

By: Senator(s) Hewes, Clarke

To: Fees, Salaries and
Administration;
Appropriations

SENATE BILL NO. 2543

1 AN ACT TO CREATE THE EFFICIENCY IN GOVERNMENT ACT; TO DECLARE
2 LEGISLATIVE INTENT; TO DEFINE CERTAIN TERMS; TO PROHIBIT ANY
3 AGENCY FROM PERFORMING GOVERNMENT COMMERCIAL OR INDUSTRIAL
4 ACTIVITIES EXCEPT IN ACCORDANCE WITH THIS ACT; TO ESTABLISH
5 WORKING GROUPS TO EVALUATE CURRENT ACTIVITIES, COORDINATE MAKE OR
6 BUY ANALYSES AND IMPLEMENT RECOMMENDATIONS FOR GREATER EFFICIENCY;
7 TO REQUIRE EACH AGENCY TO PREPARE AN INVENTORY OF ALL IN-HOUSE
8 GOVERNMENT COMMERCIAL OR INDUSTRIAL ACTIVITIES; TO AUTHORIZE THE
9 STATE AUDITOR, AS AN ELEMENT OF REGULAR AUDITS, TO INCLUDE AN
10 ASSESSMENT OF AN AGENCY OR MUNICIPALITY'S IMPLEMENTATION OF THIS
11 ACT; AND FOR RELATED PURPOSES.

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

13 **SECTION 1.** This act may be cited as the Efficiency In
14 Government Act.

15 **SECTION 2.** It is the public policy of the state to provide
16 the highest quality services at the lowest possible cost to
17 taxpayers. Efficiency cannot be achieved, however, if government
18 is permitted to act as a monopoly, with no competitive incentive
19 to reduce costs or improve services. In order to achieve
20 competition and efficiency, decisions about how services should be
21 provided must be governed by three (3) fundamental principles:

22 (a) The government should not be in the business to
23 compete with private sector services. Government should look
24 first to the private sector to provide the goods and services that
25 the public needs.

26 (b) Certain functions are inherently governmental.
27 These activities are intimately related to the public interest.

28 (c) When activities are not clearly governmental
29 functions, the government should conduct a rigorous comparison of
30 private sector costs and in-house costs.

31 **SECTION 3.** As used in this act:

32 (a) "Agency" means any department, board, bureau,
33 commission, division, office council, committee or officer of the
34 state, public benefit corporation or public authority at least one
35 (1) of those members is appointed by the Governor.

36 (b) "Commercial source" means any not-for-profit or
37 private sector entity.

38 (c) "Conversion" means the transfer of work from a
39 government commercial or industrial activity to performance by a
40 private commercial source under contract.

41 (d) "Expansion" means the modernization, replacement,
42 upgrade, or involving additional capital investment of One Hundred
43 Thousand Dollars (\$100,000.00) or more, or increasing operating
44 annual costs by Two Hundred Thousand Dollars (\$200,000.00) or
45 more; provided, however, the increase exceeds twenty percent (20%)
46 of total investment or annual operating costs. Consolidation of
47 two (2) or more activities is not an "expansion" unless the
48 proposed total capital investment or operating cost exceeds the
49 total from the individual activities by the amount of the
50 threshold. An expansion which increases either capital investment
51 or annual operating cost by one hundred percent (100%) or more is
52 a new start.

53 (e) "Government commercial or industrial activity"
54 means an activity that is operated and managed by a state agency
55 and which provides a product or a service that could be obtained
56 from a private source.

57 (f) "Governmental function" means a function which must
58 be performed in-house due to a special relationship in executing
59 governmental responsibilities, such as functions involving the
60 discretionary application of governmental authority. Such
61 functions include, but are not limited to, investigation,
62 prosecution and other judicial functions, the overall management
63 and direction of government programs, selection of program
64 priorities, and regulatory activities.

65 (g) "In-house activity" means a good or service
66 provided by an agency.

67 (h) "Make or buy analysis" means a good or service
68 provided by an agency.

69 (i) "New start" means a newly-established government
70 commercial or industrial activity, including a transfer of work
71 from contract to in-house performance. Also included is any
72 expansion which would increase capital investment or annual
73 operating cost by one hundred percent (100%) or more.

74 **SECTION 4.** (1) No agency shall perform or engage in a
75 contract for government commercial or industrial activities,
76 except in accordance with the provisions of this act, or as
77 otherwise provided by law.

78 (2) Each agency shall retain full control of service
79 quantities, service specifications, standards and any other matter
80 demonstrably related to the delivery of a particular public good
81 or service in a manner consistent with the public interest.

82 (3) Each agency shall designate one (1) official, an
83 assistant commissioner or the equal, who shall, with the working
84 groups established pursuant to subsection (4) of this act:

85 (a) Coordinate the process of evaluating current
86 activities, expansions and new start proposals;

87 (b) Implement the required make or buy analyses; and

88 (c) Implement the recommendations of the working
89 groups, established pursuant to this act, concerning whether the
90 good or service shall be delivered by in-house or commercial
91 sources.

