

2016 Regular Session

HOUSE BILL NO. 163

BY REPRESENTATIVE HAVARD

PRIVATIZATION: Creates the Privatization Review Act

1 AN ACT

2 To amend and reenact R.S. 44:4.1(B)(34) and to enact Chapter 6 of Title 49 of the Louisiana
3 Revised Statutes of 1950, to be comprised of R.S. 49:351 through 357, relative to
4 privatization contracts; to create and provide for the Privatization Review Act; to
5 provide for certain requirements and procedures for certain privatization contracts;
6 to provide for duties of executive branch agencies and agency heads relative to
7 privatization contracts; to provide for the duties of the legislative auditor relative to
8 certain privatization contracts; to provide procedures for legislative review and
9 approval of privatization contracts; to provide for definitions; to provide for certain
10 prohibitions; to provide for the voidability of privatization contracts; to provide
11 relative to the records related to privatization contracts; and to provide for related
12 matters.

13 Be it enacted by the Legislature of Louisiana:

14 Section 1. Chapter 6 of Title 49 of the Louisiana Revised Statutes of 1950,
15 comprised of R.S. 49:351 through 357, is hereby enacted to read as follows:

16 CHAPTER 6. PRIVATIZATION REVIEW ACT

17 §351. Legislative findings

18 The legislature hereby finds and declares that the using of private contractors
19 to provide public services formerly provided by state employees needs to be
20 extensively reviewed to ensure that it promotes best practices, ensures that citizens

1 of the state receive high-quality public services at low cost, and is in the overall best
2 interest of the state and its citizens.

3 §352. Definitions

4 For purposes of this Chapter only, the following words and phrases shall have
5 the following meanings:

6 (1) "Agency" shall mean an office, department, division, board, commission,
7 officer, system, or other organizational unit of the executive branch of state
8 government.

9 (2) "Appropriate standing committees of the legislature" shall mean the
10 standing committees of the legislature to which an agency is required to submit a
11 report pursuant to R.S. 49:968(B).

12 (3) "Nongovernmental entity" shall mean a legal entity other than an agency.

13 (4) "Nongovernmental person" shall mean an individual other than an
14 employee of an agency.

15 (5)(a)(i) "Privatization contract" shall mean an agreement or combination or
16 series of agreements by which a nongovernmental person or entity agrees with an
17 agency to provide services that are valued at five million dollars or more per year
18 and that are substantially similar to and in lieu of services previously provided in
19 whole or in part by state employees of an agency.

20 (ii) An agreement solely to provide engineering or design services shall not
21 be considered a privatization contract, and an agreement to provide for the
22 construction or repair of any street, road, highway, or bridge shall not be considered
23 a privatization contract.

24 (b) "Privatization contract" shall also mean any agreement or combination
25 or series of agreements by which a nongovernmental person or entity agrees to lease
26 or rent any state building or facility for five hundred thousand dollars or more.

27 §353. Requirements

28 A. No agency shall enter into a privatization contract as defined in R.S.
29 49:352(5)(a), and no such contract shall be valid, unless the agency, in consultation

1 with the division of administration, first complies with each of the following
2 requirements:

3 (1)(a) The agency shall prepare a specific written statement of the services
4 proposed to be the subject of the privatization contract, including the specific
5 quantity and standard of quality of the subject services.

6 (b) The agency shall solicit competitive bids or proposals for the
7 privatization contract based upon the statement required pursuant to Subparagraph
8 (a) of this Paragraph.

9 (c) The statement shall be a public record, shall be filed with the agency and
10 with the division of administration, and shall be transmitted to the legislative auditor
11 and the appropriate standing committees of the legislature upon its completion.

12 (2)(a) The agency shall prepare a comprehensive written estimate of the
13 costs of state employees providing the subject services in the most cost-efficient
14 manner. The estimate shall include all direct and indirect costs of state employees
15 providing the subject services, including but not limited to retirement, insurance, and
16 other employee benefit costs.

