public works and the process by

which goods and services are procured by state agencies from the private sector, the Legislature has established goals for state agencies. If necessary to meet these goals, contracts may be awarded to the next lowest responsible bidder in turn, 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 under the Office of Minority and Women's Business Enterprises law.

Summary of Substitute Bill:

Contracting Out.

Prior to issuing a request for a proposal to contract out to purchase from a private sector entity or nonprofit organization services that have been customarily and historically provided by a public employee or employees, an agency must conduct a comprehensive impact assessment. This assessment must include: (1) an estimate of the cost of performance by public employees and by the contractor, including the cost of allocating sufficient public employee staff time and resources to monitor the contract and ensure its proper performance; (2) a statement of performance objectives; and (3) an assessment of potential adverse impacts on the public. The agency must prepare a written record of the basis of the decision to contract out, including the comprehensive impact assessment and an itemization of performance standards. If an agreement to contract out is reached, the agency must file the written record with the DES. Upon completion of the contract, or every five years if the contract is not yet completed, the agency must file a report with the DES documenting the contractor's performance, itemizing contract extensions and change orders, and stating remedial actions and costs of such actions. An agency may contract out only upon complying with these provisions, the criteria for contracting out in RCW 41.06.142, and any other requirement established by law.

Agreements to contract must include a number of terms, including a cancellation clause, periodic performance review, compensation for public employee time expended in achieving full performance of the contract's objectives, employment and wage information about contractors and subcontractors, and a waiver of confidentiality with respect to basic financial information related to the contract.

The provisions requiring the OFM to identify six central service functions each biennium to potentially contract out are amended. In considering whether an activity can be contracted out at a reduced cost and with greater efficiency, the DES must consider the cost of the agency staff time and resources that may be required to monitor and ensure proper performance of the contract by the contractor. The DES may only contract out if it will afford taxpayers a cost savings of 10 percent or more of the contract value. The OFM's biennial report to the Legislature must include any unanticipated costs incurred as a result of contracting out and an estimate of staff hours devoted by employees of the OFM and the DES in conducting the required program review. In conducting the required audit of the performance of the "contracting out" provisions, the JLARC's analysis must, at a minimum, include: (1) an estimate of the cost of performance of the selected activities, if the activities had been performed by public employees; (2) an estimate of the cost of performance of the contract by the contractor, including the cost of any change orders or contract revisions and

the costs of allocating sufficient public employee staff time and resources to monitor the contract and ensure its proper performance by the contractor; (3) an analysis of the extent to which performance objectives were achieved by outsourcing the contract; and (4) an assessment of potential adverse impacts on the public of outsourcing the contract.

Contract Management Policies and Procedures.

The uniform policies and procedures for efficient management of contracts by all state agencies must include model terms to facilitate recovery of the costs of public employee staff time that must be expended to bring a contract into substantial compliance, as well as procedures and criteria for terminating performance-based contracts that are not achieving performance standards. Agencies must monitor performance-based contracts to ensure that all aspects of the contract are being properly performed and that performance standards are being achieved. The DES must include procedures to ensure compliance with the Office of Minority and Women Business Enterprises chapter, in its precontract procedures for selecting potential contractors based on their qualifications and ability to perform.

Debarment.

The statute authorizing the Director of the DES to debar a contractor is amended to provide that the Director must debar a contractor where there has been a finding of one or more of the following causes:

- a conviction within the previous five years 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;
- a 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 or the state Medicaid Fraud False Claims Act, tax evasion, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a state contractor, where such conviction or final determination occurred within the previous five years;
- a conviction within the previous five years under state or federal antitrust statutes arising out of the submission of bids or proposals; or
- two or more violations within the previous five years of the National Labor Relations Act as determined by the National Labor Relations Board or court of competent jurisdiction;

Contractor Ethics.

A contractor who has access to public resources due to a contract with an agency may not use the public resources for private benefit or gain, except to the extent directly contemplated by and specified in the performance objectives of the contract.

Performance Review of Other Projects.

By December 31, 2015, and every two years thereafter, the JLARC must review the performance of contracts related to two projects in which services historically and traditionally performed by public sector employees were outsourced to private sector or nonprofit entities. The purpose of the performance review is to determine the extent to which contracting these services out to the private sector has resulted in the savings, efficiencies, and performance objectives that were projected at the time that the outsourcing decision was

made. The first two projects reviewed under this section must be: (1) the contract outsourced to the Washington Health Benefit Exchange Call Center; and (2) the Department of Licensing's utilization of private driving schools to administer driver's examinations. Upon request, the DES must provide JLARC a list of other contracts relating to services historically and traditionally performed by public sector employees. State agencies, including those who are parties to the projects listed above, the Employment Security Department, and the Department of Revenue, must provide to the joint committee any wage, employment, or other data requested, the disclosure of which is not otherwise prohibited by law.

Substitute Bill Compared to Original Bill:

The substitute bill adds the requirement that the DES include, in its uniform precontract procedures for selecting potential contractors based on their qualifications, procedures to ensure compliance with chapter 39.19 RCW, providing for participation of minority- and women-owned businesses.

Appropriation: None.

Fiscal Note: Requested on February 3, 2014.

