H-2225.1

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**SECOND SUBSTITUTE HOUSE BILL 1521**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** House Appropriations (originally sponsored by Representatives Dolan, Harris, Valdez, Frame, Caldier, MacEwen, Griffey, Blake, Sells, Tarleton, Fitzgibbon, Ryu, Kilduff, and Ormsby)

AN ACT Relating to protecting taxpayers by providing for accountability and transparency in government contracting; amending RCW 41.06.142, 39.26.200, and 39.26.180; adding a new section to chapter 39.26 RCW; and creating new sections.

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

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

The legislature finds that prior to July 1, 2005, state agencies and institutions of higher education were prohibited from contracting out for services regularly and historically provided by classified state employees. Effective July 1, 2005, the personnel system reform act of 2002 lifted the prohibition, authorizing state agencies and institutions of higher education to contract out for services customarily and historically provided by classified state employees. It is therefore the intent of the legislature that this act be applied only to government services that have, since July 1, 2005, been customarily and historically performed by state employees in the classified service under chapter 41.06 RCW.

**Sec.**  RCW 41.06.142 and 2011 1st sp.s. c 43 s 408 are each amended to read as follows:

(1) If any department, agency, or institution of higher education ((~~may purchase~~)) intends to contract for services((~~, including services~~)) that, since July 1, 2005, have been customarily and historically provided by employees in the classified service under this chapter, a department, agency, or institution of higher education may do so by contracting with individuals, nonprofit organizations, businesses, employee business units, or other entities if the following criteria are met:

(a) A comprehensive impact assessment is completed by the agency, department, or institution of higher education to assist it in determining whether the decision to contract out is beneficial.

(i) The comprehensive impact assessment must include at a minimum the following analysis:

(A) An estimate of the cost of performance of the service by employees, including the fully allocated costs of the service, the cost of the employees' salaries and benefits, space, equipment, materials, and other costs necessary to perform the function. The estimate must not include the state's indirect overhead costs unless those costs can be attributed directly to the function in question and would not exist if that function were not performed in state service;

(B) An estimate of the cost of performance of the services if contracted out, including the cost of administration of the program and allocating sufficient employee staff time and resources to monitor the contract and ensure its proper performance by the contractor;

(C) The reason for proposing to contract out, including the objective the agency would like to achieve; and

(D) The reasons for the determination made under (e) of this subsection.

(ii) When the contract will result in termination of state employees or elimination of state positions, the comprehensive impact assessment may also include an assessment of the potential adverse impacts on the public from outsourcing the contract, such as loss of employment, effect on social services and public assistance programs, economic impacts on local businesses and local tax revenues, and environmental impacts;

(b) The invitation for bid or request for proposal contains measurable standards for the performance of the contract;

((~~(b)~~)) (c) Employees ((~~in the classified service~~)) whose positions or work would be displaced by the contract are provided an opportunity to offer alternatives to purchasing services by contract and, if these alternatives are not accepted, compete for the contract under competitive contracting procedures in subsection ((~~(4)~~)) (7) of this section;

((~~(c) The contract with an entity other than an employee business unit includes a provision requiring the entity to consider employment of state employees who may be displaced by the contract;~~))

(d) The department, agency, or institution of higher education has established a contract monitoring process to measure contract performance, costs, service delivery quality, and other contract standards, and to cancel contracts that do not meet those standards; and

(e) The department, agency, or institution of higher education has determined that the contract results in savings or efficiency improvements. The contracting agency, department, or institution of higher education must consider the consequences and potential mitigation of improper or failed performance by the contractor.

(2)(a) The agency, department, or institution of higher education must post on its web site the request for proposal, the contract or a statement that the agency, department, or institution of higher education did not move forward with contracting out, and the comprehensive impact assessment pursuant to subsection (1) of this section.

(b) The agency, department, or institution of higher education must maintain the information in (a) of this subsection in its files in accordance with the record retention schedule under RCW 40.14.060.

