

This is the fourth and final article in the LWVFC's multi-part series of special *E-Bulletins* providing our members information to help them participate effectively and efficiently in the Privatization Consensus meeting on March 27, 2012.

Consensus Meeting: Privatization
Tuesday, March 27, 2012
Time: 7– 9 p.m.
Falls Church Community Center – Teen Center

At the June 2010 biannual national convention, the LWVUS determined to undertake a study of privatization of government goods and services. In late 2011, the study was presented to state and local leagues to determine consensus. Local league's consensus reports and comments are due to LWVUS by May 1, 2012. The LWVFC's consensus meeting is scheduled for Tuesday, March 27, 2012 from 7-9 p.m. at the Teen Center in the Falls Church Community Center.

In this issue, we present the LWVFC's Privatization Study Fact Sheet and the consensus questions that will be discussed at our March 27 meeting. We recommend that you print this article and bring it with you to the consensus meeting.

Additional Suggested Readings:

- Sara Fitzgerald, LWVFC Communications, prepared a summary of the LWVFC's Privatization Lunch & Learn that was published in the *Falls Church Times* and posted on the national league's website.
Government Leaders Review Privatization Strategies at League of Women Voters Forum.
<http://fallschurchtimes.com/33673/government-leaders-review-privatization-strategies-at-league-of-women-voters-forum/>
- **Federal Privatization: The Ryan Plan** by Ann Henkener
http://www.lwv.org/files/BP_PrivStudy_FederalPrivatization.pdf
- **Privatization PowerPoint** prepared by LWVDenver
http://www.lwv.org/files/PrivPowerPoint_LWVDenver.pdf
- **History of Economics, Government, and The Market** by Muriel Strand
http://www.lwv.org/files/BP_PrivStudy_EconomicHistory.pdf

League of Women Voters of Fall Church Privatization Study Fact Sheet
PRIVATIZATION OF GOVERNMENTAL GOODS AND SERVICES IN THE U.S.A.

A study of privatization of governmental goods and services was adopted at the June 2010 LWVUS Convention. The scope of the study is to identify those parameters and policy issues to be considered in connection with proposals to transfer federal, state or local government services, assets and/or functions to the private sector. It will review the stated goals and the community impact of such transfers, and identify strategies to ensure transparency, accountability, and preservation of the common good.

A definition of privatization comes from the State of Illinois Commission Government Privatization, Privatization is the process of transferring property from public ownership to private ownership and/or transferring the management of a service or activity from the government to the private sector. Types of privatization include complete privatization, privatization of operations, privatization through contracts, franchising, and open competition.

BEST PRACTICES AND TRANSPARENCY

A decision to privatize a government service requires thorough analysis of the advantages and disadvantages of privatization to determine whether the public is better served by government or the private sector. The process of privatizing a service has three phases:

- Determining if it is appropriate to privatize a service,
- Determining the level of service desired from a contractor and conducting an open, competitive contractor selection process, and
- Negotiating the contract with the selected contractor and monitoring performance over the term of the service agreement.

In all phases, best practices call for transparency, open communication with stakeholders, impartial and unbiased analyses and the development of quantifiable expectations and measures for service delivery. The decision-making process should ask:

- What are the problems with the existing service?
- What will be gained by turning to the private sector?
- Are there alternatives to privatization?

Privatization can be successful for services with competitive markets, with clear service delivery goals and performance criteria, and where the services involve transactions that are not irrevocable. It requires decision-makers open to the idea of privatization, a government with established privatization policies, a transparent public review process, comprehensive service transition plans, active contract management and a "recovery" plan to take over service if the contractor fails to perform.

When services such as utilities, transportation systems or parks are privatized it should be clear who owns and maintains the public facilities, infrastructure and assets. If "human services" such as child protective services or welfare services are privatized, sensitive client information must be protected and cost savings should not be achieved in ways that are detrimental to vulnerable clients. There must be contractual procedures to assure that the financial statements of the contractor are audited and reviewed on a regular basis and become part of the public record. In all cases, the public must have a way to lodge complaints about the service to the government agency overseeing the private contractor.

