

2SHB 1851 - H AMD 1005

By Representative Kraft

NOT ADOPTED 02/13/2018

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 ensure
9 that public contractors given access to state resources are held to
10 ethical standards consistent with public values.

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

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

22 (a) A comprehensive impact assessment is completed by the
23 agency, department, or institution of higher education to assist it
24 in determining whether the decision to contract out is beneficial.
25 The comprehensive impact assessment must include at a minimum the
26 following analysis:

27

1 (i) An estimate of the cost of performance of the service by
2 employees, including the fully allocated costs of the service, the
3 cost of the employees' salaries and benefits, space, equipment,
4 materials, and other costs necessary to perform the function. The
5 estimate shall include the state's indirect overhead costs that
6 relate to delivering the services over the period of the proposed
7 contract;

8 (ii) An estimate of the cost of performance of the services if
9 contracted out, including the cost of allocating sufficient employee
10 staff time and resources to monitor the contract or project plan and
11 ensure its proper performance by the contractor or agency,
12 department or institution of higher education; and

13 (iii) A statement of the performance objectives to be achieved
14 by contracting with the private sector, a nonprofit entity, or a
15 state agency, or by an agency, department, or institution of higher
16 education performing the service itself.

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

19 ~~((b))~~ (c) Employees ((in the classified service)) whose
20 positions or work would be displaced by the contract are provided an
21 opportunity to offer alternatives to purchasing services by contract
22 and, if these alternatives are not accepted, compete for the
23 contract under competitive contracting procedures in subsection
24 ~~((4))~~ (8) of this section;

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

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

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1 (e) The department, agency, or institution of higher education
2 has determined that the contract results in savings or efficiency
3 improvements. The contracting agency, department, or institution of
4 higher education must consider the consequences and potential
5 mitigation of improper or failed performance by the contractor.

6 (2) An agency, department, or institution of higher education
7 that, after conducting a comprehensive impact assessment, decides to
8 continue to provide a service must develop a project plan that at
9 minimum:

10 (a) Includes terms under subsection (5) of this section;

11 (b) Adheres to uniform policies and procedures under subsection
12 (9), where applicable;

13 (c) Includes itemization of performance standards, information
14 on the estimated cost of performance, and length of time that the
15 agency is expected to provide the service; and

16 (d) A description of the project or service provided.

17 (3)(a) An agency, department, or institution of higher education
18 must prepare a written record of the basis of the decision to
19 contract out, or the decision to provide for themselves, a service,
20 which must include the comprehensive impact assessment required
21 under subsection (1)(a) of this section, an itemization of
22 performance standards contained in the project plan under subsection
23 (2) of this section, an itemization of performance standards
24 contained in the contract pursuant to subsection (1)(b) of this
25 section, and, if the agency, department, or institution of higher
26 education decides to perform the service, a quantifiable analysis
27 demonstrating the agency's, departments, or institution of higher
28 education's ability to meet or exceed the performance standards
29 required of contracts pursuant to subsection (1)(b) of this section
30 based on the current services provided by the agency, department, or
31 institution of higher education and include the length of time the
32 agency, department, or institution of higher education has been
33 providing the service if they are currently providing the service.

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1 (b) Upon entering an agreement to contract out for a service
2 that has been provided by employees, or upon an agency's,
3 department's or institution of higher education's decision to
4 continue to provide a service, the agency, department, or
5 institution of higher education must provide the written record of
6 the basis of the agency's decision to the department of enterprise
7 services and the office of financial management. The department of
8 enterprise services must post the reports on its website.

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

12 (4) Every five years or upon completion of the contract or the
13 service under a project plan, whichever comes first, the agency,
14 department, or institution of higher education must prepare and file
15 with the department of enterprise services a report, which must
16 include at a minimum the following information:

17 (a) Documentation of the performance on the contract or project
18 plan as measured by the itemized performance standards;

19 (b) Itemization of any contract or project extensions or change
20 orders made by the contractor or agency that resulted in a change in
21 the dollar value or cost of the contract; and

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

26 (5) In addition to any other terms required by law, the terms of
27 any agreement to contract out a service that has been provided by
28 public employees for three or more years from the time of
29 implementation by the employee or employees must include the
30 following:

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

34

1 (b) Terms ensuring periodic review of performance of the
2 contract every twelve months or more frequently;

3 (c) Terms requiring the contractor or agency to compensate the
4 agency or appropriate state budget for employees' hours expended in
5 achieving full performance of a contract that has failed inspection,
6 that the contractor or agency has failed to complete on schedule, or
7 that has not been completed by the contractor or agency in a manner
8 that is consistent with quality standards;

9 (d) A term requiring the contractor or agency to make available
10 to the agency or governing authority the following information at
11 the start of the contract's term and updated each fiscal year:

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

14 (ii) A list of individuals or entities performing or providing
15 the services under the contract, reflected as full-time equivalent
16 positions, including the hourly wage rate for each position, and the
17 status of the individual as an employee, subcontractor, independent
18 contractor, or consultant, or, if the agency decides to provide the
19 services, all members of the project and management team along with
20 their title reflected as full-time equivalent positions, including
21 the hourly or yearly wage rate for each position and the status of
22 the individual as an employee, subcontractor, independent
23 contractor, or consultant; and

24 (iii) A waiver of confidentiality of, and agreement to provide
25 to the agency upon request, basic financial information related to
26 the contract, other than financial, commercial, or proprietary
27 information specifically exempted from disclosure to the public
28 under RCW 42.56.270.

