

Regular Session, 2014

SENATE BILL NO. 547

BY SENATOR ADLEY

PUBLIC CONTRACTS. Provides relative to certain governmental agreements with private parties. (gov sig)

1 AN ACT
2 To enact R.S. 9:2778.1, relative to contractual agreements; to clarify and interpret public
3 policy regarding certain provisions in governmental agreements above fifty thousand
4 dollars in value between a governmental entity and a private party; to provide
5 relative to agreements of a governmental entity that are subject to the Administrative
6 Procedure Act and represented by the attorney general when called upon to do so and
7 not subject to review by the office of contractual review; to clarify and declare public
8 policy requiring specification of an expiration date or event, a monetary cap, and a
9 clear description of the services or goods to be provided; to clarify and provide for
10 the invalidity of certain provisions authorizing unilateral action by private
11 contractors on behalf of the governmental entity or conditioning public liability for
12 liquidated damages on acts of third parties, or agreements for which the
13 governmental entity neither possesses nor reasonably anticipates receiving adequate
14 funding; to provide for an effective date; and to provide for related matters.

15 Be it enacted by the Legislature of Louisiana:

16 Section 1. R.S. 9:2778.1 is hereby enacted to read as follows:

17 **§2778.1. Certain governmental agreements in excess of fifty thousand dollars**

1 between a governmental entity and a private party; agreements
2 of a governmental entity subject to the Administrative Procedure
3 Act and represented by the attorney general when called upon to
4 do so and not subject to review by the office of contractual
5 review; certain provisions required; certain provisions invalid as
6 against public policy

7 A. The legislature finds that, with respect to agreements between the
8 state, any political subdivision of the state, or any agency thereof that is subject
9 to the Administrative Procedure Act and represented by the attorney general
10 when called upon to do so and any private party that are not subject to review
11 by the office of contractual review within the division of administration and
12 under which the total value of any goods or services to be provided is greater
13 than fifty thousand dollars, provided that nothing herein shall apply to
14 contracts, permits, or servitudes with member-owned electric cooperatives or
15 investor-owned utilities regulated by the Louisiana Public Service Commission
16 or the City Council of New Orleans, all of the following apply:

17 (1) Such agreements are inequitable and contrary to the public policy of
18 this state if they fail to specify all of the following:

19 (a) An expiration date that is fixed in time, contingent upon the
20 occurrence of a specific event, or contingent upon the nonoccurrence of a
21 specific event by a specific date.

22 (b) The maximum dollar amount payable under such agreement or, in
23 the case of a contingency agreement, the percentages payable in the event of
24 recovery.

25 (c) The scope of the services to be rendered or products to be provided.

26 (2) Provisions in such agreements are inequitable and contrary to the
27 public policy of this state if they purport to do any of the following:

28 (a) Authorize the private party to take unilateral action on behalf of the
29 state, any political subdivision of the state, or any agency thereof that is subject

1 to the Administrative Procedure Act and represented by the attorney general
2 when called upon to do so outside the scope of the services to be rendered or
3 products to be provided.

4 (b) Authorize the private party to unilaterally file, institute, or pursue
5 any claim or cause of action on behalf of the state, political subdivision of the
6 state, or any agency thereof that is subject to the Administrative Procedure Act
7 and represented by the attorney general when called upon to do so.

8 (c) Condition liability of the state, any political subdivision of the state,
9 or any agency thereof that is subject to the Administrative Procedure Act and
10 represented by the attorney general when called upon to do so for liquidated
11 damages or the amount thereof on the action or inaction of any other person.

12 (d) Provide for liquidated damages payable by the state, any political
13 subdivision of the state, or any agency thereof that is subject to the
14 Administrative Procedure Act and represented by the attorney general when
15 called upon to do so without stating a specific dollar amount or a specific rate
16 per hour or per item from which the amount can be calculated.

17 (3) Such agreements are contrary to the public policy of this state if,
18 when the agreement is executed, the contracting governmental entity does not
19 possess or reasonably anticipate availability of funds sufficient to pay its
20 liability under the agreement in full at the time or times required under the
21 agreement, including but not limited to any contingent liability and any
22 liquidated damages.

23 B. The legislature hereby declares null, void, unenforceable, and against
24 public policy any agreement referenced in Paragraph (A)(1) or (3) of this
25 Section. Any such agreement may be amended to bring it into compliance with
26 the provisions of Subsection A. Any such amendment shall be effective
27 retroactively as of the date on which the agreement became effective.

28 C. The legislature hereby declares null, void, unenforceable, and against
29 public policy any provision as described in Paragraph (A)(2) of this Section. In

1 the event a suit is filed, a court shall give effect to all other provisions of any
2 such agreement containing provisions in violation of Paragraph (A)(2) of this
3 Section to the extent otherwise authorized by law.

4 D. The attorney general, or in the case of a political subdivision of the
5 state, the district attorney for the parish in which the political subdivision is
6 domiciled, or any other interested person may enforce the provisions of this
7 Section. However, the attorney general, the district attorney, or other
8 interested person shall first provide written notice by certified mail, return
9 receipt requested, to all parties of the agreement of the violation and provide the
10 parties sixty days in which to amend the agreement to bring it into compliance
11 with the provisions of this Section. After sixty days from the date of receipt of
12 written notice, the attorney general, district attorney, or other interested person
13 may bring an action to enforce the provisions of this Section in the district court
14 for the parish in which the governmental entity is domiciled.