17 (b) Such estimate shall remain confidential until after the final day for the
18 agency to receive bids or proposals for the privatization contract pursuant to
19 Paragraph (1) of this Subsection, at which time the estimate shall become a public
20 record, shall be filed with the agency and with the division of administration, and
21 shall be transmitted to the legislative auditor and the appropriate standing
22 committees of the legislature for review pursuant to R.S. 49:354.

23 (3) After soliciting and receiving bids or proposals, the agency shall publicly
24 designate the nongovernmental person or entity to which it proposes to award the
25 contract. The agency shall prepare a comprehensive written analysis of the contract
26 cost based upon the designated bid or proposal, specifically including the costs of
27 transition from public to private operation, of additional unemployment and
28 retirement benefits, if any, of additional retirement costs, if any, and of monitoring
29 and otherwise administering contract performance. If the designated

1 nongovernmental person or entity proposes to perform any or all of the contract
2 outside the boundaries of the state or if the designated nongovernmental person or
3 entity is domiciled outside the boundaries of the state, the analysis of the contract
4 cost shall indicate the amount of income tax revenue, if any, which will be lost to the
5 state by the corresponding elimination of state employees and any additional loss of
6 revenue to the state due to the domicile of the nongovernmental person or entity, as
7 determined by the Department of Revenue to the extent practicable.

8 (4) The head of the agency shall certify in writing to the legislative auditor
9 and the appropriate standing committees of the legislature that:

10 (a) He has complied with all provisions of this Section and of all other
11 applicable laws.

12 (b) The quality of the services to be provided by the designated
13 nongovernmental person or entity is likely to satisfy the quality requirements of the
14 statement prepared pursuant to Paragraph (1) of this Subsection and to equal or
15 exceed the quality of services which could be provided by state employees.

16 (c) The contract cost, according to the analysis required by Paragraph (3) of
17 this Subsection, will be less than the cost estimated pursuant to Paragraph (2) of this
18 Subsection, taking into account all comparable types of cost and analysis of lost tax
19 income, if any.

20 (d) The designated nongovernmental person or entity and its supervisory
21 employees, while in the employ of the designated nongovernmental person or entity,
22 have no adjudicated record of substantial or repeated noncompliance with any
23 relevant federal or state regulatory provision, including but not limited to provisions
24 concerning occupational safety and health, nondiscrimination, environmental
25 protection, and the Code of Governmental Ethics and other conflicts of interest
26 provisions and have no record of substantial or repeated failure to meet performance
27 measures or goals in any prior or current contract with the state.

28 (e) The proposed privatization contract is in the public interest in that it
29 meets the applicable quality and fiscal standards set forth in this Section.

1 B.(1) A copy of the proposed privatization contract shall accompany the
2 certification transmitted to the legislative auditor and appropriate standing
3 committees of the legislature for review pursuant to R.S. 49:354.

4 (2) The agency head shall send each member of the legislature a copy of the
5 proposed privatization contract and the certification via electronic mail on the same
6 day he transmits those documents to the legislative auditor and appropriate standing
7 committees of the legislature.

8 §353.1. Lease and rental agreements

9 A. No agency shall enter into a privatization contract as defined in R.S.
10 49:352(5)(b) and no such contract shall be valid unless the agency, in consultation
11 with the division of administration, first complies with each of the following
12 requirements:

13 (1) The agency shall prepare a specific written statement of the fair market
14 rental or lease value of the state building or facility based upon documented
15 comparables.

16 (2) The statement shall be a public record, shall be filed in the agency and
17 in the division of administration, and shall be transmitted to the legislative auditor
18 and the appropriate standing committees of the legislature upon its completion.

19 (3) The agency shall publicly announce the availability of the building or
20 facility for lease or rent. If more than one nongovernmental entity or person
21 expresses documented interest in the lease or rental, the agency shall engage in a
22 competitive process to designate the nongovernmental entity or person with whom
23 it intends to negotiate.

