
SECOND SUBSTITUTE HOUSE BILL 1851

State of Washington

65th Legislature

2018 Regular Session

By House State Government, Elections & Information Technology
(originally sponsored by Representatives Dolan, Harris, Hudgins,
MacEwen, Kilduff, Haler, Robinson, Bergquist, Fitzgibbon, Doglio,
Pollet, Ormsby, and Stanford)

READ FIRST TIME 02/01/18.

1 AN ACT Relating to protecting taxpayers by providing for
2 accountability and transparency in government contracting; amending
3 RCW 41.06.142 and 39.26.200; adding a new section to chapter 39.26
4 RCW; and creating a new section.

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

16 (1) Any department, agency, or institution of higher education
17 may purchase services, including services that have been customarily
18 and historically provided by employees in the classified service
19 under this chapter or by employees included in the Washington
20 management service as defined in RCW 41.06.022 and 41.06.500, by

1 contracting with individuals, nonprofit organizations, businesses,
2 employee business units, or other entities if the following criteria
3 are met:

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

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

9 (A) An estimate of the cost of performance of the service by
10 employees, including the fully allocated costs of the service, the
11 cost of the employees' salaries and benefits, space, equipment,
12 materials, and other costs necessary to perform the function. The
13 estimate must not include the state's indirect overhead costs unless
14 those costs can be attributed directly to the function in question
15 and would not exist if that function were not performed in state
16 service;

17 (B) An estimate of the cost of performance of the services if
18 contracted out, including the cost of allocating sufficient employee
19 staff time and resources to monitor the contract and ensure its
20 proper performance by the contractor; and

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

23 (ii) The comprehensive assessment may also include an assessment
24 of the potential adverse impacts on the public from outsourcing the
25 contract, such as loss of employment, effect on social services and
26 public assistance programs, economic impacts on local businesses and
27 local tax revenues, and environmental impacts;

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

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

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

39 (d) The department, agency, or institution of higher education
40 has established a contract monitoring process to measure contract

1 performance, costs, service delivery quality, and other contract
2 standards, and to cancel contracts that do not meet those standards;
3 and

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

9 (2)(a) An agency, department, or institution of higher education
10 must prepare a written record of the basis of the decision to
11 contract out a service that has been customarily and historically
12 provided by employees. The written record must include the
13 comprehensive impact assessment under subsection (1)(a) of this
14 section, an itemization of performance standards contained in the
15 contract pursuant to subsection (1)(b) of this section, an
16 explanation of why alternatives were not accepted pursuant to
17 subsection (1)(c) of this section, and an explanation of the
18 determinations and the considerations made under subsection (1)(e) of
19 this section.

20 (b) Upon entering an agreement to contract out for a service that
21 has been customarily and historically provided by employees, the
22 agency, department, or institution of higher education must provide
23 the written record of the basis of the agency's decision to the
24 department of enterprise services and the office of financial
25 management. The department of enterprise services must post the
26 reports on its web site.

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

30 (3) Every five years or upon completion of the contract,
31 whichever comes first, the agency, department, or institution of
32 higher education must prepare and file with the department of
33 enterprise services a report, which must include at a minimum the
34 following information:

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

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

39 (c) A report of any remedial actions that were taken to enforce
40 compliance with the contract, together with an estimate of the cost

1 incurred by the agency, department, or institution of higher
2 education in enforcing such compliance.

3 (4) In addition to any other terms required by law, the terms of
4 any agreement to contract out a service that has been customarily and
5 historically provided by employees must include the following:

6 (a) A cancellation clause allowing the state agency to cancel a
7 contract if the contractor fails to meet quality standards or budget
8 specifications;

9 (b) Terms ensuring periodic review of performance of the
10 contract;

11 (c) Terms requiring the contractor to compensate the agency,
12 department, or institution of higher education for employees' hours
13 expended in achieving full performance of a contract that has failed
14 inspection, that the contractor has failed to complete on schedule,
15 or that has not been completed in a manner that is consistent with
16 quality standards;

17 (d) A term requiring the contractor to make available to the
18 agency, department, or institution of higher education the following
19 information at the start of the contract's term and updated each
20 fiscal year:

21 (i) The name and unified business identifier number, if
22 applicable, of the contractor and all subcontractors;

23 (ii) A list of individuals or entities performing the services
24 under the contract, reflected as full-time equivalent positions,
25 including the hourly wage rate for each position, and the status of
26 the individual as an employee of the contractor or subcontractor,
27 subcontractor, independent contractor, or consultant; and

28 (iii) An agreement that the contractor provide to the agency,
29 department, or institution of higher education upon request, basic
30 financial information related to the contract, other than financial,
31 commercial, or proprietary information specifically exempted from
32 disclosure to the public under RCW 42.56.270; and

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

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

39 ((+3)) (6) Contracting for services that is expressly mandated
40 by the legislature or was authorized by law prior to July 1, 2005,

1 including contracts and agreements between public entities, shall not
2 be subject to the processes set forth in subsections (1)(~~(7)~~) through
3 (4), (7), and (~~(5)~~) (9) of this section.

