
SUBSTITUTE HOUSE BILL 2743

State of Washington

63rd Legislature

2014 Regular Session

By House Government Operations & Elections (originally sponsored by Representatives S. Hunt, Green, Appleton, Sullivan, Reykdal, Hudgins, Bergquist, Jenkins, Sawyer, Sells, Ormsby, Riccelli, Fitzgibbon, Robinson, Fey, Roberts, Pollet, and Freeman)

READ FIRST TIME 02/05/14.

1 AN ACT Relating to protecting taxpayers by providing for
2 accountability and transparency in government contracting; amending RCW
3 39.26.180, 43.19.008, 39.26.200, and 39.26.020; adding a new section to
4 chapter 39.26 RCW; adding a new section to chapter 44.28 RCW; and
5 creating new sections.

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

7 NEW SECTION. **Sec. 1.** The legislature finds that contracting
8 government services out to private, for-profit businesses can raise
9 serious concerns about loss of accountability to taxpayers. Without
10 proper safeguards, when administrative discretion is delegated to
11 private contractors, taxpayers may lose control over how tax dollars
12 are spent. It is the intent of the legislature to increase
13 transparency and accountability of public contracts by requiring better
14 evaluation of contract performance. Such evaluation should include an
15 assessment of whether decisions to "contract out" government services
16 to the private sector are achieving their stated objectives, in terms
17 of cost-effectiveness, and an analysis of the extent to which such
18 decisions are having unintended economic and social impacts. In

1 addition, it is the intent of the legislature to ensure that public
2 contractors given access to state resources are held to ethical
3 standards consistent with public values.

4 NEW SECTION. **Sec. 2.** A new section is added to chapter 39.26 RCW
5 to read as follows:

6 (1) Prior to issuing a request for a proposal to contract out to
7 purchase from a private sector entity or nonprofit organization
8 services that have been customarily and historically provided by a
9 public employee or employees, an agency must conduct a comprehensive
10 impact assessment. To assist the agency in determining whether the
11 decision to contract out is justified, the comprehensive impact
12 assessment must include at a minimum the following analysis:

13 (a) An estimate of the cost of performance of the service by public
14 employees;

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

19 (c) A statement of the performance objectives to be achieved by
20 contracting with a private sector or nonprofit entity; and

21 (d) An assessment of the potential adverse impacts on the public
22 from outsourcing the contract, such as loss of employment, effect on
23 social services and public assistance programs, economic impacts on
24 local businesses and local tax revenues, and environmental impacts.

25 (2) An agency must prepare a written record of the basis of the
26 decision to contract out a service that has been customarily and
27 historically provided by public employees, which must include the
28 comprehensive impact assessment required under subsection (1) of this
29 section, as well as an itemization of performance standards contained
30 in the contract.

31 (a) Upon entering an agreement to contract out for a service that
32 has been customarily and historically provided by public employees, the
33 agency must provide the written record of the basis of the agency's
34 decision to the department.

35 (b) The agency must maintain the written record in the agency's
36 files for five years or the term of the contract, whichever is longer.

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

4 (i) Documentation of the contractor's performance as measured by
5 the itemized performance standards;

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

8 (iii) A report of any remedial actions that were taken to enforce
9 compliance with the contract, together with an estimate of the cost
10 incurred by the public in enforcing such compliance.

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

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

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

18 (c) Terms requiring the contractor to compensate the agency for
19 public sector employees' hours expended in achieving full performance
20 of a contract that has failed inspection, that the contractor has
21 failed to complete on schedule, or that has not been completed in a
22 manner that is consistent with quality standards;

23 (d) A term requiring the contractor to make available to the agency
24 the following information at the start of the contract's term and
25 updated each fiscal year:

26 (i) The name and license number, if applicable, of the contractor
27 and all subcontractors; and

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

33 (e) A waiver of confidentiality of, and agreement to provide to the
34 agency upon request, basic financial information related to the
35 contract, other than financial, commercial, or proprietary information
36 specifically exempted from disclosure to the public under RCW
37 42.56.270.

