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HOUSE BILL 2743

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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 01/30/14. Referred to Committee on Government Operations & Elections.

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;

8       (b) Model complaint and protest procedures;

9       (c) Alternative dispute resolution processes;

10       (d) Incorporation of performance measures and measurable benchmarks  
11 in contracts;

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

16       (f) Executing contracts using electronic signatures;

17       (g) Criteria for contract amendments;

18       (h) Postcontract procedures;

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

23       (j) Any other subject related to effective and efficient contract  
24 management.

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

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

36       (4) To the extent practicable, agencies should enter into  
37 performance-based contracts. Performance-based contracts identify  
38 expected deliverables and performance measures or outcomes.

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

9 ((+4)) (5) An agency and contractor may execute a contract using  
10 electronic signatures.

11 ((+5)) (6) As used in subsection (2) of this section, "data"  
12 includes all information that supports the findings, conclusions, and  
13 recommendations of the contractor's reports, including computer models  
14 and the methodology for those models.

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

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

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

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

35 (4) The internal affairs of the department are under the control of  
36 the director in order that the director may manage the department in a  
37 flexible and intelligent manner as dictated by changing contemporary

1 circumstances. Unless specifically limited by law, the director has  
2 complete charge and supervisory powers over the department. The  
3 director may create the administrative structures as the director deems  
4 appropriate, except as otherwise specified by law, and the director may  
5 employ personnel as may be necessary in accordance with chapter 41.06  
6 RCW, except as otherwise provided by law.

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

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

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

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

31 (ii) The office of financial management must consider the  
32 consequences and potential mitigation of improper or failed performance  
33 by the contractor.

34 (iii) For each of the selected activities, the department shall use  
35 a request for information, request for proposal, or other procurement  
36 process to determine if a contract for the activity would result in the  
37 activity being provided at a reduced cost and with greater efficiency.

1 This must include, but is not limited to, consideration of the cost of  
2 the agency staff time and resources that may be required to monitor and  
3 ensure proper performance of the contract by the contractor.

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

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

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

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

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

36 (ix) The joint legislative audit and review committee shall conduct  
37 an audit of the implementation of this subsection (5), and report to  
38 the legislature by January 1, 2018, on the results of the audit. The

1 report must include an analysis and estimate of additional costs or  
2 savings to taxpayers as a result of the contracting out provisions.  
3 This analysis must, at a minimum, include the following:

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

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

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

13 (D) An assessment of potential adverse impacts on the public of  
14 outsourcing the contract.

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

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

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

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

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

31 (b) Conviction or a final determination in a civil action under  
32 state or federal statutes of fraud, embezzlement, theft, forgery,  
33 bribery, falsification or destruction of records, receiving stolen  
34 property, violation of the federal false claims act, 31 U.S.C. Sec.  
35 3729 et seq., or the state medicaid fraud false claims act, chapter  
36 74.66 RCW, tax evasion, or any other offense indicating a lack of  
37 business integrity or business honesty that currently, seriously, and

1 directly affects responsibility as a state contractor, where such  
2 conviction of final determination occurred within the previous five  
3 years;

4 (c) Conviction within the previous five years under state or  
5 federal antitrust statutes arising out of the submission of bids or  
6 proposals; and

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

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

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

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

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

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

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

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

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

1 (f) Violation of ethical standards set forth in RCW 39.26.020; and  
2 (g) Any other cause the director determines to be so serious and  
3 compelling as to affect responsibility as a state contractor, including  
4 debarment by another governmental entity for any cause listed in  
5 regulations.

6 ~~((3))~~ (4) The director must issue a written decision to debar.  
7 The decision must:

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

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

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

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

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

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

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

30 (1) By December 31, 2015, and every two years thereafter, the joint  
31 committee must review the performance of contracts related to two  
32 projects in which services historically and traditionally performed by  
33 public sector employees were outsourced to private sector or nonprofit  
34 entities. The purpose of the performance review is to determine the  
35 extent to which contracting these services out to the private sector

1 has resulted in the savings, efficiencies, and performance objectives  
2 that were projected at the time that the outsourcing decision was made.

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

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

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

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