

# HOUSE BILL No. 6088

May 21, 2002, Introduced by Reps. Bernero, Woodward, Gielegem, Sheltroun, Anderson, Jamnick, Minore, Hale, Murphy, Garza, Basham, Schauer, Frank, Mans, Waters, Wojno, Neumann, Bob Brown, Lipsey, Richardville, Spade, Jacobs, Kolb, Schermesser, Plakas, Quarles, Daniels, Adamini and Bovin and referred to the Committee on House Oversight and Operations.

A bill to improve public oversight and accountability of privatization contracts; to provide for certain powers and duties of certain state officers, state agencies, and state employees; to provide for certain duties and responsibilities of certain entities involved with privatization contracts; and to prescribe remedies and penalties.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1           Sec. 1. This act shall be known and may be cited as the  
2 "quality public service contractor accountability act".

3           Sec. 2. The legislature finds and declares that using pri-  
4 vate contractors to provide public services formerly provided by  
5 public employees does not always promote the public interest. To  
6 ensure that citizens of this state receive high quality public  
7 services at low cost, with due regard for the taxpayers of this  
8 state, the service recipients, and the needs of public and

1 private workers, the legislature finds it necessary to regulate  
2 certain privatization contracts, and to protect those workers who  
3 report conditions and practices that impact on the efficiency and  
4 quality of public services provided by private contractors. The  
5 legislature further finds it necessary to ensure that access to  
6 public information guaranteed by the freedom of information act,  
7 1976 PA 442, MCL 15.231 to 15.246, is not in any way hindered by  
8 the fact that public services are provided by private  
9 contractors.

10 Sec. 3. As used in this act:

11 (a) "Department" means the department of management and  
12 budget.

13 (b) "Discrimination or retaliation" means a threat, intimi-  
14 dation, or any adverse change in an employee's wages, benefits,  
15 or terms or conditions of employment. In the case of a person  
16 who is not an employee of the private contractor, discrimination  
17 or retaliation includes any adverse action taken against the  
18 person or the person's employer, including the cancellation of or  
19 refusal to renew a contract with the person or the person's  
20 employer.

21 (c) "Employee of a private contractor" means a person  
22 directly employed by a private contractor, a person employed by a  
23 subcontractor of a private contractor, or an independent contrac-  
24 tor that provides supplies or services to a private contractor.  
25 Employee of a private contractor also includes former employees  
26 of a private contractor or subcontractor and former independent  
27 contractors.

1 (d) "Person" means an individual, partnership, corporation,  
2 association, governmental entity, or other legal entity.

3 (e) "Private contractor" refers to any entity that enters  
4 into a privatization contract.

5 (f) "Privatization contract" is an agreement or combination  
6 or series of agreements by which a nongovernmental person or  
7 entity agrees with an agency to provide services or a combination  
8 of good and services, valued at \$10,000.00 or more, which are  
9 substantially similar to and in lieu of services previously pro-  
10 vided, or that could have been provided, in whole or in part, by  
11 regular employees of a state agency.

12 (g) "Public employee" means an employee of this state who is  
13 classified by the state civil service.

14 (h) "Public record" means that term as defined in section 2  
15 of the freedom of information act, 1976 PA 442, MCL 15.232, and  
16 also includes any document relating to the privatization contract  
17 or performance under the contract, prepared, received, or  
18 retained by a contractor or subcontractor whether the document is  
19 handwritten, typed, tape-recorded, printed, photocopied, photo-  
20 graphed, or recorded by any other method.

21 (i) "Services" means, with respect to a private contractor,  
22 all aspects of the provision of services provided by a private  
23 contractor pursuant to a privatization contract, or any services  
24 provided by a subcontractor of a private contractor.

25 (j) "State agency" includes the executive office, a depart-  
26 ment, division, board, commission, or other office or officer in  
27 the executive branch of state government.

1 (k) "Subcontractor" means a subcontractor of a private  
2 contractor for work under a privatization contract or an amend-  
3 ment to a privatization contract.

4 Sec. 4. (1) A state agency shall not enter into any priva-  
5 tization contract unless the state agency and the contractor  
6 comply with each of the requirements in this section and  
7 sections 5 through 8 and includes the specified provisions in the  
8 privatization contract.

9 (2) The state agency shall prepare a specific written state-  
10 ment of the services proposed to be the subject of the privatiza-  
11 tion contract, including the specific quantity and standard of  
12 quality of the subject services. The state agency shall solicit  
13 competitive sealed bids for the privatization contracts based  
14 upon this statement. The day designated by the state agency upon  
15 which it will accept these sealed bids shall be the same for any  
16 and all parties. This statement shall be a public record, shall  
17 be filed in the state agency, and shall be published in the state  
18 register not later than 30 business days prior to the date on  
19 which bids are due.