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

Staff Summary of Public Testimony:

(In support) Several years ago, the Legislature consolidated central service agencies into the DES. One of the last issues to be decided was how to deal with the "contracting out" question. This bill is trying to make sure that taxpayers have accountability and accuracy, so that when the government does contract out, we save the taxpayers money and offer full transparency.

State agencies have very strict reporting requirements and all of this information is available for review and inspection by the public. This would not be the case if the services are provided by a state contractor or vendor. With approximately 41,000 members in over 30 state agencies, the Washington Federation of State Employees (Federation) has heard a wide array of stories of state contractors mismanaging these funds. Common themes are that: state contracts are not systematically monitored for performance; there is no comparison between the initial cost and contract cost and the final total cost of accounting; and there is no evaluation of whether the goals of the original contract have been achieved. Taxpayers deserve the same accountability of services whether the services are provided by the public or private sector employees. Often times, outsourcing means taxpayers have very little say on how tax dollars are spent and no say on private actions by which companies can control public services. Unlike elected officials, the public cannot vote out a chief executive officer who makes decisions that are contrary to public health and safety. Unfortunately some contractors have figured out how to game the system. What is an acceptable threshold for

abusing taxpayer dollars? If you are being paid with tax payer dollars, you should not be allowed to break the law by failing to pay taxes. You shouldn't be able to pay top level management salaries out of client services funds. Your staff and the clients you serve should not be exposed to dangerous living or working conditions, and you shouldn't be able to get paid in full for a contract that fails inspection, where state employees have to fix it to bring it up to code, making the State pay for the service twice. The Federation has spent an excessive amount of time trying to understand one company's budget and expenditures. It should not be this difficult to access information about public contracts.

Across the country, there are stories of taxpayer dollars being wasted on contracting and fraud, and Washington is vulnerable, due to the lack of oversight. A private company, 100 percent funded by taxpayers through its state contractors, spent \$16,000 for utilities for a small one-person office. The company reported \$393,000 in vehicle ownership costs but does not allow direct care workers it hires to use company vehicles. The company reported \$100,000 in rent in a building co-owned by their chief executive officer, and also reported \$120,000 in rent for the same office for a separate program administered by the county. Is this double-dipping allowed? Even if it is legal, it is troubling. How many contractors out there have similar practices? It should not take years to find out how tax dollars are being used.

Persons Testifying: Alia Griffins and Sarah Clifthorne, Washington Federation of State Employees.

Persons Signed In To Testify But Not Testifying: None.

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 Government Operations & Elections. Signed by 16 members: Representatives Hunter, Chair; Cody, Dunshee, Green, Haigh, Hudgins, S. Hunt, Jinkins, Kagi, Lytton, Morrell, Pettigrew, Seaquist, Springer, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 13 members: Representatives Chandler, Ranking Minority Member; Ross, Assistant Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Christian, Dahlquist, Fagan, Haler, Harris, G. Hunt, Parker, Schmick and Taylor.

Staff: David Pringle (786-7310).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Government Operations & Elections:

The Appropriations committee recommendation removed the provision prohibiting a contractor with access to public resources, due to a contract with an agency, from using the public resource for private gain; removed general language that required an agency to only contract out upon compliance with requirements established by law; and removed tax evasion from the list of offenses that require the Director of the Department of Enterprise Services

(DES) to debar a contractor and from the offenses that authorize the Director of DES to debar a contractor. A section of the bill requiring the Joint Legislative Audit and Review Committee to conduct a performance review of two contracts for services each biennium is removed.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) This is a good governance bill. In recent years there has been a trend toward contracting out for services traditionally performed by state employees. There is no system of determining best practices or if the state is getting the most value for public money. Jobs that have been contracted out have come in wildly over budget. These improvements require investment to ensure the state is getting the most value for its money. As a contract supervisor, many problems have been observed, such as the decisions that went into building Lakeland Village on a bog, and bad information technology projects such as e-recruiting and Human Resource Management System. Too often, management does not perform cost or efficiency analysis, nor examine the impact of contracts on communities. This bill represents an ounce of prevention. This act is needed to prevent waste and fraud. The Department of Social and Health Services does not require their contractors to support expense claims with proof. Inflated bills for utility bills, vehicles, and rent by Kitsap Tenant Support Services are among the questionable activities that have not been explained. There is a human side to outsourcing decisions and, over the long term, it is often not in the public interest. There are social costs that are very real. Managers should be making contracting out decisions with their eyes open, with more certainty that the benefits of contracting out are substantial and proven, and the companies involved should be accountable.

(Opposed) This bill is anti-small business. The bill provides a 10 percent bidding preference for public employees. This has not been done in the past and should not be done now. It contradicts legislation passed in 2011 to enhance and preserve competition for small businesses bidding on state business. Most of this committee voted for that 2011 bill on the floor.

Persons Testifying: (In support) Joe Kendo, Washington State Labor Council AFL-CIO; Jeanine Livingston and Sarah Clifthorne, Washington Federation of State Employees; and Dave Schill, Washington Public Employees Association.

(Opposed) Gary Smith, Independent Business Association.

Persons Signed In To Testify But Not Testifying: None.