League of Women Voters

ABOUT THE PRIVATIZATION STUDY

November 07, 2011 | by Gretchen Knell

Scope of the Privatization Study:
The purpose of this 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.

Timeline:

- **Early Fall 2011:** Information provided to Local and State Leagues
- **November 2011-May 2012:** Leagues are encouraged to participate in the study on Privatization of Government services, assets and functions, and the impact on local communities by scheduling meetings to educate members and communities about the issue and come to consensus.

The Committee:

Janis McMillen, Chair
Kansas

Diane Dilanni
Tennessee

Carole Garrison
Virginia

Ann Henkener
Ohio

Cathy Lazarus
California

Nora Leech
Washington

Muriel Strand
California

Ted Volskay
South Carolina

Organization:

The committee will provide a history and background of privatization, a glossary of terms, legal issues to be considered when privatizing at different levels of government, current state regulations on privatizing and case studies on successful and unsuccessful privatizing efforts. Finally, the committee will provide suggested policies and parameters to be considered when privatizing.

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BACKGROUND

Many states have turned to private prisons to address the issues of prison overcrowding and the capital expense of building new prisons, and to reduce the cost of prison operations. In 2011, the corrections services market (including federal and state prisons, but excluding jails) in the United States was valued at approximately $70 billion. The portion of corrections services market that is outsourced to private corporations is approximately 10 percent or $7 billion.1

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Program

Convention adopted:

A study of the federal role in public education. The study will focus on the role of the federal government in education policymaking, with possible consideration of funding, common standards and/or governance relationships among all levels of the government. The scope will be dependent on available resources, including committee and LWVUS staff time.

A study on privatization: the policy agenda to transfer government functions, services and assets to the private sector.

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THE LEGAL FRAMEWORK OF TRANSPARENCY AND ACCOUNTABILITY WITHIN THE CONTEXT OF PRIVATIZATION

October 11, 2011 | by Gretchen Knell

Executive Summary

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.

A recent example involves one of the nation's largest not-for-profit providers of community-based supervision and treatment services to individuals within the criminal justice systems. The company is 97 percent publicly funded from sources such as state departments of corrections and the federal prison bureau. Following revelations of certain unusual and high profile expenditures by the private contractor in Kentucky (including hundreds of thousands of dollars in stadium suites, sponsorship of a university basketball team and extravagant social events), the Kentucky state auditor sought to examine how its tax dollars were being spent. The private contractor, however, refused to provide the state auditor with the requested financial information, and neither the state public records law nor any decision by a state court required the contractor to provide the information. This case illustrates the importance of yet another approach to ensuring public accessibility of information and records in the hands of a private contractor: that is, using the bidding or contract negotiation process of the privatization deal itself to require agreement on the part of the private contractor to make all pertinent information available to the government agency with which it is contracting before any privatization of services is put in place.

Finally, this paper concludes with a call by accountability advocates for special transparency requirements to apply to any privatization proposal. The notion, here, is that government action to privatize is of such import and consequence that special (super) public accountability procedures should apply with respect to the initial privatization decision itself in order to ensure the proper constitutional role of the people as overseers of government action.

Diane Dilanni

Introduction

The legal frameworks within which public and private sector entities operate differ. One difference is that government entities are statutorily required by transparency laws such as sunshine (open meeting) laws

and public record acts to conduct their business through open, transparent processes to ensure that they are accountable to the citizenry.[1] But what happens when services and functions are transferred into private hands? This paper discusses both successes and challenges with regard to efforts to address transparency concerns and public accountability in the context of privatization.