92 (4) Agency employees shall be encouraged to participate in
93 the activities required by this act, and each agency shall create
94 a working group chaired by the designated official. In addition
95 to such official, the group shall consist of an equal number of
96 members representing management and an equal number representing

97 all collective bargaining units which represent agency employees,
98 to develop and implement the process.

99 (5) An interagency task force, to consist of the State
100 Personnel Director, the Executive Director of the Department of
101 Finance and Administration, two (2) executive directors of
102 agencies selected by the Governor, and three (3) representatives
103 of collective bargaining units representing state employees shall
104 review issues relating to employee adjustments resulting from the
105 implementation of this act, and shall develop procedures to
106 minimize employee dislocations.

107 (6) Each agency shall create a working group consisting of
108 equal numbers representing management and all collective
109 bargaining units representing employees, to address employee
110 concerns relating to the impact of conversions of government
111 commercial or industrial activities from in-house to commercial
112 providers. Groups shall develop policies to minimize worker
113 dislocations resulting from such conversions through such
114 approaches as the use of reassignment, retraining and attrition,
115 and shall consider such other employee concerns as are brought
116 before them.

117 (7) The Department of Finance and Administration shall
118 provide technical assistance to agencies in implementing the
119 provision of this act. Functions of the department shall include,
120 but not be limited to:

121 (a) Preparing a nonexclusive list of activities which
122 are commercial or industrial, to be made available to all
123 agencies; and

124 (b) Advising agencies on cost analysis issues.

125 **SECTION 5.** (1) Each agency shall prepare an inventory of
126 all in-house government commercial or industrial activities.

127 (2) Every year, at least five percent (5%) of an agency's
128 in-house government commercial and industrial activities shall be
129 reviewed.

130 (a) Each agency shall determine goals and standards for
131 activities under review.

132 (b) Each agency shall consider alternative methods for
133 performing in-house activities with effectiveness and
134 cost-efficiency as primary concerns.

135 (c) Each agency shall determine, for each in-house
136 activity, whether these are known commercial sources.

137 (3) If the agency determines that there is potential that a
138 private commercial source can perform the activity the agency
139 shall pursue a request for petitions of interest.

140 (4) If the agency finds that there are no known private
141 commercial sources which can perform an activity, it shall
142 initiate a petition of interest process.

143 (5) Such inventory shall be available for review by the
144 Department of Finance and Administration.

145 **SECTION 6.** (1) For each in-house government commercial, or
146 industrial activity of an agency, other than an activity exempted
147 by this act, a commercial source may submit a petition of interest
148 at any time. Upon receipt of an unsolicited petition of interest,
149 an agency shall schedule such an activity for review, as is
150 provided by this act, within twelve (12) months of receipt, an
151 agency may decline a petition where a petition regarding the same
152 services has been considered during the past twelve (12) months of
153 receipt. An agency may decline a petition where a petition
154 regarding the same service has been considered during the past
155 twelve (12) months. A make or buy analysis is not required for
156 any public good or service for any period during which such public
157 good or service is to be provided under an existing competitive
158 contract.

159 (2) Each agency shall solicit petitions of interest for any
160 proposed expansions or new start activities for which there is no
161 known commercial source.

162 (3) At a minimum, the agency shall solicit petitions
163 through:

164 (a) The procurement opportunities newsletter of the
165 department of economic development; and

166 (b) A relevant trade or service journal.

167 (4) Each petition of interest submitted by a commercial
168 entity shall include:

169 (a) A description of the good or service the entity
170 offers to provide;

171 (b) A description of the entity's financial capacity to
172 undertake this activity; and

173 (c) A description of the entity's technical ability to
174 provide the good or service with references to identical, similar
175 or relevant goods or services presently provided by the entity.

176 (5) Within sixty (60) days of receipt, the agency shall
177 determine whether there is sufficient reason to believe that an
178 entity has the financial and technical ability to provide the
179 public good or service.

180 (6) The agency may make one (1) of two (2) findings:

181 (a) Where the agency determines that the entity has
182 insufficient financial and technical ability to provide the good
183 or service, it shall issue a written denial of the petition and
184 state its justification for such finding; or

185 (b) Where the agency determines that there are
186 commercial sources with sufficient financial and technical ability
187 to provide a good or service, the agency shall proceed to conduct
188 a make or buy analysis. Such analysis shall be subject to the
189 requirements of this act.

190 **SECTION 7.** (1) Where an agency is aware of commercial
191 sources for a government commercial or industrial activity, a make
192 or buy analysis shall be performed whenever an agency considers an
193 expansion of an in-house activity or performance of a new start
194 activity in-house.

195 (2) A make or buy analysis shall be performed through
196 evaluation of bids or proposals which are solicited through a
197 competitive procedure from commercial sources and state agencies
198 in accordance with Sections 9 and 11 of this act.

199 (3) An agency may request the Department of Finance and
200 Administration to authorize in-house performance of a new
201 commercial of industrial activity or an expansion of an existing
202 in-house government commercial or industrial activity without a
203 make or buy analysis where it demonstrates that:

204 (a) There is no commercial source capable of providing
205 the product or service that is needed and that it has solicited a
206 petition of interest, as required by this act; or

207 (b) Use of a commercial source would cause an
208 unacceptable delay or disruption of essential programs.