1 **Sec. 3.** RCW 39.26.180 and 2012 c 224 s 20 are each amended to read
2 as follows:

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

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

10 (b) Model complaint and protest procedures;

11 (c) Alternative dispute resolution processes;

12 (d) Incorporation of performance measures and measurable benchmarks
13 in contracts;

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

18 (f) Executing contracts using electronic signatures;

19 (g) Criteria for contract amendments;

20 (h) Postcontract procedures;

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

25 (j) Any other subject related to effective and efficient contract
26 management.

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

34 (3) An agency may enter into a contract to purchase services that
35 have been customarily and historically provided by public employees
36 only upon complying with the procedures of section 2 of this act, RCW
37 41.06.142, and any other requirements established by law.

1 (4) To the extent practicable, agencies should enter into
2 performance-based contracts. Performance-based contracts identify
3 expected deliverables and performance measures or outcomes.
4 Performance-based contracts also use appropriate techniques, which may
5 include but are not limited to, either consequences or incentives or
6 both to ensure that agreed upon value to the state is received.
7 Payment for goods and services under performance-based contracts should
8 be contingent on the contractor achieving performance outcomes.
9 Agencies must monitor performance-based contracts to ensure that all
10 aspects of the contract are being properly performed and that
11 performance standards are being achieved.

12 ((+4)) (5) An agency and contractor may execute a contract using
13 electronic signatures.

14 ((+5)) (6) As used in subsection (2) of this section, "data"
15 includes all information that supports the findings, conclusions, and
16 recommendations of the contractor's reports, including computer models
17 and the methodology for those models.

18 **Sec. 4.** RCW 43.19.008 and 2011 1st sp.s. c 43 s 104 are each
19 amended to read as follows:

20 (1) The executive powers and management of the department shall be
21 administered as described in this section.

22 (2) The executive head and appointing authority of the department
23 is the director. The director is appointed by the governor, subject to
24 confirmation by the senate. The director serves at the pleasure of the
25 governor. The director is paid a salary fixed by the governor in
26 accordance with RCW 43.03.040. If a vacancy occurs in the position of
27 director while the senate is not in session, the governor shall make a
28 temporary appointment until the next meeting of the senate at which
29 time he or she shall present to that body his or her nomination for the
30 position.

31 (3) The director may employ staff members, who are exempt from
32 chapter 41.06 RCW, and any additional staff members as are necessary to
33 administer this chapter, and such other duties as may be authorized by
34 law. The director may delegate any power or duty vested in him or her
35 by chapter 43, Laws of 2011 1st sp. sess. or other law, including
36 authority to make final decisions and enter final orders in hearings
37 conducted under chapter 34.05 RCW.

1 (4) The internal affairs of the department are under the control of
2 the director in order that the director may manage the department in a
3 flexible and intelligent manner as dictated by changing contemporary
4 circumstances. Unless specifically limited by law, the director has
5 complete charge and supervisory powers over the department. The
6 director may create the administrative structures as the director deems
7 appropriate, except as otherwise specified by law, and the director may
8 employ personnel as may be necessary in accordance with chapter 41.06
9 RCW, except as otherwise provided by law.

10 (5) Until June 30, 2018, at the beginning of each fiscal biennium,
11 the office of financial management shall conduct a review of the
12 programs and services that are performed by the department to determine
13 whether the program or service may be performed by the private sector
14 in a more cost-efficient and effective manner than being performed by
15 the department. In conducting this review, the office of financial
16 management shall:

17 (a) Examine the existing activities currently being performed by
18 the department, including but not limited to an examination of services
19 for their performance, staffing, capital requirements, and mission.
20 Programs may be broken down into discrete services or activities or
21 reviewed as a whole; and

22 (b) Examine the activities to determine which specific services are
23 available in the marketplace and what potential for efficiency gains or
24 savings exist.