24 B. The head of the agency shall certify in writing to the legislative auditor
25 and the appropriate standing committees of the legislature that:

26 (1) He has complied with all provisions of this Section and of all other
27 applicable laws.

28 (2) The designated nongovernmental person or entity and its supervisory
29 employees, while in the employ of such designated nongovernmental person or

1 entity, have no adjudicated record of substantial or repeated noncompliance with any
2 relevant federal or state regulatory provision, including but not limited to provisions
3 concerning occupational safety and health, nondiscrimination, environmental
4 protection, and the Code of Governmental Ethics and other conflicts of interest
5 provisions.

6 (3) The proposed privatization contract is in the public interest and the
7 reasons therefore.

8 C.(1) A copy of the proposed privatization contract as defined in R.S.
9 49:352(5)(b) shall accompany the certification transmitted to the legislative auditor
10 and appropriate standing committees of the legislature for review pursuant to R.S.
11 49:354.

12 (2) The agency head shall send each member of the legislature a copy of the
13 proposed privatization contract and the certification via electronic mail on the same
14 day he transmits those documents to the legislative auditor and appropriate standing
15 committees of the legislature.

16 §354. Legislative review

17 A.(1) The legislative auditor shall review each privatization contract and
18 certification no later than thirty days after receipt. After completion of the review,
19 the legislative auditor shall submit his findings to the appropriate legislative standing
20 committees. Such findings shall be in writing and shall state the legislative auditor's
21 findings regarding the agency's compliance with the requirements of R.S. 49:353 or
22 353.1 and shall specifically include the legislative auditor's independent review of
23 all relevant facts regarding any of the agency's findings required by R.S.
24 49:353(A)(5) or 353.1.

25 (2) The legislative auditor shall send each member of the legislature a copy
26 of his findings via electronic mail on the same day he transmits his findings to the
27 appropriate standing committees of the legislature.

1 (3) Each agency shall cooperate and assist the legislative auditor in his
2 review and, notwithstanding any law or privilege to the contrary, shall provide all
3 documents and other records to the legislative auditor that he deems necessary to
4 complete his review.

5 B. The appropriate standing committees of the legislature shall review the
6 certification and proposed contract and may disapprove any such contract within a
7 reasonable time, not to exceed forty-five days after their receipt of the findings of the
8 legislative auditor. If either standing committee disapproves the contract, the agency
9 shall not enter into the contract. If neither standing committee disapproves a contract
10 within the forty-five-day time period or if both committees vote to approve the
11 contract, the agency may enter into the contract.

12 §355. Prohibitions; voidability

13 A. No amendment to a privatization contract shall be valid if it has the
14 purpose or effect of avoiding any requirement of this Chapter.

15 B. No agency shall transfer or grant to another person or entity the authority
16 to negotiate any privatization agreement in any manner to subvert the provisions of
17 this Chapter or the Public Records Law.

18 C. Any contract entered into by the state or any of its agencies in violation
19 of this Chapter shall be void ab initio.

20 §356. Post-privatization review

21 A. After each complete year of a privatization contract as defined in R.S.
22 49:352(5)(a), the agency shall report to the appropriate standing committees of the
23 legislature the following information:

24 (1) An analysis of the nongovernmental person's or entity's performance
25 under the privatization contract, specifically including performance measures.

26 (2) All complaints received and the agency's and contractor's response to
27 each complaint.

1 B. After each complete year of a privatization contract as defined in R.S.
 2 49:352(5)(b), the agency shall report to the appropriate standing committees of the
 3 legislature the following information:

4 (1) An analysis of the nongovernmental person's or entity's compliance with
 5 the terms of the privatization contract.

6 (2) All complaints received and the agency's and contractor's response to
 7 each complaint.

8 (3) A current analysis of the fair market rental or lease value of the state
 9 building or facility based upon documented comparables.

10 §357. Records

11 Notwithstanding any other provision of law to the contrary and except as
 12 otherwise specifically provided by this Chapter, all records related to a privatization
 13 contract shall be available for examination, inspection, reproduction, and copying in
 14 the same manner as provided by the Public Records Law regardless of the agency,
 15 official, person, or legal entity in possession of the record.

