



**House  
Legislative  
Analysis  
Section**

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**PUBLIC SERVICES  
ACCOUNTABILITY ACT**

**House Bills 6088 and 6089  
Sponsor: Rep. Virg Bernero  
Committee: House Oversight and  
Operations**

**Complete to 9-5-02**

**A SUMMARY OF HOUSE BILLS 6088 AND 6089 AS INTRODUCED 5-21-02**

House Bill 6088 would create a new act, the “Quality Public Service Contractor Accountability Act”, to improve public oversight and accountability of privatization contracts. House Bill 6089 would amend the Management and Budget Act (MCL 18.1261) to specify that privatization contracts would be subject to the new act.

Legislative finding. House Bill 6088 contains a legislative finding, as follows: *The legislature finds and declares that using private contractors to provide public services formerly provided by public employees does not always promote the public interest. To ensure that citizens of this state receive high quality public services at low cost, with due regard for the taxpayers of this state, the service recipients, and the needs of public and private workers, the legislature finds it necessary to regulate certain privatization contracts, and to protect those workers who report conditions and practices that impact on the efficiency and quality of public services provided by private contractors. The legislature further finds it necessary to ensure that access to public information guaranteed by the Freedom of Information Act . . . is not in any way hindered by the fact that public services are provided by private contractors.*

Privatization contracts. Under the bill, a state agency could not enter into any privatization contract unless the agency and the contractor complied with the following requirements, and unless the contract included certain specified provisions.

- The state agency would be required to prepare a specific written statement of the services to be provided, including the specific quantity and standard of quality of the services. The statement would be a public record, would have to be filed in the agency, and would have to be published in the state register at least 30 days before bids were due.

- The agency would have to solicit competitive sealed bids based upon the written statement. The day designated for accepting bids would have to be the same for all parties.

- Each bid would have to disclose all of the following:

- the length of continuous employment of current employees of the contractor by job classification and without identifying employee names, or if new positions would be created, the minimum requirements for applicants. In addition, the contractor could submit information detailing the relevant prior experience of current employees within each job classification.

- the annual staff turnover rate.

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--the number of hours of training planned for each employee in subject matters directly related to providing services to state residents and clients.

--any legal complaints issued by an enforcement agency for alleged violations of federal, state, or local rules, regulations, or laws, including laws governing employee safety and health, labor relations, and other employment requirements, and any citations, court findings, or administrative findings for violations.

--any collective bargaining agreements or personnel policies covering the employees who would provide the state services.

--political contributions made by the bidder or any employee in a management position to any elected officer of the state or member of the legislature during the preceding four years.

- A contractor would have to pay its employees, at a minimum, the greater of the wage rate paid at step one of the grade or classification under which a state employee with similar duties is paid, plus the cash value of health and other benefits provided to state employees, or the average private sector compensation rate, including the value of health and other benefits, for the position as determined by the state civil service commission.

- A privatization contract could not exceed two years in duration.

- An amendment to a contract would be void if it had the purpose or effect of avoiding any of the bill's requirements.

- A contract would have to contain provisions requiring the contractor to offer available employee positions to qualified regular employees of the state agency whose employment was terminated because of the privatization contract. A contract would also have to contain nondiscrimination and equal opportunity provisions, and requirements to take affirmative steps to ensure equal opportunity for all.

- State funds could not be used support or oppose unionization; to hire or consult with legal counsel or other consultants to advise a contractor about how to assist, promote, or deter union organizing or to impede union representation; to hold meetings to influence employees about unionization; to plan or conduct activities by supervisors to assist, promote, or deter union activities; or to defend against unfair labor practice charges brought by state or federal enforcement agencies.

Cost-benefit analysis. Before privatizing any services or activities currently provided by state employees, a state agency would be required to submit to the House and Senate appropriations committees a detailed cost-benefit analysis. The cost-benefit analysis would have to be prepared using the most accurate, reliable, and objective data available and using the most actuarially sound techniques available. It would have to include a detailed estimate of the annual costs over five years, estimated for both privatizing the activity and continuing to use state employees to provide the service. In the estimate for privatizing, the agency would have to include the cost for all necessary monitoring and oversight of the private contractor by the state, and use only accurate and up-to-date bids from reputable companies with a previous history and reputation of providing quality services or activities. Further, the private entities would have to be bonded so as not to expose the state to any potential future liability.