29 (e) The contract with an entity other than an employee business
30 unit includes a provision requiring the entity to consider
31 employment of state employees who may be displaced by the contract.

32 (6) Any provision contrary to or in conflict with this section
33 in any collective bargaining agreement in effect on July 1, 2005, is
34 not effective beyond the expiration date of the agreement.

1 ~~((3))~~ (7) Contracting for services that is expressly mandated
2 by the legislature including contracts for fire suppression awarded
3 by the department of natural resources under RCW 76.04.181, or was
4 authorized by law prior to July 1, 2005, including contracts and
5 agreements between public entities, shall not be subject to the
6 processes set forth in subsections ~~(1)(7))~~ through (5), (8), and
7 ~~((5))~~ (10) of this section.

8 ~~((4))~~ (8) Competitive contracting shall be implemented as
9 follows:

10 (a) At least ninety days prior to the date the contracting
11 agency requests bids from private entities for a contract for
12 services provided by ~~((classified))~~ employees, the contracting
13 agency shall notify the ~~((classified))~~ employees whose positions or
14 work would be displaced by the contract. The employees shall have
15 sixty days from the date of notification to offer alternatives to
16 purchasing services by contract, and the agency, department, or
17 institution of higher education shall consider the alternatives
18 before requesting bids.

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

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

28 (d) The director of enterprise services, with the advice and
29 assistance of the office of financial management, shall, by rule,
30 establish procedures to ensure that bids are submitted and evaluated
31 in a fair and objective manner and that there exists a competitive
32 market for the service. Such rules shall include, but not be limited
33 to: (i) Prohibitions against participation in the bid evaluation
34 process by employees who prepared the business unit's bid or who

1 perform any of the services to be contracted; (ii) provisions to
2 ensure no bidder receives an advantage over other bidders and that
3 bid requirements are applied equitably to all parties; and (iii)
4 procedures that require the contracting agency, department, or
5 institution of higher education to receive complaints regarding the
6 bidding process and to consider them before awarding the contract.
7 Appeal of an agency's, department's, or institution of higher
8 education's actions under this subsection is an adjudicative
9 proceeding and subject to the applicable provisions of chapter 34.05
10 RCW, the administrative procedure act, with the final decision to be
11 rendered by an administrative law judge assigned under chapter 34.12
12 RCW.

13 (e) An employee business unit's bid must include the fully
14 allocated costs of the service, including the cost of the employees'
15 salaries and benefits, space, equipment, materials, and other costs
16 necessary to perform the function. An employee business unit's cost
17 shall not include the state's indirect overhead costs unless those
18 costs can be attributed directly to the function in question and
19 would not exist if that function were not performed in state
20 service.

21 (f) A department, agency, or institution of higher education may
22 contract with the department of enterprise services to conduct the
23 bidding process.

24 ~~((+5))~~ (9)(a) The department of enterprise services must
25 maintain uniform policies and procedures for the effective and
26 efficient management of contracts by all state agencies, pursuant to
27 RCW 39.26.180. The department of enterprise services must also
28 include in the policy and procedures maintained:

29 (i) In the precontract procedures for selecting potential
30 contractors based on qualifications and ability to perform,
31 procedures to ensure compliance with chapter 39.19 RCW, providing
32 for participation of minority and women-owned businesses;

33 (ii) In model contract terms to ensure contract performance and
34 compliance with state and federal standards, terms to facilitate

1 recovery of the costs of employee staff time that must be expended
2 to bring a contract into substantial compliance;

3 (iii) In the procedures and criteria for terminating contracts,
4 procedures and criteria for terminating performance-based contracts
5 that are not achieving performance standards; and

6 (iv) A requirement that agencies, departments, and institutions
7 of higher education monitor performance-based contracts on at least
8 a quarterly basis to ensure that all aspects of the contract are
9 being properly performed and that performance standards are being
10 achieved.

11 (b) The uniform policies and procedures maintained under RCW
12 39.26.180 and in subsection (a) of this subsection that apply to
13 contracts also apply to agency project plans where applicable, when
14 agencies decide to perform a service rather than contract out for
15 the service.

16 (10) As used in this section:

17 (a) "Employee business unit" means a group of employees who
18 perform services to be contracted under this section and who submit
19 a bid for the performance of those services under subsection ~~((4))~~
20 (8) of this section.

21 (b) "Indirect overhead costs" means the pro rata share of
22 existing agency administrative salaries and benefits, and rent,
23 equipment costs, utilities, and materials associated with those
24 administrative functions.

