

**NATIONAL CENTER FOR
LAW AND ECONOMIC JUSTICE**

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Privatization Issues in Public Benefits Programs: Checklist of Questions for Advocates

The following questions aim to help advocates think about how to analyze and address issues related to the privatization of public benefits programs and services. They also are designed to identify areas for possible advocacy to make the privatized services and the contracting process more responsive and accountable to program beneficiaries and public concerns. The questions are not meant to be exhaustive, but to be a starting point for work on this issue. **This document is a work in progress and is subject to modification. Comments and suggestions are welcome.**

The National Center for Law and Economic Justice (NCLEJ) welcomes information and feedback on these issues from advocates. We would like to receive information on the following: 1) effective laws, policies and practices at the state or local levels that address the issues identified in this memo; 2) advocates' experiences addressing privatization issues; and 3) issues and policies on other privatization issues not addressed in this memo. Our goal is to develop and disseminate useful resources for advocates across the country.

The National Center for Law and Economic Justice is also available to assist and support advocates who are working on privatization issues in public benefits programs.

To provide information or comments or to discuss how NCLEJ can support your work, contact Gina Mannix or Cary LaCheen at the National Center for Law and Economic Justice, tel. 212 633-6967, email: mannix@nclej.org or lacheen@nclej.org.

I. Some initial questions

- Does your state or local agency have contracts with private or non-profit organizations to provide all or part of the services of the public benefit programs (e.g., employability or disability assessments, welfare-to-work services, education and training services, eligibility determinations, etc.)?
- Who are the private providers - for-profit companies, non-profit organizations, faith-based organizations?

- What, if any, problems are applicants and recipients experiencing with the delivery of services that are related in some way to the contractor?
- Can you identify examples of effective private delivery of public benefits services? What factors account for their success?
- Who are your potential allies for addressing public benefits privatization issues (e.g. low-income grassroots groups, unions, good government groups, other advocacy and consumer advisory groups)?

II. The Contracting Process

1. The decision to contract out services

- At what level is the decision to contract out services being made (i.e., state legislature, city or local legislative body, state or local agency)?
- Is there a mechanism for your organization, other advocates, program beneficiaries and other interested parties to provide input into this decision?
- Does the authorizing legislation require consideration of specific factors as a pre-condition to contracting for services (i.e. that contracting out is likely to improve service delivery and/or be cost-effective)?
- Does the agency (or authorizing legislation) require a showing by the agency or contractors that the costs of privatizing a program or service be equal no more than the cost to the government agency of delivering the service? If so, what factors are considered in deciding whether privatizing will be cost-neutral (i.e., does the agency take into account the cost to the agency of administering the contract and monitoring contract performance)?
- If you are dealing with a legislative body's consideration of whether to authorize privatization of public benefits services or administration, is there an opportunity to secure conditions or limits on the authority to privatize if the initiative will go forward (such as a limitation on the scope of functions or services to be privatized, a requirement to proceed with a demonstration project rather than full-scale privatization, a requirement for a neutral evaluation before privatization is expanded, and requirements for consumer advisory boards or similar mechanisms to assure community input)?

2. The request for proposal (RFP) process

- Is there a mechanism for your organization, other advocates, community groups, etc. to provide input into the design and content of the Request for Proposal (RFP) (the document issued by the government agency asking private entities to submit bids to deliver the specified services)? (While a formal mechanism is preferable, advocates should make their views known even in the absence of such a mechanism.)
- Does the agency or other government entity make information readily available to the public (e.g. through the web or other readily accessible sources) about contracting initiatives related to public benefit programs?
- Are information sessions for contract bidders open to the public?
- If so, does the government agency give adequate notice about these information sessions to key advocates, low income grassroots organizations and others?

3. The decision-making process for awarding contracts to a particular bidder

- Is there a mechanism for your organization, community groups, advocates and others to review the contract bids and provide input into the decision as to whom the contract is awarded? (While a formal mechanism is preferable, advocates should make their views known even in the absence of such a mechanism.)
- What are the standards used by the agency to decide which organization will be awarded a contract? Does the agency set standards for assessing the capacity of the potential contracting organizations, for example, with respect to staffing, facilities, recordkeeping systems, client confidentiality, consumer service mechanisms? Does the agency award contracts to the lowest bidder?
- Does the state agency require the organization being awarded the contract to have consumers or clients on its board? Women or minorities? People with disabilities?
- Does the state agency require the organization being awarded the contract to meet other requirements? What are they? Are they adequate to assure that the entity will perform effectively?

