

ASSEMBLY, No. 3538

STATE OF NEW JERSEY 219th LEGISLATURE

INTRODUCED FEBRUARY 25, 2020

Sponsored by:

Assemblywoman VALERIE VAINIERI HUTTLE

District 37 (Bergen)

SYNOPSIS

Establishes procedures and standards regarding public service privatization contracts.

CURRENT VERSION OF TEXT

As introduced.



1 **AN ACT** establishing procedures and standards with respect to
2 certain privatization contracts and supplementing Title 52 of the
3 Revised Statutes.

4
5 **BE IT ENACTED** *by the Senate and General Assembly of the State*
6 *of New Jersey:*

7
8 1. The Legislature finds and declares that:

9 a. Using private contractors to provide public services formerly
10 provided by public employees does not always promote the public
11 interest;

12 b. Decisions to use private contractors to provide public
13 services must be based on factors which promote the public interest;

14 c. To ensure that citizens of the State receive high quality
15 public services at low cost, with due regard for the taxpayers of the
16 State and the needs of public and private workers, it is necessary to
17 regulate privatization contracts for public services and to require a
18 thorough review and analysis of potential cost impacts prior to
19 entering into any such privatization contract; and

20 d. It is appropriate to require that cost savings of the contract to
21 the State be substantial and significant because of the hazard that
22 the use of private contractors to provide services may prove, in the
23 long term, to be less efficient or more expensive than expected
24 when the contracting commences, and the ability of an agency to
25 resume the public provision of services under those circumstances
26 may be hindered by factors such as the divestment of equipment
27 and capital and the loss of experienced, highly qualified personnel
28 in connection with the contract.

29
30 2. As used in this act:

31 “Agency” means any department, division, board, commission or
32 other office or officer of the State or of any political subdivision of
33 the State, or any authority or other instrumentality of the State.

34 “Employee benefits” means all benefits provided to employees,
35 including, but not limited to, pensions, paid time off and health
36 insurance plans, including coverage provided under those plans to
37 the employee, the employee's spouse and dependent children.

38 “Privatization contract” or “contract” means an agreement or
39 combination or series of agreements valued at a total of \$250,000 or
40 more by which a non-governmental person or entity agrees with an
41 agency to provide services which are substantially similar to and in
42 lieu of, services previously provided, in whole or in part, by regular
43 employees of the agency, except that any agreement solely to
44 provide legal, management consulting, planning, engineering or
45 design services, or any contract solely for public work subject to the
46 prevailing wage requirements of P.L.1963, c.150 (C. 34:11-56.25 et
47 seq.), or any contract to have services principally provided by
48 persons with disabilities employed by rehabilitation facilities as

1 defined under the provisions of the “Rehabilitation Facilities Set-
2 Aside Act,” P.L.1981, c.488 (C.30:6-23 et seq.), shall not be
3 considered a privatization contract.
4

5 3. No agency shall enter into a privatization contract, and no
6 privatization contract with the agency shall be valid, unless all of
7 the following requirements are met:

8 a. The agency shall solicit competitive sealed bids for each
9 privatization contract based on a comprehensive written statement,
10 prepared by the agency, of the quality and quantity of the services
11 proposed to be the subject of the privatization contract, any fees,
12 fares or other charges to the public, the current costs to the agency
13 of providing those services, the qualifications, compensation and
14 benefits of agency personnel currently performing those services,
15 and a comprehensive description of the information the prospective
16 contractor is required to provide as part of the bid as required for
17 the evaluation of the bid pursuant to this section, and, if the bidder
18 is awarded the contract, a comprehensive description of the
19 information that the contractor is required to provide, including the
20 quarterly reports required pursuant to subsections b. and c. of this
21 section for ongoing oversight and the post-audits conducted
22 pursuant to this act. The day designated by the agency upon which
23 it will accept the sealed bids shall be the same for any and all
24 parties. The statement shall be a public record, and shall be
25 transmitted to the Office of the State Comptroller for review. The
26 term of a privatization contract shall not exceed five years. No
27 amendment to a privatization contract shall be valid if it has the
28 purpose or effect of avoiding any requirement of this section.

