By Senator Lawson

6-1793-04 See HB

A bill to be entitled

An act relating to procurement of personal property and services; creating s. 287.019, F.S.; defining "privatization"; requiring the head of a state agency, prior to the purchase, lease, or acquisition of commodities or contractual services by privatization, to conduct a business case evaluation of the proposed privatization; providing elements and components of the evaluation; requiring the head of a state agency, subsequent to the purchase, lease, or acquisition of commodities or contractual services by privatization, to conduct an evaluation of the privatization; providing evaluation criteria; requiring the State Council on Competitive Government to conduct a quarterly review of completed agency privatization evaluations; requiring state agencies to establish a system for monitoring the performance of a privatization contractor and for monitoring the contractor's compliance with the terms and conditions of the privatization contract; requiring state agencies to conduct annual evaluations of the performance of privatization contractors and report their findings to the Legislature, the Office of Program Policy Analysis and Government Accountability, and the Auditor General; requiring the Office of Program Policy Analysis and Government Accountability and the Auditor General to periodically examine any privatization in order to assist the Legislature in evaluating whether expected savings and outcomes have been achieved through privatization; providing that a vendor must be a domiciled state corporation or have a significant business presence in the state; providing an effective date.

WHEREAS, a continuing issue in government reform is the option of privatizing public services, and

WHEREAS, privatization is often proposed as a way to improve public services, with proponents claiming that privatization can cut government waste, increase employee productivity, and save tax dollars, and

WHEREAS, however, concerns have been raised that privatization can cost more than it saves, can lead to the loss of public control over government services, and may reduce service quality, and

WHEREAS, experience has shown that privatization can work well in some cases, produces mixed results in others, and can raise a variety of problems if the process is not well managed, and

WHEREAS, privatization in Florida is occurring in a host of public services, ranging from delivery of social services to building roads, and

WHEREAS, Florida is also outsourcing government programs and services through public-private partnerships, and

WHEREAS, in these partnerships, which are an alternative to full privatization, the private sector and government assume joint responsibility for the design and delivery of public programs and services, and

WHEREAS, when assessing privatization potential, the best candidates are programs where there are clearly defined tasks to be performed, good unit cost data can be developed for comparison, good quality and quantity measures are available so that service delivery can be monitored, and private sector service providers already exist, and

WHEREAS, it must also be recognized that it may be difficult to privatize many state functions, and

WHEREAS, for example, programs that involve the state's police power in which issues of fairness and equity are critical are not good candidates for privatization, and

WHEREAS, it should be recognized that market competition, rather than privatization itself, produces cost savings, and

WHEREAS, private companies have incentives to reduce their costs to increase profits and market share, whereas government agencies commonly do not face such competition, and

WHEREAS, however, when agencies have been placed in a competitive situation, they have frequently improved their performance and were able to under-bid private vendors, and

WHEREAS, studies have shown that agencies need to systematically plan privatization initiatives and evaluate the expected costs and benefits before carrying out these efforts in order to maximize the potential that privatization will be successful, and

WHEREAS, it is in the public interest of the citizens of the State of Florida that a diligent, comprehensive, ongoing effort at providing realistic assessments and evaluations of privatization efforts be undertaken, NOW, THEREFORE, Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 287.019, Florida Statutes, is created to read:

287.019 Privatization evaluation and assessment.--

(1) For the purposes of this section, "privatization" means entering into a contract with one or more private entities for the purchase, lease, or acquisition of any commodity or contractual service required by an agency of the state under this chapter when:

(a) It is maintained by the department that such commodity or contractual service can be provided in a more efficient manner by a private entity; and

(b) The expenditure by the contracting agency for the purchase, lease, or acquisition of commodities or contractual services meets or exceeds the threshold amount provided in s. 287.017 for CATEGORY FIVE:

1. Twice in any 1-year period; or

2. Four or more times during any 3-year period.

(2) Prior to the purchase, lease, or acquisition of any commodity or contractual service required by an agency of the state under this chapter which meets the definition provided in subsection (1), the head of the state agency shall conduct a business case evaluation of the proposed privatization which shall specifically address the potential for the privatization to result in a verifiable cost savings. A business case evaluation for a privatization proposal shall contain the following elements:

(a) Description and rationale.--The description and rationale element shall contain the following components:

1. A description of the program or service to be privatized.

2. An analysis of the agency's current performance and associated needs or problems with respect to the program or service that is the subject of the privatization proposal, and proposed solutions.