4. The agency's contract supervision and monitoring process

- Does the state agency provide technical assistance to the contract organization during the terms of the contract to facilitate contract performance?
- Does the state agency have trained staff to design contracts, monitor contract performance, provide technical assistance to the contract organization and engage in other activities relevant to the contract?

5. Subcontracting

- Do applicable laws and policies permit or require the contractor to subcontract any aspects of the contract (e.g., service delivery, data management, quality assurance)?
- If subcontracting is permitted or required, does applicable law or policy require the agency to play a role in the drafting and review of subcontracts and the evaluation, selection or approval of subcontractors?
- What laws or policies apply to subcontracts? For example, are there opportunities for public input into the design of subcontracts and the selection of subcontractors? Do subcontractors have to describe in detail the steps they will take to comply with civil rights laws?
- Do laws or policies mechanisms require the agency or contractors to monitor subcontractor performance?

6. The contract renewal process

- What is the process is for deciding whether the contract will be renewed with the contract organization? Or if the terms will be changed?
- Is there a formal or informal mechanism for your organization and other interested parties (i.e., low income grassroots organizations, other community groups) to provide comments on whose contracts are renewed, and whether the terms of the contract should be modified, or whether the contract should be awarded to another entity?

III. State administrative procedure act and open meetings laws

- Does your state administrative procedure law and open meetings law govern the activities of non-governmental organizations under contract with a state welfare or human services agency to deliver services?*
- Does your state public benefits law make the contract organization subject to the state administrative procedure act or open meetings law?*
- If the administrative procedures act or open meetings law do not apply to the contract organization, are there other adequate means of public participation in the development of policy by the contract organization?

IV. Public access to information

- Does your freedom of information law govern the documents and records of non-governmental organizations under contract with a state agency to deliver services?
- Does your state freedom of information law require records to be created, maintained or in the custody and control of a state agency to be available through the freedom of information law?

V. Questions to ask about specific RFPs and contracts

1. Compliance with authorizing legislation

- If the authorizing legislation requires consideration of specific factors as a pre-condition to contracting for services (i.e. cost-effectiveness), have these factors been satisfactorily considered?

* The answer may not be clear.

2. Past performance of potential contractors and their parent corporations and subsidiaries

- Has the potential contract organization (or its parent corporation or subsidiaries) had social service contracts before, in your state or elsewhere? You may be able to find information on the organization through internet research or contacts with advocates in other states. (The National Center for Law and Economic Justice can help identify advocates in other states.)
- Does the potential contract organization (or its parent corporation or subsidiaries) have any experience in delivering the type of service being contracted for? What is its track record? If there is a history of problems, how does the state agency take this experience into consideration?

3. The goals of the contract

- Does the contract have clearly defined goals for the outcomes to be achieved by the contract organization?
- If so, do you agree with these goals? Are they appropriate, consistent with ensuring that individuals receive adequate and meaningful services? (For example, is the goal to place as many people in jobs as quickly as possible or to help people to obtain the education and training they want and need in order to find jobs that enable them to support their families and achieve self-sufficiency?)
- Are the goals realistic?
- Is the contract designed to meet these goals?
- How will accomplishment of these goals be measured?

4. Scope of the contract

- Does the contract clearly define the specific services that are to be provided or activities that will be performed?
- Does the contract specify the number of people to be served, or the length of time that services must be provided to individuals?
- Does the contract, or all of the contracts for the particular service, serve the number of people who need services in the population being served?

- Does the contract exclude services to particular groups of people (e.g., those with multiple barriers, those with substance abuse problems, criminal records or minimal work histories)?

5. Protections for program beneficiaries

- Does the contract provide that state agency policies providing for program beneficiary protections (e.g. regarding notices, requirement to provide information and assistance, hearing and grievance procedures, etc.) specifically apply to contractors?
- Does the contract specifically address issues such as:
 - Providing program beneficiaries, potential beneficiaries or the public information about available services and notice of their rights?
 - The contents of these notices, or does the contractor have complete discretion to draft notices?
 - Providing notice to program beneficiaries at particular times and in particular ways?
 - Providing notice to program beneficiaries of decisions about eligibility for services, a change in services, or other important decisions?
 - Other mechanisms to ensure that program beneficiaries and the public can obtain information about services (e.g., consumer service representatives, telephone information lines, etc.)?
 - Providing that the public be able to get through on a telephone information line or to a consumer representative within a specified number of attempts or within a specified time frame?
 - Informing individuals about their right to appeal decisions they disagree with, through grievance or other procedures, fair hearings, other mechanisms?

