

# Responsible Contracting Policies and Practices

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State and local governments across the country spend an estimated \$2 trillion in goods or services every year—from repairing bridges to janitorial services to purchasing textbooks. Given the immense amount of public money transferred to the private sector through government contracting, [procurement policies and procedures are important levers states and localities can use](#) to support jobs in the private sector, set standards for the quality of those jobs, and help determine who receives training and access to those jobs.

These policies and procedures can also help make sure that contractors deliver quality goods and services without cutting corners to increase profits. However, many state and local governments choose to purchase goods and services [based on lowest cost rather than community needs and input](#). Moreover, some state and local governments enter into contracts that result in the privatization of services that can be provided better and more equitably through the public sector. Enacting responsible government contracting laws and policies are an important way that localities and states can ensure that public contracting decisions both protect and advance the public interest.

The first section of this brief describes a number of responsible contracting policies that aim to ensure that a governmental entity’s procurement process is fair, transparent, and does not result in risky privatization contracts. These policies also help ensure that approved contracts result in high quality jobs, high quality services, and that contractors are held accountable for their performance. The second section includes a selection of responsible contracting laws from localities and states around the country that encompass one or more of these policy ideas.

## 1. Responsible contracting policies

The following policies are divided in to three subsections: 1) the contracting process, 2) requirements for contracts, and 3) accountability and oversight of contracts. These policies provide a common-sense approach to government contracting that favors high-road contractors, while mitigating the risks of large-scale privatization efforts. However, each of these policies can be enacted on its own to help strengthen a governmental entity’s contracting practices. For more information and sample legislative language related to these policies, please email us: [info@inthepublicinterest.org](mailto:info@inthepublicinterest.org).

## ***The contracting process***

**Require a robust and thorough cost comparison of public and private service delivery options.** Governments must account for all expenses associated with contracting, such as contract monitoring and administration, transition costs, and the contractor's use of public equipment and facilities. But too often these expenses are not included in a cost comparison for a proposed contract.

The Government Finance Officers Association estimates that indirect and hidden costs can add up to **25 percent** to the price of the contract. These costs add up, making the true costs of contracting often much higher than a company's bid may indicate. Requiring a robust and thorough cost comparison of public versus private service provision that reflects the full costs associated with each service delivery method will help the government entity make the best fiscal decision. Some government entities require that the projected cost savings with contracting must be equal or higher than a specified threshold to justify contracting out. For example, the state of Maryland requires a minimum 10 percent projected savings for a contract to be approved.

**Require a social and economic impact analysis before outsourcing.** The impacts of privatization are far more reaching than just costs. However, governments rarely look at questions beyond whether there is projected cost savings associated with a proposed privatization effort. While a rigorous cost-benefit analysis should be a part of every government's contracting decision-making analysis, social and economic impact analyses should also be completed that examine potential impacts on various groups, such as those who use the service or asset, workers, residents, vulnerable or underserved groups in the community, and businesses. This analysis should be made public before any decision regarding outsourcing is made.

**Prohibit any contractor that has evaded taxes or broken the law from contracting for public goods or services.** It is important that governmental entities know the track records of all companies they contract with, and ensure that only law-abiding companies receive public dollars. Localities and states should bar companies that fail to abide by federal, local and state laws, including tax, labor, civil rights, environmental, and other types of laws, from participating in the contracting process.

**Require competitive bidding when a contract is up, rather than automatically renewing it.** Service contracts are too often renewed automatically when they expire, with no serious review of whether the contract actually saved money, enhanced the quality of services, or whether internal or external conditions have changed since the contract was signed. Automatic renewal of government contracts circumvents the competitive bidding process and gives one company an unfair advantage.

**Ensure that public service workers have the opportunity to submit their own plan to save money and provide quality services.** Public service workers know their jobs; they know how costs can be reduced, where there are opportunities for increased efficiencies, and how to increase the quality of services. Allowing public employees the opportunity to present public alternatives to outsourcing taps the creativity, experience, and resourcefulness of the current workforce and avoids the negative impact of privatization.

### ***Requirements in government contracts***

**Require contractors to pay a living wage and provide health and other important benefits.** Public sector jobs have long played a role in growing the middle class. Workers in a variety of roles are able to earn a decent wages and benefits when their jobs are with the public sector. However, many contractors reduce operating expenses and increase profit margins by cutting labor costs. This means that workers' wages and benefits are often decreased when private companies assume control of public functions, degrading middle class jobs. If a contractor employs workers to perform public work using public dollars, those jobs should fulfill the goal of using public money to strengthen our economy and build the middle class. Workers should be paid a living wage and provided reasonable benefits, such as health insurance, sick leave, and retirement benefits by their private employer.