20 (3) Every bid shall disclose all of the following:

21 (a) The length of continuous employment of current employees  
22 with the contractor by job classification without identifying  
23 employee names. In addition, the contractor may submit informa-  
24 tion detailing the relevant prior experience of employees within  
25 each job classification. If the positions identified by the  
26 bidder will be newly created, the bid shall identify the minimum  
27 requirements for prospective applicants for each position.

1 (b) The annual rate of current staff turnover.

2 (c) The number of hours of training planned for each  
3 employee in subject matters directly related to providing serv-  
4 ices to state residents and clients.

5 (d) Any legal complaints issued by an enforcement agency for  
6 alleged violations of applicable federal, state, or local rules,  
7 regulations, or laws, including laws governing employee safety  
8 and health, labor relations, and other employment requirements,  
9 and any citations, court findings, or administrative findings for  
10 violations of the federal, state, or local rules, regulations, or  
11 laws. The information shall include the date, enforcement  
12 agency, the rule, law, or regulation involved and any additional  
13 information the contractor may wish to submit.

14 (e) Any collective bargaining agreements or personnel poli-  
15 cies covering the employees to provide services to this state.

16 (f) Political contributions made by the bidder or any  
17 employee in a management position with the bidding company to any  
18 elected officer of this state or member of the state legislature  
19 during the 4 years immediately preceding the due date of the  
20 bid.

21 (4) For each position in which a contractor will employ any  
22 person under the privatization contract, the minimum compensation  
23 to be paid for that position shall be the greater of the wage  
24 rate paid at step 1 of the grade or classification under which a  
25 state agency employee whose duties are most similar is paid, plus  
26 the cash value of health and other benefits provided to state  
27 employees, or the average private sector compensation rate,

1 including the value of health and other benefits, for the  
2 position as determined by the state civil service commission.

3 (5) The term of a privatization contract shall not exceed 2  
4 years. An amendment to a privatization contract is not valid if  
5 it has the purpose or effect of avoiding any requirement of this  
6 act.

7 (6) Every privatization contract shall contain provisions  
8 requiring the contractor to offer available employee positions  
9 under the contract to qualified regular employees of the state  
10 agency whose state employment is terminated because of the priva-  
11 tization contract. Every privatization contract shall also con-  
12 tain provisions requiring the contractor to comply with a policy  
13 of nondiscrimination and equal opportunity for all persons and to  
14 take affirmative steps to provide equal opportunity to all.

15 (7) State funds shall not be used for any of the following:

16 (a) To support or oppose unionization, including, but not  
17 limited to, preparation and distribution of materials that advo-  
18 cate for or against unionization.

19 (b) To hire or consult with legal counsel or other consul-  
20 tants to advise the contractor about how to assist, promote, or  
21 deter union organizing or how to impede a union that represents  
22 the contractor's employees from fulfilling its representational  
23 responsibilities.

24 (c) To hold meetings to influence employees about  
25 unionization.

26 (d) To plan or conduct activities by supervisors to assist,  
27 promote, or deter union activities.

1 (e) To defend against unfair labor practice charges brought  
2 by federal or state enforcement agencies.

3 Sec. 5. (1) Before privatizing any services or activities  
4 currently provided by state employees, a state agency shall  
5 submit to the house and senate appropriations committees a  
6 detailed preprivatization cost-benefit analysis. A cost-benefit  
7 analysis shall utilize the most accurate, reliable, and objective  
8 data available and use the most actuarially sound techniques  
9 available to the department or state agency. The cost-benefit  
10 analysis shall include a detailed estimate of the annual costs  
11 that will be incurred by this state over the next 5 years, cover-  
12 ing both of the following:

13 (a) If the service or activity continues to be provided by  
14 state employees.

15 (b) If the service or activity is privatized. The costs of  
16 privatizing these services shall include the costs of all neces-  
17 sary monitoring and oversight of the private entity by this  
18 state. It shall use only accurate and up-to-date bids from repu-  
19 table companies with a previous history and reputation of provid-  
20 ing quality services or activities. These private entities shall  
21 also be adequately bonded, so as not to expose this state to any  
22 potential future liability or legal causes of action.

