

Chapter 296. AN ACT FURTHER REGULATING THE PURCHASE OF STATE SERVICES.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to immediately regulate the purchase of services by state agencies, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

SECTION 1. Chapter 7 of the General Laws is hereby amended by inserting after section 51 the following four sections:-

Section 52. The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest. To ensure that citizens of the commonwealth receive high quality public services at low cost, with due regard for the taxpayers of the commonwealth and the needs of public and private workers, the general court finds it necessary to regulate such privatization contracts in accordance with sections fifty-three to fifty-five, inclusive.

Section 53. As used in sections fifty-two to fifty-five, inclusive, the following words shall have the following meanings:-

"Agency", an executive office, department, division, board, commission or other office or officer in the executive branch of the government of the commonwealth, the Massachusetts Bay Transportation Authority, the Massachusetts Turnpike Authority and the Massachusetts Port Authority.

"Dependent", the spouse and children of an employee if such persons would qualify for dependent status under the Internal Revenue Code or for whom a support order has been or could be granted under chapter two hundred and eight, two hundred and nine, or two hundred and nine C.

"Privatization contract", an agreement or combination or series of agreements by which a non-governmental person or entity agrees with an agency to provide services, valued at one hundred thousand dollars or more, which are substantially similar to and in lieu of, services theretofore provided, in whole or in part, by regular employees of an agency. Any subsequent agreement, including any agreement resulting from a rebidding of previously privatized service, or any agreement renewing or extending a privatization contract, shall not be considered a privatization contract. An agreement solely to provide legal, management consulting, planning, engineering or design services shall not be considered a privatization contract.

Section 54. No agency shall make any privatization contract and no such contract shall be valid unless the agency, in consultation with the executive office for administration and finance, first complies with each of the following requirements:-

(1) The agency shall prepare a specific written statement of the services proposed to be the subject of the privatization contract, including the specific quantity and standard of quality of the subject services. The agency shall solicit competitive sealed bids for the privatization contracts based upon this statement. The day designated by the agency upon which it will accept these sealed bids shall be the same for any and all parties. This statement shall be a public record, shall be filed in the agency and in the executive office for administration and finance, and shall be transmitted to the state auditor for review pursuant to section fifty-five. The term of any privatization contract shall not exceed five years. No amendment to a privatization contract shall be valid if it has the purpose or effect of avoiding any requirement of this section.

(2) For each position in which a bidder will employ any person pursuant to the privatization contract and for which the duties are substantially similar to the duties performed by a regular agency employee or employees, the statement required by paragraph (1) shall include a statement of the minimum wage rate to be paid for said position, which rate shall be the lesser of step one of the grade or classification under which the comparable regular agency employee is paid, or the average private sector wage rate for said position as determined by the executive office for administration and finance from data collected by the department of employment and training and the division of purchased services. Every bid for a privatization contract and every privatization contract shall include provisions specifically establishing the wage rate for each such position, which shall not be less than said minimum wage rate as defined above. Every such bid and contract shall also include provisions for the contractor to pay not less than a percentage, comparable to the percentage paid by the commonwealth for state employees, of the costs of health insurance plans for every employee employed for not less than twenty hours per week pursuant to such contract. Such health insurance plans shall satisfy the requirements of the fifth paragraph of section nine of chapter one hundred and eighteen F, and shall provide coverage to the employee and the employee's spouse and dependent children. Each contractor shall submit quarterly payroll records to the agency, listing the name, address, social security number, hours worked and the hourly wage paid for each employee in the previous quarter. The attorney general may bring a civil action for equitable relief in the superior court to enforce this paragraph or to prevent or remedy the dismissal, demotion or other action prejudicing any employee as a result of a report of a violation of this paragraph.

(3) Every privatization contract shall contain provisions requiring the contractor to offer available employee positions pursuant to the contract to qualified regular employees of the agency whose state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor. Every such contract shall also contain provisions requiring the contractor to comply with a policy of nondiscrimination and equal opportunity for all persons protected by chapter one hundred and fifty-one B, and to take affirmative steps to provide such equal opportunity for all such persons.

(4) The agency shall prepare a comprehensive written estimate of the costs of regular agency employees' providing the subject services in the most cost-efficient manner. The estimate shall include all direct and indirect costs of regular agency employees' providing the subject services, including but not limited to, pension, insurance and other employee benefit costs. For the purpose of this estimate, any employee organization may, at any time before the final day for the agency to receive sealed bids pursuant to paragraph (1), propose amendments to any relevant collective bargaining agreement to which it is a party. Any such amendments shall take effect only if necessary to reduce the cost estimate pursuant to this paragraph below the contract cost pursuant to paragraph (6). Such estimate shall remain confidential until after the final day for the agency to receive sealed bids for the privatization contract pursuant to paragraph (1), at which time the estimate shall become a public record, shall be filed in the agency and in the executive office for administration and finance, and shall be transmitted to the state auditor for review pursuant to section fifty-five.

