



# Ohio Legislative Service Commission

## Bill Analysis

Amber Hardesty

### H.B. 436

128th General Assembly  
(As Introduced)

**Reps.** Balderson and Boose, J. Adams, R. Adams, Bacon, Baker, Blessing, Combs, Evans, Grossman, Huffman, Jordan, Morgan, Stebelton, Wagner, Zehringer

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## BILL SUMMARY

- Authorizes a state agency to contract out its provision of a good or service to a private contractor under specific contractual provisions.
- Requires a state agency to prepare a business case before executing such a contract.
- Creates a Council on Efficient Government to review business cases, issue advisory reports, and undertake other duties regarding contracting out the provision of a good or service.
- Requires the Governor to select goods or services that could be provided by a private contractor and submit the selections for Council review.
- Requires the Council to prepare an annual report.

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## TABLE OF CONTENTS

Establishment of Council on Efficient Government.....	2
Rules adopted by Council on Efficient Government .....	3
Duties of Council on Efficient Government .....	4
Submission of business cases.....	5
State agency contracting out by request for proposals.....	8
Governor selections for contracting out .....	10
Annual report .....	10

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## CONTENT AND OPERATION

### Establishment of Council on Efficient Government

(R.C. 121.85(A) to (D) and (F) to (H))

The bill establishes the Council on Efficient Government consisting of the following seven members: (1) the chief executive or head administrative officer of a state agency,<sup>1</sup> appointed by the Governor, (2) two members who are engaged in private enterprise, appointed by the Governor, (3) two members who are engaged in private enterprise, appointed by the President of the Senate, and (4) two members who are engaged in private enterprise, appointed by the Speaker of the House of Representatives.

Initial appointments to the council must be made on or before January 1, 2011. Of the initial appointments, the term of office of one member engaged in private enterprise appointed by the Governor, by the President of the Senate, and by the Speaker of the House must be for a term ending December 31, 2011. The remaining initial appointments must be for terms ending December 31, 2012. Thereafter, terms of office are for two years, with each term ending on December 31. The member appointed under (1) above is a member only so long as the member is the chief executive or head administrative officer of a state agency. Each member holds office from the date of appointment until the end of the term for which the member was appointed. Members can be reappointed one time. Vacancies are to be filled in the same manner as is provided for original appointments. Any member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed holds office for the remainder of that term. A member continues in office after the expiration date of the member's term until the member's successor takes office, or until a period of 60 days has elapsed, whichever occurs first.

The bill requires the council to meet not less than four times per calendar year. The council must elect a chairperson from among its members. Four members of the council constitute a quorum. No action of the council is valid without the concurrence

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<sup>1</sup> Under the bill, "state agency" means every department, board, bureau, commission, council, office, institution of higher education, or other organized body established by the Ohio Constitution or Ohio laws for the exercise of any function of state government. "State agency" does not include the office of the Governor, Attorney General, Auditor of State, Secretary of State, Treasurer of State, the General Assembly or any legislative agency, or a court or any judicial agency. In the case of the Department of Transportation, "state agency" does not include contracts in support of the planning, development, implementation, operation, or maintenance of the department's road, bridge, and public transportation construction program (R.C. 121.80).

of four members. The bill prohibits a council member who is engaged in private enterprise from delegating the membership to a designee.

Council members serve without compensation, but members who are engaged in private enterprise are to be reimbursed for their actual and necessary expenses incurred in the performance of council duties.

The bill requires the Auditor of State to employ an adequate number of staff who collectively possess significant expertise and experience to assist the council in carrying out its duties. Additionally, the bill permits the council to appoint advisory groups to conduct studies, research, or analyses, to prepare reports, and to make recommendations with respect to a matter within the council's jurisdiction. At least one member of the council must serve on each advisory group. Members of an advisory group serve without compensation and are not to be reimbursed for their expenses.

### **Rules adopted by Council on Efficient Government**

(R.C. 121.87)

The bill requires the Council on Efficient Government to adopt rules that establish an accounting method to be used by state agencies in preparing, and by the council in reviewing, business cases (see "**Submission of business cases**," below) that are similar to generally accepted governmental accounting standards. The rules must also provide a process to estimate the federal, state, and local taxes a state agency would pay related to engaging in a commercial activity if the state agency were required to pay those taxes to the same extent as a private contractor engaging in the commercial activity.

