

2016 Regular Session

SENATE BILL NO. 340

BY SENATOR GATTI

PUBLIC CONTRACTS. Creates the Privatization Review Act. (8/1/16)

AN ACT

To amend and reenact R.S. 44:4.1(B)(34) and to enact Chapter 6 of Title 49 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 49:351 through 357, relative to privatization contracts; to create and provide for the Privatization Review Act; to provide for certain requirements and procedures for certain privatization contracts; to provide for duties of executive branch agencies and agency heads relative to privatization contracts; to provide for the duties of the legislative auditor relative to certain privatization contracts; to provide procedures for legislative review and approval of privatization contracts; to provide for definitions; to provide for certain prohibitions; to provide for the voidability of privatization contracts; to provide relative to the records related to privatization contracts; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 6 of Title 49 of the Louisiana Revised Statutes of 1950, comprised of R.S. 49:351 through 357, is hereby enacted to read as follows:

CHAPTER 6. PRIVATIZATION REVIEW ACT

§351. Legislative findings

The legislature hereby finds and declares that the using of private contractors to provide public services formerly provided by state employees needs to be extensively reviewed to ensure that it promotes best practices, ensures that citizens of the state receive high-quality public services at low cost, and is in the overall best interest of the state and its citizens.

§352. Definitions

For purposes of this Chapter only, the following words and phrases shall have the following meanings:

(1) "Agency" shall mean an office, department, division, board, commission, officer, system, or other organizational unit of the executive branch of state government.

(2) "Appropriate standing committees of the legislature" shall mean the standing committees of the legislature to which an agency is required to submit a report pursuant to R.S. 49:968(B).

(3) "Nongovernmental entity" shall mean a legal entity other than an agency.

(4) "Nongovernmental person" shall mean an individual other than an employee of an agency.

(5)(a)(i) "Privatization contract" shall mean an agreement or combination or series of agreements by which a nongovernmental person or entity agrees with an agency to provide services that are valued at five million dollars or more per year and that are substantially similar to and in lieu of services previously provided in whole or in part by state employees of an agency.

(ii) An agreement solely to provide engineering or design services shall not be considered a privatization contract, and an agreement to provide for the construction or repair of any street, road, highway, or bridge shall not be considered a privatization contract.

(b) "Privatization contract" shall also mean any agreement or

1 combination or series of agreements by which a nongovernmental person or
2 entity agrees to lease or rent any state building or facility for five hundred
3 thousand dollars or more.

4 §353. Requirements

5 A. No agency shall enter into a privatization contract as defined in R.S.
6 49:352(5)(a), and no such contract shall be valid, unless the agency, in
7 consultation with the division of administration, first complies with each of the
8 following requirements:

9 (1)(a) The agency shall prepare a specific written statement of the
10 services proposed to be the subject of the privatization contract, including the
11 specific quantity and standard of quality of the subject services.

12 (b) The agency shall solicit competitive bids or proposals for the
13 privatization contract based upon this statement.

14 (c) The statement shall be a public record, shall be filed with the agency
15 and with the division of administration, and shall be transmitted to the
16 legislative auditor and the appropriate standing committees of the legislature
17 upon its completion.

18 (2)(a) The agency shall prepare a comprehensive written estimate of the
19 costs of state employees providing the subject services in the most cost-efficient
20 manner. The estimate shall include all direct and indirect costs of state
21 employees providing the subject services, including but not limited to
22 retirement, insurance, and other employee benefit costs.

23 (b) Such estimate shall remain confidential until after the final day for
24 the agency to receive bids or proposals for the privatization contract pursuant
25 to Paragraph (1) of this Subsection, at which time the estimate shall become a
26 public record, shall be filed with the agency and with the division of
27 administration, and shall be transmitted to the legislative auditor and the
28 appropriate standing committees of the legislature for review pursuant to R.S.

29 49:354.

1 (3) After soliciting and receiving bids or proposals, the agency shall
2 publicly designate the nongovernmental person or entity to which it proposes
3 to award the contract. The agency shall prepare a comprehensive written
4 analysis of the contract cost based upon the designated bid or proposal,
5 specifically including the costs of transition from public to private operation, of
6 additional unemployment and retirement benefits, if any, of additional
7 retirement costs, if any, and of monitoring and otherwise administering contract
8 performance. If the designated nongovernmental person or entity proposes to
9 perform any or all of the contract outside the boundaries of the state or if the
10 designated nongovernmental person or entity is domiciled outside the
11 boundaries of the state, the analysis of the contract cost shall indicate the
12 amount of income tax revenue, if any, which will be lost to the state by the
13 corresponding elimination of state employees and any additional loss of revenue
14 to the state due to the domicile of the nongovernmental person or entity, as
15 determined by the Department of Revenue to the extent practicable.

