

SB2662



94TH GENERAL ASSEMBLY

State of Illinois

2005 and 2006

SB2662

Introduced 1/20/2006, by Sen. Debbie DeFrancesco Halvorson

SYNOPSIS AS INTRODUCED:

New Act

Creates the Ethical Public Service Accountability Act. Establishes requirements for privatization contracts between contractors and State agencies. Provides for the monitoring and enforcement of privatization contracts. Establishes penalties for violations. Effective immediately.

LRB094 17143 JAM 52431 b

CORRECTIONAL
BUDGET AND
IMPACT NOTE ACT
MAY APPLY

FISCAL NOTE ACT
MAY APPLY

A BILL FOR

1 AN ACT concerning State government.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the
5 Ethical Public Service Accountability Act.

6 Section 5. Legislative intent. The legislature finds that
7 using private contractors to provide public services formerly
8 provided by public employees does not always promote the public
9 interest. To ensure that citizens of this State receive high
10 quality public services at a low cost, with due regard for the
11 taxpayers of this State, the service recipients, and the needs
12 of public and private workers, the legislature finds it
13 necessary to regulate privatization contracts and to protect
14 those workers who report conditions and practices that impact
15 on the efficiency and quality of public services provided by
16 private contractors. The legislature further finds it
17 necessary to ensure that access to public information
18 guaranteed by the Freedom of Information Act is not in any way
19 hindered by the fact that public services are provided by
20 private contractors.

21 Section 10. Definitions. For purposes of this Act:

22 "State agency" or "agency" means an executive office,
23 department, division, board, commission, or other office or
24 officer in the executive branch of State government.

25 "Employee of a private contractor" means a worker directly
26 employed by a private contractor or subcontractor or an
27 independent contractor that provides supplies or services to a
28 private contractor. This term includes former employees of a
29 private contractor or subcontractor and former independent
30 contractors.

31 "Discrimination or retaliation" means a threat,

1 intimidation, or any adverse change in an employee's wages,
2 benefits, or terms or conditions of employment as a result of
3 the employee reporting a violation of this Act. In the case of
4 a person who is not an employee of the private contractor, this
5 term includes any adverse action taken against the person or
6 the person's employer, including the cancellation of or refusal
7 to renew a contract with the person or the person's employer.

8 "Services" means, with respect to a private contractor, all
9 aspects of the provision of services provided by a private
10 contractor pursuant to a privatization contract, or any
11 services provided by a subcontractor of a private contractor.

12 "Person" means an individual, institution, federal, State,
13 or local governmental entity, or any other public or private
14 entity.

15 "Privatization contract" means an agreement or combination
16 or series of agreements by which a non-governmental person or
17 entity agrees with a State agency to provide services valued at
18 \$100,000 or more that are substantially similar to and in lieu
19 of services that have been provided or that could have been
20 provided, in whole or in part, by regular employees of an
21 agency.

22 "Private contractor" means any entity that enters into a
23 privatization contract as that term is defined in this Section.

24 "Public employee" means an employee of any State department
25 or agency.

26 "Public record" means to a public record as defined in the
27 Freedom of Information Act, and also includes any document
28 relating to the privatization contract or performance under the
29 privatization contract, prepared, received, or retained by a
30 contractor or subcontractor whether that document be
31 handwritten, typed, tape-recorded, printed, photocopied,
32 photographed, or recorded by any other method.

33 "Subcontractor" means a subcontractor of a private
34 contractor for work under a privatization contract or an
35 amendment to a privatization contract.

1 Section 15. Privatization contracts; requirements.

2 (a) No State agency shall make any privatization contract
3 and no privatization contract shall be valid unless the State
4 agency and the contractor comply with the requirements of this
5 Act, including listing those specified provisions in the
6 privatization contract as required by this Act.

7 (b) The State agency shall prepare a specific written
8 statement of the services to be provided under the
9 privatization contract, including the specific quantity and
10 standard of quality of the subject services. The agency shall
11 solicit competitive sealed bids for the privatization contract
12 based upon this statement. This statement shall be a public
13 record, shall be filed in the agency, and shall be published in
14 the State register not later than 30 business days prior to the
15 date on which bids are due. The day designated by the agency
16 for accepting these sealed bids shall be the same for all
17 parties.

