

Regular Session, 2013

HOUSE BILL NO. 240

BY REPRESENTATIVES HAVARD, BERTHELOT, CHAMPAGNE, GEYMANN,
JAMES, POPE, SCHRODER, SMITH, AND THIERRY

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

PRIVATIZATION: Establishes 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, comprised
15 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 using private contractors to
19 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) "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. An agreement solely to provide
20 engineering or design services shall not be considered a privatization contract.

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

24 §353. Requirements

25 A. No agency shall enter into a privatization contract as defined in R.S.
26 49:352(5)(a) and no such contract shall be valid unless the agency, in consultation
27 with the division of administration, first complies with each of the following
28 requirements:

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

4 (b) For each position in which a nongovernmental person or entity will
5 employ any person pursuant to the privatization contract and for which the duties are
6 substantially similar to the duties performed by a state employee or employees, the
7 statement shall include a statement of the minimum wage rate to be paid for said
8 position.

9 (c) The agency shall solicit competitive bids or proposals for the
10 privatization contracts based upon this statement.

11 (d) The statement shall be a public record, shall be filed in the agency and
12 in the division of administration, and shall be transmitted to the legislative auditor
13 and the appropriate standing committees of the legislature upon its completion.

14 (2) Every privatization contract as defined in R.S. 49:352(5)(a) shall contain
15 provisions requiring the contractor to offer available employee positions pursuant to
16 the contract to qualified classified state employees of the agency at which state
17 employment is terminated because of the privatization contract and who satisfy the
18 hiring criteria of the contractor.

19 (3)(a) The agency shall prepare a comprehensive written estimate of the
20 costs of state employees providing the subject services in the most cost-efficient
21 manner. The estimate shall include all direct and indirect costs of state employees
22 providing the subject services, including but not limited to retirement, insurance, and
23 other employee benefit costs.

24 (b) Such estimate shall remain confidential until after the final day for the
25 agency to receive bids or proposals for the privatization contract pursuant to
26 Paragraph (1) of this Subsection, at which time the estimate shall become a public
27 record, shall be filed in the agency and in the division of administration, and shall be
28 transmitted to the legislative auditor and the appropriate standing committees of the
29 legislature for review pursuant to R.S. 49:354.

1 (4) After soliciting and receiving bids or proposals, the agency shall publicly
2 designate the nongovernmental person or entity to which it proposes to award the
3 contract. The agency shall prepare a comprehensive written analysis of the contract
4 cost based upon the designated bid or proposal, specifically including the costs of
5 transition from public to private operation, of additional unemployment and
6 retirement benefits, if any, of additional retirement costs, if any, and of monitoring
7 and otherwise administering contract performance. If the designated
8 nongovernmental person or entity proposes to perform any or all of the contract
9 outside the boundaries of the state or if the designated nongovernmental person or
10 entity is domiciled outside the boundaries of the state, the analysis of the contract
11 cost shall indicate the amount of income tax revenue, if any, which will be lost to the
12 state by the corresponding elimination of state employees and any additional loss of
13 revenue to the state due to the domicile of the nongovernmental person or entity, as
14 determined by the Department of Revenue to the extent practicable.

15 (5) The head of the agency shall certify in writing to the legislative auditor
16 and the appropriate standing committees of the legislature that:

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

19 (b) The quality of the services to be provided by the designated
20 nongovernmental person or entity is likely to satisfy the quality requirements of the
21 statement prepared pursuant to Paragraph (1) of this Subsection, and to equal or
22 exceed the quality of services which could be provided by state employees pursuant
23 to Paragraph (3) of this Subsection.

24 (c) The contract cost, according to the analysis required by Paragraph (4) of
25 this Subsection, will be less than the estimated cost estimated pursuant to Paragraph
26 (3) of this Subsection, taking into account all comparable types of cost and analysis
27 of lost tax income, if any.

28 (d) The designated nongovernmental person or entity and its supervisory
29 employees, while in the employ of said 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 Code of Governmental Ethics and other conflicts of interest
5 provisions and have no record of substantial or repeated failure to meet performance
6 measures or goals in any prior or current contract with the state.

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

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

12 (2) The agency head shall send each member of the legislature a copy of the
13 proposed privatization contract and the certificate 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 §353.1. Lease and rental agreements

17 A. No agency shall enter into a privatization contract as defined in R.S.
18 49:352(5)(b) and no such contract shall be valid unless the agency, in consultation
19 with the division of administration, first complies with each of the following
20 requirements:

21 (1) The agency shall prepare a specific written statement of the fair market
22 rental or lease value of the state building or facility based upon documentable
23 comparables.

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

27 (3) The agency shall publicly announce the availability of the building or
28 facility for lease or rent. If more than one nongovernmental entity or person
29 expresses documented interest in the lease or rental, the agency shall engage in a

1 competitive process to designate the nongovernmental entity or person with whom
2 it intends to negotiate.