23 (2) After soliciting and receiving bids, the state agency  
24 shall publicly designate the bidder to which it proposes to award  
25 the privatization contract. In selecting a contractor, the state  
26 agency shall consider the contractor's past performance and its  
27 record of compliance with federal, state, and local laws,

1 including the disclosures as required in section 4(3). The state  
2 agency shall prepare a comprehensive written analysis of the con-  
3 tract cost based upon the designated bid, specifically including  
4 the costs of transition from public to private operation, of  
5 additional unemployment and retirement benefits, if any, and of  
6 monitoring and otherwise administering contract performance. If  
7 the designated bidder proposes to perform any or all of the con-  
8 tract outside the boundaries of this state, the contract cost  
9 shall be increased by the amount of income tax revenue, if any,  
10 that will be lost to this state by the corresponding elimination  
11 of state agency employees, as determined by the department of  
12 treasury to the extent that it is able to do so.

13 (3) The head of the state agency entering into a privatiza-  
14 tion contract shall certify in writing that all of the following  
15 are met:

16 (a) The state agency has complied with all provisions of  
17 this section and of all other applicable laws.

18 (b) The quality of the services to be provided by the desig-  
19 nated bidder is likely to satisfy the quality requirements of the  
20 statement prepared pursuant to section 4(2), and to equal or  
21 exceed the quality of services that could be provided by regular  
22 agency employees.

23 (c) The contract cost will be at least 10% less than the  
24 estimated cost pursuant to section 5(1), taking into account all  
25 comparable types of costs and all the additional costs of the  
26 contract as specified in section 5(2).



1 (d) The proposed privatization contract is in the public  
2 interest and meets the applicable quality and fiscal standards  
3 set forth in this act.

4 (4) A privatization contract entered into by a state agency  
5 and a private contractor and the certification are public  
6 records.

7 Sec. 6. (1) A private contractor shall not award a subcon-  
8 tract for work under a privatization contract or for work under  
9 an amendment to a privatization contract without the approval of  
10 the state agency head or his or her designee of the selection of  
11 the subcontractor and the provisions of the subcontract.

12 (2) Each private contractor shall file a copy of each exe-  
13 cuted subcontract or amendment to the subcontract with the state  
14 agency, that shall maintain the subcontract or amendment as a  
15 public record.

16 (3) Any private contractor awarded a privatization contract,  
17 and any subcontractor to a private contractor subject to these  
18 provisions, shall file with the state agency head copies of  
19 financial audits of the private contractor prepared at least  
20 annually during the course of the contract term.

21 (4) All privatization contracts shall include a contract  
22 provision specifying that in order to determine compliance with  
23 these principles as well as the contract, the private contractor  
24 shall be required to provide the state or its agents, except  
25 where prohibited by federal or state laws, regulations, or rules,  
26 reasonable access, through representatives of the private

1 contractor, to facilities, records, and employees that are used  
2 in conjunction with the provision of contract services.

3 (5) The private contractor shall submit a report, not less  
4 than annually during the term of the privatization contract,  
5 detailing the extent to which the contractor has achieved the  
6 specific quantity and standard of quality of the subject services  
7 as specified by the state agency pursuant to section 4(2) and its  
8 compliance with all federal, state, and local laws, including any  
9 complaints, citations, or findings issued by administrative agen-  
10 cies or courts.

11 (6) The state agency may seek contractual remedies for any  
12 violation of a privatization contract. In addition, if a con-  
13 tractor fails to comply with section 4(4), (6), or (7), any  
14 person or entity aggrieved by the violation may bring a claim for  
15 equitable and other relief including backpay. In a claim  
16 described in this subsection, an aggrieved person or entity shall  
17 be entitled to costs and attorney fees.

18 Sec. 7. (1) A private contractor or subcontractor, or  
19 employee or agent of a private contractor or subcontractor, shall  
20 not have any ownership rights or interest in any public records  
21 that the private contractor, subcontractor, employee, or agent  
22 possesses, modifies, or creates under a privatization contract,  
23 subcontract, or amendment to a privatization contract or  
24 subcontract.

25 (2) A private contractor or subcontractor, or employee or  
26 agent of a private contractor or subcontractor, shall not impair

1 the integrity of any public records that the private contractor,  
2 subcontractor, employee, or agent possesses or creates.

3 (3) Public records that a private contractor, subcontractor,  
4 or employee, or agent of a private contractor or subcontractor,  
5 possesses, modifies, or creates under a privatization contract or  
6 subcontract shall at all times and for all purposes remain the  
7 property of this state.

8 (4) Any public record that a state agency provides to a pri-  
9 vate contractor or subcontractor or that a private contractor or  
10 subcontractor creates is a public record under the freedom of  
11 information act, 1976 PA 442, MCL 15.231 to 15.246, and the  
12 enforcement provisions shall apply to any failure to disclose  
13 records under this section.