(5) After consulting any relevant employee organization, the agency shall provide adequate resources for the purpose of encouraging and assisting present agency employees to organize and submit a bid to provide the subject services. In determining what resources are adequate for this purpose, the agency shall refer to an existing collective bargaining agreement of a similar employee organization whose members perform the subject services, if available, which agreement provides similar resources in the same or other agencies; provided, however, that if no such collective bargaining agreement exists, the agency shall refer to any existing collective bargaining agreements providing such resources, and shall provide such resources at the minimum level of assistance provided in said agreements. The agency shall consider any such employee bid on the same basis as all other bids. An employee bid may be made as a joint venture with other persons. Subclause (h) of clause Twenty-sixth of section seven of chapter four shall apply with respect to all employee bids. Sections four, five and six of chapter two hundred and sixty-eight A shall not apply to the activities of agency employees conducted pursuant to this paragraph.

(6) After soliciting and receiving bids, the agency shall publicly designate the bidder to which it proposes to award the contract. The agency shall prepare a comprehensive written analysis of the contract cost based upon the designated bid, specifically including the costs of transition from public to private operation, of additional unemployment and retirement benefits, if any, and of monitoring and otherwise administering contract performance. If the designated bidder proposes to perform any or all of the contract outside the boundaries of the commonwealth, said contract cost shall be increased by the amount of income tax revenue, if any, which will be lost to the commonwealth by the corresponding elimination of agency employees, as determined by the department of revenue to the extent that it is able to do so.

(7) The head of the agency and the commissioner of administration shall each certify in writing to the state auditor, that:

(i) he has complied with all provisions of this section and of all other applicable laws;

(ii) the quality of the services to be provided by the designated bidder is likely to satisfy the quality requirements of the statement prepared pursuant to paragraph (1), and to equal or exceed the quality of services which could be provided by regular agency employees pursuant to paragraph (4);

(iii) the contract cost pursuant to paragraph (6) will be less than the estimated cost pursuant to paragraph (4), taking into account all comparable types of costs;

(iv) the designated bidder and its supervisory employees, while in the employ of said designated bidder, have no adjudicated record of substantial or repeated willful noncompliance with any relevant federal or state regulatory statute including, but not limited to, statutes concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection and conflicts of interest; and

(v) the proposed privatization contract is otherwise in the public interest.

A copy of the proposed privatization contract shall accompany the certificate transmitted to the state auditor.

No provision of this section shall apply in any circumstance to the extent that the provision is inconsistent with section thirty-nine M of chapter thirty or sections twenty-six to twenty-seven H, inclusive, or sections forty-four A to forty-four J, inclusive, of chapter one hundred and forty-nine.

Section 55. (a) An agency shall not make any privatization contract and no such contract shall be valid if, within thirty days after receiving the certificate required by section fifty-four, the state auditor notifies the agency of his objection. Such objection shall be in writing and shall state specifically the state auditor's finding that the agency has failed to comply with one or more requirements of said section fifty-four, including that the state auditor finds incorrect, based on independent review of all the relevant facts, any of the findings required by paragraph (7) of said section fifty-four.

(b) For the purpose of reviewing the agency's compliance and certificate pursuant to said section fifty-four, the state auditor or his designee may require by summons the attendance and testimony under oath of witnesses and the production of books, papers and other records relating to such review. All provisions of law relative to summonses in civil cases, including the manner of service, the scope and relevance to such review, and the compensation of witnesses who are not state employees, shall apply to such summonses. Such summonses shall be enforced pursuant to section ten of chapter two hundred and thirty-three.

(c) The state auditor may adopt regulations and prescribe forms to carry out the provisions of this section and section fifty-four.

(d) The objection of the state auditor pursuant to subsection (a) shall be final and binding on the agency, unless the state auditor thereafter in writing withdraws the objection, stating the specific reasons, based upon a revised certificate by the agency and by the commissioner of administration and upon the state auditor's review thereof.

SECTION 2. Section 5 of chapter 268A of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by inserting after the word "body", in line 31, the following words:- or

(f) a former state employee whose salary was not less than that in step one of job group M-VII in the management salary schedule in section forty-six C of chapter thirty, and who becomes an officer or employee of a business organization which is or was a party to any privatization contract as defined in section fifty-three of chapter seven in which contract he participated as such state employee, if he becomes such officer or employee while the business organization is such a party or within one year after he terminates his state employment, unless before the termination of his state employment the governor determines, in a writing filed with the state ethics commission, that such participation did not significantly affect the terms or implementation of such contract.