29 b. Every bid for a privatization contract and every privatization
30 contract shall require that the public not be subject to any fees,
31 fares, or other charges greater than those currently charged, that the
32 quantity and quality of the services performed under the contract
33 equal or exceed the quantity and quality of services currently
34 performed by agency employees, that the contractor has the
35 demonstrated ability and experience to provide services of that
36 quantity and quality, that the staff used by the contractor have
37 certification, licensing and levels of job proficiency equal to or
38 exceeding those of the agency employees currently performing the
39 services, and that the rate of wages and employee benefits for each
40 position not be less than the rate of wages and employee benefits
41 for comparable agency employees. Each bid shall include a
42 requirement that, in addition to the quarterly payroll records
43 required pursuant to subsection c. of this section, quarterly reports
44 be made to the agency regarding contractor compliance with the
45 requirements of this subsection regarding the quality and quantity
46 of services and any charges imposed on the public, and those
47 reports shall be made public by the agency. The agency shall have
48 access to all contractor records relevant to compliance with the

1 requirements of this section.

2 c. For each position in which a bidder will employ any person
3 pursuant to the privatization contract, the statement made by the
4 agency pursuant to subsection a. of this section shall include the
5 rate of wages and employee benefits paid by the agency to the
6 regular agency employee or employees most comparable to the
7 position under the privatization contract. Each bid for a
8 privatization contract and every privatization contract shall include
9 provisions specifically stating the rate of wages and employee
10 benefits for each position, which shall not be less than the rate of
11 wages and employee benefits stated by the agency for comparable
12 agency employees. Each contractor shall submit quarterly payroll
13 records to the agency, listing the name, hours worked, the hourly
14 wage and employee benefit rates paid to each employee, and the
15 agency shall make the records available upon request to any labor
16 organization representing employees of the contractor or employees
17 or displaced employees of the agency. Any contractor who fails to
18 pay the rates of wages and employee benefits required by the
19 contract pursuant to this subsection shall be subject to the remedies
20 which apply in connection with a failure to pay the prevailing wage
21 pursuant to the "New Jersey Prevailing Wage Act,"
22 P.L.1963, c.150 (C.34:11-56.25 et seq.), including, but not limited
23 to, the withholding of payments from the agency to the contractor
24 pursuant to section 9 of P.L.1963, c.150 (C.34:11-56.33), the
25 imposition of fines and penalties by the Commissioner of Labor and
26 Workforce Development pursuant to sections 11 and 15 of
27 P.L.1963, c.150 (C.34:11-56.35 and 34:11-56.39), debarment from
28 contracting pursuant to sections 13 and 14 of P.L.1963,
29 c.150 (C.34:11-56.37 and 34:11-56.38), and the actions by workers
30 to recover unpaid amounts in civil actions pursuant to section 16 of
31 P.L.1963, c.150 (C.34:11-56.40). The commissioner shall have the
32 same authority and responsibility to conduct investigations,
33 inspections and other activities to enforce wage and benefit
34 payments due under contracts pursuant to this section as he has to
35 conduct investigations, inspections and other activities to enforce
36 payments of prevailing wages pursuant to the "New Jersey
37 Prevailing Wage Act," P.L.1963, c.150 (C.34:11-56.25 et seq.).

38 d. The agency, prior to soliciting bids, shall permit the agency
39 personnel performing the services and the majority representative of
40 those personnel to review the agency's estimates of the cost of
41 agency personnel performing the services and permit the majority
42 representative to submit an alternative cost estimate based on that
43 review and any proposal made by the majority representative to
44 reduce costs and increase the efficiency of agency operations in a
45 manner which is in compliance with the requirements of this
46 section, including all requirements regarding charges to the public,
47 the quantity and quality of services, and employee remuneration,
48 and the agency shall review the proposal and the revised estimate

1 after bidding has been completed and make a determination of
2 whether and how much to reduce the agency's estimates of the cost
3 of agency personnel performing the services when making the
4 comparison with the cost to the agency of the contractor's bid
5 pursuant to this section and determining whether the bid will
6 provide savings for the agency. The agency shall not disclose the
7 majority representative's alternative estimate or proposal to reduce
8 costs prior to the completion of the bidding.

9 e. The contract shall require the contractor to comply with a
10 policy of nondiscrimination and equal opportunity, take affirmative
11 steps to provide that equal opportunity, and offer available
12 employee positions to qualified regular employees of the agency
13 who are displaced or dismissed from agency employment, in whole
14 or in part, because of the privatization contract, and the agency
15 shall, in consultation with affected agency personnel and their
16 majority representative, and prior to the commencing of the term of
17 the contract, prepare a plan of assistance for each employee
18 displaced as a result of the contract, including any training needed
19 to place the employee in a position with the contractor or the
20 agency.