14 (5) With regard to any public record, the state agency and  
15 the private contractor or subcontractor shall have a joint and  
16 several obligation to comply with the obligations of the state  
17 agency under the freedom of information act, 1976 PA 442,  
18 MCL 15.231 to 15.246. However, the determination of whether or  
19 not to disclose a particular record or type of record shall be  
20 made solely by the state agency.

21 (6) A private contractor or subcontractor, or employee or  
22 agent of a contractor or subcontractor, shall disclose to the  
23 public any public records that it possesses, modifies, or creates  
24 pursuant to a privatization contract, subcontract, or amendment  
25 to a contract or subcontract that meets 1 or more of the  
26 following:

1 (a) The state agency is prohibited from disclosing under  
2 state or federal law in all cases.

3 (b) The state agency may disclose under state or federal law  
4 only to certain entities or individuals or under certain  
5 conditions.

6 (c) The state agency may withhold from disclosure under  
7 state or federal law.

8 (7) No provision of this subsection shall be construed to  
9 prohibit any private contractor from disclosing the public  
10 records to any of its subcontractors to carry out the purposes of  
11 its subcontract.

12 (8) A private contractor or subcontractor, or employee or  
13 agent of a contractor or subcontractor, shall not sell, market,  
14 or otherwise profit from the disclosure or use of any public  
15 records that are in its possession under a privatization con-  
16 tract, subcontract, or amendment to a privatization contract or  
17 subcontract, except as authorized in the privatization contract,  
18 subcontract, or amendment.

19 (9) A private contractor or subcontractor, or employee or  
20 agent of a private contractor or subcontractor, that learns of  
21 any violation of the provisions of this act shall, not later than  
22 60 calendar days after learning of the violation, notify the  
23 state agency head and the attorney general of the violation.

24 (10) If any person violates any provision of subsections (1)  
25 to (9), the attorney general may bring an action against that  
26 person seeking 1 or more of the following:

1 (a) Damages on behalf of this state for the violation.

2 (b) Restitution for damages suffered by any person as a  
3 result of the violation.

4 (c) Imposition and recovery of a civil fine of not more than  
5 \$50,000.00 for the violation.

6 (11) In addition to the remedies under subsection (10), a  
7 person aggrieved by a violation of any provision of  
8 subsections (1) to (9) may bring an action in any state court to  
9 recover any damages suffered as a result of the violation.

10 (12) In any action brought under subsection (10) or (11),  
11 the court may do 1 or more of the following:

12 (a) Order any profits or other benefits derived as a result  
13 of a violation of any provision of subsections (1) to (9).

14 (b) Award treble damages, costs, and reasonable attorney  
15 fees.

16 (c) Order injunctive or other equitable relief.

17 (13) Proof of public interest or public injury is not  
18 required in any action brought under this section. A person  
19 shall not bring an action under subsection (10), (11), or (12)  
20 more than 3 years after the occurrence of the violation.

21 (14) A person who knowingly and willfully violates subsec-  
22 tions (1) to (9) is guilty of a misdemeanor punishable by impris-  
23 onment for not more than 1 year or a fine of not more than  
24 \$50,000.00, or both.

25 Sec. 8. (1) A person shall not retaliate or discriminate in  
26 any manner against any public employee or employee of a private

1 contractor because that employee or any person acting on behalf  
2 of the employee in good faith does 1 or more of the following:

3 (a) Engages in any disclosure of information relating to the  
4 services provided by a private contractor under a privatization  
5 contract.

6 (b) Advocates on behalf of service recipients with respect  
7 to the care or services provided by the private contractor.

8 (c) Initiates, cooperates, or otherwise participates in any  
9 investigation or proceeding of any governmental entity relating  
10 to the services provided under a privatization contract.

11 (2) A person shall not retaliate or discriminate in any  
12 manner against any public employee or employee of a private con-  
13 tractor because the employee has attempted or intends to engage  
14 in an action described in subsection (1).

15 (3) A person shall not by contract, policy, or procedure  
16 prohibit or restrict any employee of a private contractor from  
17 engaging in any action for which a protection against discrimina-  
18 tion or retaliation is provided under subsection (1).

19 (4) This section does not protect disclosures that would  
20 violate federal or state law or diminish or impair the rights of  
21 any person to the continued protection of confidentiality of com-  
22 munications provided by state or federal law.

23 (5) With respect to the conduct described in subsection (1),  
24 an employee of a private contractor shall be considered to be  
25 acting in good faith if the employee reasonably believes both of  
26 the following:

1 (a) The information is true.