(3) Every five years or upon completion of the contract, whichever comes first, the agency, department, or institution of higher education must prepare and maintain in the contract file a report, which must include at a minimum the following information:

(a) Documentation of the contractor's performance as measured by the itemized performance standards;

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

(c) A report of any remedial actions that were taken to enforce compliance with the contract, together with an estimate of the cost incurred by the agency, department, or institution of higher education in enforcing such compliance.

(4) In addition to any other terms required by law, the terms of any agreement to contract out a service pursuant to this section must include terms that address the following:

(a) The contract's contract management provision must allow review of the contractor's performance;

(b) The contract's termination clauses must allow termination of the contract if the contractor fails to meet the terms of the contract, including failure to meet performance standards or failure to provide the services at the contracted price;

(c) The contract's damages provision must allow recovery of direct damages and**,** when applicable, indirect damages that the agency, department, or institution of higher education incurs due to the contractor's breach of the agreement;

(d) If the contractor will be using a subcontractor for performance of services under the contract, the contract must allow the agency, department, or institution of higher education to obtain information about the subcontractor, as applicable to the performance of services under the agreement; and

(e) A provision requiring the contractor to consider employment of employees who may be displaced by the contract, if the contract is with an entity other than an employee business unit.

(5) Any provision contrary to or in conflict with this section in any collective bargaining agreement in effect on July 1, 2005, is not effective beyond the expiration date of the agreement.

((~~(3)~~)) (6) Contracting for services that is expressly mandated by the legislature, including contracts for fire suppression awarded by the department of natural resources under RCW 76.04.181, or was authorized by law prior to July 1, 2005, including contracts and agreements between public entities, shall not be subject to the processes set forth in subsections (1)((~~,~~)) through (4), (7), and ((~~(5)~~)) (8) of this section.

((~~(4)~~)) (7) Competitive contracting shall be implemented as follows:

(a) At least ninety days prior to the date the contracting agency, department, or institution of higher education requests bids from private entities for a contract for services provided by ((~~classified~~)) employees, the contracting agency, department, or institution of higher education shall notify the ((~~classified~~)) employees whose positions or work would be displaced by the contract. The employees shall have sixty days from the date of notification to offer alternatives to purchasing services by contract, and the agency, department, or institution of higher education shall consider the alternatives before requesting bids.

(b) If the employees decide to compete for the contract, they shall notify the contracting agency, department, or institution of higher education of their decision. Employees must form one or more employee business units for the purpose of submitting a bid or bids to perform the services.

(c) The department of enterprise services, with the advice and assistance of the office of financial management, shall develop and make available to employee business units training in the bidding process and general bid preparation.

(d) The director of enterprise services, with the advice and assistance of the office of financial management, shall, by rule, establish procedures to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service. Such rules shall include, but not be limited to: (i) Prohibitions against participation in the bid evaluation process by employees who prepared the business unit's bid or who perform any of the services to be contracted; (ii) provisions to ensure no bidder receives an advantage over other bidders and that bid requirements are applied equitably to all parties; and (iii) procedures that require the contracting agency, department, or institution of higher education to receive complaints regarding the bidding process and to consider them before awarding the contract. Appeal of an agency's, department's, or institution of higher education's actions under this subsection is an adjudicative proceeding and subject to the applicable provisions of chapter 34.05 RCW, the administrative procedure act, with the final decision to be rendered by an administrative law judge assigned under chapter 34.12 RCW.

(e) An employee business unit's bid must include the fully allocated costs of the service, including the cost of the employees' salaries and benefits, space, equipment, materials, and other costs necessary to perform the function. An employee business unit's cost shall not include the state's indirect overhead costs unless those costs can be attributed directly to the function in question and would not exist if that function were not performed in state service.

(f) A department, agency, or institution of higher education may contract with the department of enterprise services to conduct the bidding process.