21 f. The contractor making the bid, and its subsidiaries,
22 affiliates, principals and managerial or supervisory employees are
23 not, when the bid is made or the contract is awarded, or during the
24 ten-year period before the award were not, subject to debarment,
25 suspension, adjudication or conviction, or any criminal conviction
26 at any time, which debarment, suspension, adjudication or
27 conviction is due to substantial or repeated noncompliance with any
28 federal or State law pertaining to the operation of a business,
29 including, but not limited to, laws regarding labor relations,
30 workplace standards, occupational safety and health, public safety
31 and health, environmental protection, nondiscrimination and
32 affirmative action, tax payment and conflicts of interest.

33 g. The agency shall prepare a comprehensive estimate of the
34 costs of regular agency employees providing the services subject to
35 the contract, including the cost of employee benefits.

36 h. If the agency determines, after soliciting and receiving bids,
37 that one or more of the bids comply with the cost savings
38 requirement and all other requirements of this section, the agency
39 shall publicly designate to which of the compliant bidders it
40 proposes to award the contract and issue a comprehensive written
41 analysis of the total contract cost of the designated bid, including
42 the costs of transition from public to private operation and any
43 additional unemployment and retirement benefits of agency
44 employees, and the costs of monitoring and administering contract
45 performance born pursuant to this act by the agency and any State
46 entity, including the State Auditor and the Office of the State
47 Comptroller. If the designated bidder is headquartered outside the
48 State, or proposes to perform any or all of the work done under

1 contract outside the boundaries of the State, the contract cost shall
2 be increased by the amount of income tax revenue, if any, which
3 will be lost to the State by the corresponding elimination of agency
4 employees.

5 i. The agency shall provide the Office of the State Comptroller
6 with a copy of the proposed privatization contract and a written
7 certification:

8 (1) That the agency has complied with all provisions of this
9 section;

10 (2) That the agency finds that the proposed privatization
11 contract is in the public interest and meets all requirements of this
12 section;

13 (3) That the agency finds that the estimated contract cost is less
14 than the cost of agency personnel performing the services, taking
15 into account any reduction of that cost made by the agency pursuant
16 to subsection d. of this section; and

17 (4) That sets forth the agency's estimate of the total amount of
18 the cost savings to the agency that would be provided by the
19 contract.

20

21 4. The Office of the State Comptroller shall, within 30 business
22 days after receiving the certificate required by section 3 of this act,
23 review the certification of the agency, and prohibit the agency from
24 entering into the privatization contract if the office determines that
25 the bid does not provide cost savings or that the agency has failed to
26 comply with any other requirement of this section. The office may
27 require by summons the attendance and testimony under oath of
28 witnesses and the production of books, papers and other records
29 relating to that review. The office may extend the time for an
30 objection for an additional period of 30 business days beyond the
31 original 30 business days by written notice to the agency, stating the
32 reason for that extension. The determination shall be final and
33 binding on the agency, unless withdrawn due to a revision of the
34 certification by the agency found satisfactory by the office. The
35 certification, the proposed contract, the determination and any
36 revision of the determination, with supporting documentation, shall
37 be made available by the office to the public on the Internet.

38

39 5. The State Auditor shall, as part of his responsibility under
40 R.S.52:24-4, conduct an annual post audit of each privatization
41 contract entered into after the effective date of this act and shall
42 issue, and make available to the public and representatives of
43 employee organizations representing affected employees, an annual
44 report to the Governor and the Legislature regarding the contract,
45 the first of which shall be issued not more than 90 days after the end
46 of the first year that the contract is in effect. The report shall
47 include an evaluation of the actual entire cost and any actual cost
48 savings of the contract compared with the amount of cost and

1 savings estimated when the contract was awarded, with an analysis
2 of whether any failure to provide the amount of savings was related
3 to misrepresentation, fraud or other malfeasance, misfeasance or
4 nonfeasance of an agency or contractor, and a review of the
5 compliance of the agency and the contractor with the provisions of
6 this act, including all requirements regarding charges to the public,
7 the quantity and quality of services, and the qualifications and
8 remuneration of contractor employees, with an analysis of whether
9 any non-compliance was related to misrepresentation, fraud or other
10 malfeasance, misfeasance or nonfeasance of an agency or
11 contractor. Any agency or contractor, or officer or agent of the
12 agency or contractor, determined to be responsible for the
13 misrepresentation, fraud or other malfeasance, misfeasance or
14 nonfeasance shall be subject to penalties and sanctions as provided
15 by law, including, where appropriate, debarment, contract
16 rescission, damages, and reimbursement of excess charges to the
17 public and underpayments to employees. Any finding by the State
18 Auditor that a contractor has failed to make the wage or benefit
19 payments required under a privatization contract shall be referred to
20 the Commissioner of Labor and Workforce Development for
21 appropriate enforcement actions. The post-audit reports, with
22 supporting documentation and records, shall be made available by
23 the State Auditor to the public on the Internet on an ongoing basis.
24

