



H.B. 363

125th General Assembly
(As Introduced)

Reps. D. Stewart, Cirelli, DeGeeter, Miller, Skindell, Strahorn

BILL SUMMARY

- Establishes a new competitive selection process for state agencies entering into privatization contracts for the purchase of services other than those subject to the competitive selection process of current law.
- Specifies that a "privatization contract" is an agreement by which a private contractor agrees with a state agency to provide services, valued at \$50,000 or more, that are substantially similar to and in lieu of, services provided or that could have been provided by a public employee.
- Requires a state agency, prior to entering into a privatization contract, to prepare a comprehensive written estimate of the costs of public employees providing the services that are the subject of a proposed privatization contract.
- Requires a state agency that intends to purchase services in accordance with a privatization contract to give notice of the intent to make the purchase of the services.
- Requires every bid or proposal for a privatization contract to detail information about the bidder regarding employee length of employment, experience, training, and turnover; complaints under federal, state, or local laws; relevant collective bargaining agreements; and political contributions.
- Requires a state agency to conduct a comprehensive written analysis of each bid, including, the bidder's experience and its record of compliance with federal, state, or local laws; and the costs associated with the transition from a public to private operation, the loss of public

employment positions, and monitoring and administering the privatization contract.

- Requires the director of a state agency entering into a privatization contract to certify that the bill's requirements have been complied with, that certain quality requirements will be met, that the cost of the privatization contract will be at least 10% less than the estimated cost of public employees performing the services, and that the proposed privatization contract is in the public interest.
- Specifies that a state agency may enter into a privatization contract only if all of the following apply:
 - The contract is awarded pursuant to the bill's requirements and procedures;
 - The term of the contract does not exceed two years;
 - The contract provides that the state must be afforded reasonable access to facilities, records, and employees utilized by the private contractor to provide services under the contract;
 - The contract provides for minimum compensation for private contractor employees based on similarly situated public employee salary and benefits;
 - The contract provides that employment positions must be made available to qualified public employees whose state employment is terminated as a result of the contract;
 - The contract provides that the private contractor and any subcontractor must comply with a policy of nondiscrimination and equal opportunity; and
 - The contract provides that no state funds may be used by the private contractor or subcontractor to support or oppose unionization.
- Requires annual audits of contractors who have entered into privatization contracts.
- Establishes public record requirements in addition to public record requirements set forth in current law that specify, in part, that any public

record a private contractor, subcontractor, or employee of a private contractor creates, possesses, or modifies pursuant to a privatization contract is the property of the state agency that is a party to the privatization contract.

- Applies the state whistle-blower statute to privatization contracts.
- Authorizes civil actions for violations of the bill's contract requirements and civil and criminal actions for violations of the bill's public records requirements.

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CONTENT AND OPERATION

Required competitive selection for privatization contracts

(R.C. 125.01, 125.78(A) and (D) to (G), and 125.781)

Current law establishes the procedures by which a state agency may purchase services. In general, services must be purchased by or on behalf of state agencies via a competitive selection process. Competitive selection must be conducted on behalf of a state agency by the Department of Administrative Services (DAS) unless DAS has granted the agency a release and permit to make the purchase. However, a state agency is not required to purchase services by competitive selection if the cost of the services is less than \$50,000 adjusted annually based on the consumer price index.

The bill establishes new requirements for state agencies when entering into contracts for the provision of services referred to as "privatization contracts." A "privatization contract" is defined by the bill to mean an agreement or combination or series of agreements, and amendments thereto, by which a private contractor agrees with a state agency to provide services, valued at \$50,000 or more, which are substantially similar to and in lieu of, services provided or that could have been provided by a public employee.¹ Under the bill, a "private contractor" means a person² that enters into a privatization contract.

The bill requires a state agency³ entering into a privatization contract for the purchase of services to do so by competitive selection in accordance with the bill's requirements. All other services contracts will continue to be subject to the competitive selection requirements set forth in current law.

