



## **SJC Makes Pacheco law bulletproof**

**By Charles D. Chieppo**

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Seven years ago, the so-called Pacheco anti-privatization law was drafted with a simple goal: make the process of privatizing any service currently delivered by state employees so onerous that neither state agencies nor private vendors would attempt it. You have to give them credit; it's worked like a charm. Since its December 1993 passage, there have been only seven privatization attempts.

Not only has it worked like a charm, but a decision by the Supreme Judicial Court has just made it bulletproof.

The MBTA sued State Auditor Joseph DeNucci over his rejection of a contract to outsource the cleaning and maintenance of MBTA bus shelters. Under the law, the auditor has final power to approve or deny any privatization contract worth more than \$100,000. The SJC upheld the Auditor's rejection of the contract, calling it a "reasonable" exercise of his mandate to review such contracts. This despite the fact that the T pays its employees to maintain the shelters, while the contractor offered to do it for free and guarantee the Authority \$8.1 million in revenue from the sale of advertising space on the shelters.

The Court, however, refused to rule on the law's constitutionality, finding that the T did not have standing to challenge it. This means that the only entity that could challenge Pacheco would be an aggrieved contractor. A summary of the process that any proposed contract is subjected to reveals why that has never happened.

A state agency must compare the cost of using a private vendor not to the actual cost of using existing employees, but to the cost if such employees were to work "in the most cost-efficient manner." At no time are state employees actually held accountable for performing to this higher standard.

Prior to this comparison, the private cost must be "adjusted" in several ways. The proposed vendor must pay employees working on the state contract at least as much as the lesser of the wages paid to comparable state employees or the average private sector wage for the relevant industry. That's not all. The law also limits the compensation of the private vendor's officers and managers to the wage rates of comparable state managers.

Next, it requires the contractor to pay at least the same percentage of its employees' health premiums as the commonwealth does. The contractor must also provide the Attorney General with quarterly payroll records to prove it is complying with the various wage and benefit requirements.

Finally, the agency seeking to contract out must add lost tax revenues to the cost of the private bid if any part of the work is to be performed outside Massachusetts. No such addition is made to the public sector bid for the loss of tax revenues that would

be realized if the work were to be performed by a private business.

At this point, enter the auditor. He can reject the contract if it fails to satisfy any of five different tests, the most important being that the work must stay in-house if the adjusted private cost is higher than the hypothetical public cost. This prevents an agency from paying more to improve service, increase the number of constituents served, or reduce an existing backlog.

He can also reject a contract that he determines not to be "in the public interest." Here the auditor acts as judge and jury, raising concerns and then deciding whether they rise to the level of threatening the public interest. None of his determinations can be appealed.

Bidding on a contract is an uncertain and often expensive process under the best of conditions. In addition to the uncertainty and expense, how many vendors are willing to tolerate mandates on what they must pay both labor and management, mandated health insurance payments, burdensome reporting requirements, and the fact that the contract could be short circuited for almost any reason?

As you would expect, the answer is very few, and that's why this decision makes Pacheco bulletproof. After enduring this death of a thousand cuts, only a masochistic contractor would sink additional time and money into a legal challenge. Instead, logic and experience tell us that they abandon ship and take their business to another state; since none have anything like this shameful legislation.

Virginia, which along with two other states was rated the best-managed in a recent *Governing* magazine study, has a program to assist its agencies in making privatization decisions. Even as a start-up they saved \$106 million over three years. North Carolina has followed suit with similar legislation. Virtually every other state is moving in the same direction.

Forty-nine states are falling in line as Massachusetts falls farther behind.

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