SECTION 3. Section 274 of chapter 110 of the acts of 1993, as amended by section 113 of chapter 151 of the acts of 1993, is hereby further amended by adding the following two paragraphs:-

The division shall adopt regulations limiting the reimbursement to providers for the salaries of their officers or managers to the salary level in step seven of job group M-XII in the management salary schedule in section forty-six C of chapter thirty of the General Laws.

The division shall adopt rules and regulations governing contracts between governmental units and social service program providers which shall include, but not be limited to: a provision requiring that all transactions between said providers and related parties shall be disclosed in writing in advance to the division and to such governmental units, either of which may prohibit the transaction by written notice to the provider; a provision requiring that any reductions in a rate of reimbursement, or other payment method, or total expenditure, shall be applied, first against expenditures on managerial personnel, including but not limited to management fees, salaries, benefits and other compensation paid to managers, and shall be applied, in the last instance, against expenditures on direct service workers; a provision requiring that any contracts for which funds expended by the commonwealth thereunder reimburse or compensate said providers for the amortization of mortgages for the ownership of property, whether owned directly or indirectly by said provider, shall contain provisions for the recoupment of said reimbursement or compensation by the commonwealth in the event said property is sold and may, if necessary, allow for the execution of liens to ensure such recoupment; a provision requiring a complete inventory of equipment purchased by said providers on behalf of the commonwealth, and the return of such equipment to the proper governmental unit upon the completion or termination of the contract; a provision requiring that the uniform financial report include a subsidiary schedule for each component cost, and a related party disclosure statement from each officer, director and trustee of the said providers; provisions prohibiting any subcontract or consultant contract for services from a parent organization, or parent agency, at the national, state or local level; a provision prohibiting the refusal to service any case or type of case, or place any restrictions or limitation on services, the provision of which were mutually agreed upon in the conditions specified in the contract, subsequent to the finalization of such contract either primary or secondary; a provision prohibiting the use of state funding for investment counseling, fund-raising, management consultants and other services that are not directly related to the servicing of clients, patients and other persons served by the provider agency. If after a hearing the division finds a violation of any regulation adopted under this paragraph, the division may order that the contract be terminated, or may assess a civil penalty of not more than two thousand dollars or ten percent of the amount payable under the contract, whichever is greater, which the agency shall withhold from payments otherwise due under the contract. Notwithstanding the foregoing, any provider aggrieved under this paragraph may exercise any legal remedies or cause of action available to such provider under law. If the division determines after a hearing that a provider has committed repeated willful violations of this paragraph, it may debar the provider from further state contracts but such debarment shall not be for a period longer than five years.

SECTION 4. Notwithstanding any general or special law to the contrary, any recreational facility owned by the metropolitan district commission, the department of highways or the department of environmental management shall not be sold, leased, rented or otherwise disposed of unless the city or town within which said recreational facility is located is given first option to purchase, lease, rent or operate said recreational facility at fair market rate. Any such city or town purchasing, renting, leasing or operating such a facility pursuant to this section shall maintain the premises and the facilities located thereon in good order and repair without any additional aid from the commonwealth, unless agreed upon at the time of the transfer and shall perform without additional aid from the commonwealth all required maintenance, repairs and services relating to the facilities' use and occupancy.

SECTION 5. There shall be a commission on state government performance review consisting of nine members, three of whom shall be appointed by the governor, three of whom shall be appointed by the president of the senate, and three of whom shall be appointed by the speaker of the house of representatives. Said commission shall investigate and study the successes and failures of public and private performance of public services in the commonwealth and elsewhere. The commission may recommend appropriate legislation or changes in the procedures of the executive branch. The commission shall report the results of its investigation and study by filing the same with the clerks of the senate and house of representatives not later than October first, nineteen hundred and ninety-four.

SECTION 6. Sections fifty-two to fifty-five, inclusive, of chapter seven of the General Laws, added by section one of this act, shall apply to all privatization contracts executed on or after the effective date of this act.

SECTION 7. Clause (f) of section five of chapter two hundred and sixty-eight A of the General Laws, inserted by section two of this act, shall apply to former state employees whose state employment terminates on or after the effective date of this act.

This bill was returned by the Governor to the Senate, the branch in which it originated, with his objections thereto in writing. Said bill was passed by the Senate on December 14, 1993 and by the House of Representatives on December 15, 1993, the objections of the Governor notwithstanding in the manner prescribed by the Constitution and thereby has the "force of law".