Prior determination of cost of implementation of services by public employees

(R.C. 125.78(C) and 125.782)

Under the bill, before a state agency may submit notice of a request for bids for the provision of services under a privatization contract, the agency must prepare a comprehensive written estimate of the costs that would result if public employees provided the services that are the subject of that notice in the most cost-efficient manner, including, but not limited to, the costs associated with pensions, insurance, and other employee benefits. The written estimate must be completed not later than 90 days prior to giving notice of the request for bids.

The estimate is required to remain confidential until after the final day for the agency to receive sealed bids for the privatization contract, at which time the estimate is considered a public record under the bill and the State Public Records Law.

¹ "Public employee" is defined by the bill to mean an individual holding a position by appointment or employment in the service of a state agency.

² The bill defines "person" to include an individual, corporation, trust, estate, partnership, association, or any other public or private entity.

³ "State agency" under the bill means an office, department, board, commission, or other instrumentality in the executive branch of the state government authorized to enter into contracts for the purchase of services.

Upon commencing to prepare the written estimate under the bill, an agency must notify the relevant employee organization⁴ of its intent to enter into a privatization contract. Not later than 30 days following notification by the agency, the employee organization may commence procedures under the State Collective Bargaining Law for the purpose of modifying any existing collective bargaining agreement between the agency and the employee organization. The only modifications to the collective bargaining agreement authorized under the bill are those modifications necessary to preserve the jobs of the public employees by providing that the cost of the potential privatization contract is at least 10% less than the cost of the services if they were performed by public employees as determined in accordance with the bill (see "*Investigation, analysis, and certification, of bids,*" below). For purposes of determining if a potential contract meets that condition, the modifications to the collective bargaining agreement must be incorporated into the cost estimate.

Process for conducting and evaluating bids

Notice of intended purchase of services

(R.C. 125.783(A), (B) and (D))

A state agency that intends to purchase services in accordance with a privatization contract under the bill must first give notice of the intent to make the purchase of the services. The agency must advertise the intended purchase by notice that is posted by mail or electronic means and that is for the benefit of competing persons producing or dealing in the services to be purchased. The bill requires the notice to be in the form of a written statement detailing the services to be purchased, including the specific quantity and standard of quality of the services. The notice also must detail certain contract requirements outlined in the bill (see "*Requirements for entering into a privatization contract,*" below).

The notice must include the time and place where bids or proposals will be accepted and opened and the conditions under which bids or proposals will be received. The time designated when the bids or proposals will be accepted and opened is required to be the same for all competing persons. The posting of the notice must be completed not later than 30 business days preceding the day when the bids or proposals will be accepted and opened.

⁴ "*Employee organization*" means any labor or bona fide organization in which public employees participate and that exists for the purpose, in whole or in part, of dealing with state agencies concerning grievances, labor disputes, wages, hours, terms, and other conditions of employment.

Bid requirements

(R.C. 125.783(C)(1) to (8))

The bill requires every bid or proposal to detail the length of continuous employment of the bidder's current employees by job classification without identifying the employees, any relevant experience of current employees within each job classification, and, if the bidder anticipates creating new employment positions to fulfill requirements under the privatization contract, the minimum requirements for prospective applicants for each position. In addition, the bid must include information concerning the annual rate of employee turnover, the number of training hours planned for each employee in subject matters directly related to the provision of services under the privatization contract, and any legal complaints issued by federal, state, or local enforcement agencies for alleged violations of any laws, regulations, or rules. Information concerning complaints must include the date of the complaint, the enforcement agency involved, the relevant law, regulation, or rule, and the outcome of the complaint. Finally, the bid must include any collective bargaining agreements and personnel policies covering the employees expected to provide services under the privatization contract, and a list of certain political contributions or in-kind contributions made by the bidder or employees of the bidder in management positions to any elected officer of the state or any member of the General Assembly during the four years preceding the day when bids or proposals will be accepted.

