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**ENGROSSED SUBSTITUTE HOUSE BILL 1851**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** House Transportation (originally sponsored by Representatives Dolan, Harris, Hudgins, MacEwen, Kilduff, Haler, Robinson, Bergquist, Fitzgibbon, Doglio, Pollet, Ormsby, and Stanford)

AN ACT Relating to protecting taxpayers by providing for accountability and transparency in government contracting; amending RCW 39.26.180, 43.19.008, 39.26.200, and 41.06.142; 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 the work performed by private entities and nonprofit organizations pursuant to contracts and the work performed by public employees pursuant to project plans by requiring better evaluation of their performance. Such evaluation should include an assessment of whether decisions to "contract out" government goods and services to the private sector are achieving their stated objectives. In addition, it is the intent of the legislature to ensure that public contractors and agencies given access to state resources are held to ethical standards consistent with public values.

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

(1) Prior to issuing a request for a proposal under this chapter to contract out to purchase from a private sector entity or nonprofit organization goods and services that have been customarily and historically provided by a public employee or employees, an agency must meet the criteria specified in RCW 41.06.142 and also conduct a comprehensive impact assessment if the estimated cost of contract performance is greater than twenty thousand dollars. This section applies only to contracts entered under this chapter and does not apply to contracts awarded under alternate procurement statutes or to contracts awarded for the purposes of or by the department of transportation.

(a) To assist the agency in determining whether the decision to contract out is beneficial, the comprehensive impact assessment must include at a minimum the following comparative analysis of the estimated costs of providing the goods and services through public employees and the costs of providing the goods and services through a contract:

(i) For goods and services provided by public employees:

(A) An estimate of the cost of the goods and services, including the fully allocated costs of the good or service, the cost of the employees' salaries and benefits, space, equipment, materials, and other costs necessary to perform the function. The estimate shall include the state's indirect overhead costs that can be specifically attributed to delivering the goods and services over the period of the proposed contract; and

(B) A statement of the performance objectives to be achieved; and

(ii) For goods and services contracted out:

(A) An estimate of the cost of the goods and services, including the cost of allocating sufficient public employee staff time and resources to monitor the contract and ensure its proper performance by the contractor; and

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

(b) The comprehensive assessment may also include an assessment of the potential impacts on the public from outsourcing the contract, such as gain or loss of employment, effect on social services and public assistance programs, economic impacts on local businesses and local tax revenues, and environmental impacts.

(2) Upon completion of the comprehensive impact assessment required under subsection (1) of this section a written record must be prepared:

(a) If an agency decides to contract out a good or service that has been customarily and historically provided by public employees, the agency must prepare a written record of the basis of the decision and provide it to the department. The written record must include the comprehensive impact assessment and an itemization of performance standards in the contract for the goods or services.

(b) If an agency decides to provide the good or service through public employees, the agency must prepare a written record of the basis of the decision and provide it to the department. The written record must include the comprehensive impact assessment and a quantifiable analysis demonstrating the agency's ability to meet or exceed performance standards in the agency project plan for providing the goods or services.

(c) The agency must maintain the written record in the agency's files for five years or the term of the contract, whichever is longer.

(3) Every five years or upon completion of the contract or provision of the goods or services by the agency's public employees, whichever comes first, the agency must prepare and file with the department a report, which must include at a minimum the following information:

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

(b) Itemization of any contract extensions or change orders made by the contractor or comparable project plan revisions by the agency that resulted in a change in the dollar value or cost of the goods or services; and

(c) A report of any remedial actions that were taken to enforce compliance with the contract or project plan, together with an estimate of the cost incurred by the public in enforcing such compliance.

(4) In addition to any other terms required by law:

(a) For goods and services contracted out, the terms of the contract must include the following:

(i) A cancellation clause allowing the agency to cancel the contract if the contractor fails to meet quality standards or budget specifications;

(ii) Terms ensuring periodic review of performance of the contract on a semiannual basis or more frequently;

(iii) Terms requiring the contractor to reimburse the agency for certain additional costs including, but not limited to, the costs of the agency's employee time to mitigate or otherwise perform a contract that failed inspection, that the contractor failed to complete on schedule, or that the contractor failed to complete to specified quality standards;

(iv) A term requiring the contractor to make available to the agency the following information at the start of the contract's term and updated each fiscal year:

(A) The name and license number, if applicable, of the contractor and all subcontractors; and

(B) A list of individuals or entities performing or providing the goods or services, reflected as full-time equivalent positions, including the hourly wage rate for each position, and the status of the individual as an employee, subcontractor, independent contractor, or consultant of the contractor; and

(v) A waiver of confidentiality of, and agreement to provide to the agency upon request, basic financial information related to the contract, other than financial, commercial, or proprietary information specifically exempted from disclosure to the public under RCW 42.56.270; or