The Concepts of Public and Private

The concepts of "public" and "private" permeate our everyday discourse, and most people have a general notion of what is meant by the terms. Today, the term "public entity" generally refers to a government body at the federal, state or local level that makes the rules of society that bind those members of the public within its jurisdictional boundaries, and which acts on behalf of the whole of a society in its external relations (such as in the case of interstate or international affairs).[2] In contrast, a "private entity" is considered to be an entity that lies outside the realm of the government and, to some extent, is beyond its reach and control, such as those entities within the private domain of the marketplace.[3] Simply put, the public sector may be viewed as part of the State and the private sector as part of the economy.[4]

The idea of "private" and "public" as two separate spheres with discrete boundaries appears as early as the 4th Century B.C. in the writings of Aristotle. The Aristotelian concept of *oikos* indicated the realm of the household in which decisions were based on individual judgment and discretion, while *polis* referred to the public political realm where decisions were reached through collective deliberations upon the affairs of state.[5] John Stuart Mill described the distinction as between that part of a person's life that must be left to the free will of the individual as it concerns only the self (the private), and that part of life that falls within the realm of the collective such that the state may intervene and regulate the individual's action and behaviors (the public).[6]

Many modern scholars have challenged the popular notion that public and private are two distinct realms with rigid boundaries.[7] Such distinctions, it is argued, could only exist in a hierarchical society, such as the Rome Republic or the city-state of Athens, where the polity was organized upon the belief in a privileged class of citizens with natural superiority. These privileged individuals, considered to be masters over women, children and slaves, had complete dominion over their private realms (the domestic or household sphere), unencumbered by State regulation or control.[8] With the emergence, however, of the modern, centralized state and its liberal notions that all people are created equal, free and autonomous, the State takes on the role of protector of all its people in order to secure for them, as our Declaration of Independence proclaimed, certain unalienable rights, among them life, liberty and the pursuit of happiness.[9] In this role, the State, through the instruments of law, has not only the authority but the responsibility to regulate actions and behaviors within the private realm to ensure that such fundamental rights of its people (including the disenfranchised) are actualized and secure.

The modern State obtains authority to regulate and control private acts (through its public bodies), of course, only "by deriving [its] just Powers from the Consent of the Governed."[10] Nor is the authority of the State absolute or enduring; rather, it is expressly limited to certain enumerated powers,[11] and in the event that it fails to secure such unalienable rights, the people may petition the government for redress of grievances[12] or "alter or abolish [the government] ... and institute a new Government ... that ... shall seem most likely to effect their Safety and Happiness."[13] Thus, the people may be considered to have sovereignty (supreme authority) over the government. Accordingly, the government must be and remain accountable to the people, all of whom, as members of the ultimate sovereign, are equal in relationship to the State. For these reasons, the processes and functions of the State and its public bodies must be open and transparent in order for the sovereign people to exercise their inherent constitutional authority over the government.[14]

In limiting the powers of the State, of course, the drafters of the U.S. Constitution also recognized and provided a constitutional framework for the emergence of a robust private sector. The protection of private ownership of assets and property, for instance, is secured by the Fifth Amendment ("no person shall be deprived of property without due process of law, nor shall private property be taken for public use, without just compensation"), while the Fourth Amendment establishes the right of the people to be secure in their persons, houses, papers and effects (against unreasonable searches and seizures by the government).[15] Private actions and endeavors also are recognized and protected, perhaps most explicitly in the Tenth Amendment, which provides that those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[16]

Thus, in the modern democratic context, the guiding principles of the public realm include, among others, equality, security, collective deliberation and public accountability, while the operative principle of the private domain may be considered to be the preservation of individual freedoms and free will.[17] As one commentator noted, "the law [of the State] lays down the boundaries within which individuals are free to make choices...[and] provides a general framework of rights that cannot...be violated. The delineation of inviolable conditions, at the same time, creates space within which individuals are free to choose and pursue their own private goals, as long as they do not violate the rights of others."[18] In this way, the scope of the private is defined by the public, and the two realms operate in conjunction rather than opposition.[19]

Commentators often have noted that, in light of this conceptual divergence, the two sectors reflect different means to different ends, and that these differences are relevant to policy considerations regarding privatization. For instance, the mission and purpose of public sector entities, which are formed in order to carry out governmental functions,[20] is commonly viewed as that of promoting the general

welfare.[21] The means of achieving such ends are through provision and regulation. In other words, the State provides goods, services, resources and information to members of the public within its jurisdictional boundaries, and regulates private sector entities and actors within its jurisdiction to ensure certain standards of fairness and equity, and health, safety and well-being of the people. Thus, the primary beneficiary of the public sector entity is intended to be the public.