3. The benefits, such as cost savings or program improvements, that are expected to result from privatization.

(b) Cost-benefit analysis.--The cost-benefit analysis element shall contain the following components:

1. An accounting of the current direct and indirect expenditures for the program or services for which privatization is proposed. Indirect costs, as determined by the agency, include, but are not limited to, providing executive direction, legal services, and administrative support services such as personnel, finance, and budgeting; program direction, monitoring, and other activities that are essential to operating a program but are not directly associated with providing a service; and the salaries, benefits, and expenses of the individuals overseeing the contractor for the privatization. Direct costs, as determined by the agency, include, but are not limited to, salaries and benefits of employees formerly providing the program or service.

2. An analysis demonstrating the potential savings or increased costs that are expected to occur as a result of privatization. The analysis shall include the identification of crucial factors that could affect the potential savings realized, the effect of changes in these factors on costs and benefits of the proposal, and a list of state assets that

would be transferred to the contractor if the privatization plan is implemented.

3. If the proposed privatization will occur under a share-in-savings contract, a description of the methodology that will be used to calculate savings and payments to a contractor under such contract. For purposes of this section, a "share-in-savings contract" is an agreement in which an agency pays a contractor based on the financial benefits derived from the contractor's performance and which contains quantifiable baseline data that will be used to establish the basis upon which the percentage of savings paid to a contractor will be determined.

(c) Contract monitoring and contingency plans.--The contract monitoring and contingency plans element shall contain the following components:

1. The process the agency plans to use to monitor the performance of the privatization contractor and the estimated monitoring costs the agency will incur for this oversight function.

2. A contingency plan specifying actions that will be taken to address potential problems such as vendor prices exceeding anticipated levels, unexpected delays by the contractor in performing services by required deadlines, failure to meet performance expectations, or inability to meet obligations or abandonment of the contract.

(d) Public records access.--The public records access element shall contain the following components:

1. A list of public records issues pertinent to the proposed privatization, including whether any confidential or exempt records would be maintained by the contractor and the procedures that would be used to ensure that the contractor

maintains security and privacy of confidential or exempt records.

2. Agency plans to require the contractor to make available for inspection and review any program-related records that it produces or collects to the same extent and in the same manner as such records would be available from a state agency.

(3) If the business case evaluation conducted pursuant to subsection (2) indicates that the proposed privatization will result in a verifiable cost savings, the evaluation must ascertain whether the cost savings will be directly attributable to any of the following:

(a) Lower labor costs than that of the state agency.

(b) Reduced regulatory requirements.

(c) Reduced overhead.

(d) Increased flexibility with respect to the motivation, reward, and termination of employees.

(e) Access to better equipment than that available to the state agency.

(f) The ability to react more quickly to changing conditions than the state agency. If so was this ability attributable to:

1. An ability to shift funds to pay unexpected expenses without the encumbrance of budget transfer authority under which the state agency must operate.

2. An ability to expand operations more quickly than the state agency.

(g) Staffing flexibility, including the ability to obtain specialized expertise by contract or through the hiring of a consultant for one-time occasional projects.