**Ban contract language that guarantees company profits.** Some government contracts contain language that shield companies from risk and help ensure contractor profits. Non-compete clauses and compensation clauses in public infrastructure contracts and occupancy guarantee clauses in private prison contracts are examples of how corporations guarantee corporate revenues. These guarantees often indirectly eliminate or limit policy decisions that would benefit the public. These types of provisions should be limited or banned completely from government contracts.

**Ensure that every contract allows for regular audit and oversight, and agencies have sufficient staffing levels to adequately oversee contracts to make sure the public is getting what they pay for.** Substantial time and personnel are necessary to adequately monitor contracts. If government agencies are unable to dedicate a sufficient number of highly trained personnel and adequate time to overseeing contracts, they run a high risk of poor contractor performance and wasting money.

**Ensure that every contract includes language that allows the government to cancel the contract if the company doesn't live up to its promises of quality and cost savings.** Governments frequently outsource public services based on contractor promises of reduced costs. Too often those promises fail to materialize, yet it is very difficult and sometimes impossible for governments to terminate those contracts. Contracts should contain provisions that allow the governmental entity to cancel the contract at any time, especially if contractors fail to meet performance standards and/or achieve cost savings targets.

## ***Accountability and transparency practices***

**Require any company being paid with public dollars to open its books and meetings to the public, just as the government does.** Access to information is a cornerstone of our democracy. Open meetings and open records laws ensure that the public has access to government documents and other types of information, which can be critical in understanding how public funds are being spent and holding elected officials accountable. Yet government contractors, paid with public dollars, are often not subject to these sunshine laws, leaving the public without information about services and programs performed by contractors.

**State and local governments should track how much money is spent on private contracts, how many workers are employed by those contracts, and worker wage rates—all of which should be readily available to the public.** While researchers estimate that total state and local procurement may be roughly valued at \$2 trillion, it is difficult to know how accurate this figure is. It's also difficult to know how much contracting takes place and important details about these contracts in individual jurisdictions, since many governmental entities do not systematically collect and make this information public. It is essential that every jurisdiction understands how much of its budget goes toward contracting and is able to evaluate its contracting practices.

## **2. Selected samples of state and local legislation and laws related to privatization and responsible contracting**

### **Massachusetts “Pacheco Law”**

Summary: Requires that contracts pursued by state agencies must first be approved by the Office of the State Auditor (OSA). Ensures that the state does a fair cost analysis comparing private and public provision of service. The OSA must certify that the cost of performing the service by the private vendor is less costly than having the work done by state employees and that the quality of services will be equal or better. Additionally, the law puts a five-year sunset on any contract; guarantees employees receive the average private sector or state wage (whichever is lower); requires positions of contracted activities be offered to qualified state employees; and has conflict of interest, affirmative action, and equal opportunity provisions. For more information, see this 2019 report reviewing the state's experience with the law: *The Pacheco Law: 25 Years of Taxpayer Protection*.

### **California CA GOV §19130**

Summary: Sets requirements for a public vs. private cost comparison to ensure robust cost analysis, including all relevant costs of contracting including such expenses as salaries and benefits, equipment, materials, and those related to supervision, inspection, and monitoring of a contractor's performance. Specifies that contacts cannot be approved for savings resulting from lower contractor pay rates or benefits, cannot cause displacement of state employees, cannot adversely impact state's affirmative action efforts, and many other requirements. Additionally, specifies

that potential economic advantage of contracting is not outweighed by the public's interest in having a particular function performed directly by state government, and requires public competitive bidding process.

### **City of San Jose, CA Public Private Competition Policy**

Summary: Requires contractor to pay employees prevailing wages, and bids shall be reviewed with the following considerations: contractor's employee benefit levels, employee compliant process, contractor litigation history related to breach of contract, and more. Cost comparisons include transition costs, monitoring and enforcement costs, effects on overhead costs, costs of training and equipment, and projections of future costs. Sets transparency requirements for contractor and subcontractor records. Requires evaluation of whether contracted out services can be delivered more competitively in-house with stated preference for in-house provision of services. Allows city employees providing the service to be given opportunity develop efficiency and effectiveness improvements prior to the decision to pursue managed competition. Requires that city continues to deliver the service in-house when the potential savings for an outside service delivery are less than 10 percent for the same level of service. Requires city to provide training to employees before they have to compete against contractors for service. If contractor is hired, the city either finds alternative employment for displaced employees within the city or facilitates employment with the contractor.