25 (c) "Competitive contracting" means the process by which
26 ~~((classified))~~ employees of a department, agency, or institution of
27 higher education compete with businesses, individuals, nonprofit
28 organizations, or other entities for contracts authorized by
29 subsection (1) of this section.

30 ~~((6))~~ (d) "Employee" means state employees in the classified
31 service under this chapter and state employees included in the
32 Washington management service under RCW 41.06.022 and 41.06.500,
33 unless otherwise specified.

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1 (e) A service that has been "customarily and historically
2 provided" means a service that has been performed for three years or
3 longer.

4 (11) The processes set forth in subsections (1)(a), (2), (3),
5 (4) and (5)(a) through (d)(iii) of this section do not apply to
6 contracts awarded for the purposes of or by the department of
7 transportation or to contracts with an estimated cost of contract
8 performance of twenty thousand dollars or less.

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

11 (a) *RCW 74.13.031((5)) (6); and

12 (b) The acquisition of printing services by a state agency(+
13 and

14 ~~(c) Contracting for services or activities by the department of~~
15 ~~enterprise services under RCW 43.19.008 and the department may~~
16 ~~continue to contract for such services and activities after June 30,~~
17 ~~2018)).~~

18 ~~((7)) (13) The processes set forth in subsections (1)((7))~~
19 ~~through (4), (8), and ((5)) (10) of this section do not apply to~~
20 ~~the consolidated technology services agency when contracting for~~
21 ~~services or activities as follows:~~

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

27 (b) Contracting for services and activities recommended by the
28 chief information officer through a business plan and approved by
29 the technology services board created in ((**RCW 43.41A.070)) RCW
30 43.105.285.

31

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

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

5 (b) After reasonable notice to the contractor and reasonable
6 opportunity for that contractor to be heard, the director has the
7 authority to debar a contractor for cause from consideration for
8 award of contracts. The debarment must be for a period of not more
9 than three years.

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

12 (a) Conviction for commission of a criminal offense as an
13 incident to obtaining or attempting to obtain a public or private
14 contract or subcontract, or in the performance of such contract or
15 subcontract;

16 (b) Conviction or a final determination in a civil action under
17 state or federal statutes of fraud, embezzlement, theft, forgery,
18 bribery, falsification or destruction of records, receiving stolen
19 property, violation of the federal false claims act, 31 U.S.C. Sec.
20 3729 et seq., or the state medicaid fraud false claims act, chapter
21 74.66 RCW, or any other offense indicating a lack of business
22 integrity or business honesty that currently, seriously, and
23 directly affects responsibility as a state contractor;

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

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

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

32 (i) Deliberate failure without good cause to perform in
33 accordance with the specifications or within the time limit provided
34 in the contract; or

1 (ii) A recent record of failure to perform or of unsatisfactory
2 performance in accordance with the terms of one or more contracts,
3 however the failure to perform or unsatisfactory performance caused
4 by acts beyond the control of the contractor may not be considered
5 to be a basis for debarment;

6 ~~((f))~~ (e) Violation of ethical standards set forth in RCW
7 39.26.020;

8 ~~((g))~~ (f) Any other cause the director determines to be so
9 serious and compelling as to affect responsibility as a state
10 contractor, including debarment by another governmental entity for
11 any cause listed in regulations; and

12 ~~((h))~~ (g) During the 2017-2019 fiscal biennium, the failure to
13 comply with a provision in a state master contract or other
14 agreement with a state agency that requires equality among its
15 workers by ensuring similarly employed individuals are compensated
16 as equals.

17 (3) The director must issue a written decision to debar. The
18 decision must:

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

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

22

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

25 An agency, department, or institution of higher education that
26 intends to contract out, or does contract out, for services
27 customarily and historically provided by employees in the classified
28 service defined in RCW 41.06.020 or employees included in the
29 Washington management service under RCW 41.06.022 and 41.06.500 must
30 follow procedures and meet criteria established under RCW 41.06.142.

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32 NEW SECTION. **Sec. 5.** This act may be known and cited as the
33 "taxpayer protection act."

34

1 Correct the title.

2

EFFECT: (1) Requires agencies, departments, or institutions of higher education to develop a project plan that must contain certain elements, if it decides to continue to provide a service rather than contract out for the service.

(2) Makes provisions applicable to contracts with private entities, nonprofit entities, and agreements with other state agencies also applicable to project plans.

(3) Requires an agency, department, or institution of higher education to also submit a written record if it decides to continue to provide a service rather than contract out for the service.

(4) Defines a service that is customarily and historically provided as a service performed for three years or longer.

(5) Exempts contracts with an estimated cost of contract performance of \$20,000 or less from the requirement to complete a comprehensive impact assessment, submit a written record and a 5-year report, and include certain contract terms in agreements.

(6) Clarifies that contracts for fire suppression are contracts for services expressly mandated by the legislature, and therefore exempt from the requirements relating to the comprehensive impact assessment, written record and 5-year report, required terms of agreements, and competitive contracting.

(7) Modifies information required in the comprehensive impact assessment and the written record.

--- END ---