The legal frameworks within which public and private sector entities operate differ. One difference is that, unlike private entities, government entities are statutorily required to conduct their business through open, transparent processes to ensure that they are accountable to the citizenry. This modern practice of open government is viewed as both a key feature and a necessary condition of a contemporary democratic state. It is based upon the conviction that the people can only effectively

exercise their constitutional role as overseers of government action where their unfettered rights of access to information about government operations are secure.

Public transparency laws thus have been enacted throughout the United States at both the federal and state level for the purpose of maintaining free and open access to the government's proceedings, deliberations, decision-making and records. Such laws include sunshine or open meeting laws, which seek to ensure that the public may observe the meetings and deliberations of government bodies, and freedom of information or public record acts, which seek to ensure public access to the documents and records of government.

Privatization raises particular issues with respect to transparency, however, because as a general matter, such transparency laws apply exclusively to public bodies, and not to private entities. Where the provision of government services are transferred into private hands, what then becomes of the public's right of access to information regarding the provision of those services?

Judicial and legislative efforts to address concerns regarding public transparency within the context of privatization have emerged over several years. Some state courts, for instance, have adopted a judicial doctrine that subjects a private contractor to the applicable transparency law when the contractor is performing a government function in such a manner that it may be deemed the "functional equivalent of the public body." In addition, state legislatures have been modifying their public accountability statutes over the years in order to make such laws applicable to certain private entities carrying out government functions. Public accountability advocates nonetheless are concerned that public access to information in the hands of private contractors often is frustrated when statutory language does not adequately cover the private entity or a court ruling is not obtained. Moreover, even when private contractors are subject to such laws, they often dispute it or are not aware of such requirements, and, thus, refuse to provide the information.

HOW STATES ARE ADDRESSING PRIVATIZATION

State legislatures throughout the country have enacted statutes addressing privatization over the past few decades. Based upon its national survey, a Council of State Governments (CSG) report concluded that the main reasons for privatization were a lack of personnel or expertise and cost savings.

Legislative approaches to privatization across the 50 states differ widely. Some states have enacted broad-based privatization laws that apply to all such activity within the state (general privatization laws), while other states have passed laws that relate only to one or more sectors (sector-specific privatization laws). Laws relating to privatization, but which deal only with a specific issue or policy concern (issue-specific privatization law), also have been enacted in many states.

The CSG survey also inquired into the most popular services being privatized within the 50 states. They are:

- i) corrections programs and services (including medical/health care services, food services, substance abuse treatment, mental health services, private prisons, inmate housing);

- ii) education programs and services (including information technology, professional development/training, statewide student assessment, product/program development, special education);
- iii) health & human services programs (including mental health services, child welfare services, substance abuse treatment/prevention, child support administration, medical services/staff);
- iv) personnel programs and services (including states' training program staff/development, information technology, workers' compensation claims/processing, health insurance claims/processing, general program administration/support, consultants, collective bargaining negotiations); and
- v) transportation programs and services (including general, design/engineering, general construction, maintenance, information technology, inspections, grass mowing, rest area operation and highway construction/maintenance).

Moreover, while some states have enacted laws that promote and facilitate privatization, others have enacted laws seeking to regulate and curtail such activity. In fact, at times, privatization policies have changed dramatically from one year to the next even within a state, due to such factors as political or economic shifts, civic engagement (pro or con), or on-the-ground experience with prior privatization deals.

VIRGINIA LAW (from LWVUS State Level Privatization 2011 by Ann Henkener)

Virginia defined an "inherently governmental" activity (from the Constitution of Virginia) as:

- the act of governing,
- authority to collect and spend public revenues, and
- entitlements.

The Virginia list also included these examples of inherently governmental activities:

- an effective system of education throughout the Commonwealth;
- free elections;
- transportation system;
- defense from enemy attack on the soil of Virginia;
- intercourse with other and foreign states;
- taxation and assessments at fair market value;
- ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the Commonwealth, including the collection, control or disbursement of appropriated and other state funds; and
- natural resources for the benefit, enjoyment and general welfare of the people of the Commonwealth.

