

HOUSE BILL REPORT

ESHB 1851

As Reported by House Committee On:
State Government, Elections & Information Technology
Appropriations

Title: An act relating to protecting taxpayers by providing for accountability and transparency in government contracting.

Brief Description: Protecting taxpayers by providing for accountability and transparency in government contracting.

Sponsors: House Committee on Transportation (originally sponsored by Representatives Dolan, Harris, Hudgins, MacEwen, Kilduff, Haler, Robinson, Bergquist, Fitzgibbon, Doglio, Pollet, Ormsby and Stanford).

Brief History:

Committee Activity:

State Government, Elections & Information Technology: 2/14/17, 2/17/17 [DP], 1/10/18, 1/30/18 [DP2S];

Transportations: 2/22/17, 2/23/17 [DPS];

Appropriations: 2/3/18, 2/6/18 [DP2S(SEIT)].

Brief Summary of Second Substitute Bill

- Establishes new requirements, such as comprehensive impact assessments, written records of decisions, reports of performance, and additional terms in agreements, for services contracted out that are customarily and historically provided by certain state employees.
- Exempts certain contracts from the new requirements.
- Modifies uniform policies and procedures on contract management, including contract termination, minority- and women-owned business participation, performance monitoring, and cost recovery.

HOUSE COMMITTEE ON STATE GOVERNMENT, ELECTIONS & INFORMATION TECHNOLOGY

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by 5 members: Representatives Hudgins, Chair; Dolan, Vice Chair; Appleton, Gregerson and Pellicciotti.

Minority Report: Do not pass. Signed by 3 members: Representatives McDonald, Ranking Minority Member; Kraft, Assistant Ranking Minority Member; Irwin.

Minority Report: Without recommendation. Signed by 1 member: Representative Johnson.

Staff: Desiree Omli (786-7105).

Background:

Contracting Out—Generally.

State agencies and institutions of higher education may purchase services, including services traditionally and historically provided by state employees in classified service, if certain criteria are met. Contracts must contain a provision that the contracted entity consider employment of state employees who may be displaced by the contract. A contract monitoring process must be established to measure contract performance and to cancel contracts not meeting standards. Agencies, departments, and institutions also determine that contracts would lead to savings or efficiencies. Classified employees must also be allowed to provide alternative solutions to purchasing the services by contract, and, in the event those solutions are not approved, form employee business units and bid for the contract. Implementation of competitive contracting must include notice to the employees whose positions or work would be displaced by contracting out, training opportunities for business units, and procedures established by the Department of Enterprise Services (DES) to ensure that bids are submitted and evaluated fairly and objectively. Certain entities and contracts are exempt from these criteria, such as contracts for services expressly mandated by the Legislature, printing services, and certain contracts by the DES and Consolidated Technology Services Agency.

Civil Service and the Washington Management Services.

Civil service is a system of personnel administration for state government and institutions of higher education. It includes state employees not specifically exempt from the state civil service statute.

Washington Management Services (WMS) is a decentralized personnel system established separately for civil service managers in state government. This differs from general civil service in that it:

- focuses on individual accountability for program results;
- emphasizes management training and development;
- provides flexibility in setting and changing salaries;
- provides for flexible hiring procedures; and
- facilitates interagency and upward mobility.

Contract Management Policies and Procedures.

The DES must adopt policies and procedures for effective and efficient management of contracts by state agencies. These include procedures for selecting potential contractors based on their qualifications, performance measures, model contract terms to ensure contract performance and compliance with state and federal standards, executing contracts using electronic signatures, and procedures and criteria for terminating contracts. Agencies must provide, on an annual basis, a list of contracts that the agency has entered into or renewed. The DES must maintain a list of all contracts entered into by agencies.

Performance-Based Contracts.

Agencies, to the extent practicable, should enter into performance-based contracts that identify expected deliverables and performance measures or outcomes. Performance-based contracts may include, but are not limited to, either consequences or incentives, or both, to ensure that the agreed upon value to the state is received. Payment for goods and services under performance-based contracts should be contingent on the customer achieving performance outcomes.

Minority and Women's Business Enterprises.

To provide the maximum practicable opportunity for increased participation by minority- and women-owned and controlled businesses in public works and agency procurement, the Legislature has established goals for state agencies. If necessary to meet these goals, contracts may be awarded to the next lowest responsible bidder, or all bids may be rejected and new bids obtained, if the lowest responsible bidder does not meet the goals established for a particular contract.

Summary of Second Substitute Bill:

Contracting Out—Generally.

Any department, agency, or institution of higher education may purchase services customarily and historically provided by employees in classified service or employees in the WMS if the department, agency, or institution of higher education also completes a comprehensive impact assessment. The assessment must include an estimate of the cost of performance to contract out and the cost of performance of the service by employees, a statement of performance objectives, and potential adverse impacts on the public from outsourcing the contract.

Additionally, the department, agency, or institution of higher education must prepare and submit a written record to the Office of Financial Management (OFM) and the DES, of its decision to contract out for a service customarily and historically provided by employees in classified service or in the WMS. The record must include the comprehensive assessment, an itemization of performance standards, an explanation of why alternatives submitted by the employees were not accepted, an explanation of the determinations of cost savings or efficiency improvements, and an explanation of considerations made pertaining to consequences and potential mitigation of improper or failed performance by the contractor. The DES must post the record on its website and the record must be retained by the agency, department, or institution of higher education for the statutory retention schedule.

The department, agency, or institution of higher education is required to file a report with the DES every five years that documents performances by contractors, itemizes certain contract extensions and change orders made by contractors that result in a change in cost, and reports remedial actions taken to enforce compliance and the cost of enforcement.