16 Section 2. R.S. 44:4.1(B)(34) is hereby amended and reenacted to read as follows:

17 §4.1. Exceptions

18 * * *

19 B. The legislature further recognizes that there exist exceptions, exemptions,
 20 and limitations to the laws pertaining to public records throughout the revised
 21 statutes and codes of this state. Therefore, the following exceptions, exemptions, and
 22 limitations are hereby continued in effect by incorporation into this Chapter by
 23 citation:

24 * * *

25 (34) R.S. 49:220.25, 353(A)(2)(b), 956, 997, 1055

26 * * *

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

HB 163 Engrossed

2016 Regular Session

Havard

Abstract: Establishes the Privatization Review Act to provide certain requirements for specified privatization contracts and for legislative oversight and approval of such privatization contracts.

Proposed law defines for its purposes (1) "appropriate standing committees of the legislature" as the standing committees of the legislature to which an agency is required to submit a report pursuant to present law (Administrative Procedure Act—APA); (2) "agency" as an office, department, division, board, commission, officer, system, or other organizational unit of the executive branch of state government; (3) "nongovernmental entity" as a legal entity other than an agency; (4) "nongovernmental person" as an individual other than an employee of an agency; and (5) "privatization contract" as either (a) an agreement or combination or series of agreements by which a nongovernmental person or entity agrees with an agency to provide services valued at \$5 million or more per year and which are substantially similar to and in lieu of services previously provided in whole or in part by state employees of an agency (specifically excludes an agreement solely to provide engineering or design services and an agreement to provide for the repair or construction of a street, road, highway, or bridge) or (b) any agreement or combination or series of agreements by which a nongovernmental person or entity agrees to lease or rent any state building or facility for \$500,000 or more.

Proposed law creates and provides for the Privatization Review Act by prohibiting an agency from entering into a privatization contract for services, unless the agency (or agency head) complies with each of the following:

- (1) (a) Prepare a specific statement of services proposed to be privatized, including the quantity and standard of quality of such services; (b) solicit competitive bids or proposals based upon the statement; and (c) transmit the statement to the legislative auditor and appropriate legislative standing committees.
- (2) Prepare a comprehensive written estimate of the costs of state employees providing the subject services in the most cost-efficient manner, including all direct and indirect costs of state employees providing the subject services. Provides that such estimate remains confidential until after the final day for the agency to receive bids or proposals for the privatization contract at which time the estimate shall become a public record, shall be filed in the agency and in the division of administration, and shall be transmitted to the legislative auditor and the appropriate standing committees of the legislature.
- (3) After solicitation of the competitive bids or proposals, publicly designate the nongovernmental person or entity to which it proposes to award the contract and 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, of additional retirement costs, if any, and of monitoring and otherwise administering contract performance. If the designated nongovernmental person or entity proposes to perform any or all of the contract outside the boundaries of the state or if the designated nongovernmental person or entity is domiciled outside the boundaries of

the state, the analysis shall include the amount of income tax revenue, if any, which will be lost to the state by the corresponding elimination of state employees and any additional loss of revenue to the state due to the domicile of the nongovernmental person or entity, as determined by the Dept. of Revenue to the extent practicable.

- (4) Certify to the legislative auditor and appropriate legislative standing committees that (a) he has complied with all provisions of proposed law and of all other applicable laws; (b) the quality of the services to be provided by the contractor is likely to satisfy the quality requirements of the statement and to equal or exceed the quality of services which could be provided by state employees; (c) the contract cost will be less than the estimated cost, taking into account all comparable types of cost and analysis of lost tax income, if any; (d) the designated contractor and its supervisory employees, while in the employ of the contractor, have no adjudicated record of substantial or repeated noncompliance with any relevant federal or state regulatory provision and have no record of substantial or repeated failure to meet performance measures or goals in any prior or current contract with the state; and (e) the proposed privatization contract is in the public interest in that it meets the applicable quality and fiscal standards set forth in proposed law.