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

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

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

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

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

1 rendered by an administrative law judge assigned under chapter 34.12
2 RCW.

3 (e) An employee business unit's bid must include the fully
4 allocated costs of the service, including the cost of the employees'
5 salaries and benefits, space, equipment, materials, and other costs
6 necessary to perform the function. An employee business unit's cost
7 shall not include the state's indirect overhead costs unless those
8 costs can be attributed directly to the function in question and
9 would not exist if that function were not performed in state service.

10 (f) A department, agency, or institution of higher education may
11 contract with the department of enterprise services to conduct the
12 bidding process.

13 ~~((+5))~~ (8) The department of enterprise services must maintain
14 uniform policies and procedures for the effective and efficient
15 management of contracts by all state agencies, pursuant to RCW
16 39.26.180. The department of enterprise services must also include in
17 the policy and procedures maintained:

18 (a) In the precontract procedures for selecting potential
19 contractors based on qualifications and ability to perform,
20 procedures to ensure compliance with chapter 39.19 RCW, providing for
21 participation of minority and women-owned businesses;

22 (b) In model contract terms to ensure contract performance and
23 compliance with state and federal standards, terms to facilitate
24 recovery of the costs of employee staff time that must be expended to
25 bring a contract into substantial compliance;

26 (c) In the procedures and criteria for terminating contracts,
27 procedures and criteria for terminating performance-based contracts
28 that are not achieving performance standards; and

29 (d) A requirement that agencies, departments, and institutions of
30 higher education monitor performance-based contracts to ensure that
31 all aspects of the contract are being properly performed and that
32 performance standards are being achieved.

33 (9) As used in this section:

34 (a) "Employee business unit" means a group of employees who
35 perform services to be contracted under this section and who submit a
36 bid for the performance of those services under subsection ~~((+4))~~
37 (7) of this section.

38 (b) "Indirect overhead costs" means the pro rata share of
39 existing agency administrative salaries and benefits, and rent,

1 equipment costs, utilities, and materials associated with those
2 administrative functions.

3 (c) "Competitive contracting" means the process by which
4 ~~((classified))~~ employees of a department, agency, or institution of
5 higher education compete with businesses, individuals, nonprofit
6 organizations, or other entities for contracts authorized by
7 subsection (1) of this section.

8 ~~((+6))~~ (d) "Employee" means state employees in the classified
9 service under this chapter and state employees included in the
10 Washington management service under RCW 41.06.022 and 41.06.500,
11 unless otherwise specified.

12 (10) The processes set forth in subsections (1)(a), (2), (3), and
13 (4)(a) through (d)(iii) of this section do not apply to contracts
14 awarded for the purposes of or by the department of transportation.

15 (11) The processes set forth in subsections (1)~~((7))~~ through (4),
16 ~~(7), and ((+5)) (9) of this section do not apply to:~~

17 (a) RCW 74.13.031~~((+5))~~ (6); and

18 (b) The acquisition of printing services by a state agency~~((+and~~
19 ~~(c) Contracting for services or activities by the department of~~
20 ~~enterprise services under RCW 43.19.008 and the department may~~
21 ~~continue to contract for such services and activities after June 30,~~
22 ~~2018)).~~

23 ~~((+7))~~ (12) The processes set forth in subsections (1)~~((7))~~
24 through (4), (7), and ~~((+5)) (9) of this section do not apply to the~~
25 consolidated technology services agency when contracting for services
26 or activities as follows:

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

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

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

37 (1)(a) The director shall provide notice to the contractor of the
38 director's intent to either fine or debar with the specific reason

1 for either the fine or debarment. The department must establish the
2 debarment and fining processes by rule.

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

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

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

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

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

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

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

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

33 (ii) A recent record of failure to perform or of unsatisfactory
34 performance in accordance with the terms of one or more contracts,
35 however the failure to perform or unsatisfactory performance caused
36 by acts beyond the control of the contractor may not be considered to
37 be a basis for debarment;

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

39 (g) Any other cause the director determines to be so serious and
40 compelling as to affect responsibility as a state contractor,

1 including debarment by another governmental entity for any cause
2 listed in regulations; and

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

7 (3) The director must issue a written decision to debar. The
8 decision must:

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

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

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

14 An agency, department, or institution of higher education that
15 intends to contract out, or does contract out, for services
16 customarily and historically provided by employees in the classified
17 service defined in RCW 41.06.020 or employees included in the
18 Washington management service under RCW 41.06.022 and 41.06.500 must
19 follow procedures and meet criteria established under RCW 41.06.142.

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