

HOUSE BILL REPORT

ESHB 1851

As Passed House:
March 8, 2017

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];
Transportation: 2/22/17, 2/23/17 [DPS].

Floor Activity:

Passed House: 3/8/17, 69-28.

Brief Summary of Engrossed Substitute Bill

- Establishes new requirements for certain goods and services contracted out to private entities or provided by public employees, including comprehensive impact assessments, written records of decisions, reports of performance, and additional terms.
- Exempts from new requirements contracts that are: estimated to cost \$20,000 or less; awarded under alternate procurement statutes; or by the Department of Transportation.
- Makes existing requirements for contracting out, including competitive contracting with employee business units, applicable to certain services and activities by the Department of Enterprise Services (DES) and the Consolidated Technology Services Agency.
- Modifies existing requirements for contracting out by the DES, including the Office of Financial Management review, the Joint Legislative Audit and Review Committee audit, and a new requirement that contracting out achieve a cost savings or efficiency.

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.

- Modifies uniform policies and procedures on contract management, including requirements for agency project plans, minority- and women-owned business participation, performance monitoring, and cost recovery.
- Makes certain requirements for contracting out and uniform policies and procedures applicable to contracts with employee business units and interlocal agreements with other agencies.

HOUSE COMMITTEE ON STATE GOVERNMENT, ELECTIONS & INFORMATION TECHNOLOGY

Majority Report: Do pass. Signed by 5 members: Representatives Hudgins, Chair; Dolan, Vice Chair; Appleton, Gregerson and Pellicciotti.

Minority Report: Do not pass. Signed by 4 members: Representatives Koster, Ranking Minority Member; Volz, Assistant Ranking Minority Member; Irwin and Kraft.

Staff: Joan Elgee (786-7106) and Jill Reinmuth (786-7102).

HOUSE COMMITTEE ON TRANSPORTATION

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 15 members: Representatives Clibborn, Chair; Farrell, Vice Chair; Fey, Vice Chair; Wylie, Vice Chair; Chapman, Gregerson, Hayes, Kloba, Lovick, McBride, Morris, Ortiz-Self, Pellicciotti, Riccelli and Tarleton.

Minority Report: Do not pass. Signed by 9 members: Representatives Orcutt, Ranking Minority Member; Hargrove, Assistant Ranking Minority Member; Harmsworth, Assistant Ranking Minority Member; Irwin, Pike, Shea, Stambaugh, Van Werven and Young.

Staff: Joan Elgee (786-7106).

Background:

Contracting Out – Generally.

State agencies and institutions of higher education may contract out for services, including services traditionally and historically provided by state employees, if certain criteria are met. Contracts must contain performance measures and agencies and institutions must demonstrate that contracts would lead to savings or efficiencies. Classified employees must 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. These criteria and specified procedures for competitive contracting do not apply to contracting for certain services and activities by the Department of Enterprise Services (DES) and the Consolidated Technology Services Agency.

Contracting Out – Department of Enterprise Services.

Until June 30, 2018, at the beginning of each fiscal biennium, the Office of Financial Management (OFM) must review programs and services performed by the DES to determine whether they may be performed by the private sector in a more cost-efficient and effective manner. In consultation with affected industry stakeholders, the OFM must select up to six activities or services that potentially could be provided by the private sector. The OFM must submit on a biennial basis reports on its examinations of various programs and services to the Legislature.

Procurement processes must contain measurable performance standards. The OFM must consider the consequences and potential mitigation of improper or failed performance by contractors. If services cannot be provided at a reduced cost and with greater efficiency, the DES may cancel a procurement and must notify legislative fiscal committees. The DES, with the OFM, must establish contract monitoring processes to measure contract performance, costs, service delivery quality, and other contract standards, and cancel contracts that do not meet those standards. No contract may be renewed without a review of these measures.

By January 1, 2018, the Joint Legislative Audit and Review Committee (JLARC) must conduct a performance audit of the implementation of contracting for services at the DES, and submit its report to the Legislature.

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, 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 Engrossed Substitute Bill:

Legislative intent is expressed to increase transparency and accountability by requiring better evaluation of performances by private contractors and public employees, and to ensure that contractors and agencies are held to ethical standards consistent with public values.

Contracting Out – Generally.

Prior to issuing requests for proposals to contract out goods and services customarily and historically provided by public employees, agencies must meet the criteria for competitive contracting, and also conduct comprehensive impact assessments if estimated costs are greater than \$20,000. These assessments are not required for contracts awarded under alternate procurement statutes or by the Department of Transportation.

These assessments must include: cost estimates for goods and services provided through public employees and contracts; statements of performance objectives; and assessments of potential adverse impacts on the public from outsourcing. For goods and services contracted out, the cost estimates must include costs of public employee staff time for contract monitoring. For goods and services provided by public employees, the cost estimates must include employees' salaries and benefits, space, equipment, materials, certain indirect overhead costs, and other necessary costs.

After completing these assessments, agencies must prepare written records of their decision to contract out for goods and services or provide them through public employees, provide these records to the DES, and maintain them for five years or the terms of contracts, whichever is longer. For goods and services contracted out, the records must include comprehensive impact assessments and performance standards from contracts. For goods and services provided by public employees, the records must include comprehensive impact assessments and quantifiable analyses of agency abilities to meet or exceed performance standards in project plans.

Every five years or upon completion of contracts or upon provision of goods and services by public employees, agencies must prepare reports and file them with the DES. The reports must document performances by contractors or agencies, itemize certain contract extensions and change orders made by contractors or comparable project plan revisions by agencies, and report remedial actions taken and their costs.

