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By Representatives S. Hunt, Harris, MacEwen, Walkinshaw, Sells, Goodman, Moscoso, Reykdal, Robinson, Kilduff, Fitzgibbon, Hayes, Hudgins, Tarleton, Appleton, Ormsby, Pollet, and Bergquist

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1 AN ACT Relating to protecting taxpayers by providing for
2 accountability and transparency in government contracting; amending
3 RCW 39.26.180, 43.19.008, and 39.26.200; adding a new section to
4 chapter 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
12 ensure that public contractors given access to state resources are
13 held to ethical standards consistent with public values.

14 NEW SECTION. **Sec. 2.** A new section is added to chapter 39.26
15 RCW 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
19 public employee or employees, an agency must conduct a comprehensive
20 impact assessment. To assist the agency in determining whether the

1 decision to contract out is justified, the comprehensive impact
2 assessment must include at a minimum the following analysis:

3 (a) An estimate of the cost of performance of the service by
4 public employees;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 (b) Model complaint and protest procedures;

39 (c) Alternative dispute resolution processes;

1 (d) Incorporation of performance measures and measurable
2 benchmarks in contracts;

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

7 (f) Executing contracts using electronic signatures;

8 (g) Criteria for contract amendments;

9 (h) Postcontract procedures;

10 (i) Procedures and criteria for terminating contracts for cause
11 or otherwise, including procedures and criteria for terminating
12 performance-based contracts that are not achieving performance
13 standards; and

14 (j) Any other subject related to effective and efficient contract
15 management.

16 (2) An agency may not enter into a contract under which the
17 contractor could charge additional costs to the agency, the
18 department, the joint legislative audit and review committee, or the
19 state auditor for access to data generated under the contract. A
20 contractor under such a contract must provide access to data
21 generated under the contract to the contracting agency, the joint
22 legislative audit and review committee, and the state auditor.

23 (3) To the extent practicable, agencies should enter into
24 performance-based contracts. Performance-based contracts identify
25 expected deliverables and performance measures or outcomes.
26 Performance-based contracts also use appropriate techniques, which
27 may include but are not limited to, either consequences or incentives
28 or both to ensure that agreed upon value to the state is received.
29 Payment for goods and services under performance-based contracts
30 should be contingent on the contractor achieving performance
31 outcomes. Agencies must monitor performance-based contracts to ensure
32 that all aspects of the contract are being properly performed and
33 that performance standards are being achieved.

34 (4) An agency and contractor may execute a contract using
35 electronic signatures.

36 (5) As used in subsection (2) of this section, "data" includes
37 all information that supports the findings, conclusions, and
38 recommendations of the contractor's reports, including computer
39 models and the methodology for those models.

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

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

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

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

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

31 (5) Until June 30, 2018, at the beginning of each fiscal
32 biennium, the office of financial management shall conduct a review
33 of the programs and services that are performed by the department to
34 determine whether the program or service may be performed by the
35 private sector in a more cost-efficient and effective manner than
36 being performed by the department. In conducting this review, the
37 office of financial management shall:

38 (a) Examine the existing activities currently being performed by
39 the department, including but not limited to an examination of
40 services for their performance, staffing, capital requirements, and

1 mission. Programs may be broken down into discrete services or
2 activities or reviewed as a whole; and

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

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

15 (ii) The office of financial management must consider the
16 consequences and potential mitigation of improper or failed
17 performance by the contractor.

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

26 (iv) The request for information, request for proposal, or other
27 procurement process must contain measurable standards for the
28 performance of the contract.

29 (v) If contracting out will afford taxpayers a cost savings, the
30 department may contract with one or more vendors to provide the
31 service as a result of the procurement process.

32 (vi) If the office of financial management determines via the
33 procurement process that the activity cannot be provided by the
34 private sector at a reduced cost and greater efficiency, the
35 department of enterprise services may cancel the procurement without
36 entering into a contract and shall promptly notify the legislative
37 fiscal committees of such a decision.

38 (vii) The department of enterprise services, in consultation with
39 the office of financial management, must establish a contract
40 monitoring process to measure contract performance, costs, service

1 delivery quality, and other contract standards, and to cancel
2 contracts that do not meet those standards. No contracts may be
3 renewed without a review of these measures.

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

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

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

26 (B) An estimate of the cost of performance of the contract by the
27 contractor, including the cost of any change orders or contract
28 revisions and the costs of allocating sufficient public employee
29 staff time and resources to monitor the contract and ensure its
30 proper performance by the contractor;

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

33 (D) An assessment of potential adverse impacts on the public of
34 outsourcing the contract.

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

37 (1)(a) The director shall provide notice to the contractor of the
38 director's intent to either debar, fine, or both, with the specific

1 reason for either the debarment, fine, or both. The department must
2 establish the debarment and fining process by rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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