In contrast, the privatesector may be viewed as that part of the economy that derives from private actors' use of privately held assets, properties and information, usually as a means of enterprise for the accumulation or preservation of private wealth. Such activities, while not immune from regulation,[22] are essentially controlled and operated by individuals or groups of individuals through the exercise of their own free will, discretion and judgment, rather than by the State or any of its subdivisions. The private sector entity's primary purpose thus is commonly understood to be to benefit and financially enrich one or more specific individuals (the owners, investors or shareholders), through operating the entity in such a manner as to enhance the value of the privately held assets (usually by maximizing profits or return on investments). For this reason, it may be said that the intended, primary beneficiaries of the private entity are its individual owners rather than the public.[23]

The geographic commitment of public and private entities also differs. The dominion of public sector or government entities is, by definition, intrinsically bound to a specific jurisdiction established by precise geographic boundaries that define and limit the entity's reach in exercising authority. This is not true for private sector entities. Although the legal form that a private or business sector entity may take (i.e., a sole proprietorship, partnership, corporation, cooperative, limited liability company),[24] is largely defined by the law of the relevant jurisdiction, private sector entities do not have any particular geographic constraints or commitments. And, at their sole discretion, they may relocate across jurisdictional lines and set up shop in a different state or country, taking the corpus of such entity (assets, jobs and taxable revenue streams) with them to the new location.

Statutory Transparency and Public Accountability

James Madison wrote that the people are "the only legitimate fountain of power [from which] the constitutional charter, under which the several branches of government hold their power, is derived."[25] Yet, how might the People exercise their sovereignty over the government if they do not know what their government is doing? How can government be fully accountable to the People for the actions it takes on their behalf if it conducts itself in secrecy or behind closed doors?

The modern practice of open government in which government conducts its business in a transparent fashion in order to allow for public scrutiny and public participation is widely 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 and documents about government operations are secure.[26] Public transparency laws thus have been enacted throughout the United States at both the federal and state levels for the purpose of maintaining free and open public access to the government's proceedings, deliberations, decision-making and records.[27] Sunshine or open meeting laws seek to ensure access to certain meetings and deliberations of such bodies, while freedom of information or public record laws seek to ensure access to the documents, materials and records of government.

Federal and State Transparency Laws

Most people are generally familiar with federal transparency laws. The federal Sunshine Act[28] requires not only that every portion of every meeting of an agency be open to public observation, but that there be advance public notice of each meeting in order to facilitate public attendance.[29] It expressly prohibits agency heads from conducting or disposing of any agency business other than in accordance with the Act.[30]

Although the Sunshine Act's reach is limited by the specific statutory definitions of the terms "agency" and "meeting," the federal definitions of these terms are broad. For instance, "agency" is defined essentially to mean any executive branch agency headed by a collegial body of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate and any subdivision thereof authorized to act on behalf of such agency.[31] "Meeting" is broadly defined to mean the deliberations of at least the number of individual agency members that are required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.[32] Although there are certain statutory exceptions to the federal requirement of open meetings,[33] when an agency determines that it may close a meeting, in whole or in part, based on the applicability of one or more such exemptions, it must follow certain strict procedural requirements set forth in the Act. For instance, even when the meeting or portions of the meeting are closed to the public, a full transcript of the meeting is made and retained to ensure a full record of the government's deliberations and actions.[34] Finally, the federal Act treats these rights of the people to open government as important enough to make them specifically enforceable by the federal courts.

As the federal sunshine law does not apply at the state or local level, state legislatures throughout the country have enacted open meeting laws to ensure the transparent operation of state, county and local government and to prohibit private or secret deliberations and/or voting on matters falling within the public body's jurisdiction.[35] In general, such laws require that public sector meetings be open and accessible to the public. State statutes commonly define the term "meeting" with language similar to the following: a convening of a governing body of a public entity for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. Such laws also require that advance

public notice of such meetings be given and that a proper and complete record of the proceeding (electronic recordings, transcripts and/or minutes), be created, maintained and made accessible to the public. In many states, the law also provides that any action taken at a meeting of a public body in violation of the state's open meeting law is void and of no effect.