Agreements must contain certain additional terms. For goods and services contracted out, these terms include: a cancellation clause; periodic performance review; reimbursement for public employee time to perform contracts; employment and wage information about individuals and entities providing goods and services; and a waiver of confidentiality with respect to basic financial information related to the contract. For goods and services provided by public employees, agency project plans must include: a cancellation clause; periodic performance review; requirements to absorb costs of employee time to perform project plans; and employment and wage information about individuals and entities

providing goods and services. When agencies are required to absorb costs, funds intended for other purposes may not be used to supplement or supplant funds for acquiring goods and services.

Provisions applicable to contracts with private entities also apply to contracts with employee business units and interlocal agreements with other agencies.

Provisions on contracting out and competitive contracting with classified state employees are made applicable to the following:

- contracting by the DES for certain services and activities, including the six central service functions identified by the OFM; and
- contracting by the Consolidated Technology Services Agency for certain services and activities necessary for the state data center, and also for those recommended by the Chief Information Officer through a business plan and approved by the Technology Services Board.

Contracting Out – Department of Enterprise Services.

Provisions requiring the OFM to identify six functions each biennium to potentially contract out are modified. They are made applicable to goods in addition to programs and services, project plans in addition to contracts, and employee business units and other agencies in addition to the private sector. They are also extended to June 30, 2019.

Functions and projects with initial project plans of \$250,000 or more must be given priority. The criteria used to determine whether there is a more cost-efficient and effective manner are modified to include cost compared to revenue impact. The criteria used to determine if contracting out would result in reduced costs and greater efficiency are modified to include consideration of the cost of agency staff time and resources to monitor and ensure proper performance of the contract or project plan.

The DES may contract out only if it will afford taxpayers a cost savings or efficiency. The DES must include the cost analysis and the basis for a decision when notifying legislative fiscal committees of decisions to cancel a procurement.

The biennial report from the OFM to the Legislature must include any unanticipated costs incurred as a result of contracting out or from the agency providing the goods and services, as well as an estimate of OFM and DES staff hours devoted to conducting the required program review. The report must be on the website of the agency that was the subject of the report.

In conducting the required audit of the performance of the "contracting out" provisions, the JLARC's analysis must, at a minimum, include:

- an estimate of the cost of performance of the selected activities, if the activities had been performed by public employees;
- an estimate of the cost of performance of the contract or project plan, 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;

- an analysis of the extent to which performance objectives were achieved by outsourcing the contract or having the agency perform the activity; and
- an assessment of potential adverse impacts on the public of outsourcing the contract or having the agency perform the activities.

Contract Management Policies and Procedures.

The uniform policies and procedures for management of contracts are made applicable to agency project plans. The minimum requirements for these policies and procedures 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 public employee staff time expended to achieve substantial compliance; and procedures and criteria for terminating contracts and project plans that are not achieving performance standards.

The requirement that, to the extent practicable, agencies enter into performance-based contracts is made applicable to performance-based project plans. Agencies must monitor performance-based contracts and project plans at least on a semiannual basis to ensure that all aspects are being properly performed and that performance standards are being achieved.

Provisions on contract management applicable to contracts and contractors also apply to contracts with employee business units and interlocal agreements with other agencies.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 13, 2017.

Effective Date: The bill is effective 90 days following the adjournment of the session in which the bill was passed.

Staff Summary of Public Testimony (State Government, Elections & Information Technology):

(In support) Negotiations are underway regarding contracting out. There has been little cost analysis. Cost overruns and change orders have contributed to irresponsible contracting. This bill supports transparency and accountability.

(Opposed) It is most cost-effective to allow private contractors to work and government to govern.

Staff Summary of Public Testimony (Transportation):

(In support) This legislation is the result of about four contracts in the past that have gone bad. The state's own employees had to go in, after an outside vendor had performed poorly, to fix the inadequate work. Essentially, the state paid for the same work to be done twice. So this is not trying to take away outsourcing but, with respect to managing taxpayer dollars, to be more careful and provide oversight. This bill is intended to address the goods and services

procurement overseen by the DES, and not highway construction procurement or highway maintenance. There is likely an amendment based on conversations with members in the minority.

The Washington Federation of State Employees is in full support of the bill. The union has an eye on the possible misuse of state dollars. There are examples of incomplete or poor-quality work in which the state has had to pay twice essentially for the same work. Other examples exist where client-care dollars have padded the compensation of chief executive officer benefits. One of the latest trends is that contractors are building into their books of business an approach where they complete 90 percent of the work, but when it comes time to address the punch list, they walk away from the job, leaving it to state employees to finish. The overall goal is that the taxpayer should know what their money is going towards, whether it is work done by in-house employees or whether contracted out with third parties. They should know that the work is being done efficiently and effectively and that they are getting the best bang for their buck. This is intended to focus on goods and services contracts.

(Opposed) None.

Persons Testifying (State Government, Elections & Information Technology): (In support) Representative Dolan, prime sponsor; Alia Griffing, Washington Federation of State Employees; and Todd Stidd, Washington Federation of State Employees.

(Opposed) Larry Stevens, Mechanical Contractors Association of Washington and National Electrical Contractors Association.

Persons Testifying (Transportation): Representative Dolan, prime sponsor; and Alia Griffing, Washington Federation of State Employees.

Persons Signed In To Testify But Not Testifying (State Government, Elections & Information Technology): None.

Persons Signed In To Testify But Not Testifying (Transportation): None.