

E2SHB 1851 - S COMM AMD

By Committee on State Government, Tribal Relations & Elections

1 Strike everything after the enacting clause and insert the
2 following:

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

11 **Sec. 2.** RCW 41.06.142 and 2011 1st sp.s. c 43 s 408 are each
12 amended to read as follows:

13 (1) Any department, agency, or institution of higher education
14 may purchase services, including services that have been customarily
15 and historically provided by employees in the classified service
16 under this chapter or by employees included in the Washington
17 management service as defined in RCW 41.06.022 and 41.06.500, by
18 contracting with individuals, nonprofit organizations, businesses,
19 employee business units, or other entities if the following criteria
20 are met:

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

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

26 (A) An estimate of the cost of performance of the service by
27 employees, including the fully allocated costs of the service, the
28 cost of the employees' salaries and benefits, space, equipment,
29 materials, and other costs necessary to perform the function. The
30 estimate must not include the state's indirect overhead costs unless
31 those costs can be attributed directly to the function in question

1 and would not exist if that function were not performed in state
2 service;

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

7 (C) A statement of the performance objectives to be achieved by
8 contracting with a private sector or nonprofit entity.

9 (ii) The comprehensive assessment may also include an assessment
10 of the potential adverse impacts on the public from outsourcing the
11 contract, such as loss of employment, effect on social services and
12 public assistance programs, economic impacts on local businesses and
13 local tax revenues, and environmental impacts;

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

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

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

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

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

35 (2)(a) An agency, department, or institution of higher education
36 must prepare a written record of the basis of the decision to
37 contract out a service that has been customarily and historically
38 provided by employees. The written record must include the
39 comprehensive impact assessment under subsection (1)(a) of this
40 section, an itemization of performance standards contained in the

1 contract pursuant to subsection (1)(b) of this section, an
2 explanation of why alternatives were not accepted pursuant to
3 subsection (1)(c) of this section, and an explanation of the
4 determinations and the considerations made under subsection (1)(e) of
5 this section.

6 (b) Upon entering an agreement to contract out for a service that
7 has been customarily and historically provided by employees, the
8 agency, department, or institution of higher education must provide
9 the written record of the basis of the agency's decision to the
10 department of enterprise services and the office of financial
11 management. The department of enterprise services must post the
12 reports on its web site.

13 (c) The agency, department, or institution of higher education
14 must maintain the written record in the agency's files in accordance
15 with the record retention schedule under RCW 40.14.060.

16 (3) Every five years or upon completion of the contract,
17 whichever comes first, the agency, department, or institution of
18 higher education must prepare and file with the department of
19 enterprise services a report, which must include at a minimum the
20 following information:

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

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

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

29 (4) In addition to any other terms required by law, the terms of
30 any agreement to contract out a service that has been customarily and
31 historically provided by employees must include the following:

32 (a) A cancellation clause allowing the state agency to cancel a
33 contract if the contractor fails to meet quality standards or budget
34 specifications;

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

37 (c) Terms requiring the contractor to compensate the agency,
38 department, or institution of higher education for employees' hours
39 expended in achieving full performance of a contract that has failed
40 inspection, that the contractor has failed to complete on schedule,

1 or that has not been completed in a manner that is consistent with
2 quality standards;

3 (d) A term requiring the contractor to make available to the
4 agency, department, or institution of higher education the following
5 information at the start of the contract's term and updated each
6 fiscal year:

7 (i) The name and unified business identifier number, if
8 applicable, of the contractor and all subcontractors;

9 (ii) A list of individuals or entities performing the services
10 under the contract, reflected as full-time equivalent positions,
11 including the hourly wage rate for each position, and the status of
12 the individual as an employee of the contractor or subcontractor,
13 subcontractor, independent contractor, or consultant; and

14 (iii) An agreement that the contractor provide to the agency,
15 department, or institution of higher education upon request, basic
16 financial information related to the contract, other than financial,
17 commercial, or proprietary information specifically exempted from
18 disclosure to the public under RCW 42.56.270; and

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

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

25 ~~((+3))~~ (6) Contracting for services that is expressly mandated
26 by the legislature, including contracts for fire suppression awarded
27 by the department of natural resources under RCW 76.04.181, or was
28 authorized by law prior to July 1, 2005, including contracts and
29 agreements between public entities, shall not be subject to the
30 processes set forth in subsections (1)~~((7))~~ through (4), ~~(7)~~, and
31 ~~((+5))~~ (9) of this section.