25 (i) As part of the review in this subsection (5), the office of
26 financial management shall select up to six activities or services that
27 have been determined as an activity that may be provided by the private
28 sector in a cost-effective and efficient manner, including for the
29 2011-2013 fiscal biennium the bulk printing services. The office of
30 financial management may consult with affected industry stakeholders in
31 making its decision on which activities to contract for services.
32 Priority for selection shall be given to agency activities or services
33 that are significant, ongoing functions.

34 (ii) The office of financial management must consider the
35 consequences and potential mitigation of improper or failed performance
36 by the contractor.

37 (iii) For each of the selected activities, the department shall use
38 a request for information, request for proposal, or other procurement

1 process to determine if a contract for the activity would result in the
2 activity being provided at a reduced cost and with greater efficiency.
3 This must include, but is not limited to, consideration of the cost of
4 the agency staff time and resources that may be required to monitor and
5 ensure proper performance of the contract by the contractor.

6 (iv) The request for information, request for proposal, or other
7 procurement process must contain measurable standards for the
8 performance of the contract.

9 (v) If contracting out will afford taxpayers a cost savings of ten
10 percent or more of the contract value, the department may contract with
11 one or more vendors to provide the service as a result of the
12 procurement process.

13 (vi) If the office of financial management determines via the
14 procurement process that the activity cannot be provided by the private
15 sector at a reduced cost of ten percent or more and greater efficiency,
16 the department of enterprise services may cancel the procurement
17 without entering into a contract and shall promptly notify the
18 legislative fiscal committees of such a decision.

19 (vii) The department of enterprise services, in consultation with
20 the office of financial management, must establish a contract
21 monitoring process to measure contract performance, costs, service
22 delivery quality, and other contract standards, and to cancel contracts
23 that do not meet those standards. No contracts may be renewed without
24 a review of these measures.

25 (viii) The office of financial management shall prepare a biennial
26 report summarizing the results of the examination of the agency's
27 programs and services. In addition to the programs and services
28 examined and the result of the examination, the report shall provide
29 information on any procurement process that does not result in a
30 contract for the services. The biennial report must include updates
31 reporting any unanticipated costs incurred as a result of contracting
32 out pursuant to this section and an estimate of staff hours devoted by
33 employees of the office of financial management and department of
34 enterprise services in conducting the program review required by this
35 section. During each regular legislative session held in odd-numbered
36 years, the legislative fiscal committees shall hold a public hearing on
37 the report and the department's activities under this section.

1 (ix) The joint legislative audit and review committee shall conduct
2 an audit of the implementation of this subsection (5), and report to
3 the legislature by January 1, 2018, on the results of the audit. The
4 report must include an analysis and estimate of additional costs or
5 savings to taxpayers as a result of the contracting out provisions.
6 This analysis must, at a minimum, include the following:

7 (A) An estimate of the cost of performance of the selected
8 activities, if the activities had been performed by public employees;

9 (B) An estimate of the cost of performance of the contract by the
10 contractor, including the cost of any change orders or contract
11 revisions and the costs of allocating sufficient public employee staff
12 time and resources to monitor the contract and ensure its proper
13 performance by the contractor;

14 (C) An analysis of the extent to which performance objectives were
15 achieved by outsourcing the contract; and

16 (D) An assessment of potential adverse impacts on the public of
17 outsourcing the contract.

18 **Sec. 5.** RCW 39.26.200 and 2013 2nd sp.s. c 34 s 1 are each amended
19 to read as follows:

20 (1)(a) The director shall provide notice to the contractor of the
21 director's intent to debar with the specific reason for the debarment.
22 The department must establish the debarment process by rule.