Proposed law further provides for the Privatization Review Act by prohibiting an agency from entering into a privatization contract for lease or rental of state buildings or facilities, unless the agency (or agency head) complies with each of the following:

- (1) Prepare a specific written statement of the fair market rental or lease value of the state building or facility based upon documented comparables. Specifies that the statement is a public record and requires it to be filed in the agency and in the division of administration, and transmitted to the legislative auditor and the appropriate legislative committees upon completion.
- (2) Publicly announce the availability of the building or facility for lease or rent and if more than one nongovernmental entity or person expresses documented interest in the lease or rental, engage in a competitive process to designate the nongovernmental entity or person with whom it intends to negotiate.
- (3) Certify in writing to the legislative auditor and the appropriate standing committees of the legislature that: (a) he has complied with all provisions of proposed law and of all other applicable laws; (b) the designated nongovernmental person or entity and its supervisory employees, while in the employ of said designated nongovernmental person or entity, have no adjudicated record of substantial or repeated noncompliance with any relevant federal or state regulatory provision; and (c) the proposed privatization contract is in the public interest and the reasons therefore.

Proposed law provides for legislative review as follows:

- (1) Requires a copy of the proposed privatization contract to accompany the certification transmitted to the legislative auditor and appropriate standing committees of the legislature.
- (2) Requires the agency head to further send each legislator a copy of the proposed privatization contract and the certification via e-mail on the same day he transmits those documents to the legislative auditor and appropriate standing committees of the legislature.
- (3) Requires the legislative auditor to review each contract and certification no later than 30 days after receipt and to submit his findings to the appropriate legislative standing committees and to each legislator via e-mail. Requires the findings to be in writing and to include findings regarding the agency's compliance with the requirements of proposed law and to include the legislative auditor's independent review of all

- relevant facts regarding any of the agency's and division of administration's findings. Requires each agency to cooperate and assist the legislative auditor in his review and notwithstanding any law or privilege to the contrary, to provide all documents and other records to the legislative auditor that he deems necessary to complete his review.
- (4) Requires the appropriate legislative standing committees to review the certification and proposed contract and provides that the committees may disapprove the contract within a reasonable time, not to exceed 45 days after receipt of the findings of the legislative auditor. Prohibits the agency from entering into the contract if either standing committee disapproves the contract. Provides that if either standing committee does not disapprove of a contract within the 45-day time period or if both committees approve the contract, the agency may enter into the contract.

Proposed law further provides that (1) no amendment to a privatization contract shall be valid if it has the purpose or effect of avoiding any requirement of proposed law and (2) no agency shall transfer or grant to another person or entity the authority to negotiate any privatization agreement in any manner to subvert the provisions of proposed law or the Public Records Law. Proposed law specifies that any contract entered into by the state or any of its agencies in violation of proposed law shall be void ab initio.

Proposed law provides that after each complete year of a privatization contract for services, the agency shall report to the appropriate legislative standing committees (1) an analysis of the performance on the privatization contract, specifically including performance measures; and (2) all complaints received and the agency's and contractor's response to each complaint.

Proposed law provides that after each complete year of a privatization contract for rental or lease of state buildings or facilities, the agency shall report to the appropriate legislative standing committees: (1) an analysis of the nongovernmental person's or entity's compliance with the terms of the privatization contract; (2) all complaints received and the agency's and contractor's response to each complaint; and (3) a current analysis of the fair market rental of lease value of the state building or facility based upon documented comparables.

Proposed law specifies that notwithstanding any other provision to the contrary and except as otherwise specifically provided by proposed law, all records related to a privatization contract shall be available for examination, inspection, reproduction, and copying in the same manner as provided by the Public Records Law regardless of the agency, official, person, or legal entity in possession of the record.

(Amends R.S. 44:4.1(B)(34); Adds R.S. 49:351-357)