

FIRST REGULAR SESSION

SENATE BILL NO. 150

93RD GENERAL ASSEMBLY

INTRODUCED BY SENATOR GREEN.

Pre-filed January 4, 2005, and ordered printed.

TERRY L. SPIELER, Secretary.

0484S.011

AN ACT

To amend chapter 37, RSMo, by adding thereto ten new sections relating to oversight of public privatization contracts, with an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 37, RSMo, is amended by adding thereto ten new sections, to be known as sections 37.550, 37.551, 37.552, 37.553, 37.554, 37.555, 37.556, 37.557, 37.558, and 37.559, to read as follows:

37.550. Sections 37.550 to 37.559 shall be known and may be cited as the "Public Service Accountability Act".

37.551. For purposes of sections 37.550 to 37.559, the following terms mean:

(1) "Employee of a private contractor", a worker directly employed by a private contractor, as defined in this section, as well as an employee of a subcontractor or an independent contractor that provides supplies or services to a private contractor. Such term includes former employees of a private contractor or subcontractor and former independent contractors;

(2) "Participating political subdivision", any municipality, county or other local political entity, not including any municipal fire department when such department is contracting with private companies pursuant to section 85.012, RSMo, that is authorized to levy taxes and which, by a recorded roll-call vote of its governing body, has opted to follow the provisions of sections 37.550 to 37.559 for any particular privatization contract. Each such governing body shall have such a recorded roll-call vote for every privatization contract engaged in by that political subdivision;

(3) "Person", an individual, institution, federal, state or local governmental entity, or any other public or private entity;

(4) "Private contractor", any entity which enters into a privatization contract, as that term is defined in this section;

(5) "Privatization contract", an agreement, or combination or series of agreements, by which a nongovernmental person or entity agrees with a public body to provide services, valued at twenty-five thousand dollars or more, which are substantially similar to and in lieu of services which have been provided, in whole or in part, by regular employees of a public body;

(6) "Public body", any participating political subdivision or the state of Missouri, or any officer, official, authority, agency, board, or commission of the state; except that the following state entities shall not be included in this definition:

(a) The department of transportation; or

(b) Any public body, when contracting for architectural services, engineering services or land surveying services, as those terms are defined in section 8.287, RSMo;

(7) "Public employee", any employee of a public body, as that term is defined in subdivision (6) of this section;

(8) "Retaliation", any adverse action taken against an employee, including any threat to take adverse action, in response to or in anticipation of the employee's utilization of the rights or protections set forth in this chapter. In the case of a person who is not an employee of the private contractor, such term includes any adverse action taken against the person or the person's employer, including the cancellation of or refusal to renew a contract with the person or the person's employer;

(9) "Services", with respect to a private contractor, all aspects of the provision of services provided by a private contractor pursuant to a privatization contract or any services provided by a subcontractor of a private contractor;

(10) "Subcontractor", a subcontractor of a private contractor for work under a privatization contract or an amendment to a privatization contract.

37.552. 1. No public body shall make any privatization contract and no such contract shall be valid unless the public body and the contractor comply with each of the requirements in sections 37.550 to 37.559 and unless such contract includes the specified provisions in the privatization contract.

2. The public body shall prepare a specific written statement of the services proposed to be the subject of the privatization contract, including the specific quantity and standard of quality of the subject services. The public body shall solicit competitive sealed bids for the privatization contracts based upon this statement. The date designated by the public body upon which it will accept these sealed bids shall be the same for any and all parties. This statement shall be a public record, shall be filed with the public body, and shall be published in the

state register not later than thirty business days prior to the date on which bids are due.

3. Every bid shall detail:

(1) The length of continuous employment of current employees with the contractor by job classification, without identifying employees by name. In addition, the contractor may submit information detailing the relevant prior experience of employees within each job classification. If the positions identified by the bidder shall be newly created, the bid shall identify the minimum requirements for prospective applicants for each such position;

(2) The annual rate of current staff turnover;

(3) The number of hours of training planned for each employee in subject matters directly related to providing services to state residents and clients;

(4) Any legal complaints issued by an enforcement agency for alleged violations of applicable 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 of such federal, state, or local rules, regulations, or laws. The information shall include the date, enforcement agency, the rule, law or regulation involved and any additional information the contractor may wish to submit.

4. For each position in which a contractor will employ any person pursuant to the privatization contract, the minimum compensation to be paid for such position shall be the greater of the wage rate paid at step one of the grade or classification under which a public employee whose duties are most similar is paid, plus the cash value of health and other benefits provided to such public employees, or the average private sector compensation rate, including the value of health and other benefits, for such position as determined by the state department of labor and industrial relations.

5. The term of any privatization contract shall not exceed two years. No amendment to a privatization contract shall be valid if it has the purpose or effect of avoiding any requirement of any section of sections 37.550 to 37.559.

