
SECOND SUBSTITUTE HOUSE BILL 1521

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)

READ FIRST TIME 03/01/19.

1 AN ACT Relating to protecting taxpayers by providing for
2 accountability and transparency in government contracting; amending
3 RCW 41.06.142, 39.26.200, and 39.26.180; 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 The legislature finds that prior to July 1, 2005, state agencies
15 and institutions of higher education were prohibited from contracting
16 out for services regularly and historically provided by classified
17 state employees. Effective July 1, 2005, the personnel system reform
18 act of 2002 lifted the prohibition, authorizing state agencies and
19 institutions of higher education to contract out for services
20 customarily and historically provided by classified state employees.
21 It is therefore the intent of the legislature that this act be

1 applied only to government services that have, since July 1, 2005,
2 been customarily and historically performed by state employees in the
3 classified service under chapter 41.06 RCW.

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

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

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

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

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

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

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

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

36 (ii) When the contract will result in termination of state
37 employees or elimination of state positions, the comprehensive impact
38 assessment may also include an assessment of the potential adverse
39 impacts on the public from outsourcing the contract, such as loss of

1 employment, effect on social services and public assistance programs,
2 economic impacts on local businesses and local tax revenues, and
3 environmental impacts;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 ~~((3))~~ (6) Contracting for services that is expressly mandated
32 by the legislature, including contracts for fire suppression awarded
33 by the department of natural resources under RCW 76.04.181, or was
34 authorized by law prior to July 1, 2005, including contracts and
35 agreements between public entities, shall not be subject to the
36 processes set forth in subsections (1) ~~((7))~~ through (4), ~~((7))~~, and
37 ~~((5))~~ (8) of this section.

38 ~~((4))~~ (7) Competitive contracting shall be implemented as
39 follows:

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

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

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

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

39 (e) An employee business unit's bid must include the fully
40 allocated costs of the service, including the cost of the employees'

1 salaries and benefits, space, equipment, materials, and other costs
2 necessary to perform the function. An employee business unit's cost
3 shall not include the state's indirect overhead costs unless those
4 costs can be attributed directly to the function in question and
5 would not exist if that function were not performed in state service.

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

9 ((+5)) (8)(a) As used in this section:

10 ((+a)) (i) "Employee business unit" means a group of employees
11 who perform services to be contracted under this section and who
12 submit a bid for the performance of those services under subsection
13 ((+4)) (7) of this section.

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

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

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

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

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

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

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

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

38 (a) RCW 74.13.031((+5)) (6); and

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

1 ~~(c) Contracting for services or activities by the department of~~
2 ~~enterprise services under RCW 43.19.008 and the department may~~
3 ~~continue to contract for such services and activities after June 30,~~
4 ~~2018)).~~

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

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

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

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

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

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

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

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

34 (b) Conviction or a final determination in a civil action under
35 state or federal statutes of fraud, embezzlement, theft, forgery,
36 bribery, falsification or destruction of records, receiving stolen
37 property, violation of the federal false claims act, 31 U.S.C. Sec.
38 3729 et seq., or the state medicaid fraud false claims act, chapter
39 74.66 RCW, or any other offense indicating a lack of business

1 integrity or business honesty that currently, seriously, and directly
2 affects responsibility as a state contractor;

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

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

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

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

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

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

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

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

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

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

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

33 **Sec. 4.** RCW 39.26.180 and 2012 c 224 s 20 are each amended to
34 read as follows:

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

38 (a) Precontract procedures for selecting potential contractors
39 based on their qualifications and ability to perform, including

1 procedures to ensure compliance with chapter 39.19 RCW, and providing
2 for participation of minority and women-owned businesses;

3 (b) Model complaint and protest procedures;

4 (c) Alternative dispute resolution processes;

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

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

12 (f) Executing contracts using electronic signatures;

13 (g) Criteria for contract amendments;

14 (h) Postcontract procedures;

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

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

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

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

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

1 should be contingent on the contractor achieving performance
2 outcomes.

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 NEW SECTION. **Sec. 5.** A new section is added to chapter 39.26
10 RCW to read as follows:

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

16 NEW SECTION. **Sec. 6.** This act is prospective and applies only
17 to contracts commenced on or after the effective date of this
18 section. Contracts in effect prior to the effective date of this
19 section remain unaffected by this act through their expiration date.

20 NEW SECTION. **Sec. 7.** If specific funding for the purposes of
21 this act, referencing this act by bill or chapter number, is not
22 provided by June 30, 2019, in the omnibus appropriations act, this
23 act is null and void.

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