18 (c) Every bid shall detail:

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

28 (2) The annual rate of current staff turnover;

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

32 (4) Any legal complaints issued by an enforcement
33 agency of this state or any other State for alleged
34 violations of applicable federal, state, or local rules,
35 regulations, or laws, including laws governing employee
36 safety and health, labor relations, and other employment

1 requirements, and any citations, court findings, or
2 administrative findings for violations of federal, state,
3 or local rules, regulations, or laws. The information must
4 include: (i) the date; (ii) the enforcement agency; (iii)
5 the rule, law, or regulation involved; and (iv) any
6 additional information the contractor may wish to submit;

7 (5) Any collective bargaining agreements or personnel
8 policies covering the employees that provide services to
9 the State; and

10 (6) Political contributions made by the bidder or any
11 employee in a management position with the bidding company
12 to any elected officer of the State or member of the State
13 legislature during the 4 years prior to the due date of the
14 bid.

15 (d) For each position in which a contractor will employ a
16 person pursuant to the privatization contract, the minimum
17 compensation to be paid for the position shall be:

18 (1) The greater of the wage rate paid at step one of
19 the grade or classification under which an agency employee
20 whose duties are most similar is paid plus the cash value
21 of health and other benefits provided to the State
22 employees; or

23 (2) The private sector compensation rate, including
24 the value of health and other benefits, for that position
25 as determined by the Department of Labor.

26 (e) The term of any privatization contract shall not exceed
27 2 years.

28 (f) No amendment to a privatization contract shall be valid
29 if it has the purpose or effect of avoiding any of the
30 requirements of this Act.

31 (g) Every privatization contract shall contain provisions
32 requiring the contractor to offer available employee positions
33 pursuant to the contract to qualified regular employees of the
34 agency whose State employment is terminated because of the
35 privatization contract. Every contract shall also contain
36 provisions requiring the contractor to comply with a policy of

1 nondiscrimination and equal employment opportunity for all
2 persons and to take affirmative steps to provide equal
3 opportunity for all persons.

4 (h) Every privatization contract shall contain provisions
5 regarding the process for determining whether or not to
6 disclose a particular record or type of record. The
7 privatization contract shall specify who is responsible for
8 determining whether or not disclosure is required and shall
9 outline the liability of the parties to the contract for
10 failure to disclose as required by the Freedom of Information
11 Act.

12 Section 20. Review of contract costs.

13 (a) Any State agency considering whether to enter into a
14 privatization contract shall prepare a comprehensive written
15 estimate of the costs of regular agency employees' providing
16 the subject services in the most cost-efficient manner. The
17 estimate shall include all direct and indirect costs of regular
18 agency employees providing the subject services including, but
19 not limited to, pension, insurance, and other employee benefit
20 costs. For the purpose of this estimate, any employee
21 organization may, at any time before the final day for the
22 agency to receive sealed bids, propose amendments to any
23 relevant collective bargaining agreement to which it is a
24 party. Any amendments shall take effect only if necessary to
25 reduce the cost estimate. This estimate shall remain
26 confidential until after the final day for the agency to
27 receive sealed bids for the privatization contract at which
28 time the estimate shall become a public record, shall be filed
29 with the agency, and shall be published in the State register.

30 (b) Any State agency required to complete a written
31 estimate of costs evaluation as detailed in subsection (a) of
32 this Section shall also prepare a community impact evaluation
33 that shall be submitted to the General Assembly when the
34 issuance of a privatization contract would result in the
35 closure of a State facility or the layoff of the lesser of 50

1 employees or 50% of the staff of a State facility or agency. A
2 community impact evaluation shall also be submitted to the
3 General Assembly when a private entity that holds a
4 privatization contract with a State agency seeks to layoff the
5 lesser of 50 employees or 50% of the staff performing work
6 pursuant to the privatization contract. Any time a community
7 impact evaluation is required pursuant to this Act, a report
8 shall be presented to the General Assembly no later than 3
9 months prior to the planned issuance of a privatization
10 contract or the implementation of a facility closure or the
11 layoff of employees. The community impact evaluation shall be
12 in the form of a report to the General Assembly and shall
13 include, but not be limited to, the following:

14 (1) State revenues expected to be saved as a result of
15 the proposed layoff or facility or agency closing;

16 (2) The rationale for the layoff or facility or agency
17 closing;

18 (3) The function and duties of the State employees that
19 will be laid-off;

20 (4) Whether the function and duties of the State
21 employees to be laid-off will be performed by another
22 section of State government, and if so, which section;

23 (5) The economic impact on the community where the
24 proposed layoff or closure of a facility or agency is
25 located;

26 (6) The analyses of current and projected economic and
27 labor conditions of the communities affected by the
28 proposed layoff or facility or agency closure;

29 (7) Any other data that pertains to the economic and
30 labor impacts on Illinois communities as a result of the
31 proposed layoff or facility or agency closing; and

32 (8) Any other data that the General Assembly may
33 request concerning the proposed layoff or facility or
34 agency closing.