16 (4) The head of the agency shall certify in writing to the legislative
17 auditor and the appropriate standing committees of the legislature that:

18 (a) He has complied with all provisions of this Section and of all other
19 applicable laws.

20 (b) The quality of the services to be provided by the designated
21 nongovernmental person or entity is likely to satisfy the quality requirements
22 of the statement prepared pursuant to Paragraph (1) of this Subsection and to
23 equal or exceed the quality of services which could be provided by state
24 employees.

25 (c) The contract cost, according to the analysis required by Paragraph
26 (4) of this Subsection, will be less than the cost estimated pursuant to Paragraph
27 (3) of this Subsection, taking into account all comparable types of cost and
28 analysis of lost tax income, if any.

29 (d) The designated nongovernmental person or entity and its supervisory

1 employees, while in the employ of the designated nongovernmental person or
2 entity, have no adjudicated record of substantial or repeated noncompliance
3 with any relevant federal or state regulatory provision, including but not limited
4 to provisions concerning occupational safety and health, nondiscrimination,
5 environmental protection, and the Code of Governmental Ethics and other
6 conflicts of interest provisions and have no record of substantial or repeated
7 failure to meet performance measures or goals in any prior or current contract
8 with the state.

9 (e) The proposed privatization contract is in the public interest in that
10 it meets the applicable quality and fiscal standards set forth in this Section.

11 B.(1) A copy of the proposed privatization contract shall accompany the
12 certification transmitted to the legislative auditor and appropriate standing
13 committees of the legislature for review pursuant to R.S. 49:354.

14 (2) The agency head shall send each member of the legislature a copy of
15 the proposed privatization contract and the certification via electronic mail on
16 the same day he transmits those documents to the legislative auditor and
17 appropriate standing committees of the legislature.

18 §353.1. Lease and rental agreements

19 A. No agency shall enter into a privatization contract as defined in R.S.
20 49:352(5)(b) and no such contract shall be valid unless the agency, in
21 consultation with the division of administration, first complies with each of the
22 following requirements:

23 (1) The agency shall prepare a specific written statement of the fair
24 market rental or lease value of the state building or facility based upon
25 documented comparables.

26 (2) The statement shall be a public record, shall be filed in the agency
27 and in the division of administration, and shall be transmitted to the legislative
28 auditor and the appropriate standing committees of the legislature upon its
29 completion.

1 (3) The agency shall publicly announce the availability of the building or
2 facility for lease or rent. If more than one nongovernmental entity or person
3 expresses documented interest in the lease or rental, the agency shall engage in
4 a competitive process to designate the nongovernmental entity or person with
5 whom it intends to negotiate.

6 B. The head of the agency shall certify in writing to the legislative
7 auditor and the appropriate standing committees of the legislature that:

8 (1) He has complied with all provisions of this Section and of all other
9 applicable laws.

10 (2) The designated nongovernmental person or entity and its supervisory
11 employees, while in the employ of said designated nongovernmental person or
12 entity, have no adjudicated record of substantial or repeated noncompliance
13 with any relevant federal or state regulatory provision, including but not limited
14 to provisions concerning occupational safety and health, nondiscrimination,
15 environmental protection, and the Code of Governmental Ethics and other
16 conflicts of interest provisions.

17 (3) The proposed privatization contract is in the public interest and the
18 reasons therefore.

19 C.(1) A copy of the proposed privatization contract as defined in R.S.
20 49:352(5)(b) shall accompany the certification transmitted to the legislative
21 auditor and appropriate standing committees of the legislature for review
22 pursuant to R.S. 49:354.

23 (2) The agency head shall send each member of the legislature a copy of
24 the proposed privatization contract and the certification via electronic mail on
25 the same day he transmits those documents to the legislative auditor and
26 appropriate standing committees of the legislature.

27 §354. Legislative review

28 A.(1) The legislative auditor shall review each privatization contract and
29 certification no later than thirty days after receipt. After completion of the

1 review, the legislative auditor shall submit his findings to the appropriate
2 legislative standing committees. Such findings shall be in writing and shall state
3 the legislative auditor's findings regarding the agency's compliance with the
4 requirements of R.S. 49:353 or 353.1, as the case may be, and shall specifically
5 include the legislative auditor's independent review of all relevant facts
6 regarding any of the agency's findings required by R.S. 49:353(A)(5) or 353.1,
7 as the case may be.

8 (2) The legislative auditor shall send each member of the legislature a
9 copy of his findings via electronic mail on the same day he transmits his findings
10 to the appropriate standing committees of the legislature.

11 (3) Each agency shall cooperate and assist the legislative auditor in his
12 review and, notwithstanding any law or privilege to the contrary, shall provide
13 all documents and other records to the legislative auditor that he deems
14 necessary to complete his review.

