SENATE COMMITTEE SUBSTITUTE FOR
SENATE, Nos. 968 and 1494

STATE OF NEW JERSEY
215th LEGISLATURE

ADOPTED OCTOBER 1, 2012

Sponsored by:
Senator LORETTA WEINBERG
District 37 (Bergen)
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District 15 (Hunterdon and Mercer)
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Senators Van Drew, Greenstein, Assemblywoman Mosquera and
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SYNOPSIS
Establishes procedures and standards regarding public service privatization
contracts.

CURRENT VERSION OF TEXT
Substitute as adopted by the Senate Labor Committee.

(Sponsorship Updated As Of: 5/21/2013)
AN ACT establishing procedures and standards with respect to certain privatization contracts and supplementing Title 52 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The Legislature finds and declares that:
   a. Using private contractors to provide public services formerly provided by public employees does not always promote the public interest;
   b. Decisions to use private contractors to provide public services must be based on factors which promote the public interest;
   c. To ensure that citizens of the State receive high quality public services at low cost, with due regard for the taxpayers of the State and the needs of public and private workers, it is necessary to regulate privatization contracts for public services and to require a thorough review and analysis of potential cost impacts prior to entering into any such privatization contract; and
   d. It is appropriate to require that cost savings of the contract to the State be substantial and significant because of the hazard that the use of private contractors to provide services may prove, in the long term, to be less efficient or more expensive than expected when the contracting commences, and the ability of an agency to resume the public provision of services under those circumstances may be hindered by factors such as the divestment of equipment and capital and the loss of experienced, highly qualified personnel in connection with the contract.

2. As used in this act:
   “Agency” means any department, division, board, commission or other office or officer of the State or of any political subdivision of the State, or any authority or other instrumentality of the State.
   “Employee benefits” means all benefits provided to employees, including, but not limited to, pensions, paid time off and health insurance plans, including coverage provided under those plans to the employee, the employee's spouse and dependent children.
   “Privatization contract” or “contract” means an agreement or combination or series of agreements valued at a total of $250,000 or more by which a non-governmental person or entity agrees with an agency to provide services which are substantially similar to and in lieu of, services previously provided, in whole or in part, by regular employees of the agency, except that any agreement solely to provide legal, management consulting, planning, engineering or design services, or any contract solely for public work subject to the prevailing wage requirements of P.L.1963, c. 150 (C. 34:11-56.25 et seq.), or any contract solely to have services provided by persons
with disabilities employed at rehabilitation facilities under provisions of the “Rehabilitation Facilities Set-Aside Act,” P.L.1981, c.488 (C.30:6-23 et seq.), shall not be considered a “privatization contract.”

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

a. The agency shall solicit competitive sealed bids for each privatization contract based on a comprehensive written statement, prepared by the agency, of the quality and quantity of the services proposed to be the subject of the privatization contract, any fees, fares or other charges to the public, the current costs to the agency of providing those services, the qualifications, compensation and benefits of agency personnel currently performing those services, and a comprehensive description of the information the prospective contractor is required to provide as part of the bid as required for the evaluation of the bid pursuant to this section, and, if the bidder is awarded the contract, a comprehensive description of the information that the contractor is required to provide, including the quarterly reports required pursuant to subsections b. and c. of this section for ongoing oversight and the post-audits conducted pursuant to this act. The day designated by the agency upon which it will accept the sealed bids shall be the same for any and all parties. The statement shall be a public record, and shall be transmitted to the Office of the State Comptroller for review. The term of a 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.

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

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

d. The agency, prior to soliciting bids, shall permit the agency personnel performing the services and the majority representative of those personnel to review the agency’s estimates of the cost of agency personnel performing the services and permit the majority representative to submit an alternative cost estimate based on that review and any proposal made by the majority representative to reduce costs and increase the efficiency of agency operations in a manner which is in compliance with the requirements of this
section, including all requirements regarding charges to the public,
the quantity and quality of services, and employee remuneration,
and the agency shall review the proposal and the revised estimate
after bidding has been completed and make a determination of
whether and how much to reduce the agency’s estimates of the cost
of agency personnel performing the services when making the
comparison with the cost to the agency of the contractor’s bid
pursuant to this section and determining whether the bid will
provide savings for the agency. The agency shall not disclose the
majority representative’s alternative estimate or proposal to reduce
costs prior to the completion of the bidding.

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

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

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

h. If the agency determines, after soliciting and receiving bids,
that one or more of the bids comply with the cost savings
requirement and all other requirements of this section, the agency
shall publicly designate to which of the compliant bidders it
proposes to award the contract and issue a comprehensive written
analysis of the total contract cost of the designated bid, including
the costs of transition from public to private operation and any
additional unemployment and retirement benefits of agency
employees, and the costs of monitoring and administering contract
performance born pursuant to this act by the agency and any State
entity, including the State Auditor and the Office of the State Comptroller. If the designated bidder is headquartered outside the State, or proposes to perform any or all of the work done under contract outside the boundaries of the State, the contract cost shall be increased by the amount of income tax revenue, if any, which will be lost to the State by the corresponding elimination of agency employees.

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

   (1) That the agency has complied with all provisions of this section;
   (2) That the agency finds that the proposed privatization contract is in the public interest and meets all requirements of this section;
   (3) That the agency finds that the estimated contract cost is less than the cost of agency personnel performing the services, taking into account any reduction of that cost made by the agency pursuant to subsection d. of this section; and
   (4) That sets forth the agency’s estimate of the total amount of the cost savings to the agency that would be provided by the contract.

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

5. The State Auditor shall, as part of his responsibility under R.S.52:24-4, conduct an annual post audit of each privatization contract entered into after the effective date of this act and shall issue, and make available to the public and representatives of employee organizations representing affected employees, an annual report to the Governor and the Legislature regarding the contract, the first of which shall be issued not more than 90 days after the end
of the first year that the contract is in effect. The report shall
include an evaluation of the actual entire cost and any actual cost
savings of the contract compared with the amount of cost and
savings estimated when the contract was awarded, with an analysis
of whether any failure to provide the amount of savings was related
to misrepresentation, fraud or other malfeasance, misfeasance or
nonfeasance of an agency or contractor, and a review of the
compliance of the agency and the contractor with the provisions of
this act, including all requirements regarding charges to the public,
the quantity and quality of services, and the qualifications and
remuneration of contractor employees, with an analysis of whether
any non-compliance was related to misrepresentation, fraud or other
malfeasance, misfeasance or nonfeasance of an agency or
contractor. Any agency or contractor, or officer or agent of the
agency or contractor, determined to be responsible for the
misrepresentation, fraud or other malfeasance, misfeasance or
nonfeasance shall be subject to penalties and sanctions as provided
by law, including, where appropriate, debarment, contract
rescission, damages, and reimbursement of excess charges to the
public and underpayments to employees. Any finding by the State
Auditor that a contractor has failed to make the wage or benefit
payments required under a privatization contract shall be referred to
the Commissioner of Labor and Workforce Development for
appropriate enforcement actions. The post-audit reports, with
supporting documentation and records, shall be made available by
the State Auditor to the public on the Internet on an ongoing basis.

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