Selection of bidders. After soliciting and receiving bids, a state agency would be required to publicly designate the bidder to which it proposes to award a privatization contract. In selecting a contractor, the agency would have to consider the contractor's past performance and its record of compliance with federal, state, and local laws. The agency would be required to prepare a written analysis of the contract cost based on the bid, specifically including the costs of transition from public to private operation, of additional unemployment and retirement benefits, if any, and of monitoring and administering the contract. If the bidder proposes to perform any or all of the contract outside the state, the contract cost would have to be increased to reflect any lost income tax revenue due to the elimination of state employees.

Agency certification. The head of a state agency entering into a privatization contract would be required to certify in writing that:

- The agency complied with all the requirements of the bill and other applicable law;
- The quality of services to be provided by the contractor is likely to satisfy the quality requirements specified by the agency, and to equal or exceed the quality of services that could be provided by regular agency employees.
- The contract cost would be at least 10 percent less than the estimated cost to provide the service using state employees. [Note: This provision appears to contain an incorrect subsection reference.]
- The privatization contract is in the public interest and meets the applicable quality and fiscal standards set forth by the bill.

The bill specifies that a privatization contract entered into by a state agency and a private contractor, and the certification, would be public records.

Subcontracts by privatization contractors. A private contractor could not award a subcontract for work under a privatization contract without the approval of the state agency head or a designee of the selection of the subcontractor and the provisions of the subcontract. Further, each executed subcontract would have to be filed with the state agency, which would have to maintain it as a public record.

Financial audits. A private contractor, and subcontractors, would have to file with the state agency a copy of a financial audit prepared at least annually during the term of the contract.

State agency access. Privatization contracts would have to contain provisions requiring the contractor to provide the state or its agents reasonable access to facilities, records, and employees used in the provision of contract services.

Reports. A contractor would have to report, at least annually during the term of a contract, to the agency detailing the extent to which it had achieved the specific quantity and quality of services specified in the contract, and its compliance with federal, state, and local laws, including any complaints, citations, or findings issued by administrative agencies or courts.

Contractual remedies. A state agency could seek contractual remedies for any violation of a privatization contract. In addition, any aggrieved person could bring legal action concerning a

violation of the bill's requirements regarding minimum compensation of employees, offering employment to displaced state employees, and nondiscrimination and equal opportunity, and the prohibition on using state funds to support or oppose unionization.

Public records. A private contractor (or subcontractor) or its employees or agents would have no ownership rights in any public records possessed or created under a privatization contract; such records would remain the property of the state for all purposes and at all times. Further, a contractor would be prohibited from impairing the integrity of such records.

Public records provided by a state agency to a contractor, or created by a contractor, would be subject to disclosure under the Freedom of Information Act, and the enforcement provisions of that act would apply to any failure to disclose records under the bill. The state agency and the contractor would have a joint and several obligation to comply with the obligations of the state agency under the FOIA, but the determination of whether or not to disclose a particular record or type of record would be made solely by the state agency.

A private contractor or subcontractor could not disclose to the public any public records it possesses due to a privatization contract if the state agency is prohibited from disclosing such records under state or federal law in all cases, if the state agency is allowed to disclose such records only to certain entities or individuals or under certain conditions, or if the state agency may withhold the records under state or federal law. [Note: This provision appears to contain a technical error.]

A private contractor or subcontractor, and their employees and agents, would be prohibited from selling, marketing, or otherwise profiting from the disclosure or use of any public records in their possession due to a privatization contract.

Violations. A contractor, subcontractor, or employee who learns of any violations of the bill would be required to notify the state agency head and the attorney general of the violation within 60 days.

A knowing and willful violation of the provisions of the bill dealing with the possession, use, and disclosure of public records would be a misdemeanor, punishable by imprisonment for up to one year, a fine of up to \$50,000, or both. Additionally, the bill would authorize the attorney general to bring an action against a person who violated those provisions, seeking damages on behalf of the state, restitution for damages suffered by any person as a result of the violation, and imposition and recovery of a civil fine of up to \$50,000.