Agreements must contain certain additional terms, including: a cancellation clause; periodic review of performance of the contract; requirement that the contractor compensate the agency, department, or institution of higher education for hours spent by an employee in achieving full performance of a contract; and updated information regarding the contractor and all subcontractors including a list of individuals performing services under the contract and basic financial information that is not exempt from disclosure.

Contracts and entities exempt from contracting out provisions under the civil service statute, and contracts awarded for the purposes of or by the Department of Transportation, are exempt from the requirement to conduct a comprehensive impact assessment, prepare and submit a written record, file a report every five years, and include additional contract terms in their agreements. The exemption for the DES is removed.

Contract Management Policies and Procedures.

The uniform policies and procedures for management of contracts are modified to include: precontract procedures to ensure compliance with minority- and women-owned business participation; model terms to facilitate recovery of the costs of employee staff time expended to achieve substantial compliance; and procedures and criteria for terminating contracts that are not achieving performance standards. Agencies must monitor performance-based contracts to ensure that all aspects are being properly performed and that performance standards are being achieved.

Second Substitute Bill Compared to Engrossed Substitute Bill:

The second substitute bill:

- makes the comprehensive impact assessment, written record requirement, and requirement for certain contract terms applicable to only purchasing services customarily and historically provided by employees in the classified service and employees included in the WMS;
- removes the requirement to conduct a comprehensive assessment, prepare a written report, and include certain terms in agreements, for contracts to purchase goods, leaving the requirement only applicable to contracts for services;
- removes the exemption for contracts with an estimated cost of \$20,000 or less, and contracts awarded under alternate procurement statutes;
- makes certain agencies and contracts that are already exempt from civil service contracting out provisions also exempt from the requirement to conduct a comprehensive impact assessment, prepare and submit a written record, file a report every five years, and include the additional contract terms;
- requires the written record to be submitted by the agency only if it decides to contract out for services;
- removes provisions pertaining to the OFM's review of the DES programs and requirements that the Joint Legislative Audit and Review Committee's report of the OFM's program review contain certain analysis; and

- restores current law that exempts certain contracting activities by Consolidated Technology Services from contracting out requirements.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is about good management and simplifies the process from last year's engrossed bill. Agencies are trying to address situations where contractors do the work but leave before the work is complete, leaving agencies to finish the work, which requires the use of agency resources. Public employees are the biggest watchdog of public money, so the state should be monitoring contracts to ensure that it is getting what it agreed to buy. The state should also evaluate the performance of contracts.

(Opposed) Smaller private-sector vendors will be impacted by this policy because the exemption for small contracts is taken out of the proposed version. This bill presents a barrier to contracting out and sets up an "us-versus-them" scenario. There are many considerations for contracting out besides costs, and this may cause the number of government contracts in the private sector to drop. The biggest concerns would be in the information technology sector. Additionally, when the state contracts with a private vendor, some of that money goes back to the government but the evaluation requirements do not account for that. The bill also lacks guidance on what to do with the required assessment.

Persons Testifying: (In support) Representative Dolan, prime sponsor; Alia Griffing, Washington Federation of State Employees; and Seamus Petrie, Washington Public Employees Association.

(Opposed) Jerry VanderWood, Associated General Contractors of Washington; and Van Collins, American Council of Engineering Companies of Washington.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill by Committee on State Government, Elections & Information Technology be substituted therefor and the second substitute bill do pass. Signed by 22 members: Representatives Ormsby, Chair; Robinson, Vice Chair; MacEwen, Assistant Ranking Minority Member; Bergquist, Caldier, Cody, Fitzgibbon, Haler, Hansen, Harris, Hudgins, Jinkins, Kagi, Lytton, Pettigrew, Pollet, Sawyer, Senn, Springer, Stanford, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 11 members: Representatives Chandler, Ranking Minority Member; Stokesbary, Assistant Ranking Minority Member; Buys, Condotta, Graves, Manweller, Schmick, Taylor, Vick, Volz and Wilcox.

Staff: Meghan Morris (786-7119).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On State Government, Elections & Information Technology:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill puts more transparency and accountability measures in place when an agency decides to contract out for certain services. It works to ensure proper contract monitoring, enforcement, good business practices, and provides a consistent approach to analyzing agency decisions. The bill does not mandate a decision about when to contract out, but rather asks agencies to document the decision making process, including factors aside from cost, and to include information on the outcomes of the contracts for services that are contracted out. This year's bill is easier to implement. This bill should save money in the long run to ensure that when contracting out, the private contracts are of good value. The fiscal note does not account for the savings that would be achieved by the bill because there is no information about how many contracts exist. This bill would enable the Department of Enterprise Services (DES) to track how contracts are implemented and whether they are saving money. A few years ago, the Department of Natural Resources contracted out for accounting services, but half of the work had to be redone by public employees, which was not a good use of taxpayer money. If provisions of this bill lead to catching even a couple of these contracts per year, it would more than pay for itself.

(Opposed) This bill expands the prior legislation to any service contract that may have been provided by a state employee. This is an unnecessary requirement and alleges a systemic problem that does not exist. The contracts in the construction and design industry perform well all the time. This bill presents an unnecessary burden. The state has to go through many hoops in order to contract out, including completing a report that goes to DES. There is no iterative process to learn from problems. The private industry and state agencies currently work collaboratively, but the bill would present an "us against you" proposition. The bill ignores the importance of looking at qualifications on the front end and instead looks at problems on the back end.

Persons Testifying: (In support) Jessie Turner, Washington Federation of State Employees; and Seamus Petrie, Washington Public Employees Association.

(Opposed) Van Collins, Washington Construction Industry Council and American Council of Engineering Companies of Washington.

Persons Signed In To Testify But Not Testifying: None.