

SENATE BILL REPORT

ESHB 1851

As of March 29, 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: Passed House: 3/08/17, 69-28.

Committee Activity: State Government: 3/29/17.

Brief Summary of Bill

- Requires agencies to meet certain requirements prior to issuing a request-for-proposal from a private sector entity or nonprofit organization for certain goods and services contracts customarily and historically provided by public employees.
- Requires agencies to prepare and maintain written records regarding decisions for the provision of goods or services, including comprehensive impact statements, whether provided by public employees or under contract.
- Requires agencies or Department of Enterprise Services (DES) to monitor performance-based contracts or project plans to ensure that all aspects are being properly performed, and that performance standards are being achieved.
- Requires the DES to modify its uniform policies and procedures to include agency project plans and reflect the recovery of costs and termination procedures for poor performance and other components.
- Modifies the review conducted by the Office of Financial Management to determine whether the programs, goods and services performed by DES may be performed in a more cost-efficient and effective manner.

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 the Joint Legislative Audit and Review Committee's audit to include analyses of cost estimates addressing activities performed by public employees and private contractors.

SENATE COMMITTEE ON STATE GOVERNMENT

Staff: Melissa Van Gorkom (786-7491)

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

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

The Consolidated Technology Services Agency may contract for services related to operation and management of the State Data Center if they are approved by the Technology Services Board (TSB). TSB may approve contracting for other services and activities if those services are recommended by the Chief Information Officer through a business plan.

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

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

Contracting Out for DES Services. State law requires the Office of Financial Management (OFM) to conduct a review of programs and services performed by the DES to determine whether the program or service may be performed by the private sector in a more cost-efficient and effective manner. OFM chooses up to six activities or services per biennium that could be provided by the private sector.

As part of the review, DES initiates a procurement process for the services OFM selects. The procurement process must contain measurable standards for the performance of the contract.

In making its determination, OFM must consider the consequences and potential mitigation of improper or failed performance by the contractor. If OFM determines that the service cannot be provided at a lower rate or more efficiently by the private sector, DES may cancel the procurement process. DES and OFM must establish a contract monitoring process to measure contract performance, costs, service, delivery, quality, and other contract standards, and cancel contracts that do not meet those standards. No contract may be renewed without a review of these measures.

OFM reports on the results of these examinations biennially to the Legislature, providing information on any procurement process that does not result in a contract for the services. The Joint Legislative Audit and Review Committee (JLARC) will conduct a performance audit of the implementation of contracting for services at DES and report to the Legislature by January 1, 2018.

Summary of Bill: Contracting Out. Prior to issuing a request-for-proposal from a private sector entity or nonprofit organization for goods and services with an estimated cost greater than \$20,000, customarily and historically provided by public employees, agencies (except Department of Transportation) are required to conduct comprehensive impact assessments and meet the following criteria:

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

The impact assessment must, at minimum, provide a comparative analysis of the estimated costs of providing goods and services through public employees or a contract. The impact assessment must observe the following:

1. For goods and services provided by public employees, the assessment must include analysis of cost for work conducted by public employees and contractors, and include a statement of performance objectives achieved.
2. For goods and services contracted out, the assessment must include an estimate of the cost of goods and services, including the cost of public employee staff time and resources to monitor the contract, and include a statement of performance objectives achieved via contracting.

Agencies must prepare written records regarding the decision to contract, and include the comprehensive impact assessment and performance standards contained in the contract. Written records must be maintained for the term of any contract, or five years, whichever is longer.

Upon completion of the contract or provision of the goods or services by the agency's public employees, or every five years if not yet completed, the agency must file a report with DES

documenting the contractor or project plan performance, itemizing contract extensions and change orders, and stating remedial actions and costs of such actions.

Agencies must include specific terms in their contract or project plan:

- a cancellation clause;
- a semiannual, or more frequent, periodic performance review;
- requirement to reimburse, if contracting out, or absorb, if provided by public employees, certain additional costs, including but not limited to public employee time expended in achieving full performance of the contract or project plan objectives;
- employment and wage information about contractors and subcontractors or state employee; and
- if contracting out, a waiver of confidentiality with respect to basic financial information related to the contract.

The state civil service law is amended to remove the exception for certain services and activities approved by the Technology Services Board to meet criteria when contracting out for these services if traditionally and historically provided by state employees.

Contract Management. DES uniform policies and procedures are expanded to include agency project plans, in addition to contracts, and must include:

- compliance with requirements regarding women and minority business owners;
- model terms to facilitate recovery of the costs of public employee staff time that must be expended to bring a contract into substantial compliance; and
- criteria for terminating performance-based contracts or project plans not achieving standards.

Agencies or DES must monitor performance-based contracts or project plans to ensure that all aspects are being properly performed, and that performance standards are being achieved.

Contracting Out for DES Services. The provisions requiring OFM to identify six activities, goods or services functions each biennium to potentially contract out are amended. Priority for selection must be given to agency activities, goods or services that are significant, ongoing functions or projects with an initial project plan of \$250,000 or more.

In considering whether an activity can be contracted out at a reduced cost and with greater efficiency, DES must consider cost compared to revenue impacts of existing activities currently performed by DES and 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. DES may only contract out if it will afford taxpayers a cost savings or achieve an efficiency.

OFM's biennial report to the Legislature must include any unanticipated costs incurred as a result of contracting out and an estimate of staff hours devoted by employees of OFM and DES in conducting the required program review. This report must be made available on the web site of the agency that was the subject of the report.

In conducting the required audit of the performance of the provisions for contracting out, 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 by the contractor 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 an 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.

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

The act is named the Taxpayer Protection Act.

Appropriation: None.

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

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

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

Staff Summary of Public Testimony: PRO: This bill has been negotiated but still needs additional work over the interim to try to find language that will continue to move this issue forward. Taxpayers are paying for these services regardless of whether they are being provided by the state or by contract and the right questions need to be asked before the decision is made. This bill is all about good management whether in house or contracted out. The state needs to be on top of these jobs and should be doing more to ensure that jobs are done right the first time, within budget and the agreed upon timeframes.

CON: This bill tips the favor of the analysis to keeping the work rather than contracting out. It is important to look at both options. There are provisions in the bill that may lead to unfair analysis, which need further discussion such as defining what's included in the state's indirect overhead cost and the fact that the private sector has built in mechanisms to keep overhead low. Most issues can be handled in the contract itself. The stakeholders need to work through these issues in the interim.

Persons Testifying: PRO: Representative Laurie Dolan, Prime Sponsor; Alia Griffing, WA Federation of State Employees; Todd Stidd, WA Federation of State Employees.

CON: Van Collins, American Council of Engineering Companies of Washington; Jerry Vanderwood, Associated General Contractors.

Persons Signed In To Testify But Not Testifying: No one.