The state also recognized that the greater the amount of discretion involved in performing the activity, the more it is inherently governmental. In addition, it looked at the effect of activities that committed the government and viewed those activities as inherently governmental.

LARGER THAN THE UNITED STATES

The privatization movement is an international movement. Outside the United States, prominent divestitures of government assets have included Russia's natural gas (Gazprom), Bolivia's municipal water system in Cochabamba and the United Kingdom's British Rail.

ARGUMENTS FOR AND AGAINST PRIVATIZATION

Those promoting privatization claim that:

1. The private sector can provide increased efficiency, better quality, and more innovation, in services than the government can provide. Private industry may also possess expertise or specialized knowledge that is not available in the public sector
2. Privatization would result in a smaller government, which will reduce costs to the taxpayer
3. Privatization would provide a better environment for business, thus creating more jobs.

Those concerned about privatization suggest the following:

1. The mandate to make a profit could endanger public safety and reduce services available to the general public.
2. There could be increased costs to consumers.
3. There could be increased corruption between government officials and for-profit (and even nonprofit) private companies.
4. Privatizing sectors such as ports, utilities and defense can result in foreign control and will put the country at risk in the event of war

CASE HISTORIES: SUCCESSFUL AND UNSUCCESSFUL PRIVATIZATION EFFORTS

The city of Franklin, Ohio, became the first municipality in the nation to sell the public asset of a publicly owned (wastewater) treatment works (POTW) that had been constructed with federal funds and enter into a public/private partnership agreement with the new owner. The key to the success of this privatization effort was 16 months of extensive planning and negotiations that culminated in a 20 year contract and retention of all plant personnel. The city of Franklin's rates for wastewater disposal were reduced by 23 percent during the first year of the 20 year contract. The pace of economic development in the area increased after sale of the treatment plant. Stabilized wastewater treatment fees were reportedly a primary incentive for expanding operations of three area paper industries and a subsequent increase in jobs. Subsequently in 1997, the city of Franklin, Ohio, opened a new 5-million-gallon-per-day water supply treatment plant that was designed, built and financed, and is now operated by a private contractor.

Many states have turned to private prisons to address prison overcrowding, the expense of building new prisons and reducing the cost of prison operations. The portion of the corrections services market that is outsourced to private corporations is approximately 10 percent or \$7 billion.

The privatization of the Pennsylvania Child Care Center in Luzerne County, Pennsylvania illustrates the consequences of lax oversight. In February 2011, a federal jury convicted Luzerne County Juvenile Court Judge Mark Ciavarella of racketeering, money laundering and conspiracy in connection with the

infamous “Kids for Cash” scheme. Ciavarella and former judge Michael T Conahan reportedly received \$2.6 million in kickbacks for sending thousands of juveniles to detention. When Judge Michael T. Conahan became the “president” judge in 2002, he obtained control over the county courthouse budget. Judge Conahan then signed a secret deal with Robert J. Powell to rent Powell’s private detention center for \$1.3 million and for the tens of millions of dollars that the county and state would pay to house juvenile delinquents. Conahan and Ciavarella systematically shut down the public juvenile detention center by refusing to send delinquent juveniles to the public detention center and cutting off funds for its operation. Judge Ciavarella sentenced juveniles at a rate that was twice the state average over the next five years. Finally the mother of a 15 year old high school student contacted the Juvenile Law Center (JLC) a nonprofit advocacy group, which filed a petition with the Pennsylvania Supreme Court. The petition was not granted until the FBI began an independent investigation into Ciavarella and Conahan’s activities.

MORE INFORMATION

To see all LWVUS Privatization Resources go to www.lwv.org/member-resources/privatization.
To review the other special editions of the LWVFC *E-Bulletin* go to <http://lwvfallschurch.org/E-Bulletin.html>

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PRIVATIZATION CONSENSUS QUESTIONS

[LWVFC Note: first 2 consensus questions placed at end of documents. LWVFC committee feels this is a more appropriate order to encourage productive discussion.]