15 E. No payment is or may be due or paid for services rendered under any
16 agreement that is null and void under this Section or pursuant to any provision
17 that is null and void under this Section, other than in quantum meruit. If an
18 action is filed under Subsection D of this Section, any action or claim for
19 quantum meruit may be brought only within the action to enforce this Section.

20 Section 2. It is the intent of the legislature that the provisions of this Act shall apply
21 both prospectively and retroactively. It is further the intent of the legislature to clarify that
22 those agreements and provisions described in Section 1 of this Act are and have always been
23 contrary to the public policy of this state and void ab initio.

24 Section 3. This Act shall become effective upon signature by the governor or, if not
25 signed by the governor, upon expiration of the time for bills to become law without signature
26 by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If
27 vetoed by the governor and subsequently approved by the legislature, this Act shall become
28 effective on the day following such approval.

The original instrument was prepared by Jay Lueckel. The following digest, which does not constitute a part of the legislative instrument, was prepared by Cathy R. Wells.

DIGEST

Adley (SB 547)

Proposed law provides that agreements between private parties and governmental entities that are subject to the APA and represented by the attorney general when called to do so and not subject to review by the office of contractual review and under which the total value is greater than \$50,000, all of the following provisions shall apply:

- (1) Such agreements are inequitable and contrary to the public policy of the state if they fail to specify: an expiration date that is fixed in time, contingent on the occurrence of a specific event, or contingent on the nonoccurrence of a specific event by a specific date; the maximum dollar amount payable under such agreement or in the case of a contingency agreement, the percentages payable in the event of recovery; and the scope of the services to be rendered or products to be provided.
- (2) Provisions in such agreements are inequitable and contrary to the public policy of this state if they purport to: authorize the private party to take unilateral action on behalf of the state, any political subdivision of the state, or agency thereof that is subject to the APA and represented by the attorney general when called upon to do so outside the scope of the services to be rendered or products to be provided; authorize the private party to unilaterally file, institute, or pursue any claim or cause of action on behalf of the state, political subdivision of the state, or any agency thereof that is subject to the APA and represented by the attorney general when called upon to do so; condition liability of the state, any political subdivision of the state, or any agency thereof that is subject to the APA and represented by the attorney general when called upon to do so for liquidated damages or the amount thereof on the action or inaction of any other person; or provide for liquidated damages payable by the state, any political subdivision of the state, or any agency thereof that is subject to the APA and represented by the attorney general when called upon to do so without stating a specific dollar amount, or specific rate per hour or per item from which the amount can be calculated.
- (3) Such agreements are contrary to the public policy of this state if, when the agreement is executed, the contracting governmental entity does not possess or reasonably anticipate availability of funds sufficient to pay its liability under the agreement in full at the time or times required under the agreement, including but not limited to any contingent liability and any liquidated damages.

Proposed law provides that it does not apply to contracts, permits, or servitudes with member owned electric cooperatives or investor owned utilities regulated by the La. Public Service Commission or the City Council of New Orleans.

Proposed law provides the legislature declares null, void, unenforceable, and against public policy any agreement referenced under such provisions; however, any agreement may be amended to bring it into compliance with the provisions. Proposed law provides that any such amendment shall be effective retroactively as of the date on which the agreement became effective.

Proposed law provides the legislature declares null, void, unenforceable, and against public policy, any agreement referenced under these provisions. In the event a suit is filed, a court shall give effect to certain provisions containing violations of proposed law.

Proposed law provides that the attorney general or in the case of a political subdivision of

the state, the district attorney or other interested person for the parish in which the political subdivisions is domiciled may enforce the provisions of proposed law. However, the attorney general, the district attorney, or other interested party shall provide written notice via certified mail, return receipt requested to all parties of the agreement of the violation and provide 60 days to amend the agreement to bring it into compliance. After 60 days from the date of receipt of written notice, said officials may bring an action to enforce the provisions of proposed law in the district court for the parish in which the entity is domiciled.

Proposed law further provides no payment is or may be due or paid for services rendered under any agreement that is null and void under the provisions of proposed law, other than in quantum meruit. If an action is filed, any action or claim for quantum meruit may be brought only within the action to enforce such provision.

Proposed law states it is the intent of the legislature that these provisions shall apply both prospectively and retroactively. It is further the intent of the legislature to clarify that those agreements and provisions in proposed law are and have always been contrary to the public policy of this state and void ab initio.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds R.S. 9:2778.1)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Finance to the original bill

1. Provides that proposed law does not apply to contracts, permits, or servitudes with member owned electric cooperatives or investor owned utilities regulated by the La. Public Service Commission or the City Council of New Orleans.

Senate Floor Amendments to engrossed bill

1. Makes technical changes.
2. Makes proposed law applicable to agreements of a governmental entity that are subject to the APA and represented by the attorney general when called to do so and not subject to review by the office of contractual review.
3. Removes provision that states proposed law is interpretive and procedural in nature.