
HOUSE BILL 1851

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By Representatives Dolan, Harris, Hudgins, MacEwen, Kilduff, Haler, Robinson, Bergquist, Fitzgibbon, Doglio, Pollet, Ormsby, and Stanford

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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.

1 (a) To assist the agency in determining whether the decision to
2 contract out is beneficial, the comprehensive impact assessment must
3 include at a minimum the following analysis:

4 (i) An estimate of the cost of performance of the service by
5 public employees, including the fully allocated costs of the service,
6 the cost of the employees' salaries and benefits, space, equipment,
7 materials, and other costs necessary to perform the function. The
8 estimate shall not include the state's indirect overhead costs unless
9 those costs can be attributed directly to the function in question
10 and would not exist if that function were not performed in state
11 service;

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

16 (iii) A statement of the performance objectives to be achieved by
17 contracting with a private sector or nonprofit entity.

18 (b) The comprehensive assessment may also include an assessment
19 of the potential adverse impacts on the public from outsourcing the
20 contract, such as loss of employment, effect on social services and
21 public assistance programs, economic impacts on local businesses and
22 local tax revenues, and environmental impacts.

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

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

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

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

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

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

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

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

11 (a) A cancellation clause allowing the state agency to cancel a
12 contract if the contractor fails to meet quality standards or budget
13 specifications;

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

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

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

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

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

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

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

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

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

8 (b) Model complaint and protest procedures;

9 (c) Alternative dispute resolution processes;

10 (d) Incorporation of performance measures and measurable
11 benchmarks 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
20 or 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
27 department, the joint legislative audit and review committee, or the
28 state auditor for access to data generated under the contract. A
29 contractor under such a contract must provide access to data
30 generated under the contract to the contracting agency, the joint
31 legislative audit and review committee, and the state auditor.

32 (3) To the extent practicable, agencies should enter into
33 performance-based contracts. Performance-based contracts identify
34 expected deliverables and performance measures or outcomes.
35 Performance-based contracts also use appropriate techniques, which
36 may include but are not limited to, either consequences or incentives
37 or both to ensure that agreed upon value to the state is received.
38 Payment for goods and services under performance-based contracts
39 should be contingent on the contractor achieving performance
40 outcomes. Agencies must monitor performance-based contracts to ensure

1 that all aspects of the contract are being properly performed and
2 that performance standards are being achieved.

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

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

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

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

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

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

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

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

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

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

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

25 (ii) The office of financial management must consider the
26 consequences and potential mitigation of improper or failed
27 performance by the contractor.

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

36 (iv) The request for information, request for proposal, or other
37 procurement process must contain measurable standards for the
38 performance of the contract.

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

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

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

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

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

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

38 (B) An estimate of the cost of performance of the contract by the
39 contractor, including the cost of any change orders or contract
40 revisions and the costs of allocating sufficient public employee

1 staff time and resources to monitor the contract and ensure its
2 proper performance by the contractor;

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

5 (D) An assessment of potential adverse impacts on the public of
6 outsourcing the contract.

7 **Sec. 5.** RCW 39.26.200 and 2015 c 44 s 1 are each amended to read
8 as follows:

9 (1)(a) The director shall provide notice to the contractor of the
10 director's intent to either fine or debar with the specific reason
11 for either the fine or debarment. The department must establish the
12 debarment and fining processes by rule.

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

18 (2) The director may either fine or debar a contractor based on a
19 finding of one or more of the following causes:

20 (a) Conviction for commission of a criminal offense as an
21 incident to obtaining or attempting to obtain a public or private
22 contract or subcontract, or in the performance of such contract or
23 subcontract;

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

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

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

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

1 (i) Deliberate failure without good cause to perform in
2 accordance with the specifications or within the time limit provided
3 in the contract; or

4 (ii) A recent record of failure to perform or of unsatisfactory
5 performance in accordance with the terms of one or more contracts,
6 however the failure to perform or unsatisfactory performance caused
7 by acts beyond the control of the contractor may not be considered to
8 be a basis for debarment;

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

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

15 (3) The director must issue a written decision to debar. The
16 decision must:

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

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

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

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