35 (c) After soliciting and receiving bids, the agency shall
36 publicly designate the bidder to which it proposes to award the

1 privatization contract. In selecting a contractor, the agency
2 shall consider the contractors' past performance and its record
3 in this State or any other state of compliance with federal,
4 state, and local laws, including the disclosures required by
5 this Act.

6 (d) The agency shall prepare a comprehensive written
7 analysis of the contract cost based upon the designated bid,
8 specifically including the costs of transition from public to
9 private operation, of additional unemployment and retirement
10 benefits, if any, and of monitoring and otherwise administering
11 contract performance. If the designated bidder proposes to
12 perform any or all of the contract outside the boundaries of
13 the State, the contract cost shall be increased by the amount
14 of income tax revenue, if any, that will be lost to the State
15 by the corresponding elimination of agency employees, as
16 determined by the Department of Revenue to the extent that it
17 is able to do so.

18 (e) The head of the agency shall certify in writing that:

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

21 (2) The quality of the services to be provided by
22 the designated bidder is likely to satisfy the quality
23 requirements of the statement prepared pursuant to
24 this Act, and to equal or exceed the quality of
25 services that could be provided by regular agency
26 employees;

27 (3) The contract cost will be at least 10% less
28 than the estimated cost, taking into account all
29 comparable types of costs and all the additional costs
30 of the contract as specified in this Act; and

31 (4) The proposed privatization contract is in the
32 public interest and meets the applicable quality and
33 fiscal standards set forth in this Act.

34 Any privatization contract entered into by a State agency
35 and the agency certification described above shall be a public
36 record and subject to disclosure pursuant to the Freedom of

1 Information Act.

2 Section 25. Monitoring and enforcement of privatization
3 contracts.

4 (a) No contractor shall award a subcontract for work under
5 a contract or an amendment to a contract without the approval
6 of the selection of the subcontractor and the provisions of the
7 subcontract by agency head or his or her designee.

8 (b) Each contractor shall file a copy of executed
9 subcontract or amendment to the subcontract with the agency.
10 The agency shall maintain the subcontract or amendment as a
11 public record.

12 (c) Any private contractor awarded a privatization
13 contract, and any subcontractor to a private contractor subject
14 to these provisions, shall file with the agency head copies of
15 financial audits of the private contractor prepared by
16 independent, certified public auditors at least annually
17 during the course of the contract term.

18 (d) All privatization contracts shall include a contract
19 provision specifying that in order to determine compliance with
20 these principles, as well as the contract, the private
21 contractor shall be required to provide the State or its agents
22 reasonable access through representatives of the private
23 contractor to facilities, records, and employees that are used
24 in conjunction with the provision of contract services, except
25 where prohibited by federal or State laws, regulations, or
26 rules.

27 (e) The private contractor shall submit a report, not less
28 than annually during the term of the privatization contract,
29 detailing the extent to which the contractor has achieved the
30 specific quantity and standard of quality of the subject
31 services as specified by the agency and its compliance with all
32 federal, State, and local laws including any complaints,
33 citations, or findings issued by administrative agencies or
34 courts.

35 (f) The State agency may seek contractual remedies for any

1 violation of a privatization contract. In addition, if a
2 contractor fails to comply with the wage standards, employment
3 provisions or union provisions in this Act, any person or
4 entity aggrieved by the violation may bring a claim for
5 equitable and other relief including backpay. In any lawsuit
6 brought for reasons listed in this subsection, an aggrieved
7 person or entity shall be entitled to costs and attorney fees.