Investigation, analysis, and certification of bids

(R.C. 125.784)

The state agency must open the bids or proposals at the time and place designated in the bid notice. Prior to designating the bidder to which it intends to award a privatization contract, the agency must conduct an investigation of the bids. For purposes of the investigation, the agency must prepare a comprehensive, written analysis of the potential privatization contract with each bidder. The analysis is required to consider:

- (1) The bidder's experience and its record of compliance with federal, state, or local laws, regulations, and rules;
- (2) The costs associated with the transition from public to private operation;
- (3) The costs of additional unemployment and retirement benefits as a result of entering into the privatization contract; and

(4) The costs associated with monitoring and administering the privatization contract.

Further, if the bidder proposes to perform any of the privatization contract outside the state, the agency must increase its estimate of the contract cost by the amount of income tax revenue, if any, which will be lost to the state by the corresponding elimination of public employees, as determined by the State Tax Commissioner.

Following the investigation the director of the state agency must certify in writing all of the following as to the winning bid:

(1) The director has complied with all of the bill's requirements;

(2) The quality of the services to be provided pursuant to the privatization contract is likely to satisfy the quality requirements set forth in the bid notice and is likely to equal or exceed the quality of services provided by public employees;

(3) The cost of the privatization contract will be at least 10% less than the estimated cost of public employees performing the services to be performed under the privatization contract; and

(4) The proposed privatization contract is in the public interest.

The bill specifies that the certification by the director is a public record under the bill (see "**Public Records**," below) and for purposes of the State Public Records Law.

Requirements for entering into a privatization contract

(R.C. 125.785)

Under the bill, after the investigation, analysis, and certification of bids are completed a state agency may enter into a privatization contract. However, the contract may be entered into only if it meets all of the following requirements:

(1) The contract is awarded pursuant to the bill's competitive selection requirements and procedures;

(2) The term of the contract does not exceed two years;

(3) The contract provides that the state must be afforded reasonable access to facilities, records, and employees utilized by the private contractor to provide services under the contract;

(4) The contract provides that the minimum compensation of a private contractor employee providing services pursuant to the contract must be the greater of the wage rate paid at step one of the grade or classification under which a public employee whose duties are most similar is paid, plus the cash value of health and other benefits provided to such public employee, or the average private sector compensation, including the value of health and other benefits, for the position as determined by the Department of Job and Family Services;

(5) The contract provides that the private contractor and subcontractor must offer employee positions made available pursuant to the contract to qualified public employees whose state employment is terminated as a result of the contract;

(6) The contract provides that the private contractor and subcontractor must comply with a policy of nondiscrimination and equal opportunity for all individuals and, in doing so, must not discriminate against or intimidate any employee or applicant for employment on account of race, creed, gender, disability, or color; and

(7) The contract provides that no state funds may be used by the private contractor or subcontractor to support or oppose unionization. Under the bill, prohibited activities include, but are not limited to, preparing and distributing materials that advocate for or against unionization; hiring or consulting legal counsel or other consultants to advise the contractor or subcontractor about how to assist, promote, or deter unionization or how to impede a union that represents the contractor's or subcontractor's employees from fulfilling its representational responsibilities; holding meetings to influence employees about unionization; planning or conducting activities to assist, promote, or deter union activities; or defending against unfair labor practice charges brought by federal or state enforcement agencies.

The bill also specifies that a privatization contract entered into by a state agency is a public record and that no amendment to a privatization contract is valid if it has the purpose or effect of avoiding any requirement pertaining to the original privatization contract.

Subcontracts of private contractors

(R.C. 125.786)

The bill prohibits a private contractor from entering into a subcontract, or an amendment to a subcontract, for work under a privatization contract without the approval of the state agency. Any such subcontract or amendment must be filed with the agency and is a public record under the bill and the State Public Records Law.

Required contract audits and reports

(R.C. 125.787)

The bill requires that, at least once every year during the term of a privatization contract, the private contractor and any subcontractors must conduct a financial audit related to the provision of services under the contract or a subcontract. The financial audit must be prepared and attested as correct by an independent certified public accountant and filed with the state agency that entered into the privatization contract. In addition, the private contractor must file with the state agency a report detailing the extent to which the contractor has achieved the specific quantity and standard of quality for the services it is conducting. The report also must detail the contractor's compliance with federal, state, and local laws in providing services under the contract.