Under the bill, the rules must allow a state agency to identify the total actual cost of engaging in a commercial activity in a manner similar to how a private contractor identifies the total actual cost of engaging in the same commercial activity, including identifying the following:

(1) Labor expenses, such as compensation and benefits; costs of training, of paying overtime, and of supervising labor; and other personnel expenses;

(2) Operating costs, such as vehicle maintenance and repair, marketing, advertising and other sales expenses, and office expenses; costs of accounting operations, such as billing, insurance expenses, real estate, or equipment costs; debt service costs; and overhead or capital expenses, such as vehicle depreciation and depreciation of other fixed assets;

(3) Contract management costs; and

- (4) Other costs particular to the provision of a good or service.

## **Duties of Council on Efficient Government**

(R.C. 121.86)

The bill requires the Council on Efficient Government to do all of the following:

- (1) Review business cases (see "**Submission of business cases**," below) submitted by state agencies and, if required, provide to the state agency an advisory report. The advisory report must contain a copy of the business case, an evaluation of the business case, any relevant council recommendations, and sufficient information to assist the state agency proposing to contract out the provision of a good or service in determining whether the business case should be included with the state agency's legislative budget request.

- (2) Implement a standard process for council review of submitted business cases, including templates for use by state agencies in submitting business cases to the council.

- (3) Recommend standards, procedures, and guidelines for use by state agencies in developing business cases.

- (4) Review, evaluate, and make written recommendations in the annual report (see "**Annual report**," below) regarding whether to contract out the provision of a good or service selected by the Governor.

- (5) Review contracting out the provision of a good or service at the request of a state agency or a private contractor.

- (6) Evaluate whether a good or service provided by a state agency could be provided by a private contractor at the same quality and service levels as provided by the state agency, and whether contracting out the provision of the good or service would result in cost savings to the state. The council can hold public hearings as part of this evaluation process.

- (7) Recommend to a state agency contracting out the provision of a good or service if the council determines that contracting out the provision is a more cost-efficient or a more effective manner of providing a good or service.

- (8) Review issues concerning state agency competition with one or more private contractors to determine ways to eliminate any unfair competition with them.

- (9) Incorporate any lessons learned from contracting out the provision of goods and services into council standards, procedures, and guidelines, as appropriate, and



identify and disseminate to state agencies information regarding best practices in efforts to contract out.

(10) Develop guidelines for assisting state employees whose jobs are eliminated as a result of the contracting out.

(11) Receive complaints of violations of the bill's provisions and transmit a copy of the complaint to the state agency alleged to be in violation. Within 30 days after receiving the complaint, the state agency must file a response to the complaint with the council.

(12) Hold public hearings on the complaints, determine whether the state agency violated the bill's provisions, and issue a written report of its findings to the complainant within 90 days after receiving the state agency's response.

(13) Solicit from private contractors petitions of interest regarding contracting out the provision of a good or service, as the council considers appropriate. The council can evaluate the petitions, and can hold public hearings as part of the evaluation process. The council can refer petitions to the Governor's office for further consideration. A private contractor does not have a cause of action based on the council's failure to evaluate a petition or to refer a petition to the Governor's office.

### **Submission of business cases**

(R.C. 121.82 and 121.83)

A state agency proposing to contract out the provision of a good or service must prepare a written business case that justifies the proposal to contract out and must submit the business case to the Council on Efficient Government on or before the time required (see below). The business case must include all of the following:

- (1) A detailed description of the good or service proposed to be contracted out.
- (2) An analysis of the state agency's current performance and costs incurred in providing the good or service, if the state agency currently is providing the good or service.
- (3) Identification of statutory amendments or enactments, if any, needed to authorize the contracting out of the provision of the good or service.
- (4) The goals desired to be achieved by contracting out the provision of the proposed good or service and the rationale for the goals.

(5) A description of available options for achieving those goals, including at least one option where the state agency provides the good or service, if the state agency is currently providing the good or service.

(6) An analysis of the advantages and disadvantages of each option described under (5), including, at a minimum, the potential performance improvements resulting from, and the risks of, contracting out the provision of a good or service.

(7) A cost-benefit analysis that specifies: (a) the direct and indirect estimated savings,<sup>2</sup> baseline costs,<sup>3</sup> and qualitative and quantitative benefits that would be involved in or would be the result of implementing each option described under (5), (b) the time schedule that must be adhered to in order to achieve the estimated savings, and (c) the costs of the option, supported by records and reports. The bill requires the head of the state agency proposing to contract out the provision of a good or service to attest that, based on the data and information underlying the business case and to the best of the state agency head's knowledge, all estimated savings, costs, and benefits are valid and achievable.