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

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

7 (2) The designated nongovernmental person or entity and its supervisory
8 employees, while in the employ of said designated nongovernmental person or
9 entity, have no adjudicated record of substantial or repeated noncompliance with any
10 relevant federal or state regulatory provision, including but not limited to provisions
11 concerning occupational safety and health, nondiscrimination, environmental
12 protection, and the Code of Governmental Ethics and other conflicts of interest
13 provisions.

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

16 C.(1) A copy of the proposed privatization contract as defined in R.S.
17 49:352(5)(b) shall accompany the certificate transmitted to the legislative auditor and
18 appropriate standing committees of the legislature for review pursuant to R.S.
19 49:354.

20 (2) The agency head shall send each member of the legislature a copy of the
21 proposed privatization contract and the certificate via electronic mail on the same
22 day he transmits those documents to the legislative auditor and appropriate standing
23 committees of the legislature.

24 §354. Legislative review

25 A.(1) The legislative auditor shall review each contract and certificate no
26 later than thirty days after receipt. After completion of the review, the legislative
27 auditor shall submit his findings to the appropriate legislative standing committees.
28 Such findings shall be in writing and shall state the legislative auditor's findings
29 regarding the agency's compliance with the requirements of R.S. 49:353 or 353.1, as

1 the case may be, and shall specifically include the legislative auditor's independent
2 review of all relevant facts regarding any of the agency's findings required by R.S.
3 49:353(A)(5) or 353.1, as the case may be.

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

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

11 B. The appropriate standing committees of the legislature shall review the
12 proposed certificate and contract and comment as necessary on any such contract
13 within a reasonable time not to exceed forty-five days after receipt of the findings
14 of the legislative auditor. If either standing committee disapproves the contract, the
15 agency shall not enter into the contract. If either standing committee does not
16 disapprove of a contract within the forty-five-day time period or if both committees
17 vote to approve the contract, the agency may enter into the contract.

18 §355. Prohibitions; voidability

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

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

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

26 §356. Post-privatization review

27 A. After each complete year of a privatization contract as defined in R.S.
28 49:352(5)(a), the agency shall report to the appropriate standing committees of the
29 legislature the following information:

1 (1) The number of privatization contractor employees and consultants,
2 reflected as full-time equivalent positions, and the amount of compensation received
3 by each privatization contractor employee and consultant during the previous year,
4 and their hourly wage rates for the current and previous fiscal year.

5 (2) An analysis of the nongovernmental person or entity performance under
6 the privatization contract, specifically including performance measures.

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

9 B. After each complete year of a privatization contract as defined in R.S.
10 49:352(5)(b), the agency shall report to the appropriate standing committees of the
11 legislature the following information:

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

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

16 (3) A current analysis of the fair market rental or lease value of the state
17 building or facility based upon documentable comparables.

18 §357. Records

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

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

25 §4.1. Exceptions

26 * * *

27 B. The legislature further recognizes that there exist exceptions, exemptions,
28 and limitations to the laws pertaining to public records throughout the revised
29 statutes and codes of this state. Therefore, the following exceptions, exemptions, and

1 limitations are hereby continued in effect by incorporation into this Chapter by
2 citation:

3 * * *

4 (34) R.S. 49:220.25, 353(A)(3)(b), 956, 997, 1055

5 * * *

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)]

Havard

HB No. 240

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 and specifies that an agreement solely to provide engineering or design services shall not be considered a privatization contract, 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; (c) include in the statement for each position in which a nongovernmental person or entity will employ any person pursuant to the privatization contract and for which the duties are substantially similar to the duties performed by a state employee or employees, a statement of the minimum wage rate to be paid for said position; and (d) transmit the statement to the legislative auditor and appropriate legislative standing committees.
- (2) Require every privatization contract to contain provisions requiring the contractor to offer available employee positions pursuant to the contract to qualified classified state employees of the agency at which state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor.
- (3) 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, including but not limited to retirement, insurance, and other employee benefit costs. 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.
- (4) 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 and 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, include in the analysis 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.
- (5) 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, including but not limited to provisions concerning occupational safety and health, nondiscrimination, environmental protection, and Code of Governmental Ethics and other conflicts of interest provisions 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 of lease value of the state building or facility based upon documentable 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, including but not limited to provisions concerning occupational safety and health, nondiscrimination, environmental protection, and the Code of Governmental Ethics and other conflicts of interest provisions; 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 certificate 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 certificate 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 certificate 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 proposed certificate and contract and comment as necessary on any such 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) the number of privatization contractor employees and consultants, reflected as full-time equivalent positions, and the amount of compensation received by each privatization contractor employee and consultant during the previous year, and their hourly wage rates for the current and previous fiscal year; (2) an analysis of the performance on the privatization contract, specifically including performance measures; and (3) 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 documentable 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)

Summary of Amendments Adopted by House

House Floor Amendments to the engrossed bill.

1. Adds lease or rent by a nongovernmental person or entity of any state building or facility for five hundred thousand dollars or more as a type of privatization contract for purposes of proposed law.