
SECOND SUBSTITUTE HOUSE BILL 2743

State of Washington

63rd Legislature

2014 Regular Session

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

READ FIRST TIME 02/11/14.

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, and 39.26.200; adding a new section to chapter
4 39.26 RCW; and creating new sections.

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

6 NEW SECTION. **Sec. 1.** It is the intent of the legislature to
7 increase transparency and accountability of public contracts by
8 requiring better evaluation of contract performance. Such evaluation
9 should include an assessment of whether decisions to "contract out"
10 government services to the private sector are achieving their stated
11 objectives. In addition, it is the intent of the legislature to ensure
12 that public contractors given access to state resources are held to
13 ethical standards consistent with public values.

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

16 (1) Prior to issuing a request for a proposal to contract out to
17 purchase from a private sector entity or nonprofit organization
18 services that have been customarily and historically provided by a

1 public employee or employees, an agency must conduct a comprehensive
2 impact assessment. To assist the agency in determining whether the
3 decision to contract out is justified, the comprehensive impact
4 assessment must include at a minimum the following analysis:

5 (a) An estimate of the cost of performance of the service by public
6 employees;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 (e) A waiver of confidentiality of, and agreement to provide to the
24 agency upon request, basic financial information related to the
25 contract, other than financial, commercial, or proprietary information
26 specifically exempted from disclosure to the public under RCW
27 42.56.270.

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

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

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

37 (b) Model complaint and protest procedures;

- 1 (c) Alternative dispute resolution processes;
- 2 (d) Incorporation of performance measures and measurable benchmarks
3 in contracts;
- 4 (e) Model contract terms to ensure contract performance and
5 compliance with state and federal standards, including terms to
6 facilitate recovery of the costs of public employee staff time that
7 must be expended to bring a contract into substantial compliance;
- 8 (f) Executing contracts using electronic signatures;
- 9 (g) Criteria for contract amendments;
- 10 (h) Postcontract procedures;
- 11 (i) Procedures and criteria for terminating contracts for cause or
12 otherwise, including procedures and criteria for terminating
13 performance-based contracts that are not achieving performance
14 standards; and
- 15 (j) Any other subject related to effective and efficient contract
16 management.
- 17 (2) An agency may not enter into a contract under which the
18 contractor could charge additional costs to the agency, the department,
19 the joint legislative audit and review committee, or the state auditor
20 for access to data generated under the contract. A contractor under
21 such a contract must provide access to data generated under the
22 contract to the contracting agency, the joint legislative audit and
23 review committee, and the state auditor.
- 24 (3) To the extent practicable, agencies should enter into
25 performance-based contracts. Performance-based contracts identify
26 expected deliverables and performance measures or outcomes.
27 Performance-based contracts also use appropriate techniques, which may
28 include but are not limited to, either consequences or incentives or
29 both to ensure that agreed upon value to the state is received.
30 Payment for goods and services under performance-based contracts should
31 be contingent on the contractor achieving performance outcomes.
32 Agencies must monitor performance-based contracts to ensure that all
33 aspects of the contract are being properly performed and that
34 performance standards are being achieved.
- 35 (4) An agency and contractor may execute a contract using
36 electronic signatures.
- 37 (5) As used in subsection (2) of this section, "data" includes all

1 information that supports the findings, conclusions, and
2 recommendations of the contractor's reports, including computer models
3 and the methodology for those models.

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

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

8 (2) The executive head and appointing authority of the department
9 is the director. The director is appointed by the governor, subject to
10 confirmation by the senate. The director serves at the pleasure of the
11 governor. The director is paid a salary fixed by the governor in
12 accordance with RCW 43.03.040. If a vacancy occurs in the position of
13 director while the senate is not in session, the governor shall make a
14 temporary appointment until the next meeting of the senate at which
15 time he or she shall present to that body his or her nomination for the
16 position.

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

24 (4) The internal affairs of the department are under the control of
25 the director in order that the director may manage the department in a
26 flexible and intelligent manner as dictated by changing contemporary
27 circumstances. Unless specifically limited by law, the director has
28 complete charge and supervisory powers over the department. The
29 director may create the administrative structures as the director deems
30 appropriate, except as otherwise specified by law, and the director may
31 employ personnel as may be necessary in accordance with chapter 41.06
32 RCW, except as otherwise provided by law.