In addition, a person aggrieved by a violation of any of the public records provisions of the bill could bring an action in any state court to recover damages.

In an action brought by the attorney general or by an aggrieved person, the court could order the violator to forfeit any profits or other benefits gained as a result of a violation, award treble damages, costs, and reasonable attorney fees, and order injunctive or other equitable relief.

The bill specifies that proof of public interest or public injury would not be required in any action brought under the bill. However, an action could not be commenced later than three years after the occurrence of the violation.

Whistleblower protection. The bill would prohibit any person from retaliating or discriminating in any manner against any public employee or employee of a private contractor because the employee (or a person acting on the employee's behalf), acting in good faith, discloses information regarding services provided under a privatization contract, advocates on behalf of service recipients with respect to the care or services provided under a privatization contract, or initiates or participates in an investigation or other proceeding of a government entity related to a privatization contract. The prohibition against retaliation would also apply to a public or private employee who attempts or intends to take those actions. In addition, a person could not, by contract, policy, or procedure, prohibit or restrict any employee of a private contract from engaging in those actions. However, the bill specifies that these provisions would not protect disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by state or federal law.

A violation would result in a civil fine of up to \$10,000 per violation. The size of the fine would be proportionate to the size of the business of the person charged and the gravity of the violation. The amount of a fine could be deducted from any sums owed by the state to the person charged, or the court could order the fine to be paid.

With respect to the whistleblower protections described above, an employee of a private contractor would be considered to be acting in good faith if the employee reasonably believed that the information disclosed was true; and that it showed a violation of any law, rule, or regulation, or of a generally recognized professional or clinical standard, or that it related to the care, services, or conditions that potentially endanger recipients of services or employees employed under a privatization contract.

The identity of an employee of a private contractor who complains in good faith to a government agency or department, or to a member or employee of the legislature, about the quality of services provided by a private contractor would have to be kept confidential. It could not be disclosed without the person's written consent or unless there was imminent danger to health or public safety or an imminent violation of criminal law.

A current or former public employee or employee of a private contractor who alleges retaliation or discrimination in violation of the bill could file a civil action against the violator in any state court of competent jurisdiction. If the court determined that a violation had occurred, it would be required to award damages, including compensatory damages, reinstatement, reimbursement of wages, salary, employment benefits, or other compensation denied or lost to the employee by reason of the violation, as well as treble damages, attorney fees, and costs, including expert witness fees. The court would also be required to award interest on the damages as provided by law. In addition, the court could issue temporary, preliminary, and permanent injunctive relief restraining violations of the bill, including the restraint of withholding of the payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due, and the restraint of any other change in the terms and conditions of employment. The court could also award any other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

An action brought under these provisions would have to be commenced no later than two years after the date of the last event constituting the alleged violation.

In a civil action brought under the bill alleging discrimination or retaliation because the plaintiff engaged in protected activities, the plaintiff would have the initial burden of making a prima facie showing that the protected activity (e.g., cooperating with an investigation) was a contributing factor in the adverse action or inaction (e.g., being fired) alleged in the complaint. A prima facie case would be established (presumed to be true unless disproved by some evidence to the contrary) if the plaintiff could show that the other party knew of the plaintiff's protected activities at the time that the adverse action or inaction was taken, and that the discrimination or retaliation occurred within a period of time that would allow a reasonable person to conclude that the protected activity was a contributing factor to the discrimination or retaliation. If a plaintiff established a prima facie case, the burden of proof would shift to the other party to demonstrate, by clear and convincing evidence, that he or she would have taken the same action in the absence of the protected behavior.

Each private contractor would have to post in conspicuous places a notice setting forth pertinent provisions of the bill and information pertaining to the filing of a charge under the whistleblower protection provisions. An employer who willfully violated this requirement could be assessed a civil fine of up to \$100 for each offense.

Interpretation of law. The bill specifies that nothing in it would preempt any other law, nor could it be construed or interpreted to impair or diminish in any way the authority of a municipality to enact or enforce any law that provides equivalent or greater protections for its employees.

Tie-bar. The bill could not take effect unless House Bill 4704 was also enacted. House Bill 4704 would amend the Whistleblowers' Protection Act to increase the penalty for violation of the law, and to extend the application of the law to employees of private contractors.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.