15 B. The appropriate standing committees of the legislature shall review
16 the certification and proposed contract and may disapprove any such contract
17 within a reasonable time, not to exceed forty-five days after receipt of the
18 findings of the legislative auditor. If either standing committee disapproves the
19 contract, the agency shall not enter into the contract. If neither standing
20 committee disapproves a contract within the forty-five-day time period or if
21 both committees vote to approve the contract, the agency may enter into the
22 contract.

23 §355. Prohibitions; voidability

24 A. No amendment to a privatization contract shall be valid if it has the
25 purpose or effect of avoiding any requirement of this Chapter.

26 B. No agency shall transfer or grant to another person or entity the
27 authority to negotiate any privatization agreement in any manner to subvert the
28 provisions of this Chapter or the Public Records Law.

29 C. Any contract entered into by the state or any of its agencies in

violation of this Chapter shall be void ab initio.

§356. Post-privatization review

A. After each complete year of a privatization contract as defined in R.S. 49:352(5)(a), the agency shall report to the appropriate standing committees of the legislature the following information:

(1) The number of privatization contractor employees and consultants, reflected as full-time equivalent positions, and the amount of compensation received by each privatization contractor employee and consultant during the previous year, and their hourly wage rates for the current and previous fiscal year.

(2) An analysis of the nongovernmental person or entity performance under the privatization contract, specifically including performance measures.

(3) All complaints received and the agency's and contractor's response to each complaint.

B. After each complete year of a privatization contract as defined in R.S. 49:352(5)(b), the agency shall report to the appropriate standing committees of the legislature the following information:

(1) An analysis of the nongovernmental person's or entity's compliance with the terms of the privatization contract.

(2) All complaints received and the agency's and contractor's response to each complaint.

(3) A current analysis of the fair market rental or lease value of the state building or facility based upon documented comparables.

§357. Records

Notwithstanding any other provision to the contrary and except as otherwise specifically provided by this Chapter, all records related to a privatization contract shall be available for examination, inspection, reproduction, and copying in the same manner as provided by the Public Records Law regardless of the agency, official, person, or legal entity in

possession of the record.

Section 2. R.S. 44:4.1(B)(34) is hereby amended and reenacted to read as follows:

§4.1. Exceptions

* * *

B. The legislature further recognizes that there exist exceptions, exemptions, and limitations to the laws pertaining to public records throughout the revised statutes and codes of this state. Therefore, the following exceptions, exemptions, and limitations are hereby continued in effect by incorporation into this Chapter by citation:

* * *

(34) R.S. 49:220.25, **353(A)(3)(b)**, 956, 997, 1055

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The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by J. Ashley Mitchell Carter.

DIGEST

SB 340 Original

2016 Regular Session

Gatti

Proposed law defines for its purposes: (1) "appropriate standing committees of the legislature" as the standing committees of the legislature to which an agency is required to submit a report pursuant to present law (Administrative Procedure Act—APA); (2) "agency" as an office, department, division, board, commission, officer, system, or other organizational unit of the executive branch of state government; (3) "nongovernmental entity" as a legal entity other than an agency; (4) "nongovernmental person" as an individual other than an employee of an agency; and (5) "privatization contract" as either (a) an agreement or combination or series of agreements by which a nongovernmental person or entity agrees with an agency to provide services valued at \$5 million or more per year and which are substantially similar to and in lieu of services previously provided in whole or in part by state employees of an agency (specifically excludes an agreement solely to provide engineering or design services and an agreement to provide for the repair or construction of a street, road, highway, or bridge; further excludes any contract in effect prior to the effective date of this Chapter) or (b) any agreement or combination or series of agreements by which a nongovernmental person or entity agrees to lease or rent any state building or facility for \$500,000 or more.

Proposed law creates and provides for the Privatization Review Act by prohibiting an agency from entering into a privatization contract for services, unless the agency (or agency head) complies with each of the following:

- (1) (a) Prepare a specific statement of services proposed to be privatized, including the quantity and standard of quality of such services; (b) solicit competitive bids or proposals based upon the statement; and (c) transmit the statement to the legislative auditor and appropriate legislative standing committees.
- (2) Prepare a comprehensive written estimate of the costs of state employees providing

the subject services in the most cost-efficient manner, including all direct and indirect costs of state employees providing the subject services. Provides that such estimate remains confidential until after the final day for the agency to receive bids or proposals for the privatization contract at which time the estimate shall become a public record, shall be filed in the agency and in the division of administration, and shall be transmitted to the legislative auditor and the appropriate standing committees of the legislature.