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

28 (2) The director must debar a contractor where there has been a
29 finding of one or more of the following causes:

30 (a) Conviction within the previous five years for commission of a
31 criminal offense as an incident to obtaining or attempting to obtain a
32 public or private contract or subcontract, or in the performance of
33 such contract or subcontract;

34 (b) Conviction or a final determination in a civil action under
35 state or federal statutes of fraud, embezzlement, theft, forgery,
36 bribery, falsification or destruction of records, receiving stolen
37 property, violation of the federal false claims act, 31 U.S.C. Sec.

1 3729 et seq., or the state medicaid fraud false claims act, chapter
2 74.66 RCW, tax evasion, or any other offense indicating a lack of
3 business integrity or business honesty that currently, seriously, and
4 directly affects responsibility as a state contractor, where such
5 conviction of final determination occurred within the previous five
6 years;

7 (c) Conviction within the previous five years under state or
8 federal antitrust statutes arising out of the submission of bids or
9 proposals; and

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

13 (3) The director may debar a contractor based on a finding of one
14 or more of the following causes:

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

18 (b) Conviction or a final determination in a civil action under
19 state or federal statutes of fraud, embezzlement, theft, forgery,
20 bribery, falsification or destruction of records, receiving stolen
21 property, violation of the federal false claims act, 31 U.S.C. Sec.
22 3729 et seq., or the state medicaid fraud false claims act, chapter
23 74.66 RCW, tax evasion, or any other offense indicating a lack of
24 business integrity or business honesty that currently, seriously, and
25 directly affects responsibility as a state contractor;

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

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

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

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

37 (ii) A recent record of failure to perform or of unsatisfactory
38 performance in accordance with the terms of one or more contracts,

1 however the failure to perform or unsatisfactory performance caused by
2 acts beyond the control of the contractor may not be considered to be
3 a basis for debarment;

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

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

9 ~~((3))~~ (4) The director must issue a written decision to debar.
10 The decision must:

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

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

14 **Sec. 6.** RCW 39.26.020 and 2012 c 224 s 3 are each amended to read
15 as follows:

16 (1)(a) A state officer or employee of an agency who seeks to
17 acquire goods or services or who participates in those contractual
18 matters is subject to the requirements in RCW 42.52.150.

19 (b) A contractor who contracts with an agency to perform services
20 related to the acquisition of goods and services for or on behalf of
21 the state is subject to the requirements in RCW 42.52.150. A
22 contractor who has access to public resources due to a contract with an
23 agency may not use the public resources for private benefit or gain,
24 except to the extent directly contemplated by and specified in the
25 performance objectives of the contract.

26 (2) No person or entity who seeks or may seek a contract with a
27 state agency may give, loan, transfer, or deliver to any person
28 something of economic value for which receipt of such item would cause
29 a state officer or employee to be in a violation of RCW 42.52.040,
30 42.52.110, 42.52.120, 42.52.140, or 42.52.150.

31 NEW SECTION. **Sec. 7.** A new section is added to chapter 44.28 RCW
32 to read as follows:

33 (1) By December 31, 2015, and every two years thereafter, the joint
34 committee must review the performance of contracts related to two
35 projects in which services historically and traditionally performed by
36 public sector employees were outsourced to private sector or nonprofit

1 entities. The purpose of the performance review is to determine the
2 extent to which contracting these services out to the private sector
3 has resulted in the savings, efficiencies, and performance objectives
4 that were projected at the time that the outsourcing decision was made.

5 (2) The first two projects reviewed under this section must be the
6 contract outsourced to the Washington health benefit exchange call
7 center and the department of licensing's utilization of private driving
8 schools to administer driver's examinations. Upon request, the
9 department of enterprise services must provide the joint committee a
10 list of other contracts relating to services historically and
11 traditionally performed by public sector employees.

12 (3) State agencies, including those who are parties to the projects
13 listed above, the employment security department, and the department of
14 revenue, must provide to the joint committee any wage, employment, or
15 other data requested, the disclosure of which is not otherwise
16 prohibited by law.

17 NEW SECTION. **Sec. 8.** This act may be known and cited as the
18 "taxpayer protection act."

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