

SENATE BILL REPORT

E2SHB 1851

As of February 24, 2018

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

Brief Description: Concerning accountability and transparency in government contracting.

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

Brief History: Passed House: 2/12/18, 52-45.

Committee Activity: State Government, Tribal Relations & Elections: 2/19/18, 2/21/18, 2/23/18 [DPA-WM, DNP].

Ways & Means: 2/24/18.

Brief Summary of Amended Bill

- Establishes new requirements for services contracted out that are customarily and historically provided by certain state employees, including comprehensive impact assessments, written records of decisions, reports of performance, and additional terms in agreements.
- Exempts certain contracts from the new requirements.
- Modifies uniform policies and procedures on contract management, including requirements for minority and women-owned business participation, cost recovery, performance monitoring, and contract termination.
- Requires the Joint Legislative Audit and Review Committee (JLARC) review and report on the new contracting out process and provisions during the 2022 calendar year.

SENATE COMMITTEE ON STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

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.

Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Miloscia, Ranking Member; Saldaña.

Minority Report: Do not pass.
Signed by Senator Zeiger.

Staff: Melissa Van Gorkom (786-7491)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Amanda Cecil (786-7460)

Background: Contract Management. The Department of Enterprise Services (DES) is responsible for the oversight of the state's procurement of goods and services, and adopts uniform policies and procedures for the effective and efficient management of contracts by all state agencies, and provides training on best practices for state procurement. Agencies must provide, on an annual basis, a list of all contracts that the agency has entered into or renewed to DES.

Agencies are encouraged to enter into performance-based contracts that identify expected deliverables and performance measures. Payment for goods and services under performance-based contracts should be contingent on the contractor meeting the performance measures or outcomes.

Contracting Out. Under the state civil service law, a state agency or institution of higher education may contract out for services, including services traditionally and historically provided by state employees if the following are met:

- the contract must contain measurable standards for the performance;
- classified employees are allowed to provide alternative solutions to purchasing services by contract and, in the event those solutions are not approved, bid for the contract using competitive bidding procedures;
- the contract contains a provision requiring the entity to consider employing displaced classified employees;
- the agency or institution has established contract monitoring and termination procedures; and
- the agency or institution has determined that the contract would lead to savings or efficiencies, taking into account the possibility of improper performance.

Certain entities and contracts are exempt from this criteria, such as contracts for services expressly mandated by the Legislature, printing services, and certain contracts by DES and Consolidated Technology Services Agency.

Contracting Out for DES Services. State law requires the Office of Financial Management (OFM), until June 30, 2018, to conduct a review of programs and services performed by the DES to determine whether the program or service may be performed by the private sector in a more cost-efficient and effective manner. DES and OFM must establish a contract monitoring process to measure contract performance, costs, service, delivery, quality, and other contract standards, and cancel contracts that do not meet those standards.

JLARC completed a performance audit of the implementation of contracting for services at DES and provided a preliminary report in January 2018. The final report is planned for April 2018.

Summary of Amended Bill: Contracting Out. Any department, agency, or institution of higher education may contract out for services with an estimated cost greater than \$20,000, customarily and historically provided by employees in classified service or employees in Washington management services, if they complete 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, and a statement of performance objectives. The assessment may also include potential adverse impacts on the public from outsourcing the contract.

An agency, department, or institute of higher education must prepare and submit to OFM and DES written records regarding the decision to contract, and include:

- the comprehensive impact assessment;
- performance standards contained in the contract;
- an explanation of why alternatives submitted by the employees were not accepted;
- an explanation of the determinations of cost savings or efficiency improvements; and
- considerations made pertaining to consequences and potential mitigation of improper or failed performance by the contractor.

Written records must be maintained in accordance with the state records retention schedule.

Terms of any agreement to contract out services must contain specific terms including:

- a cancellation clause;
- a periodic review of performance of the contract;
- a requirement to reimburse for employee time expended in achieving full performance of the contract;
- employment and wage information about contractors and subcontractors; and
- a provision requiring the entity consider employment of displaced employees.

Upon completion of the contract, or every five years if not yet completed, the agency, department, or institution of higher education must file a report with DES documenting the contractor performance, itemizing contract extensions and change orders, and stating remedial actions and costs of such actions.