6. Every privatization contract shall contain provisions requiring the contractor to offer available employee positions pursuant to the contract to qualified regular public employees of the public body whose state employment is terminated because of the privatization contract. Every such contract shall also contain provisions requiring the contractor to comply with a policy of nondiscrimination and equal opportunity for all persons, and to take affirmative steps to provide such equal opportunity for all such persons.

7. Funds of the public body shall not be used to support or oppose

unionization, including but not limited to, preparation and distribution of materials which advocate for or against unionization; hiring or consulting legal counsel or other consultants to advise the contractor about how to assist, promote, or deter union organizing or how to impede a union which represents the contractor's employees from fulfilling its representational responsibilities; holding meetings to influence employees about unionization; planning or conducting activities by supervisors to assist, promote, or deter union activities; or defending against unfair labor practice charges brought by federal or state enforcement agencies.

37.553. 1. Any public body considering whether to enter into a privatization contract shall prepare a comprehensive written estimate of the costs of regular public employees providing the subject services in the most cost-efficient manner. The estimate shall include all direct and indirect costs of regular public employees providing the subject services, including but not limited to, pension, insurance, and other employee benefit costs. For the purpose of this estimate, any public employee organization may, at any time before the final day for the public body to receive sealed bids pursuant to subsection 2 of section 37.552, propose amendments to any relevant collective bargaining agreement to which it is a party. Any such amendments shall take effect only if necessary to reduce the cost estimate pursuant to this subsection below the contract cost. Such estimate shall remain confidential until after the final day for the public body to receive sealed bids for the privatization contract, at which time the estimate shall become a public record, shall be filed with the public body and shall be published in the state register.

2. After soliciting and receiving bids, the public body shall publicly designate the bidder to which it proposes to award the privatization contract. In selecting a contractor, the public body shall consider the contractor's past performance and its record of compliance with federal, state, and local laws, including the disclosures as required pursuant to subsection 3 of section 37.552. The public body shall 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, and of monitoring and otherwise administering contract performance. If the designated bidder proposes to perform any or all of the 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 public employees, as determined by the department of revenue to the extent that it is able to do so.

3. The head of the appropriate public body shall certify in writing that:

(1) He or she has complied with all provisions of this section and of all other applicable laws;

(2) The quality of the services to be provided by the designated bidder is likely to satisfy the quality requirements of the statement prepared pursuant to subsection 2 of section 37.552, and to equal or exceed the quality of services which could be provided by regular public employees;

(3) The contract cost will be at least ten percent less than the estimated cost pursuant to subsection 1 of this section, taking into account all comparable types of costs and all the additional costs of the contract as specified in subsection 2 of this section; and

(4) The proposed privatization contract is in the public interest, in that it meets the applicable quality and fiscal standards set forth in sections 37.550 to 37.556.

4. Any privatization contract entered into by a public body, and the public body certification required pursuant to this section, shall be public records subject to disclosure pursuant to chapter 610, RSMo.

37.554. 1. No contractor shall award a subcontract for work under a contract or for work under an amendment to a contract without the approval of the head of the appropriate public body, or his or her designee, of:

- (1) The selection of the subcontractor; and**
- (2) The provisions of the subcontract.**

2. Each contractor described in subsection 1 of this section shall file a copy of each executed subcontractor amendment to the subcontract with the agency, who shall maintain the subcontract or amendment as a public record pursuant to chapter 610, RSMo.

37.555. 1. Any private contractor awarded a privatization contract, and any subcontractor to a private contractor subject to sections 37.550 to 37.559 shall file with the head of the public body copies of financial audits of the private contractor prepared at least annually during the course of the contract term.

2. All privatization contracts shall include a contract provision specifying that in order to determine compliance with these principles as well as the contract, the private contractor shall be required to provide the public body or its agents, except where prohibited by federal or state laws, regulations, or rules, reasonable access, through representatives of the private contractor, to facilities, records, and employees that are used in conjunction with the provision of contract services.

3. The private contractor shall submit a report, not less than annually

during the term of the privatization contract, detailing the extent to which the contractor has achieved the specific quantity and standard of quality of the subject services as specified by the public body pursuant to subsection 2 of section 37.552 and its compliance with all federal, state, and local laws including any complaints, citations, or findings issued by administrative agencies or courts.

4. The public body may seek contractual remedies for any violation of a privatization contract. In addition, if a contractor fails to comply with subsection 4, 6 or 7 of section 37.552, any person or entity aggrieved by the violation may bring a claim for equitable and other relief, including back pay. In such a suit, an aggrieved person or entity shall be entitled to costs and attorney's fees.

37.556. 1. No contractor or subcontractor, or employee or agent of a contractor or subcontractor, shall:

(1) Have any ownership rights or interest in any public records which the contractor, subcontractor, employee, or agent possesses, modifies, or creates pursuant to a contract, subcontract, or amendment to a contract or subcontract; or

(2) Impair the integrity of any public records which the contractor, subcontractor, employee or agent possesses or creates.