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3. As a matter of good government policy, which of the following criteria should be applied when making decisions to transfer government services, assets and functions to the private sector?

a. Transparency and Accountability: All government contracts with private companies for services must ensure public access to relevant records and information regarding contracted services, functions and assets and provide for adequate government oversight and control.

High priority Lower priority Not a priority No consensus

b. Public Well-Being: Provisions are in place to assure that, in the event any public services are to be privatized, there will be no increased risks to public well-being, especially to vulnerable populations.

High priority Lower priority Not a priority No consensus

c. Cost and Quality: Privatized services should not appreciably increase the costs or decrease the quality of services to the public.

High priority Lower priority Not a priority No consensus

d. Environmental and Natural Resources: Defined parameters should be in place to assure that environmental and natural resources are not compromised. High priority Lower priority Not a priority No consensus

e. Contracts and Sales of Public Assets: All government contracts and privatized public assets should be subject to competitive bidding and comply with all laws regarding awarding contracts.

High priority Lower priority Not a priority No consensus

f. Economic Impact: Privatization should not result in a negative economic impact on the communities in which the services are provided.

High priority Lower priority Not a priority No consensus

g . Government Recovery of Services and Assets: Provisions should be in place to recover key services, assets and functions should the private sector fail to safeguard them.

High priority Lower priority Not a priority No consensus

4. Privatization is not appropriate:

a. When the government lacks the will, ability or resources to adequately oversee contracts with the private entity and any successor thereto.

Agree Disagree No Consensus

b. When there is no private entity able or willing to provide the service for the short and long term.

Agree Disagree No Consensus

c. When it poses a potential threat to national security.

Agree Disagree No Consensus

d. When it poses a risk to personal or security data.

Agree Disagree No Consensus

e. When there has been evidence of potential corruption.

Agree Disagree No Consensus

f. When the private entity's goals and purposes are not compatible with public well-being.

Agree Disagree No Consensus

g. When the private entity has not complied with existing government requirements for public records, open meetings or publication of reports and audits.

Agree Disagree No Consensus

h. When a loss of revenue decreases government support for mandated or critical services.

Agree Disagree No Consensus

5. Some states have developed laws and regulations to control the process of privatization within their jurisdictions. As a general matter, should privatization be regulated?

a. Yes, all privatization efforts should be regulated.

b. Yes, some types of privatization efforts should be regulated.

c. No, privatization efforts should never be regulated

d. No consensus

6. Which of the following should be included in the regulatory process when privatizing public assets, services and functions?

a. Timely public announcements regarding intentions to privatize and the clear and measurable expected benefits to the public

Strongly agree Agree Disagree Strongly disagree No consensus

b. Public and stakeholder (investors, shareholders, experts) input into the decision and terms of the contract.

Strongly agree Agree Disagree Strongly disagree No consensus

c. Feasibility study regarding performance, costs and benefits.

Strongly agree Agree Disagree Strongly disagree No consensus

d. Adherence to all laws regarding public contracts..

Strongly agree Agree Disagree Strongly disagree No consensus

e. Transition plans for displaced employees.

Strongly agree Agree Disagree Strongly disagree No consensus

f. Accountability and transparency provisions in all contracts.

Strongly agree Agree Disagree Strongly disagree No consensus

g. Regular performance evaluations including meaningful opportunity for public comment.

Strongly agree Agree Disagree Strongly disagree No consensus

h. Provisions for transferring services and assets back to the government or another contractor in the event of inadequate performance.

Strongly agree Agree Disagree Strongly disagree No consensus

i. Adequate resources for enforcement.

Strongly agree Agree Disagree Strongly disagree No consensus

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1. As a general matter, the extent to which government functions, services and assets have been privatized in the past decade is:

Much too much Too much About right Too little Much too little No consensus

2. Core government services and functions important to well-being of the people should remain with government and not be transferred to the private sector.

Strongly agree Agree Disagree Strongly disagree No consensus

Comments: 500 words or fewer.

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