2 (b) The information disclosed by the employee meets 1 or  
3 more of the following:

4 (i) Evidences a violation of any law, rule, or regulation,  
5 or of a generally recognized professional or clinical standard.

6 (ii) Relates to the care, services, or conditions that  
7 potentially endanger 1 or more recipients of service or employees  
8 employed under a privatization contract.

9 (6) The identity of an employee of a private contractor who  
10 complains in good faith to a government agency or department or  
11 any member or employee of the state legislature about the quality  
12 of services provided by a private contractor shall remain confi-  
13 dential and shall not be disclosed by any person except upon the  
14 knowing written consent of the employee of the private contractor  
15 and except in the case in which there is imminent danger to  
16 health or public safety or an imminent violation of criminal  
17 law.

18 (7) Any current or former public employee or employee of a  
19 private contractor who believes that he or she has been retali-  
20 ated or discriminated against in violation of subsection (1),  
21 (2), or (3) may file a civil action in any state court of compe-  
22 tent jurisdiction against the person believed to have violated  
23 subsection (1), (2), or (3).

24 (8) If the court determines that a violation of  
25 subsection (1), (2), or (3) has occurred, the court shall award  
26 the damages that result from the unlawful act or acts, including  
27 compensatory damages, reinstatement, reimbursement of any wages,

1 salary, employment benefits, or other compensation denied or lost  
2 to the employee by reason of the violation, as well as treble  
3 damages, attorney fees, and costs, including expert witness  
4 fees. The court shall award interest on the amount of damages as  
5 provided by law.

6 (9) The court may issue temporary, preliminary, and per-  
7 manent injunctive relief restraining violations of this act,  
8 including the restraint of any withholding of the payment of  
9 wages, salary, employment benefits, or other compensation, plus  
10 interest, found by the court to be due and the restraint of any  
11 other change in the terms and conditions of employment and may  
12 award any other equitable relief as may be appropriate, including  
13 employment, reinstatement, and promotion.

14 (10) An action may be brought under this subsection not  
15 later than 2 years after the date of the last event constituting  
16 the alleged violation for which the action is brought.

17 (11) Any person who violates a provision of subsection (1),  
18 (2), or (3) shall be subject to a civil fine of not to exceed  
19 \$10,000.00 for each violation. In determining the amount of any  
20 fine under this subsection, the appropriateness of the fine to  
21 the size of the business of the person charged and the gravity of  
22 the violation shall be considered. The amount of any fine under  
23 this subsection, when finally determined, may be modified by 1 or  
24 more of the following:

25 (a) Deducted from any sums owing by this state to the person  
26 charged.



1 (b) Ordered by the court, in an action brought for a  
2 violation of subsection (1), (2), or (3).

3 (12) In any civil action brought under this act, the com-  
4 plainant shall have the initial burden of making a prima facie  
5 showing that any behavior described in subsection (1), (2), or  
6 (3) was a contributing factor in the adverse action or inaction  
7 alleged in the complaint. A prima facie case is established if  
8 the complainant can show that all of the following occurred:

9 (a) The respondent knew of the complainant's protected  
10 activities at the time that the alleged unfavorable action or  
11 inaction was taken.

12 (b) The discriminatory action occurred within a period of  
13 time that a reasonable person could conclude that an activity  
14 protected by subsection (1) or (2) was a contributing factor in  
15 the discriminatory treatment.

16 (13) If the complainant establishes a prima facie case  
17 described in subsection (9), the burden shifts to the respondent  
18 to demonstrate, by clear and convincing evidence, that it would  
19 have taken the same adverse action or inaction in the absence of  
20 the behavior.

21 (14) Each private contractor shall post and keep posted, in  
22 conspicuous places on its premises where notices to employees and  
23 applicants for employment are customarily posted, a notice, to be  
24 prepared or approved by the department, setting forth excerpts  
25 from, or summaries of, the pertinent provisions of this act and  
26 information pertaining to the filing of a charge under this  
27 section.

1           (15) Any employer that willfully violates subsection (14)  
2 may be assessed by the department a civil fine not to exceed  
3 \$100.00 for each separate offense.

4           Sec. 9. Nothing in this act preempts any other law, and  
5 nothing in this act shall be construed or interpreted to impair  
6 or diminish in any way the authority of any municipality to enact  
7 and enforce any law that provides equivalent or greater protec-  
8 tions for its employees.

9           Enacting section 1. This act does not take effect unless  
10 House Bill No. 4704 of the 91st Legislature is enacted into law.