32 ~~((+4))~~ (7) Competitive contracting shall be implemented as
33 follows:

34 (a) At least ninety days prior to the date the contracting agency
35 requests bids from private entities for a contract for services
36 provided by ~~((classified))~~ employees, the contracting agency shall
37 notify the ~~((classified))~~ employees whose positions or work would be
38 displaced by the contract. The employees shall have sixty days from
39 the date of notification to offer alternatives to purchasing services

1 by contract, and the agency, department, or institution of higher
2 education shall consider the alternatives before requesting bids.

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

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

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

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

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

1 ~~((+5))~~ (8) The department of enterprise services must maintain
2 uniform policies and procedures for the effective and efficient
3 management of contracts by all state agencies, pursuant to RCW
4 39.26.180. The department of enterprise services must also include in
5 the policy and procedures maintained:

6 (a) In the precontract procedures for selecting potential
7 contractors based on qualifications and ability to perform,
8 procedures to ensure compliance with chapter 39.19 RCW, providing for
9 participation of minority and women-owned businesses;

10 (b) In model contract terms to ensure contract performance and
11 compliance with state and federal standards, terms to facilitate
12 recovery of the costs of employee staff time that must be expended to
13 bring a contract into substantial compliance;

14 (c) In the procedures and criteria for terminating contracts,
15 procedures and criteria for terminating performance-based contracts
16 that are not achieving performance standards; and

17 (d) A requirement that agencies, departments, and institutions of
18 higher education monitor performance-based contracts to ensure that
19 all aspects of the contract are being properly performed and that
20 performance standards are being achieved.

21 (9) As used in this section:

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

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

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

35 ~~((+6))~~ (d) "Employee" means state employees in the classified
36 service under this chapter and state employees included in the
37 Washington management service under RCW 41.06.022 and 41.06.500,
38 unless otherwise specified.

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

1 awarded for the purposes of or by the department of transportation,
2 or to contracts with an estimated cost of contract performance of
3 twenty thousand dollars or less.

4 (11) The processes set forth in subsections (1)~~((7))~~ through (4),
5 (7), and ~~((5))~~ (9) of this section do not apply to:

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

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

8 (c) ~~((Contracting for services or activities by the department of~~
9 ~~enterprise services under RCW 43.19.008 and the department may~~
10 ~~continue to contract for such services and activities after June 30,~~
11 ~~2018)) Contracts awarded on major projects, as defined by the office~~
12 ~~of financial management, for services related to construction,~~
13 ~~architecture, engineering, and land surveying.~~

14 ~~((7))~~ (12) The processes set forth in subsections (1)~~((7))~~
15 through (4), (7), and ~~((5))~~ (9) of this section do not apply to the
16 consolidated technology services agency when contracting for services
17 or activities as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 NEW SECTION. **Sec. 4.** A new section is added to chapter 39.26
4 RCW to read as follows:

5 An agency, department, or institution of higher education that
6 intends to contract out, or does contract out, for services
7 customarily and historically provided by employees in the classified
8 service defined in RCW 41.06.020 or employees included in the
9 Washington management service under RCW 41.06.022 and 41.06.500 must
10 follow procedures and meet criteria established under RCW 41.06.142.

11 NEW SECTION. **Sec. 5.** A new section is added to chapter 44.28
12 RCW to read as follows:

13 The joint legislative audit and review committee shall conduct a
14 program and fiscal review of the changes made by chapter . . . , Laws
15 of 2018 (this act). This program and fiscal review shall be completed
16 and a preliminary report prepared during the 2022 calendar year.
17 These reports shall be prepared in the manner set forth in RCW
18 44.28.071 and 44.28.075. Upon completion of its preliminary report,
19 the joint legislative audit and review committee shall transmit
20 copies of the report to the office of financial management and any
21 affected entities. The final report shall include the response, if
22 any, of the affected entities and the office of financial management
23 in the same manner as set forth in RCW 44.28.088, except the affected
24 entities and the office of financial management shall have sixty days
25 to respond to the report. The joint legislative audit and review
26 committee shall transmit the final report to the legislature, to the
27 state entities affected, to the governor, and to the state library."

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28 On page 1, line 2 of the title, after "contracting;" strike the
29 remainder of the title and insert "amending RCW 41.06.142 and
30 39.26.200; adding a new section to chapter 39.26 RCW; adding a new
31 section to chapter 44.28 RCW; and creating a new section."

EFFECT: Provides an exemption for contracts awarded on major projects, as defined by the Office of Financial Management, for services related to construction, architecture, engineering, and land surveying.

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