6. Contract payment structure

- Does the contract payment structure create incentives for the contractor to provide adequate and meaningful services to program beneficiaries and to comply with relevant laws? For example, are payments adequate to serve those with greater needs? Are there disincentives for adequate services? Does the contract organization derive profits from not serving eligible individuals?
- Does the contract have a payment structure that encourages the staff of the contract organization to serve a realistic number of individuals and still provide adequate and effective services?

7. Allocation of responsibility between state agency and contractor

- Does the contract clearly identify which duties and outcomes are the responsibility of the state agency and which are the responsibility of the contractor (such as who decides that an individual is not complying with requirements imposed by the contractor, or who decides to sanction individuals' benefits)?
- Does the contract clearly identify who makes the decision that a individual is not eligible for any, or particular, services under the contract? If this is the responsibility of the contractor, what standards govern these decisions?
- Does the contract contain provisions that allow, or require, the contractor to notify the welfare agency if particular situations arise, or to obtain approval from the welfare agency in particular situations?

8. Credentials and training for staff of the contract organization

- Does the contract contain any restrictions on who can perform particular tasks (i.e., educational requirements, professional credentials, previous experience)? Are they appropriate?
- Does the contract clearly state whose responsibility it is to train the contractor's staff on a range of issues on which training is required or needed?

9. Compliance with civil rights laws

- Do the RFP and the contract have detailed, meaningful provisions to ensure the contractor's compliance with civil rights laws? For example, with respect to the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (where federal funds are involved):

- Do the RFP and contract require bidders/contractors to *describe in detail* how they will ensure that individuals with disabilities, including those with visual, speech, hearing, cognitive, mobility and other impairments will have a meaningful opportunity to obtain and retain benefits, describe in detail how they will train staff on ADA and Section 504 compliance, and how it will monitor its own compliance, and that of subcontractors, with the ADA and Section 504?
- Do the RFP and contract require bidders/contractors to *submit with their bids* copies of reasonable modification policies, consumer documentation informing individuals of their rights under the ADA and Section 504 and other materials relevant to compliance with the ADA and Section 504?
- Do the RFP and contract require bidders/contractors to document various steps related to compliance with the ADA, including outreach efforts, and requests for and provision of reasonable modifications, grievances filed on disability access issues, and other issues. Do they require bidders/contractors to *describe in detail* how their systems will collect this data?
- With respect to the language access requirements of Title VI of the Civil Rights Act of 1964 for those with Limited English Proficiency (LEP):
 - Do the RFP and contract require bidders/contractors to describe in detail how they will comply with federal requirements under Title VI of the Civil Rights Act (see HHS's guidance at www.lep.gov) and have an effective language access plan with the following elements:
 - identification of those who need language assistance
 - language assistance measures (e.g. types of language services available, including translation of forms into languages other than English, bilingual staff, provision of interpreters; how staff can obtain these services; how they respond to callers with LEP; how to deal with written documents from persons with LEP; how to ensure competency of interpreters and translator services).
 - Training staff on LEP policies and effective communication with individuals with LEP and interpreters.
 - Notice to persons with LEP of services available and how to obtain.
 - monitoring and ongoing updating of the plan.

- Do the RFP and contract require bidders/contractors to describe the qualifications for bilingual staff and set standard for use of outside interpreters and translators?
- Do the RFP and contract specify the data collection requirements with respect to language access that will allow adequate monitoring of compliance with elements of the language access plan? How this data will be collected? For example, will contractors be required to keep data on the number of LEP individuals served, by type of language assistance required, and primary language; the number of bilingual staff and interpreter staff employed by the agency, disaggregated by language translated or interpreted; whether proper language determinations are made and whether required services are provided. How this data will be collected?

10. Subcontracting

- Does the contract permit or require the contractor to subcontract any aspects of the contract (e.g., service delivery, data management, quality assurance)?
- If subcontracting is permitted or required, does the contract require the agency to play a role in the drafting and review of subcontracts and the evaluation, selection or approval of subcontractors?
- What contract provisions apply to subcontracts? Do subcontractors have to describe in detail the steps they will take to comply with civil rights laws? Do subcontracts contain restrictions on the qualifications, training, credentials of those who can perform tasks under the subcontracts?

11. Contract performance monitoring and evaluation

- Does the contract have mechanisms, including data collection, record reviews, and site visits, for the welfare agency to determine whether the goals and requirements of the contract and relevant laws (including civil rights laws) are complied with?
- Does the contract contain a mechanism to audit or review the performance of the contract organization under the contract (i.e., by requiring the contract organization to submit data; by hiring another organization to audit performance)?
- Does the contract impose penalties if the contractor does not comply with contract requirements or other relevant laws?

- Do the results of contract monitoring and evaluation indicate that the contract should not be renewed with this particular contract organization?
- Do the results suggest that changes should be made in the contract?