(b) For goods and services provided by public employees, the terms of an agency project plan must include the following:

(i) A clause allowing the agency to cancel the good or service if the agency fails to meet quality standards or budget specifications;

(ii) Terms ensuring periodic review of performance of the project plan on a semiannual basis or more frequently;

(iii) Terms requiring the agency to absorb certain additional costs including, but not limited to, the costs of the agency's employee time to mitigate or otherwise perform a project plan that failed inspection, that the agency failed to complete on schedule, or that the agency failed to complete to specified quality standards. In circumstances in which agencies are required to absorb certain additional costs or employee business units and other agencies are required to compensate an agency for certain additional costs, funds appropriated, allotted, or otherwise intended for other purposes may not be used to supplement or supplant funds for the purpose of acquiring the good or service; and

(iv) A term requiring the agency to make available to the department the following information at the start of the project plan and updated each fiscal year:

(A) The name and license number, if applicable, of any contractors and subcontractors; and

(B) A list of individuals or entities performing or providing the goods or services, reflected as full-time equivalent positions, including the hourly wage rate for each position, and the status of the individual as an employee, subcontractor, independent contractor, or consultant of the agency.

(5) The provisions applicable to contracts with a private sector entity or nonprofit organization set forth in this section also apply to contracts with employee business units under RCW 41.06.142 and interlocal agreements with other agencies under chapter 39.34 RCW.

**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 or agency project plans 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, 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 or agency project plans;

(e) Model ((~~contract~~)) terms to ensure ((~~contract~~)) performance and compliance with state and federal standards, including terms to facilitate recovery of the costs of public employee staff time that must be expended to achieve substantial compliance;

(f) Executing contracts using electronic signatures;

(g) Criteria for contract or project plan amendments;

(h) Postcontract or postproject procedures;

(i) Procedures and criteria for terminating contracts or project plans for cause or otherwise, including procedures and criteria for not achieving performance standards; and

(j) Any other subject related to effective and efficient contract or project plan management.

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

(3) To the extent practicable, agencies should enter into performance-based contracts or adopt performance-based project plans. Performance-based contracts and project plans identify expected deliverables and performance measures or outcomes. Performance-based contracts and project plans 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. Agencies or the department must monitor performance-based contracts or project plans at least on a semiannual basis to ensure that all aspects are being properly performed and that performance standards are being achieved.

(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 or agency's reports, including computer models and the methodology for those models.

(6) The provisions applicable to contracts and contractors set forth in this section also apply to contracts with employee business units under RCW 41.06.142 and interlocal agreements with other agencies under chapter 39.34 RCW.

**Sec.**  RCW 43.19.008 and 2011 1st sp.s. c 43 s 104 are each amended to read as follows:

(1) The executive powers and management of the department, and oversight through review or audit by the office of financial management, the joint legislative audit and review committee, or state auditor, shall be administered as described in this section.

(2) The executive head and appointing authority of the department is the director. The director is appointed by the governor, subject to confirmation by the senate. The director serves at the pleasure of the governor. The director is paid a salary fixed by the governor in accordance with RCW 43.03.040. If a vacancy occurs in the position of director while the senate is not in session, the governor shall make a temporary appointment until the next meeting of the senate at which time he or she shall present to that body his or her nomination for the position.

(3) The director may employ staff members, who are exempt from chapter 41.06 RCW, and any additional staff members as are necessary to administer this chapter, and such other duties as may be authorized by law. The director may delegate any power or duty vested in ((~~him or her~~)) the position by chapter 43, Laws of 2011 1st sp. sess. or other law, including authority to make final decisions and enter final orders in hearings conducted under chapter 34.05 RCW.

(4) The internal affairs of the department are under the control of the director in order that the director may manage the department in a flexible and intelligent manner as dictated by changing contemporary circumstances. Unless specifically limited by law, the director has complete charge and supervisory powers over the department. The director may create the administrative structures as the director deems appropriate, except as otherwise specified by law, and the director may employ personnel as may be necessary in accordance with chapter 41.06 RCW, except as otherwise provided by law.

(5) Until June 30, ((~~2018~~)) 2019, at the beginning of each fiscal biennium, unless the joint legislative audit and review committee or the state auditor is otherwise directed to do so in the omnibus operating budget, the office of financial management shall conduct a review of the programs, goods, and services that are performed by the department to determine whether the program, goods, or services may be performed by the private sector, an employee business unit under RCW 41.06.142, or another agency pursuant to an interlocal agreement under chapter 39.34 RCW in a more cost-efficient and effective manner than being performed by the department. In conducting this review, the office of financial management shall:

(a) Examine the existing activities currently being performed by the department, including but not limited to an examination of goods or services for their performance, cost compared to revenue impact, staffing, capital requirements, and mission. Programs may be broken down into discrete goods, services, or activities or reviewed as a whole; and

(b) Examine the activities to determine which specific goods or services are available in the marketplace and what potential for efficiency gains or savings exist.