### **New Jersey C.34:13A**

Summary: Prevents boards of education from privatizing the work of public school district employees while a collective bargaining agreement is in effect. It also places conditions on how a board of education can enter into a subcontracting arrangement when a collective bargaining agreement expires: The employer must provide written notice and must offer the local association the opportunity to meet and discuss the decision to subcontract and negotiate over its impact. The law also mandates that each employee replaced or displaced because of a subcontracting agreement retain all previously acquired seniority and would have recall rights if the subcontracting terminates.

### **District of Columbia D.C. Law 13-274**

Summary: Requires assessment by auditor of the impact of the privatization contract on Washington, D.C.'s economic and tax base, including the effects on employment opportunities for D.C. residents, business creation, business development, and business retention; expected impact on the quality of goods or services provided to or on behalf of the D.C. government, including performance targets and requirements for the contractor and potential effects of the contract on the health and safety of D.C. residents.

### **Maine S.P. 289 - L.D. 875**

Summary: Sets requirements for state departments and agencies seeking to enter into a contract to privatize a state service, including a calculation of the lowest wage a contractor can pay each position with duties similar to duties public employees provide, the percentage of health insurance coverage provided for these employees, and the cost to the agency to provide the service being privatized. Documentation of these calculations must be submitted to the state attorney general, who may review the materials and intervene in the contracting process. The bill also establishes a State Procurement Review Committee that has oversight over contracts, amendments, renewals, and requests for proposal valued over \$1,000,000. Additionally, public employees who are represented by an employee organization may organize and request that the employee organization submit a bid on their behalf to provide the services to be privatized.

### **Maryland Subtitle 4, Section 13-402-405**

Summary: States preference for state to use state employees to perform all state functions in state-operated facilities in preference to contracting with the private sector to perform those functions. A service contract may be entered into only as approved by the Board of Public Works. Department must show that service contract provides at least 20 percent cost savings, including direct and indirect costs. Also, requires plan of assistance to all affected state employees.

### **Oregon ORS 279B.033**

Summary: Requires cost comparison between public and private service provision options and states that the agency cannot proceed with the procurement if cost savings are the sole reason for contracting out. Requires that any contractor receiving a state contract be deemed responsible, which includes a satisfactory record of performance and compliance with state and local tax laws, among other requirements.

### **Connecticut Chapter 62**

Summary: Establishes a State Contracting Standards Board. A two-thirds vote of the State Contracting Standards Board is needed to approve a contract. Requires robust cost benefit analysis, including direct and indirect costs. If a privatization contract is projected to result in cost savings, the state may present a business case to evaluate the feasibility of entering into the contract. However, the law creates a “presumption” that “core governmental function[s] should not be privatized.” If a proposed contract would impact more than 100 state employees, the agency must provide an opportunity for those employees to reduce the costs of the service to be privatized and provide reasonable resources for state employees to organize and submit a bid to provide the services that are the subject of the potential privatization contract. The law also requires a state portal where all procurement materials, including resulting agreements and contracts are posted in a public searchable database. More information about Connecticut’s cost comparison requirements can be found [here](#).

### **Rhode Island Gen. Laws Sec. 42-148-4**

Summary: Requires robust cost analysis, including an analysis of comparative benefits for employees, all transition costs, any conversion costs, and areas where the bidder's costs appear artificially low, thereby putting the state at risk for further cost overruns. Also requires an analysis of whether the cost savings will result in meeting the performance and qualitative measures set out in the statement of work and performance standards.

### **New York STF § 112**

Summary: New York's Office of the State Comptroller is required by statute to pre-audit and approve contracts. Note: There are [reports](#) analyzing this pre-audit process that suggests that this independent and centralized review of proposed state contracts and any subsequent amendments or change orders has saved the state millions of dollars and has not been a significant burden to the process.

### **Texas SB 20 (2015)**

Summary: Each state agency must post online a list of every contract/RFP/rationale for no bid contract, requires agencies to develop statements of work that justify the contract and mandates that agencies reach out to multiple vendors on the pre-approved contractor list, requires state agencies to explain no-bid contracts in writing on their websites, justify large contract expansions, retain contract documents for seven years, and have their governing boards sign off on major contracts. The law also puts an emphasis on vendor performance, mandating that contractors be graded, and cracks down on a "revolving door" by making state employees wait two years before working for a company that had a contract they oversaw.

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