8 Section 30. Compliance; privacy actions.

9 (a) Public records that a contractor, subcontractor,
10 employee, or agent possesses, modifies, or creates pursuant to
11 a privatization contract shall at all times and for all
12 purposes remain the property of the State. A contractor,
13 subcontractor, employee, or agent of a contractor or
14 subcontractor shall have no ownership rights or interest in any
15 public records that the contractor, subcontractor, employee,
16 or agent possesses, modifies, or creates pursuant to a
17 contract, subcontract, or amendment to a contract or
18 subcontract and shall not impair the integrity of any public
19 record that the contractor, subcontractor, employee, or agent
20 possesses or creates.

21 (b) Any public record that a State agency provides to a
22 contractor or subcontractor or that a contractor or
23 subcontractor creates shall be and remain a public record for
24 the purposes of the Freedom of Information Act and the
25 enforcement provisions of that law shall apply to any failure
26 to disclose records under this Section.

27 (c) A private contractor who fails to disclose a record
28 that the privatization contract requires to be disclosed or
29 that the State agency directs to be disclosed shall be liable
30 to the State agency for any fines or penalties assessed against
31 the agency for the violation of the Freedom of Information Act
32 concerning that record.

33 (d) No contractor or subcontractor or employee or agent of
34 a contractor or subcontractor shall disclose to the public any
35 public records that it possesses, modifies, or creates pursuant

1 to a contract, subcontract, or amendment to a contract and that
2 the State agency:

3 (1) Is prohibited from disclosing pursuant to State or
4 federal law in all cases;

5 (2) May disclose pursuant to State or federal law only
6 to certain entities or individuals or under certain
7 conditions; or

8 (3) May withhold from disclosure pursuant to State or
9 federal law.

10 No provision of this subsection shall be construed to
11 prohibit any contractor from disclosing public records to any
12 of its subcontractors to carry out the purposes of its
13 subcontract.

14 (e) No contractor, subcontractor, employee, or agent of a
15 contractor or subcontractor shall sell, market, or otherwise
16 profit from the disclosure or use of any public records that
17 are in its possession pursuant to a contract, subcontract, or
18 amendment to a contract or subcontract, except as authorized in
19 the contract, subcontract, or amendment.

20 (f) Any contractor or subcontractor, or employee or agent
21 of a contractor or subcontractor, that learns of any violation
22 of the provisions of this Act shall, no later than 7 calendar
23 days after learning of the violation, notify the agency head
24 and the Attorney General of the violation.

25 (g) In addition to any remedies provided under the Freedom
26 of Information Act, if any person violates any provision of
27 subsections (a) or (b) of this Section, the Attorney General
28 may bring an action against that person seeking damages on
29 behalf of the State for the violation, restitution for damages
30 suffered by any person as a result of the violation, or
31 imposition and recovery of a civil penalty of not more than
32 \$50,000 for the violation.

33 In addition to the remedies that may be brought by the
34 Attorney General, any person aggrieved by a violation of any
35 provision of subsections (a) or (b) of this Section may bring
36 an action in any State court to recover any damages suffered as

1 a result of the violation.

2 In any action brought under this subsection, the court may:

3 (1) Order disgorgement of any profits or other benefits
4 derived as a result of a violation of any provision of
5 subsections (a) or (b) of this Section;

6 (2) Award punitive damages, costs, and reasonable
7 attorneys fees; and

8 (3) Order injunctive or other equitable relief.

9 Proof of public interest or public injury shall not be
10 required in any action brought under this subsection (g). No
11 action may be brought more than 3 years after the occurrence of
12 the violation.

13 Any person who knowingly and willfully violates any
14 provision of subsections (a) or (b) shall be guilty of a Class
15 3 felony.

16 Section 35. Prohibition against discrimination.

17 (a) No person shall retaliate or discriminate in any manner
18 against any public employee or employee of a private contractor
19 because that employee, or any person acting on behalf of the
20 employee, acting in good faith:

21 (1) Engaged in any disclosure of information relating
22 to the services provided by a private contractor pursuant
23 to a privatization contract;

24 (2) Advocated on behalf of service recipients with
25 respect to the care or services provided by the private
26 contractor; or

27 (3) Initiated, cooperated, or otherwise participated
28 in any investigation or proceeding of any governmental
29 entity relating to the services provided pursuant to a
30 privatization contract.

31 (b) No person shall retaliate or discriminate in any manner
32 against any public employee or employee of a private contractor
33 because the employee has attempted or has an intention to
34 engage in an action described in subsection (a) of this
35 Section.