Although the general provisions of such laws are of similar effect throughout the fifty states, the scope of such acts varies widely from state to state. For instance, the way in which a state defines such terms as "meeting" (e.g., whether a conference call or email communication would be sufficient for the law to apply),[36] and "governing body"[37] may either broaden or narrow the practical applicability of the law. Statutory exemptions to the open meeting rule also vary significantly from state to state.[38]

Another key federal transparency law is The Freedom of Information Act (FOIA).[39] It is designed to ensure public access to records regarding the operations of the federal government. As with the federal Sunshine Act, FOIA's mandate is broad: it requires that each agency within the executive branch of government[40] make its records promptly available to any person upon request as long as (1) the request reasonably describes such records and (2) the request is in accordance with published procedures.[41] The records subject to the Act include those tangible records (in any format, including electronic) created or obtained by the agency, and within its control as a result of conducting its official duties.[42] Agencies also are required, under the Act, to make certain specially enumerated documents available for public inspection and copying (including such items as the agency's final opinions, orders and votes as well as policy statements and staff manuals, among others).

Although the Act authorizes the charging of fees under certain circumstances in connection with a public record request (for document search, duplication and review), it specifically provides that there will be no charge (or a reduced charge) in the event that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." [43] In addition, agencies must facilitate citizen oversight by publishing descriptions of their central and field organization; the process by which the public may obtain information or make requests; statements of the course, methods and procedures by which the agency's functions are determined; and instructions as to the scope and contents of all its papers and reports.[44]

Although certain categories of records are statutorily exempt from production,[45] the Act requires agencies claiming such exceptions to adhere to strict timelines for asserting the exemption, and it provides the person making the request with a right to administratively appeal the agency's decision to assert such exemption.[46] As is the case with the federal Sunshine Act, these rights of access to government records are enforceable in the federal courts. Moreover, the burden of proof is on the agency to sustain its action in the event it claims an exemption applies, and a court may award fees and litigation costs to a prevailing requester.[47]

As FOIA applies only to federal agencies, the states have enacted public records laws of their own, sometimes referred to as the "little FOIAs." As with state open meeting laws, state public records acts vary in scope, largely dependent upon the particular law's definition of "agency,"[48] which serves to limit or broaden the categories of public bodies to which the act applies. Although there is some variation in definition of the term "records," such term is commonly defined to include any records made or received in connection with the transaction of official business by a governmental agency. Statutory exemptions within state public record laws also vary, reflecting jurisdictional differences in policy and priorities.

Over the past several years, open government agencies and advocacy organizations have proliferated. As a result, there are many useful tools now on the Internet for easy access to detailed information about both federal and state transparency laws, including user-friendly indices, guides and compilations of open meeting and public record laws of the 50 states. One or more of such websites allow for easy comparison across jurisdictions of the several features of transparency laws, and provide information on important federal and state court cases in the area of government transparency litigation. Among such sites are the Whitehouse's Open Government Initiative, at www.whitehouse.gov/open; The Citizens Media Law Project (hosted by the Berkman Center for Internet and Society) at www.citmedialaw.org/legal-guide/access-government-records; The Reporters' Committee for Freedom of the Press at www.rcfp.org/ogg; and the Sunshine Review at http://sunshinereview.org/. There are numerous other online sites.

Transparency in the Context of Privatization

Privatization raises particular issues with respect to transparency. When the provision of government services is transferred into private hands, what becomes of the public's right of access to information regarding the provision of those services? In other words, to what extent is a private entity required to make accessible to the public the information and records relating to its provision of services previously provided by the government?

Legislators apparently had not foreseen the challenges to accountability caused by government privatization as transparency laws, as originally enacted, applied exclusively to government agencies and not to private sector entities. For this reason, certain commentators have raised concerns over the years that an anti-democratic consequence of transferring the performance of government services to private entities might well be the "cloaking" of previously accessible information and records. One commentator draws a playful metaphor, arguing that by privatizing, government is using a "cloaking device" that keeps some of its functions and expenditures from public view just as Star Trek's evil Klingon Empire used such a device to make its starship invisible.[49]

Courts throughout the country have taken steps to address this cloaking concern over the years as members of the press and the public have brought public access litigation to enforce statutory rights of access against private contractors performing services previously provided by government. Such courts have had to consider the applicability of open government laws to private contractors (both for-profit and not-for-profit), on a case-by-case basis in light of the legislative intent of the laws and the oft-heard arguments of private contractors that information kept in the performance of their contractual duties is proprietary. As a result, a judicial doctrine known as the functional equivalency test has developed. It provides that in cases where a private contractor is performing a government function in such a manner that the contractor may be deemed the "functional equivalent of a public body," the public records laws (and sometimes other transparency laws), apply to that private entity in the same manner as if it were a public body.