Public records and criminal penalty

(R.C. 125.78(B) and (H), 125.788, 125.789, and 125.99)

In addition to requirements of the State Public Records Law, the bill requires public records⁵ to be maintained and made available as follows:

(1) Any public record a private contractor, subcontractor, or employee of a private contractor creates, possesses, or modifies pursuant to a privatization contract remains the property of the state agency with which the private contractor has entered into a privatization contract, and no private contractor, subcontractor, or employee of a private contractor may have any ownership rights in the records. Under the bill, an "employee of a private contractor" means an individual directly employed by a private contractor or a subcontractor, as well as an independent contractor providing services pursuant to a privatization contract and also includes former employees of a private contractor or subcontractor, and former independent contractors.

(2) A private contractor, subcontractor, or employee of a private contractor may not impair the integrity of any public record it possesses.

(3) A private contractor or subcontractor in possession of a public record must make the record available in accordance with State Public Records Law, but the determination of whether or not to make the record available must be made

⁵ "Public record" is defined by the bill to have the same meaning as "public record" under the State Public Records Law and also includes records, regardless of the medium, prepared, received, or retained by a contractor or subcontractor relating to a privatization contract.

solely by the state agency. A private contractor, subcontractor, or employee of a private contractor is not required to make a public record available if the state agency is prohibited from disclosing, or is not required to disclose, the public record pursuant to federal or state law or if the state agency may disclose the public record only to certain entities or individuals or under certain conditions pursuant to federal or state law.

(4) A private contractor, subcontractor, or employee of a private contractor must not sell, market, or otherwise profit from the disclosure or use of any public record that it possesses pursuant to a privatization contract.

If a private contractor, subcontractor, or employee of a private contractor learns of any violation of the public records provisions of the bill, the private contractor, subcontractor, or employee of a private contractor, not later than seven calendar days after learning of the violation, must notify the state agency and the Attorney General of the violation. Further, if a public employee or employee of a private contractor reasonably believes that a violation of the bill's public record provisions has occurred, the public employee or employee of a private contractor has the same rights and duties accorded an employee under the State Whistle Blower Law and for purposes of that law, the violation is considered a hazard to public health or safety. A person who willfully and knowingly violates the bill's public records provisions must be fined not more than \$5,000 or imprisoned for not less than one year nor more than five years, or both.

Civil actions

(R.C. 125.7810)

Contract compliance

A person may bring a civil action against a private contractor when that person is aggrieved by the private contractor's failure to comply with the bill's provisions related to wage requirements, nondiscrimination requirements, requirements related to employment opportunities for public employees whose positions have been terminated, and requirements governing contractors support of or opposition to labor organizations (see "**Requirements for entering into a privatization contract**," paragraphs (4) to (7), above). In that civil action, the court may award damages, including back pay, equitable relief as the court finds appropriate, court costs, and reasonable attorney's fees.

Public records compliance

A person aggrieved by a violation of the bill's public records provisions may bring a civil action to recover damages suffered as a result of the violation.

Such an action may be brought in addition to any remedies provided for under the State Public Records Law.

Additionally, if the Attorney General has reasonable cause to believe that a person has violated the bill's public records provisions he may do one of the following:

(1) Bring an action on behalf of any state agency for damages caused by the violation;

(2) Bring an action on behalf of persons injured by the violation to recover damages caused by the violation;

(3) Bring an action seeking the imposition of a civil penalty of not more than \$50,000.

In any such action brought by a person or the Attorney General, the court, on its own motion, may grant additional relief, including damages equal to any profits derived by the person who committed the violation to the extent the profits are reasonably related to the violation; punitive damages, court costs, and reasonable attorney's fees; and injunctive or other equitable relief. No such action may be brought more than three years after the occurrence of the violation.

HISTORY

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Introduced	12-30-03	pp. 1345-1346

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