1 (c) No person shall by contract, policy, or procedure
2 prohibit or restrict any employee of a private contractor from
3 engaging in any action for which a protection against
4 discrimination or retaliation is provided under this Section.

5 (d) This Section does not protect disclosures that would
6 violate federal or State law or diminish or impair the rights
7 of any person to the continued protection of confidentiality of
8 communications provided by State or federal law.

9 (e) With respect to the conduct described in subsection (a)
10 of this Section, an employee of a private contractor shall be
11 considered to be acting in good faith if the employee
12 reasonably believes that the information is true and the
13 information disclosed by the employee: (i) evidences a
14 violation of any law, rule, or regulation, or of a generally
15 recognized professional or clinical standard; or (ii) relates
16 to the care, services, or conditions that potentially endanger
17 one or more recipients of service or employees employed
18 pursuant to a privatization contract.

19 (f) The identity of an employee of a private contractor who
20 complains in good faith to a government agency or department or
21 any member or employee of the State legislature about the
22 quality of services provided by a private contractor shall
23 remain confidential and shall not be disclosed by any person
24 except upon the knowing written consent of the employee of the
25 private contractor and except in the case where there is
26 imminent danger to health or public safety or an imminent
27 violation of criminal law.

28 (g) Any current or former public employee or employee of a
29 private contractor who believes that he or she has been
30 retaliated or discriminated against in violation of
31 subsections (a), (b), or (c) of this Section may file a civil
32 action in any State court of competent jurisdiction against the
33 person believed to have violated these subsections.

34 (h) If the court determines that a violation of this
35 Section has occurred, the court shall award any damages that
36 result from the unlawful act or acts, including compensatory

1 damages, reinstatement, reimbursement of any wages, salary,
2 employment benefits, or other compensation denied or lost to
3 such employee by reason of the violation, as well as punitive
4 damages, attorneys' fees, and costs, including expert witness
5 fees. The court shall award interest on the amount of damages
6 awarded at the prevailing rate.

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

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

19 (k) Any person who violates a provision of subsections (a),
20 (b), or (c) of this Section shall be subject to a civil penalty
21 of not to exceed \$10,000 for each violation. In determining the
22 amount of any penalty under this subsection, the
23 appropriateness of the penalty to the size of the business of
24 the person charged and the gravity of the violation shall be
25 considered. The amount of any penalty under this subsection,
26 when finally determined, may be deducted from any sums owing by
27 the state to the person charged or ordered to be paid to the
28 employee or employees who suffered retaliation or
29 discrimination, as ordered by the court.

30 (l) In any civil action brought under this Act, the
31 complainant shall have the initial burden of making a prima
32 facie showing that any behavior described in subsections (a),
33 (b), or (c) of this Section was a contributing factor in the
34 adverse action or inaction alleged in the complaint. A prima
35 facie case shall be established if the complainant can show
36 that the respondent knew of the complainant's protected

1 activities at the time that the alleged unfavorable action or
2 inaction was taken and the discriminatory action occurred
3 within a period of time that a reasonable person could conclude
4 that an activity protected by subsections (a), (b), or (c) of
5 this Section was a contributing factor in the discriminatory
6 treatment. Once the complainant establishes a prima facie case,
7 the burden shifts to the respondent to demonstrate, by clear
8 and convincing evidence, that it would have taken the same
9 adverse action or inaction in the absence of such behavior.

10 (m) Each private contractor shall post and keep posted, in
11 conspicuous places on its premises where notices to employees
12 and applicants for employment are customarily posted, a notice,
13 to be prepared or approved by the secretary, setting forth
14 excerpts from, or summaries of, the pertinent provisions of
15 this Act and information pertaining to the filing of a charge
16 under this Section. Any employer that willfully violates this
17 Section may be assessed a civil penalty not to exceed \$100 for
18 each separate offense.

19 Section 40. Nonpreemption. Nothing in this Act preempts
20 any other law, and nothing in this Act shall be construed or
21 interpreted to impair or diminish in any way the authority of
22 any locality, municipality or subdivision to enact and enforce
23 any law that provides equivalent or greater protections for its
24 employees.

25 Section 45. Severability. If any provision of this Act or
26 its application to any person or circumstances is held to be
27 invalid, the invalidity of that provision or application does
28 not affect other provisions or applications of this Act that
29 can be given effect without the invalid provision or
30 application.

31 Section 99. Effective date. This Act takes effect upon
32 becoming law.