- (3) After solicitation of the competitive bids or proposals, publicly designate the nongovernmental person or entity to which it proposes to award the contract and 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, of additional retirement costs, if any, and of monitoring and otherwise administering contract performance. If the designated nongovernmental person or entity proposes to perform any or all of the contract outside the boundaries of the state or if the designated nongovernmental person or entity is domiciled outside the boundaries of the state, the analysis shall include the amount of income tax revenue, if any, which will be lost to the state by the corresponding elimination of state employees and any additional loss of revenue to the state due to the domicile of the nongovernmental person or entity, as determined by the Dept. of Revenue to the extent practicable.
- (4) Certify to the legislative auditor and appropriate legislative standing committees that (a) he has complied with all provisions of proposed law and of all other applicable laws; (b) the quality of the services to be provided by the contractor is likely to satisfy the quality requirements of the statement and to equal or exceed the quality of services which could be provided by state employees; (c) the contract cost will be less than the estimated cost, taking into account all comparable types of cost and analysis of lost tax income, if any; (d) the designated contractor and its supervisory employees, while in the employ of the contractor, have no adjudicated record of substantial or repeated noncompliance with any relevant federal or state regulatory provision and have no record of substantial or repeated failure to meet performance measures or goals in any prior or current contract with the state; and (e) the proposed privatization contract is in the public interest in that it meets the applicable quality and fiscal standards set forth in proposed law.

Proposed law further provides for the Privatization Review Act by prohibiting an agency from entering into a privatization contract for lease or rental of state buildings or facilities, unless the agency (or agency head) complies with each of the following:

- (1) Prepare a specific written statement of the fair market rental of lease value of the state building or facility based upon documented comparables. Specifies that the statement is a public record and requires it to be filed in the agency and in the division of administration, and transmitted to the legislative auditor and the appropriate legislative committees upon completion.
- (2) Publicly announce the availability of the building or facility for lease or rent and if more than one nongovernmental entity or person expresses documented interest in the lease or rental, engage in a competitive process to designate the nongovernmental entity or person with whom it intends to negotiate.
- (3) Certify in writing to the legislative auditor and the appropriate standing committees of the legislature that: (a) he has complied with all provisions of proposed law and of all other applicable laws; (b) the designated nongovernmental person or entity and its supervisory employees, while in the employ of said designated nongovernmental person or entity, have no adjudicated record of substantial or repeated noncompliance with any relevant federal or state regulatory provision; and (c) the proposed privatization contract is in the public interest and the reasons therefore.

Proposed law provides for legislative review as follows:

- (1) Requires a copy of the proposed privatization contract to accompany the certification transmitted to the legislative auditor and appropriate standing committees of the legislature.
- (2) Requires the agency head to further send each legislator a copy of the proposed privatization contract and the certification via email on the same day he transmits those documents to the legislative auditor and appropriate standing committees of the legislature.
- (3) Requires the legislative auditor to review each contract and certification no later than 30 days after receipt and to submit his findings to the appropriate legislative standing committees and to each legislator via email. Requires the findings to be in writing and to include findings regarding the agency's compliance with the requirements of proposed law and to include the legislative auditor's independent review of all relevant facts regarding any of the agency's and division of administration's findings. Requires each agency to cooperate and assist the legislative auditor in his review and notwithstanding any law or privilege to the contrary, to provide all documents and other records to the legislative auditor that he deems necessary to complete his review.
- (4) Requires the appropriate legislative standing committees to review the certification and proposed contract and provides that the committees may disapprove the contract within a reasonable time, not to exceed 45 days after receipt of the findings of the legislative auditor. Prohibits the agency from entering into the contract if either standing committee disapproves the contract. Provides that if either standing committee does not disapprove of a contract within the 45-day time period or if both committees approve the contract, the agency may enter into the contract.

Proposed law further provides that (1) no amendment to a privatization contract shall be valid if it has the purpose or effect of avoiding any requirement of proposed law and (2) no agency shall transfer or grant to another person or entity the authority to negotiate any privatization agreement in any manner to subvert the provisions of proposed law or the Public Records Law. Proposed law specifies that any contract entered into by the state or any of its agencies in violation of proposed law shall be void ab initio.

Proposed law provides that after each complete year of a privatization contract for services, the agency shall report to the appropriate legislative standing committees: (1) an analysis of the performance on the privatization contract, specifically including performance measures; and (2) all complaints received and the agency's and contractor's response to each complaint.

Proposed law provides that after each complete year of a privatization contract for rental or lease of state buildings or facilities, the agency shall report to the appropriate legislative standing committees: (1) an analysis of the nongovernmental person's or entity's compliance with the terms of the privatization contract; (2) all complaints received and the agency's and contractor's response to each complaint; and (3) a current analysis of the fair market rental of lease value of the state building or facility based upon documented comparables.

Proposed law specifies that notwithstanding any other provision to the contrary and except as otherwise specifically provided by proposed law, all records related to a privatization contract shall be available for examination, inspection, reproduction, and copying in the same manner as provided by the Public Records Law regardless of the agency, official, person, or legal entity in possession of the record.

Effective August 1, 2016.

(Amends R.S. 44:4.1(B)(34); adds R.S. 49:351-357)