33 (5) Until June 30, 2018, at the beginning of each fiscal biennium,
34 the office of financial management shall conduct a review of the
35 programs and services that are performed by the department to determine
36 whether the program or service may be performed by the private sector

1 in a more cost-efficient and effective manner than being performed by
2 the department. In conducting this review, the office of financial
3 management shall:

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

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

12 (i) As part of the review in this subsection (5), the office of
13 financial management shall select up to six activities or services that
14 have been determined as an activity that may be provided by the private
15 sector in a cost-effective and efficient manner, including for the
16 2011-2013 fiscal biennium the bulk printing services. The office of
17 financial management may consult with affected industry stakeholders in
18 making its decision on which activities to contract for services.
19 Priority for selection shall be given to agency activities or services
20 that are significant, ongoing functions.

21 (ii) The office of financial management must consider the
22 consequences and potential mitigation of improper or failed performance
23 by the contractor.

24 (iii) For each of the selected activities, the department shall use
25 a request for information, request for proposal, or other procurement
26 process to determine if a contract for the activity would result in the
27 activity being provided at a reduced cost and with greater efficiency.
28 This must include, but is not limited to, consideration of the cost of
29 the agency staff time and resources that may be required to monitor and
30 ensure proper performance of the contract by the contractor.

31 (iv) The request for information, request for proposal, or other
32 procurement process must contain measurable standards for the
33 performance of the contract.

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

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

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

13 (viii) The office of financial management shall prepare a biennial
14 report summarizing the results of the examination of the agency's
15 programs and services. In addition to the programs and services
16 examined and the result of the examination, the report shall provide
17 information on any procurement process that does not result in a
18 contract for the services. The biennial report must include updates
19 reporting any unanticipated costs incurred as a result of contracting
20 out pursuant to this section and an estimate of staff hours devoted by
21 employees of the office of financial management and department of
22 enterprise services in conducting the program review required by this
23 section. During each regular legislative session held in odd-numbered
24 years, the legislative fiscal committees shall hold a public hearing on
25 the report and the department's activities under this section.

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

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

34 (B) An estimate of the cost of performance of the contract by the
35 contractor, including the cost of any change orders or contract
36 revisions and the costs of allocating sufficient public employee staff
37 time and resources to monitor the contract and ensure its proper
38 performance by the contractor;

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

3 (D) An assessment of potential adverse impacts on the public of
4 outsourcing the contract.

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

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

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

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

17 (a) Conviction within the previous five years for commission of a
18 criminal offense as an incident to obtaining or attempting to obtain a
19 public or private contract or subcontract, or in the performance of
20 such contract or subcontract;

21 (b) Conviction or a final determination in a civil action under
22 state or federal statutes of fraud, embezzlement, theft, forgery,
23 bribery, falsification or destruction of records, receiving stolen
24 property, violation of the federal false claims act, 31 U.S.C. Sec.
25 3729 et seq., or the state medicaid fraud false claims act, chapter
26 74.66 RCW, or any other offense indicating a lack of business integrity
27 or business honesty that currently, seriously, and directly affects
28 responsibility as a state contractor, where such conviction of final
29 determination occurred within the previous five years;

30 (c) Conviction within the previous five years under state or
31 federal antitrust statutes arising out of the submission of bids or
32 proposals; and

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

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

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

4 (b) Conviction or a final determination in a civil action under
5 state or federal statutes of fraud, embezzlement, theft, forgery,
6 bribery, falsification or destruction of records, receiving stolen
7 property, violation of the federal false claims act, 31 U.S.C. Sec.
8 3729 et seq., or the state medicaid fraud false claims act, chapter
9 74.66 RCW, or any other offense indicating a lack of business integrity
10 or business honesty that currently, seriously, and directly affects
11 responsibility as a state contractor;

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

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

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

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

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

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

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

33 (~~((3))~~) (4) The director must issue a written decision to debar.
34 The decision must:

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

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

1 NEW SECTION. **Sec. 6.** This act may be known and cited as the
2 "taxpayer protection act."

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