12. Gaps in the RFP and contract

- What is missing from the RFP and/or contract? What questions are not answered or addressed by RFP and/or contract that are important to the delivery of the services and the protection of program beneficiaries?

13. Other

- Does the contract require a start-up plan for contract activities that includes an adequate contingency plan and protections for program beneficiaries in the event of start up problems? This is especially important if the contract relates to the development and implementation of new technology systems for administering benefits. In appropriate situations, including implementation of new technology, is there a phase-in plan with performance benchmarks that must be achieved before further implementation?
- Does the contract have a provisions for turning over operations to a successor or to the government agency if the contractor is no longer able to perform its duties?
- Does the contract specify the type of data that the contractor will collect and maintain? Is the data collection sufficient to allow the state agency to monitor and evaluate performance? Does the contract make clear that the state agency has access to this data?
- Does the contract contain provisions that will ensure that information and documents are accessible to the public under the state freedom of information law (such as a provision stating that the records are under the custody and control of the state agency, or a requirement that the reports, records or monitoring results and data be submitted to the state agency)?

VI. Resources for Advocates

The following are some selected resources:

General

- *Privatization in Practice: Case Studies of Contracting for TANF Case Management* by Sheena McConnell, Andrew Berwick, Irma Perez-Johnson, and Pamela Winston (Mathematica Policy Research, Inc. March 2003)
<http://aspe.hhs.gov/hsp/privatization-rpt03/report.pdf>
- *35 Clearinghouse Review* 487 (Jan.-Feb. 2002). The entire issue is devoted to privatization and includes two articles authored or co-authored by WLC staff. For information on the *Clearinghouse Review* visit www.povertylaw.org
- The Economic Success Clearinghouse (formerly the Welfare Information Network, a project of the Finance Project, www.financeproject.org) has a collection of materials on welfare privatization. Visit www.financeproject.org/irc/win/outsourcing.asp?m=1.
- Welfare Reform: Federal Oversight of State and Local Contracting Can Be Strengthened (GAO-02-661, June 11, 2002) available at www.gao.gov.

Specific State Privatization Initiatives

Texas Integrated Eligibility and Enrollment Services (TIEES)

- Center on Public Policy Priorities in Texas (www.cppp.org) has posted extensive materials on the Texas Integrated Eligibility and Enrollment Services project, which will use private call centers and a new technology system in the application and recertification processes for public benefits programs.
- *Updating and Outsourcing Enrollment in Public Benefits: The Texas Experience* by Celia Hagert (center for Public Policy Priorities, November 2006) www.cppp.org
- Texas State Comptroller Report on Texas HHSC contract with Accenture re TIEES (Oct. 25, 2006)
http://www.cpa.state.tx.us/comptrol/letters/accenture/accenture_letter.pdf

Indiana Eligibility Determination Process

- The Indiana Coalition for Human Services has posted information on this initiative to privatize the eligibility determination process for Food Stamps, Medicaid, TANF and some other programs at www.ichsonline.org
- Information from the Indiana Family Services Administration (including contract documents) are at <http://www.in.gov/fssa/transformations/edp/edp/index.html>

Arizona Jobs Privatization Project

- The Arizona Department of Economic Security has an initiative to privatize the Jobs Program, the state's TANF work program. See information in the Bidders' Library at <http://www.azdes.gov/opac/privatization.asp>

Workforce Florida

- *Miami Workers Center and Its Allies Win Comprehensive Grievance Policy* (from our July 2003 Welfare News), available at www.nclej.org. From the Home Page, go to Key issues, click on Privations & Modernization.
- *Privatization of TANF in Florida: A Cautionary Tale* by Cindy Huddleston and Valory Greenfield, 35 Clearinghouse Rev. 540 (Jan.-Feb. 2002)

New York City Employment Services and Placement Program

- *The Revolving Door: Research Findings on NYC's Employment Services and Placement System and Its Effectiveness in Moving People From Welfare to Work* by Sandra Youdelman with Paul Getsos (Community Voices Heard, 2005), available at www.cvhaaction.org

New York City Welfare Disability Assessment Process

- *Welfare Advocacy in the Privatized Era: A Case Study of Advocacy to Shape the Welfare Disability Assessment Process in New York City* (from our May 2004 Welfare News), available at www.nclej.org. From the Home Page, go to Key issues, click on Privations & Modernization.

Wisconsin Works (W-2)

- *Wisconsin Works - for Private Contractors, That Is* by Karyn Rotker, Jane Albistrom, and Fran Bernstein, 35 Clearinghouse Rev. 530 (Jan. - Feb. 2002)

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