

Regular Session, 2014

SENATE BILL NO. 547

BY SENATOR ADLEY

PUBLIC CONTRACTS. Provides relative to certain governmental agreements with private parties. (gov sig)

1 AN ACT

2 To enact R.S. 9:2778.1, relative to contractual agreements; to clarify and interpret public
3 policy regarding certain provisions in governmental agreements above fifty thousand
4 dollars in value and not subject to review by the office of contractual review; to
5 clarify and declare public policy requiring specification of an expiration date or
6 event, a monetary cap, and a clear description of the services or goods to be
7 provided; to clarify and provide for the invalidity of certain provisions authorizing
8 unilateral action by private contractors on behalf of the governmental entity or
9 conditioning public liability for liquidated damages on acts of third parties, or
10 agreements for which the governmental entity neither possesses nor reasonably
11 anticipates receiving adequate funding; to provide for an effective date; and to
12 provide for related matters.

13 Be it enacted by the Legislature of Louisiana:

14 Section 1. R.S. 9:2778.1 is hereby enacted to read as follows:

15 **§2778.1. Certain governmental agreements with private parties above fifty**
16 **thousand dollars and not subject to review by the office of**
17 **contractual review; certain provisions required; certain**

1 **provisions invalid as against public policy**

2 **A. The legislature finds that with respect to agreements between the**
3 **state, any political subdivision of the state, or any agency thereof and any**
4 **private party that are not subject to review by the office of contractual review**
5 **within the division of administration and under which the total value of any**
6 **goods or services to be provided is greater than fifty thousand dollars, provided**
7 **that nothing herein shall apply to contracts, permits, or servitudes with member**
8 **owned electric cooperatives or investor owned utilities regulated by the**
9 **Louisiana Public Service Commission, or the City Council of New Orleans:**

10 **(1) Such agreements are inequitable and contrary to the public policy of**
11 **this state if they fail to specify:**

12 **(a) An expiration date that is fixed in time, contingent upon the**
13 **occurrence of a specific event, or contingent upon the nonoccurrence of a**
14 **specific event by a specific date.**

15 **(b) The maximum dollar amount payable under such agreement or in the**
16 **case of a contingency agreement, the percentages payable in the event of**
17 **recovery.**

18 **(c) The scope of the services to be rendered or products to be provided.**

19 **(2) Provisions in such agreements are inequitable and contrary to the**
20 **public policy of this state if they purport to:**

21 **(a) Authorize the private party to take unilateral action on behalf of the**
22 **state, any political subdivision of the state, or any agency thereof outside the**
23 **scope of the services to be rendered or products to be provided.**

24 **(b) Authorize the private party to unilaterally file, institute or pursue**
25 **any claim or cause of action on behalf of the state, political subdivision of the**
26 **state, or any agency thereof.**

27 **(c) Condition liability of the state, any political subdivision of the state,**
28 **or any agency thereof for liquidated damages or the amount thereof on the**
29 **action or inaction of any other person.**

1 (d) Provide for liquidated damages payable by the state, any political
2 subdivision of the state, or any agency thereof without stating a specific dollar
3 amount, or a specific rate per hour or per item from which the amount can be
4 calculated.

5 (3) Such agreements are contrary to the public policy of this state if,
6 when the agreement is executed, the contracting governmental entity does not
7 possess or reasonably anticipate availability of funds sufficient to pay its
8 liability under the agreement in full at the time or times required under the
9 agreement, including but not limited to any contingent liability and any
10 liquidated damages.

11 B. The legislature hereby declares null, void, unenforceable, and against
12 public policy, any agreement referenced in Paragraph (1) or (3) of Subsection
13 A. Any such agreement may be amended to bring it into compliance with the
14 provisions of Subsection A. Any such amendment shall be effective retroactively
15 as of the date on which the agreement became effective.

16 C. The legislature hereby declares null, void, unenforceable, and against
17 public policy any provision as described in Paragraph (2) of Subsection A. In
18 the event a suit is filed, a court shall give effect to all other provisions of any
19 such agreement containing provisions in violation of Paragraph (2) of
20 Subsection A to the extent otherwise authorized by law.