The following contracts are exempt from this criteria:

- the Department of Transportation;
- contracts for fire suppression awarded by Department of Natural Resources; and
- contracts awarded on major projects, as defined by OFM, for services related to construction, architecture, engineering, and land surveying.

The exemptions for DES are removed.

Contract Management. DES uniform policies and procedures are expanded to include:

- precontract procedures to ensure compliance with requirements regarding women and minority-owned business participation;
- model terms to facilitate recovery of the costs of public employee staff time that must be expended to bring a contract into substantial compliance;
- criteria for terminating performance-based contracts or project plans not achieving standards; and
- a requirement that agencies, departments, and institutions of higher education monitor performance-based contracts to ensure the contract is being performed properly and that performance standards are being achieved.

Other Provisions. It is clarified that the basis for fining or debaring a contractor may be two or more violations of the National Labor Relations Act, rather than the Federal Labor Relations Act, within five years.

JLARC must conduct a review of, and prepare a report on, the new contracting out processes and provisions during the 2022 calendar year.

EFFECT OF STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS COMMITTEE AMENDMENT(S):

- 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.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Engrossed Second Substitute House Bill (State Government, Tribal Relations & Elections): *The committee recommended a different version of the bill than what was heard.* PRO: This bill is about good management. The state of Washington supervises thousands of state employees and oversees thousands of contracts. This bill is about giving careful consideration to information when determining whether to complete the job in house or contract out for services. There is a systemic problem regarding contracting. The JLARC preliminary report that was released and will be finalized later this year shows that it is unclear that the DES contracts for services saved the state money or improved accountability performance. The bill does not mandate a decision about whether or not to contract out for services. The bill asks agencies to document the decision making process, including factors aside from cost, and provide follow-up information as to the outcomes of the contracted project. This bill attempts to codify and streamline a process for conducting the reviews to provide information that can be used to determine if the objectives are being met. The amendments made in the House exempt contracts under \$20,000 so that there is not an undue burden on smaller projects. The bill

also requires a JLARC review in four years to ensure that the state is meeting the desired goals and outcomes of the bill.

CON: It takes both state forces and private industries to meet the states need. The state has a long standing history of contracting out for some services and doing other services in house which works well. The current statute already has requirements for businesses to look at certain issues when contracting out. There is no data to show that there is a systemic problem with the current system. This bill creates additional barriers for contractors and assumes that public services are better. The bill is inconsistent with its intent. While the intent section indicates that the bill will ensure contracts are meeting objectives, the bill actually establishes precontract requirements rather than performing a post contract assessment. The bill only addresses upfront costs of providing a service, and not qualifications. It should include whether or not an entity has experience in providing services as well as the positive impacts on private contracts, not just potential adverse impacts on public employment. In most cases the cost to conduct this analysis alone will reach the \$20,000 threshold for the contract exemption. The bill should be narrowed and the threshold for exemptions should be higher.

Persons Testifying (State Government, Tribal Relations & Elections): PRO: Representative Laurie Dolan, Prime Sponsor; Seamus Petrie, Washington Public Employees Association; Jessie Turner, Washington Federation of State Employees.

CON: Stephen Black, McGranahan Architects; Jerry VanderWood, Associated General Contractors of Washington; Van Collins, Washington Construction Industry Council and ACEC; Mike Ennis, Association of Washington Business; Cliff Webster, Architects and Engineers Legislative Council.

Persons Signed In To Testify But Not Testifying (State Government, Tribal Relations & Elections): No one.

Staff Summary of Public Testimony on Amended Bill (Ways & Means): PRO: This creates a transparent process to contracting out services. The JLARC report revealed a system problem with accountability and this bill is a step towards correcting that. This bill has been narrowed so that it does not impact work that has regularly been contracted out.

CON: Major project needs to be better defined and the scope of the bill should be limited.

Persons Testifying (Ways & Means): PRO: Seamus Petrie, Washington Public Employees Association; Jessie Turner, Washington Federation of State Employees.

CON: Michael Transue, Mechanical Contractors Association of Western Washington.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.