

## Testimony of Commissioner Christopher Cole - H.363

The purpose of H.363 is to further restrict the State's ability to enter into privatization contracts and its provisions are so restrictive that it will have the practical effect of eliminating these types of contracts, thereby depriving the taxpayers of quality government services for less expense.

### Background

VSA Title 3, section 343 contains the privatization contracting procedure for the State of Vermont and it is a rigorous review involving multiple reviews including the Attorney General's Office and the Secretary of Administration. (Go through the Statute)

The existing law privatization contracting process is a stringent review, with checks and balances, is used very rarely in State government and was successful in the last implementation.

Of the approximate 3,500 current contracts with the State, we currently have one contract that is a privatization contract. This contract is for the provision of workers compensation services. Because of this contract, the State of Vermont saved \$10 million through reducing our reserved amount by closing out claims and reduced operating costs by approximately \$400,000 annually. If this bill had been enacted into statute, we believe the State of Vermont would not have been able to contract out these services and thus the taxpayers would be required to pay more for workers compensation management services. In addition to benefitting the taxpayers, these improved services with claims not lingering and having action taken upon them, employees who have been injured on the job have been receiving better worker compensation services at reduced cost to the SOV.

### Provisions of H.363 that are of Concern

#### Sec. 1. 3 V.S.A. §343(B)(2)

- This section requires at least a 20 percent overall cost savings above the projected cost having the services provided by classified State employees, as opposed to the current requirement of 10 percent. It is unclear why we would create an additional barrier to achieving savings for services that would save the State of Vermont funds.
- The bill includes provisions for establishing a wage rate for each position which states shall not be less than the minimum wage rate contained in the statement described in subdivision (1)(B) of this subsection. Every bid shall also include provisions for the contractor to include in the contract the costs of health, dental, and vision insurance plans for every employee employed pursuant to the contract at least equal to the percentage paid by the State for State employees. The health insurance plan described in the bid shall provide coverage to the employee and the employee's spouse and dependent children. When contracting out and/or privatizing, we are requesting services, this assumes it will be a one-to-one change in positions and does not focus on the service offerings.
- In order for a prospective private sector company to provide a bid, to respond to the

RFP, they will have to understand the State's classification system and decipher it to the private sector. They will also have to figure out the percentage of the premium that each employee will be paid that is equal to the State benefit. These provisions will effectively eliminate private sector companies from responding to the privatization RFP because there is too much work on their end just to try and bid on a contract.

- The bill requires the Secretary of Administration to certify a number of areas, specifically one of note; the designated bidder and its supervisory employees, while in the employ of the designated bidder, have no record of substantial or repeated willful noncompliance with any relevant federal or State regulatory statute concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection, and conflicts of interest. How does the Secretary meet these obligations? Where is the database for private companies that have willfully non-complied? Who determines that it is willful non-compliance rather than non-compliance?
- Page 4 Sec.5(D) The bill requires a number of contract provisions be included that are problematic:
  - First it requires the State to require through the contract that the private company must pay its employees at a minimum the same rate of pay as State employees.
  - Second, it requires the private company to include the costs of its benefit program, health, dental and vision insurance plans for every employee employed pursuant to the contract which must be equal to or greater than the State's percentage paid to employees. These two provisions will effectively eliminate privatization contracts, by forcing private companies to carry costs that have been collectively bargained by the State union.
  - The bill calls for the contractor to send quarterly payroll records to the State including a requirement to send the State the social security number for each of their employees. The State doesn't want the responsibility as custodian for this information, there is too much risk.
- The bill, page 5 subsection (4): requires the contractor to comply with nondiscrimination and equal opportunity, our current attachment C in our contract includes these provisions but the bill takes an additional step, it requires the contractor "to take affirmative steps to provide such equal opportunity for all persons." This seems like a new standard we are creating requiring these particular contractors to have an affirmative action program.
  - **11. Whistleblower Protections:** The Party shall not discriminate or retaliate against one of its employees or agents for disclosing information concerning a violation of law, fraud, waste, abuse of authority or acts threatening health or safety, including but not limited to allegations concerning the False Claims Act. Further, the Party shall not require such employees or agents to forego monetary awards as a result of such disclosures, nor should they be required to report misconduct to the Party or its agents prior to reporting to any governmental entity and/or the public.
  - **14. Fair Employment Practices and Americans with Disabilities Act:** Party agrees to comply with the requirement of 21 V.S.A. Chapter 5, Subchapter 6, relating to fair employment practices, to the full extent applicable. Party shall also ensure, to the full