(8) A description of the current market for the goods or services the provision of which is proposed to be contracted out.

(9) A description of the specific performance standards a private contractor, at a minimum, must meet to ensure adequate performance under a contract to contract out.

(10) The projected time frame for key events, from the beginning of the proposed contracting out through the expiration of the contract to contract out.

(11) A plan to ensure a private contractor's compliance with any public records law that applies to the state agency contracting out the provision of a good or service.

(12) A specific and feasible contingency plan addressing private contractor nonperformance, and a description of the tasks involved in and costs required for the plan's implementation.

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<sup>2</sup> "Savings" means the difference between the direct and indirect actual annual baseline costs of an option compared to the projected annual costs for providing a good or service in any succeeding state fiscal year during the term of the contract to contract out the provision of the good or service.

<sup>3</sup> "Costs" means reasonable, relevant, and verifiable costs, including cost elements such as personnel, materials and supplies, services, equipment, capital depreciation, rent, maintenance and repairs, utilities, insurance, personnel travel, overhead, and interim and final payments. The appropriate cost elements included in "costs" depends on the nature of the specific good or service proposed to be contracted out.

(13) The state agency's transition plan for addressing changes in the number of agency personnel, affected business processes, employee transition issues, and communication with affected stakeholders, such as agency clients and the public. The transition plan must contain a re-employment and retraining assistance plan for employees who are not retained by the state agency or are not employed by the private contractor.

(14) A plan for ensuring access to the private contractor's place of business by persons with disabilities, in compliance with applicable state and federal laws.

(15) A description of legislative budgetary actions, if any, necessary to accomplish contracting out the provision of the good or service.

A business case is not subject to challenge or protest by any person.

Under the bill, at least 60 days before a state agency issues a request for proposals to contract out the provision of a good or service having a projected cost of more than \$10 million in any fiscal year, the state agency must submit its business case to the council for its review. The council must evaluate the business case and issue an advisory report to the state agency not later than 30 days after receiving the business case. The state agency must submit a final business case to the council at least 30 days before execution of a contract to contract out. The final business case must reflect any changes to the business case as the result of contract negotiations.

At least 30 days before a state agency issues a request for proposals to contract out the provision of a good or service having a projected cost of at least \$1 million but not more than \$10 million in any fiscal year, the state agency must submit its business case to the council for its review. The state agency must submit a final business case to the council at least 30 days before execution of a contract to contract out. The final business case must reflect any changes to the business case as the result of contract negotiations.

After the conclusion of contract negotiations regarding contracting out the provision of a good or service having a projected cost of less than \$1 million in any fiscal year, but at least 30 days before the execution of a contract to contract out, the state agency must submit a final business case to the council for its review. The final business case is the business case prepared as required and amended to reflect any changes as the result of contract negotiations.

The bill prohibits a council member from participating in reviewing a business case if the member is the chief executive or head administrative officer of the state agency that submitted the business case, or, in the case of a council member engaged in

private enterprise, if the member has a business relationship with a private contractor that is involved or potentially could be involved in the proposed contracting out (R.C. 121.85(E)).

## **State agency contracting out by request for proposals**

(R.C. 121.81 and 121.84)

After following the procedures described above, the bill permits a state agency to contract out to a private contractor the state agency's duty to provide a good or service. The state agency must select the private contractor by issuing a request for proposals. The request for proposals must state the relative importance of price and other evaluation criteria selected by the state agency. The bill requires the state agency to develop a process to be used in issuing the request for proposals, receiving responses to the request, and evaluating the responses on a competitive basis. The award of a contract can be made to the private contractor whose proposal is determined to be the most advantageous to the state, taking into consideration factors such as price, the evaluation criteria set forth in the request for proposals, and the advisory report of the Council on Efficient Government.

To ensure fair and impartial evaluation, proposals and related documents submitted in response to a request for proposals are not available for public inspection and copying under the Public Records Act until after the award of the contract.

Each contract to contract out the provision of a good or service must, at a minimum, include all of the following articles:

(1) A scope-of-work article that clearly specifies and describes each quantifiable, measurable, and verifiable good or service to be provided by the private contractor. This article must include a clause stating that if a particular good or service is inadvertently omitted or not clearly specified, but is determined to be operationally necessary and is verified to have been performed by the state agency within the 12-month period before execution of the contract, the good or service will be provided by the contractor by amending the contract through the amendment process.