21 D. The attorney general, or in the case of a political subdivision of the
22 state the district attorney for the parish in which the political subdivision is
23 domiciled, or any other interested person may enforce the provisions of this
24 Section. However, the attorney general, the district attorney, or other
25 interested person shall first provide written notice by certified mail, return
26 receipt requested, to all parties of the agreement of the violation and provide it
27 sixty days in which to amend the agreement to bring it into accordance with the
28 provisions of this Section. After sixty days from the date of receipt of written
29 notice, the attorney general, district attorney, or other interested person may

1 **bring an action to enforce the provisions of this Section in the district court for**
2 **the parish in which the governmental entity is domiciled.**

3 **E. No payment is or may be due or paid for services rendered under any**
4 **agreement that is null and void under this Section, or pursuant to any provision**
5 **that is null and void under this Section, other than in quantum meruit. If an**
6 **action is filed under Subsection D of this Section, any action or claim for**
7 **quantum meruit may be brought only within the action to enforce this Section.**

8 Section 2. It is the intent of the legislature that the provisions of this Act are
9 interpretive and procedural in nature, and shall apply both prospectively and retroactively.
10 It is further the intent of the legislature to clarify that those agreements and provisions
11 described in Section 1 of this Act are and have always been contrary to the public policy of
12 this state and void ab initio.

13 Section 3. This Act shall become effective upon signature by the governor or, if not
14 signed by the governor, upon expiration of the time for bills to become law without signature
15 by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If
16 vetoed by the governor and subsequently approved by the legislature, this Act shall become
17 effective on the day following such approval.

The original instrument was prepared by Jay Lueckel. The following digest,
which does not constitute a part of the legislative instrument, was prepared
by Martha Hess.

DIGEST

Adley (SB 547)

Proposed law provides that for any governmental agreements with private parties that are not subject to review by the office of contractual review and under which the total value is greater than \$50,000, the following provisions shall apply:

- (1) Such agreements are inequitable and contrary to the public policy of the state if they fail to specify: an expiration date that is fixed in time, contingent on the occurrence of a specific event, or contingent on the nonoccurrence of a specific event by a specific date; the maximum dollar amount payable under such agreement or in the case of a contingency agreement, the percentages payable in the event of recovery; or the scope of the services to be rendered or products to be provided.
- (2) Provisions in such agreements are inequitable and contrary to the public policy of this state if they purport to: authorize the private party to take unilateral action on behalf of the state, any political subdivision of the state, or agency thereof outside the scope of the services to be rendered or products to be provided; authorize the private party to unilaterally file, institute, or pursue any claim or cause of action on

behalf of the state, political subdivision of the state, or any agency thereof; condition liability of the state, any political subdivision of the state, or any agency thereof for liquidated damages or the amount thereof on the action or inaction of any other person; or provide for liquidated damages payable by the state, any political subdivision of the state, or any agency thereof without stating a specific dollar amount, or specific rate per hour or per item from which the amount can be calculated.

- (3) Such agreements are contrary to the public policy of this state if, when the agreement is executed, the contracting governmental entity does not possess or reasonably anticipate availability of funds sufficient to pay its liability under the agreement in full at the time or times required under the agreement, including but not limited to any contingent liability and any liquidated damages.

Proposed law provides that it does not apply to contracts, permits, or servitudes with member owned electric cooperatives or investor owned utilities regulated by the La. Public Service Commission or the City Council of New Orleans.

Proposed law provides the legislature would declare null, void, unenforceable, and against public policy, any agreement referenced under such provisions; however, any agreement may be amended to bring it into compliance with the provisions. Proposed law provides that any such amendment shall be effective retroactively as of the date on which the agreement became effective.

Proposed law provides the legislature would declare null, void, unenforceable, and against public policy, any agreement referenced under these provisions. In the event a suit is filed, a court shall give effect to certain provisions containing violations of proposed law.

Proposed law also provides that the attorney general or in the case of a political subdivision of the state, the district attorney or other interested person for the parish in which the political subdivisions is domiciled may enforce the provisions of this Act. However, the attorney general, the district attorney, or other interested party shall provide written notice via certified mail, return receipt requested 60 days to amend the agreement to bring it into compliance. After 60 days from the date of receipt of written notice, said officials may bring an action to enforce the provisions of proposed law in the district court for the parish in which the entity is domiciled.

Proposed law further provides no payment is or may be due or paid for services rendered under any agreement that is null and void under the provisions of proposed law, other than in quantum meruit. If an action is filed, any action or claim for quantum meruit may be brought only within the action to enforce such provision.

Proposed law states it is the intent of the legislature that these provisions are interpretive and procedural in nature, and shall apply both prospectively and retroactively. It is further the intent of the legislature to clarify that those agreements and provisions in proposed law are and have always been contrary to the public policy of this state and void ab initio.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds R.S. 9:2778.1)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Finance to the original bill

1. Provides that proposed law does not apply to contracts, permits, or servitudes with member owned electric cooperatives or investor owned utilities

regulated by the La. Public Service Commission or the City Council of New Orleans.