25 6. This act shall take effect on the 90th day after enactment but
26 the provisions of this act shall not apply to any privatization
27 contract first entered into prior to the effective date of this act or to
28 the renewal or extension of any privatization contract first entered
29 into prior to the effective date of this act.
30

31 STATEMENT 32 33

34 The purpose of this bill is to ensure that no public services are
35 privatized unless there are cost savings which are not based on
36 increased charges or reduced services to the public, or lowered
37 workforce standards. Each prospective private contractor would be
38 required to demonstrate cost reductions based on improvements
39 such as management efficiencies or technical innovation, not based
40 on added burdens imposed on the members of the public using the
41 services or the employees producing them. The bill requires that a
42 contract for the privatization of public services not be entered into
43 without cost analyses demonstrating that there will be actual cost
44 savings for the public agency and the taxpayers without increased
45 fees, fares, or other charges to the public, reduced quantity or
46 quality of services, or lowered workforce standards, including
47 reduced staff qualifications and remuneration. The bill further
48 requires sustained oversight and public disclosure regarding those

1 contracts to provide accountability to taxpayers, public users of the
2 services, and employees producing the services, that the cost
3 savings actually occur without increased charges, or reduced
4 services or workforce standards, and provides penalties and
5 sanctions for any noncompliance involving agency or contractor
6 misrepresentation, fraud or other malfeasance, misfeasance or
7 nonfeasance.

8 The bill prohibits any agency of the State or political subdivision
9 from entering into a contract of \$250,000 or more to purchase from
10 private entities services previously performed by agency employees,
11 other than legal, management consulting, planning, engineering or
12 design services, prevailing wage construction work, or certain
13 services provided by disabled individuals employed by
14 rehabilitation facilities, unless:

15 1. The agency solicits competitive sealed bids for the contracts
16 based on a comprehensive statement of requirements by the agency;

17 2. The contract requires that the public not be charged fares,
18 fees or other charges greater than those currently charged, that the
19 quantity and quality of the services provided equal or exceed the
20 quantity and quality of services currently provided, that the
21 contractor is qualified, and that contractor employees have
22 qualifications and wage and benefit rates at least equal to the
23 agency employees currently performing the services. Contractors
24 are required to submit payroll records to the agency and, upon any
25 failure to pay the agreed upon wage and benefit rates, are subject to
26 the remedies and penalties provided by the “New Jersey Prevailing
27 Wage Act,” P.L.1963, c.150 (C.34:11-56.25 et seq.) for failure to
28 pay the prevailing wage;

29 3. The agency permits the union of the affected agency
30 employees to review the agency’s estimate of current costs and
31 submit an alternative cost estimate and propose cost saving
32 measures compliant with requirements of the bill and the agency
33 reviews the union estimate and proposal and makes a determination
34 whether to reduce the agency’s estimate of current costs;

35 4. The contract requires compliance with antidiscrimination
36 standards, requires available positions to be offered to qualified
37 displaced agency employees, and requires the agency to prepare a
38 plan of training and assistance for displaced employees;

39 5. The contractor and specified associates have no adjudicated
40 record of substantial or repeated noncompliance with any federal or
41 State law pertaining to the operation of a business, including laws
42 regarding contracting and conflict of interest;

43 6. After receiving bids, the agency publicly designates the
44 bidder to which it proposes to award the contract and issues a
45 comprehensive written analysis of the total contract cost of the
46 designated bid; and

47 7. The agency provides written certification that the agency
48 and the proposed contract are in compliance with all provisions of

1 the bill and the total estimated contract cost is less than the cost of
2 agency employees performing the services, with a statement of the
3 amount of the savings.

4 The Office of the State Comptroller would be required to review
5 the certification and prohibit the agency from entering into the
6 privatization contract if the office provides a written determination
7 that the bid does not provide cost savings or that the agency has
8 otherwise failed to comply with any requirement of the bill.

9 The State Auditor would be required to conduct post-audits of
10 contracts subject to the bill, evaluating whether the projected cost
11 savings were obtained without raising charges, cutting services, or
12 lowering workforce standards. If the noncompliance was related to
13 agency or contractor misrepresentation, fraud or other malfeasance,
14 misfeasance or nonfeasance, the agency or contractor would be
15 subject to penalties and sanctions including, where appropriate,
16 debarment or rescission of contracts, or reimbursement of excess
17 charges to the public and underpayments of employees.

18 The requirements of the bill do not apply to any privatization
19 contract first entered into before the effective date of the bill or to
20 the renewal or extension of any privatization contract first entered
21 into prior to that effective date.