2. Any public record which a public body provides to a contractor or subcontractor or which a contractor or subcontractor creates shall be and remain a public record for the purposes of chapter 610, RSMo, and the enforcement provisions of chapter 610, RSMo, shall apply to any failure to disclose records pursuant to this section.

3. With regard to any public record, the public body and the contractor or subcontractor shall have a joint and several obligation to comply with the obligations of the public body pursuant to chapter 610, RSMo, provided the determination of whether or not to disclose a particular record or type of record shall be made solely by such public body.

4. No contractor or subcontractor, or employee or agent of a contractor or subcontractor, shall disclose to the public any record deemed closed or confidential, pursuant to state or federal law. No provision of this subsection shall be construed to prohibit any such contractor from disclosing such public records to any of its subcontractors to carry out the purposes of its subcontract.

5. No contractor or subcontractor, or employee or agent of a contractor or subcontractor, shall sell, market, or otherwise profit from the disclosure or use of any public records which are in its possession pursuant to a contract, subcontract, or amendment to a contract or subcontract, except as authorized in the contract, subcontract, or amendment.

6. Any contractor or subcontractor, or employee or agent of a contractor or subcontractor, which learns of any violation of the provisions of this section shall, no later than seven calendar days after learning of such violation, notify the head of the public body and the attorney general of such violation.

37.557. 1. The remedies provided pursuant to this section shall be in addition to any remedies provided for violations of section 37.556 pursuant to chapter 610, RSMo.

2. If any person violates any provision of section 37.556, the attorney general may bring an action against such person seeking:

- (1) Damages on behalf of the state for such violation;
- (2) Restitution for damages suffered by any person as a result of the violation; or
- (3) Imposition and recovery of a civil penalty of not more than fifty thousand dollars for the violation.

3. In addition to the remedies pursuant to subsection 2 of this section, any person aggrieved by a violation of any provision of section 37.556 may bring an action in any state court to recover any damages suffered as a result of such violation.

4. In any action brought pursuant to subsection 2 or 3, the court may:

- (1) Order disgorgement of any profits or other benefits derived as a result of a violation of any provision of section 37.556;
- (2) Award punitive damages, costs, and reasonable attorneys fees; and
- (3) Order injunctive or other equitable relief. No action may be brought pursuant to subsection 2 or 3 of this section more than three years after the occurrence of such violation; and
- (4) Any person who knowingly and willfully violates any provision of section 37.556 shall, for each such violation, be fined not more than five thousand dollars.

37.558. 1. No person shall retaliate in any manner against any public employee or employee of a private contractor because that employee, or any person acting on behalf of the employee, in good faith:

- (1) Engaged in any disclosure of information relating to the services provided by a private contractor pursuant to a privatization contract;
- (2) Advocated on behalf of service recipients with respect to the care or services provided by the private contractor;
- (3) Initiated, cooperated, or otherwise participated in any investigation or proceeding of any governmental entity relating to the services provided pursuant to a privatization contract.

2. No person shall retaliate in any manner against any public employee or

employee of a private contractor because the employee has attempted or has an intention to engage in an action described in subsection 1 of this section.

3. No person shall by contract, policy, or procedure prohibit or restrict any employee of a private contractor from engaging in any action for which a protection against retaliation is provided pursuant to subsection 1 of this section.

4. This section shall 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.

5. With respect to the conduct described in subdivision (1) of subsection 1 of this section, an employee of a private contractor shall be considered to be acting in good faith if the employee reasonably believes that:

(1) The information is true; and

(2) The information disclosed by the employee:

(a) Evidences a violation of any law, rule, or regulation, or of a generally recognized professional or clinical standard; or

(b) Relates to the care, services, or conditions which potentially endanger one or more recipients of service or employees employed pursuant to a privatization contract.

6. The identity of an employee of a private contractor who complains in good faith to a public body, any elected official of a public body, or any member or employee of the state legislature about the quality of services provided by a private contractor shall remain confidential and shall not be disclosed by any person except upon the knowing written consent of the employee of the private contractor and except in the case in which there is imminent danger to health or public safety or an imminent violation of criminal law.

37.559. 1. Each private contractor shall post and keep posted, in conspicuous places on its premises where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the office of administration, setting forth excerpts from, or summaries of, the pertinent provisions of sections 37.550 to 37.559 and information pertaining to the filing of a charge pursuant to section 37.553.

2. Any employer that willfully violates this section may be assessed by the office of administration a civil penalty not to exceed one hundred dollars for each separate offense.

3. Only the public body or the attorney general shall have standing to seek enforcement of this section.

Section B. Because immediate action is necessary to encourage economic growth in the state through the privatization of public service, section A of this act is deemed necessary

for the immediate preservation of the public health, welfare, peace, and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect on July 1, 2005, or upon its passage and approval, whichever later occurs.

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