209 (4) The Department of Finance and Administration shall make
210 a decision within thirty (30) days of receiving a documented
211 explanation from the relevant agency where such agency seeks to
212 perform a commercial or industrial activity in-house. Such
213 documentation shall include:

214 (a) Delay or disruption explained specifically in terms
215 of cost, time and performance measures;

216 (b) Disruption shown to be of a lasting or unacceptable
217 nature. Transitory disruption caused by a change shall not be
218 sufficient cause.

219 **SECTION 8.** (1) Both agency and commercial source cost
220 analysis shall be based on the same scope of work and the same
221 level of performance. A precise work statement with standards
222 that can be monitored shall be required.

223 (2) The Department of Finance and Administration shall be
224 required to determine standard cost factors, which shall be
225 applied by agencies performing analysis pursuant to this act.

226 (3) Cost comparisons shall be done by using fully allocated
227 costs.

228 (a) All significant costs, including, but not limited
229 to, fixed costs, variable costs, overhead costs, direct and
230 indirect costs shall be considered both for in-house and
231 nongovernmental sources.

232 (b) The Department of Finance and Administration shall
233 review agency cost comparisons and shall determine whether costing
234 was done using full cost comparisons.

235 (4) In the solicitation for bids from commercial sources for
236 workloads of a continuing nature, unless otherwise inappropriate,
237 solicitations shall provide for pre-priced options for out-years.

238 (5) The Department of Finance and Administration shall
239 compute a rate to be applied by agencies for the opportunity cost
240 of capital investments and of the net proceeds from the potential
241 sale of capital assets, utilizing the best available date for
242 comparable commercial and industrial activities.

243 (6) Agencies shall not be required to conduct cost
244 comparisons for goods or services estimated for which annual
245 operation costs are estimated to be less than One Hundred Dollars
246 (\$100.00).

247 (a) Activities below such threshold should be performed
248 by contract unless otherwise exempted by this act.

249 (b) Where there is reason to believe that inadequate
250 competition or other factors are causing commercial prices to be
251 unreasonable, a cost comparison may be conducted. However,
252 reasonable effort shall first be conducted to obtain satisfactory
253 prices from existing commercial sources.

254 **SECTION 9.** (1) Any public good or service provided through
255 a competitive bidding process shall be subject to a new
256 competitive bidding process at least every five (5) years. No
257 change in contract or renewal option payment amounts to a private
258 contractor or agency shall be made except as provided in the
259 contract executed at the start of service. Payment charges in
260 contracts shall be limited to indices, escalators, deflators,

261 changes in service level and other expressly stated or calculable
262 amounts, consistent with the proposal of the private contractor or
263 agency awarded the contract.

264 (2) In no case shall a good or service which has been
265 procured through a competitive process be procured from an
266 external source or returned to in-house performance without
267 conducting the make or buy analysis required by this act.

268 (3) For any positions made available as a result of a
269 conversion from an in-house activity to one provided by a
270 commercial source, the commercial sources shall first consider
271 persons who were laid off from public employment because of such
272 conversion.

273 (4) An agency may not establish any requirement relating to
274 conditions of employment of contracted employees other than those
275 required by applicable state and federal laws.

276 (5) Under no circumstances shall an agency increase payment
277 to an in-house or private provider of services except as is
278 explicitly stated in the terms of the contract.

279 **SECTION 10.** (1) The State Auditor, as an element of the
280 regular audits of agency activities, shall include an assessment
281 of:

282 (a) Progress on implementation of this act;

283 (b) Compliance with the competitive proposal
284 requirement;

285 (c) Compliance with fully allocated cost requirement;

286 (d) Level of contract compliance by private
287 contractors;

288 (e) Cost of such compliance;

289 (f) Whether such costs will be recurring or reduced;

290 and

291 (g) The costs and benefits of further efforts to
292 privatize.

293 **SECTION 11.** (1) The Director of the Department of Finance
294 and Administration shall establish a procedure for administrative
295 review of determinations in accordance with the requirements of
296 the state administrative procedure act. This procedure will only
297 be used to resolve questions of determinations between in-house
298 and contract performance, and shall not apply to questions
299 concerning award to a contractor in preference to another
300 contractor. Upon written request from a directly affected party
301 raising a specific objection, the appeals procedure will provide
302 for:

303 (a) An independent, objective review of the initial
304 determination and the rationale upon which the decision was based;
305 and

306 (b) An expeditious determination, within thirty (30)
307 days.

308 (2) The appeals procedure is intended to provide an
309 administrative safeguard to assure that agency decisions are fair,
310 equitable and in accordance with established policy.

311 (3) Since the appeal procedure is intended to protect the
312 rights of all affected parties (state employees and their
313 representative organizations, contractors and contract employees
314 and their representatives) the procedure and agency determinations
315 may not be subject to negotiation, arbitration or agreements with
316 any one (1) of those parties.

317 (4) Any decision of the Director of the Department of
318 Finance and Administration shall be final and shall be subject to
319 judicial review.

320 **SECTION 12.** This act shall take effect and be in force from
321 and after July 1, 2004.