extent required by the Americans with Disabilities Act of 1990, as amended, that qualified individuals with disabilities receive equitable access to the services, programs, and activities provided by the Party under this Agreement.

- The bill requires the Auditor of Accounts to weigh in on contract compliance issues. There is an assumption that the services two or more years into an already privatized agreement are going to be the same and therefore an apple to apple comparison can be conducted. What if the review is not done in a timely manner? What is considered timely? Will the State be without services?
- It also indicates “If the Auditor of Accounts finds that a privatization contract has not achieved the cost savings required under subdivision (a)(2) of this section, does not include the terms and conditions required under subsection (b) of this section, or has not complied with performance measures required under subdivision (b)(1) (c)(1) of this section, the Auditor of Accounts shall file a report with the agency and the House and Senate Committees on Government Operations, and the agency shall review whether to renew the privatization contract or perform the work with State employees.” We should be concerned about the legislative body weighing in on whether the executive branch can “renew” an agreement, this seems very problematic and is setting precedence. We should be concerned with separation of powers.
- The bill focuses on performance measures and cost savings at time of initial renewal. At the point of renewal, the “services” have already been privatized, and if the only “determination or consideration” is cost savings, there of course may be other reasons the State may want to renew, etc.

### 3 V.S.A. § 343 Standards for Contracts Including Privatization Contracts:

- **Link:** <https://legislature.vermont.gov/statutes/fullchapter/03/014>.

Administrative Bulletin 3.5 indicates:

- **Definition of Privatization Contract:** means a Contract for Service valued at \$25,000 or more per year, which is the same or substantially similar to and in lieu of services previously provided, in whole or in part, by permanent, classified State employees, and which results in a reduction in force of at least one permanent, classified employee, the elimination of a vacant position of an employee covered by a collective bargaining agreement, as further described in Section IV.D of this Bulletin 3.5.

- **Section IV.D of**

#### **Administrative Bulletin 3.5**

**indicates: Privatization**

#### **Contract**

A Privatization Contract is a Contract for Service valued at \$25,000 or more per year that satisfies the criteria below:

*(i) provides services which are the same, or substantially similar to, and in lieu of*

*services provided, in whole or in part, by permanent, classified State employees;*

**AND**

*(ii) results in a reduction in force of at least one permanent, classified employee, or the elimination of a vacant position of an employee covered by a collective bargaining agreement.*

***NOTE: Unless otherwise permitted by applicable Agency statute, no Agency may enter into a Privatization Contract, unless the procedure set forth at 3 V.S.A. § 343 is followed.***

### Summary

The State currently only has one privatization contract that provided significant savings to the State of Vermont and its taxpayers. This bill would effectively eliminate these types of contracts by setting standards and complexity of contracting so high that private companies wouldn't respond to bid opportunities. This appears to be a bill in search of a problem where one doesn't exist. The State uses its discretion in this area very rarely, as the record indicates, but it is an important tool in the tool box as we reconfigure State government over time, as resources become scarce, to find the right balance between the provision of services by State employees and the private sector. Why would we want to create a statute that appears to allow for privatization but sets the bar so high that businesses cannot respond to RFP's without a lot of work on their part and changing their employee salaries and benefits without knowing the full range of benefits they provide.

We do not support the bill as currently drafted and cannot see any modifications that would make this process as outlined workable.