((~~(5)~~)) (8)(a) As used in this section:

((~~(a)~~)) (i) "Employee business unit" means a group of employees who perform services to be contracted under this section and who submit a bid for the performance of those services under subsection ((~~(4)~~)) (7) of this section.

((~~(b)~~)) (ii) "Indirect overhead costs" means the pro rata share of existing agency administrative salaries and benefits, and rent, equipment costs, utilities, and materials associated with those administrative functions.

((~~(c)~~)) (iii) "Competitive contracting" means the process by which ((~~classified~~)) employees of a department, agency, or institution of higher education compete with businesses, individuals, nonprofit organizations, or other entities for contracts authorized by subsection (1) of this section.

((~~(6)~~)) (b) Unless otherwise specified, for the purpose of this act, "employee" means state employees in the classified service under this chapter except employees in the Washington management service as defined under RCW 41.06.022 and 41.06.500.

(9) The processes set forth in subsections (1)(a), (2), (3), and (4)(a) through (d) of this section do not apply to contracts:

(a) Awarded for the purposes of or by the department of transportation;

(b) With an estimated cost of contract performance of twenty thousand dollars or less; or

(c) Awarded on major projects, as defined by the office of financial management, for services related to construction, architecture, engineering, and land surveying.

(10) The processes set forth in subsections (1)((~~,~~)) through (4), (7), and ((~~(5)~~)) (8) of this section do not apply to:

(a) RCW 74.13.031((~~(5)~~)) (6); and

(b) The acquisition of printing services by a state agency((~~; and~~

~~(c) Contracting for services or activities by the department of enterprise services under RCW 43.19.008 and the department may continue to contract for such services and activities after June 30, 2018~~)).

((~~(7)~~)) (11) The processes set forth in subsections (1)((~~,~~)) through (4), (7), and ((~~(5)~~)) (8) of this section do not apply to the consolidated technology services agency when contracting for services or activities as follows:

(a) Contracting for services and activities that are necessary to establish, operate, or manage the state data center, including architecture, design, engineering, installation, and operation of the facility that are approved by the technology services board created in RCW ((~~43.41A.070~~)) 43.105.285.

(b) Contracting for services and activities recommended by the chief information officer through a business plan and approved by the technology services board created in RCW ((~~43.41A.070~~)) 43.105.285.

**Sec.**  RCW 39.26.200 and 2017 3rd sp.s. c 1 s 996 are each amended to read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

(h) During the 2017-2019 fiscal biennium, the failure to comply with a provision in a state master contract or other agreement with a state agency that requires equality among its workers by ensuring similarly employed individuals are compensated as equals.

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

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

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

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

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

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

(b) Model complaint and protest procedures;

(c) Alternative dispute resolution processes;

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

(e) Model contract terms to ensure contract performance and compliance with state and federal standards, including terms to facilitate recovery of the costs of employee staff time that must be expended to bring a contract into substantial compliance, and terms required under RCW 41.06.142;

(f) Executing contracts using electronic signatures;

(g) Criteria for contract amendments;

(h) Postcontract procedures;

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

(j) A requirement that agencies, departments, and institutions of higher education monitor performance-based contracts, including contracts awarded pursuant to RCW 41.06.142, to ensure that all aspects of the contract are being properly performed and that performance standards are being achieved; and

(k) Any other subject related to effective and efficient contract management.

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

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

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

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

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

An agency, department, or institution of higher education that intends to contract out, or does contract out, for services that, since July 1, 2005, have been customarily and historically performed by employees in the classified service defined in RCW 41.06.020 must follow procedures and meet criteria established under RCW 41.06.142.

NEW SECTION. **Sec.**  This act is prospective and applies only to contracts commenced on or after the effective date of this section. Contracts in effect prior to the effective date of this section remain unaffected by this act through their expiration date.

NEW SECTION. **Sec.**  If specific funding for the purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2019, in the omnibus appropriations act, this act is null and void.

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