<u>(h) The avoidance of political factors, which may include the use of private-sector experts not aligned or associated with partisan political groups.</u>

<u>(i) The avoidance of prohibitive or excessive start-up costs needed to provide appropriate up-front funding for service infrastructure.</u>

<u>(4) One year after entering into a contract for the purchase, lease, or acquisition of any commodity or contractual service required by an agency of the state under this chapter which meets the definition provided in subsection (1), the head of the state agency shall conduct an evaluation of the results of the privatization to determine whether the privatization yielded or failed to yield the projected cost savings based on the evaluation conducted pursuant to subsections (2) and (3) prior to entering into the contract, and an evaluation of the results of the privatization during its first year which shall specifically address whether the privatization resulted in a verifiable cost increase. If it is determined that the privatization resulted in a verifiable cost increase, the evaluation must ascertain whether the cost increase was directly attributable to any of the following:</u>

<u>(a) Reduced public accountability. If so, did the lack of public accountability or reduced public accountability manifest itself in increased costs resulting from:</u>

<u>1. Lack of public access to service and financial records maintained by the provider.</u>

<u>2. Variations in the quality of services being provided to citizens.</u>

<u>3. Entering into a contract the term of which was too lengthy, thus precluding the ability to adjust to a changing condition or circumstance.</u>

4. A resultant inability to gauge or monitor poor performance. In an instance where such an inability and poor performance resulted in termination of a contract, was increased cost and or hardship incurred because:

a. The contractor was a sole-source provider of a service; or

b. The contractor was providing a service in which no service disruptions could be tolerated.

(b) Service quality problems which include, but are not limited to:

1. Providing service to only those who do not have many needs, commonly known as "creaming."

2. Identifiable cost-cutting measures that result in cost increases including, but not limited to, frequent replacement of poorly maintained equipment.

3. Service quality problems that arise from contract deficiencies which include, but are not limited to:

a. Poorly defined responsibilities of the contractor;

b. Lack of service quality performance measures;

c. The absence of penalties for nonperformance;

d. The absence of contingency plans.

(c) Higher long-term costs. If so, did the higher long-term costs result from:

1. The submission by the contractor of a low initial bid in order to obtain the contract followed by substantially increasing costs in subsequent years when the agency previously providing the service no longer has the staff or authority to perform the service.

2. The acceptance of a contract bid that appears low but is in actuality higher than the in-house costs of the agency due to the agency's inability to determine the actual

cost of providing services in-house because of agency accounting systems which do not allocate all direct and indirect costs to services.

3. Failure in the request for proposals that solicited the bid for the service to mandate that the contractor achieve a specified level of savings.

4. Failure of the contract to limit future price increases.

(d) Workforce issues including, but not limited to:

1. Employee layoffs resulting in morale problems.

2. Union challenges to privatization.

3. Disruptions resulting from bumping rights when affected employees assume jobs in other areas.

4. Failure of an agency's ability to meet Equal Employment Opportunity goals and subsequent discrimination challenges resulting from inordinate numbers of minority groups being removed from state payrolls.

5. Failure in a contract to require the contractor to guarantee jobs and wages for a limited time period.

Section 2. (1) No later than January 1, 2005, each state agency shall establish a system for monitoring the performance of a contractor with whom the state has entered into a contract for the purchase, lease, or acquisition of commodities or contractual services by privatization as defined in section 287.019(1), Florida Statutes, and for monitoring the contractor's compliance with the terms and conditions of the privatization contract.

(2) Beginning January 1, 2005, each state agency, in coordination with the State Council on Competitive Government, shall conduct an annual evaluation of the performance of any contractor with whom the state has entered into a contract for

the purchase, lease, or acquisition of commodities or contractual services by privatization as defined in section 287.019(1), Florida Statutes, and report its findings to the Legislature, the Office of Program Policy Analysis and Government Accountability, and the Auditor General.

(3) Beginning January 1, 2005, the Office of Program Policy Analysis and Government Accountability and the Auditor General shall be required to periodically examine any privatization as defined in section 287.019(1), Florida Statutes, in order to assist the Legislature in evaluating whether expected savings and outcomes have been achieved through privatization.

Section 3. Any other provision of law to the contrary notwithstanding, a contract for services, request for proposals, or invitation to bid between an agency of the state and a contract vendor succeeding to the operation of a program or function of a state agency shall not be executed unless the vendor is a domiciled corporation in this state or has a significant business presence in the state for the duration of the contract. For purposes of this section, the term "significant business presence" means a retention of substantially all of the filed positions previously assigned to the state agency at substantially the same total cash equivalent of salaries and benefits.

Section 4. This act shall take effect upon becoming a law.