(i) As part of the review in this subsection (5), the office of financial management shall select up to six activities, goods, or services that have been determined as an activity that may be provided by the private sector in a cost-effective and efficient manner((~~, including for the 2011-2013 fiscal biennium the bulk printing services~~)). The office of financial management may consult with affected industry stakeholders in making its decision on which activities to contract for goods or services. Priority for selection shall be given to agency activities, goods, or services that are significant, ongoing functions or projects with an initial project plan of two hundred fifty thousand dollars or more.

(ii) The office of financial management must consider the consequences and potential mitigation of improper or failed performance by the contractor or agency, if the activity was performed by public employees.

(iii) For each of the selected activities, the department or agency shall use a request for information, request for proposal, or other procurement process to determine if a contract for the activity would result in the activity being provided at a reduced cost and with greater efficiency. This must include, but is not limited to, consideration of the cost of the agency staff time and resources that may be required to monitor and ensure proper performance of the contract by the contractor or project plan by the agency.

(iv) The request for information, request for proposal, or other procurement process must contain measurable standards for the performance of the contract.

(v) If contracting out will afford taxpayers a cost savings or efficiency, the department may contract with one or more vendors to provide the good or service as a result of the procurement process.

(vi) If the office of financial management determines via the procurement process that the activity cannot be provided by the private sector at a reduced cost and greater efficiency, the department of enterprise services may cancel the procurement without entering into a contract and shall promptly notify the legislative fiscal committees of such a decision along with the cost analysis and basis for the decision.

(vii) The department of enterprise services, in consultation with the office of financial management, must establish a contract or project plan monitoring process to measure contract or project plan performance, costs, service delivery quality, and other contract or project plan standards, and to cancel contracts or projects that do not meet those standards. No contracts or project extensions, expansions, future upgrades, or phases may be renewed without a review of these measures.

(viii) The office of financial management shall prepare a biennial report summarizing the results of the examination of the agency's programs, goods, and services. In addition to the programs, goods, and services examined and the result of the examination, the report shall provide information on any procurement process that does not result in a contract for the goods or services. The biennial report must include updates reporting any unanticipated costs incurred as a result of contracting out or from the agency providing the goods or services pursuant to this section and an estimate of staff hours devoted by employees of the office of financial management and department of enterprise services in conducting the program review required by this section. During each regular legislative session held in odd-numbered years, the legislative fiscal committees shall hold a public hearing on the report and the department's activities under this section. This report must be made available on the web site of the agency that was the subject of the report.

(ix) The joint legislative audit and review committee shall conduct an audit of the implementation of this subsection (5), and report to the legislature by January 1, 2018, on the results of the audit. The report must include an analysis and estimate of additional costs or savings to taxpayers as a result of the contracting out or project plan provisions. This analysis must, at a minimum, include the following:

(A) An estimate of the cost of performance of the selected activities, if the activities had been performed by public employees;

(B) An estimate of the cost of performance of the contract or project plan by the contractor, including the cost of any change orders, project plan, or contract revisions and the costs of allocating sufficient public employee staff time and resources to monitor the contract and ensure its proper performance by the contractor;

(C) An analysis of the extent to which performance objectives were achieved by outsourcing the contract or by having the agency perform the activity; and

(D) An assessment of potential impacts on the public of outsourcing the contract or by having the agency perform the activities.

**Sec.**  RCW 39.26.200 and 2015 c 44 s 1 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; and

(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.

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

(1) Any department, agency, or institution of higher education may purchase services, including services that have been customarily and historically provided by employees in the classified service under this chapter, by contracting with individuals, nonprofit organizations, businesses, employee business units, or other entities if the following criteria are met:

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

(b) 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) 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 must consider the consequences and potential mitigation of improper or failed performance by the contractor.

(2) 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) Contracting for services that is expressly mandated by the legislature 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), (4), and (5) of this section.

(4) Competitive contracting shall be implemented as follows:

(a) At least ninety days prior to the date the contracting agency requests bids from private entities for a contract for services provided by classified employees, the contracting agency 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 shall consider the alternatives before requesting bids.

(b) If the employees decide to compete for the contract, they shall notify the contracting agency 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 to receive complaints regarding the bidding process and to consider them before awarding the contract. Appeal of an agency'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) As used in this section:

(a) "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) of this section.

(b) "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) "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) The processes set forth in subsections (1), (4), and (5) 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) The processes set forth in subsections (1), (4), and (5) 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.~~

~~(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~~)).

NEW SECTION. **Sec.**  This act may be known and cited as the "taxpayer protection act."

**--- END ---**