(2) A quality level article that describes all goods or services to be provided by the private contractor under the terms of the contract; the quality level of the goods or services and the service requirements to be met by the contractor; the specific responsibilities of the state agency and the contractor; and the process for amending any portion of the article. The article must contain an exclusivity clause that allows the state agency to retain the right to provide the good or service directly, or to contract with another contractor, if quality levels or service requirements are not being met or specific responsibilities are not performed.



(3) An article that identifies all required performance standards to be met by the private contractor, which must include, at a minimum: (a) detailed and measurable acceptance criteria for each good and service to be provided to the state agency under the terms of the contract, (b) a method for monitoring and reporting progress in achieving the performance standards, (c) the sanctions or disincentives that will be imposed for the private contractor's and state agency's nonperformance.

(4) An article that identifies all associated costs, specific payment terms, and payment schedules, including financial incentives and disincentives and other criteria governing payments.

(5) An article that identifies a clear and specific transition plan that will be implemented in order to complete all required activities needed to transfer the provision of a good or service, or an activity, from the state agency to the private contractor, and to make the transfer successful.

(6) An article that describes a contingency plan for continuing the operation of providing a good or service, including transferring the provision of the good or service back to the state agency or a successor contractor, if the private contractor fails to perform and comply with the contract's performance standards and the contract is terminated.

(7) An article that requires the private contractor and its subcontractors to maintain adequate accounting records that comply with all applicable federal and state laws and generally accepted accounting principles.

(8) An article that authorizes the state agency to have access to and review all records related to the contract or to any subcontract, or related to any responsibilities or functions under the contract or any subcontract, for purposes of legislative oversight.

(9) An article that requires audits of the private contractor or subcontractor by the Auditor of State.

(10) An article that requires the private contractor to interview and consider for employment with the private contractor each state employee who is interested in employment and who was or will be displaced because the provision of a good or service was or will be contracted out.

(11) An article that requires the private contractor and its subcontractors to comply with any public records laws that apply to the state agency that contracted out the provision of the good or service, specifically to: (a) keep and maintain the public records that ordinarily and necessarily would be required by the state agency regarding a good or service contracted out, (b) provide the public with access to the public records

on the same terms and conditions that the state agency would have provided the records, (c) ensure that confidential or exempt records are not disclosed, except as authorized by law, (d) meet all requirements for retaining records, (e) require the transfer to the state agency, at no cost, of all public records in the private contractor's or a subcontractor's possession on termination of the contract and to require the destruction of any duplicate public records that are exempt or confidential. The article must include a clause that requires all records stored electronically to be provided to the state agency in a format that is compatible with the state agency's information technology systems.

(12) An article that addresses ownership of intellectual property. This provision does not provide the specific authority needed by a state agency to obtain a copyright or trademark.

(13) If applicable, an article that allows the state agency to purchase from the private contractor, at its depreciated value, assets used by the contractor in the performance of the contract. If assets have not depreciated, the state agency retains the right to negotiate to purchase them at an agreed-to cost.

### **Governor selections for contracting out**

(R.C. 107.35)

Beginning July 1, 2012, the Governor, at least once every two fiscal years, must select at least three goods or services that are being provided by a state agency, the provision of which the Governor believes could be contracted out to a private contractor. The Governor must submit the selections to the Council on Efficient Government for its review and evaluation.

### **Annual report**

(R.C. 121.88)

The bill requires the Council on Efficient Government to prepare an annual report that contains all of the following:

(1) Recommendations on innovative methods of delivering goods or services provided by state agencies that would improve the efficiency, effectiveness, or competition in the delivery of those goods or services;

(2) A summary for the previous calendar year of each state agency's efforts to contract out the provision of a good or service, including the number of business cases submitted to the council; the number of requests for proposals issued by state agencies

for selecting a private contractor; the number and dollar value of contracts to contract out executed; descriptions of contract performance results, as applicable; any contract violations or slippages; and the status of extensions and renewals of, and amendments to, contracts to contract out;

(3) Information about the council's activities;

(4) Copies of the business cases submitted to the council;

(5) The minutes of each council meeting;

(6) Copies of advisory reports issued by the council;

(7) The council's written recommendations regarding whether to contract out the provision of a good or service selected by the Governor.

The council must submit a copy of the annual report to the Governor, the Senate President and Minority Leader, and the House Speaker and Minority Leader on or before January 15 immediately following the calendar year for which the report was made. Each year, the council must provide the House and Senate committees that primarily deal with finances an oral report that summarizes the annual report.

The bill requires each state agency to submit to the council all information, documents, and other materials requested by the council for preparation of the annual report.

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## HISTORY

ACTION	DATE
Introduced	02-02-10

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