To illustrate, the Tennessee Court of Appeals recently applied the "functional equivalency" test in a case involving Corrections Corporation of America (CCA), the nation's largest for-profit private prison firm.[50] The case arose after CCA denied a prison advocate's request for records relating to such matters as lawsuits filed against the company and state reports and audits showing contract violations by CCA. The firm argued that such records were proprietary and that, in any event, it was not the functional equivalent of a state agency.[51]The court disagreed, however, holding that because operating a state prison is a task traditionally performed by the government, CCA's public functions outweigh its private identity for purposes of the public records act.[52] The court required that CCA produce the records, based on an earlier Tennessee Supreme Court decision[53] that had interpreted the state's public record act[54] broadly to include records made and received in connection with the transaction of official business in the hands of any private entity where its relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, such that the accountability created by public oversight should be preserved.[55]

Numerous other cases throughout the country have addressed the applicability of public records acts to both for-profit and nonprofit private entities. In determining whether the private entity was a either a "public body" or the functional equivalent, and thus subject to the state's transparency law, courts have tended to look at such factors as whether the entity performs a governmental function, the level of government funding, the extent of government involvement or regulation, whether the entity was created by a government body, and whether it has the authority to make decisions binding upon a government body. Considering such factors, courts have found, for example, that a New Hampshire housing finance authority, a corporate entity with a distinct legal existence separate from the state, was a public body subject to the public records act as it dispensed public funds for elderly and low-income residents' housing, a public function.[56] So, too, was the City of Baltimore Development Corporation, a private, nonprofit entity whose members were appointed by the mayor and which, the court determined, had no essentially private functions, but rather served in place of the city.[57] A private, for-profit, limited liability firm managing a public arena under a government contract with the Sports Authority of Metro Nashville also was subject to the public record laws under the functional equivalency test where the court found it had the ability to make decisions binding the government, such as entering into contracts and fixing and collecting fees, and received public funding.[58] Courts, of course, also have declined to find private entities subject to transparency laws from time to time. Two such cases are: a private architectural firm, which although performing services for a Florida school board and receiving compensation for such services, had not been delegated any governmental or legislative functions;[59] and the Connecticut Humane Society, a private entity that the court determined was neither performing a public function nor controlled by a government body.[60]

In recent years, state legislatures have sought statutory solutions to the issue of transparency and privatization as well. State legislatures have been expanding the scope of their transparency laws in order to make private contractors and other privatizer-entities subject to such laws.[61] State legislature are reworking statutory definitions of the type of entity subject to the law and are including such elements as whether the private entity receives or dispenses public funds, was created or controlled by a public agency or performs an essential government function.[62] Minnesota, on the other hand, took a direct approach. It amended its public records law, the Minnesota Data Practices Act, in 1999 to address the issue of privatization and transparency head on by adding a new subdivision, which provides in pertinent part as follows:

> *Subd. 11. [PRIVATIZATION.] (a) If a government entity enters into a contract with a private person to perform any of its functions, the government entity shall include in the contract terms that make it clear that all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this [public record act] . . .and that the private person must comply with those requirements as if it were a government entity.* Minnesota Statutes, 2010, Section 13.05,Subdivision 11.

Despite both judicial and statutory efforts to address issues of transparency in the context of privatization, public accountability advocates still are concerned that public access to information and records in the hands of private contractors often is frustrated when statutory language does not adequately cover the private sector entity or a court ruling has not been obtained. Moreover, even when it is clear that private contractors are subject to such laws, they often are not aware of such requirements or they dispute their applicability, and, as a result, refuse to provide the information and records.

One recent example of the challenges of ensuring public accountability within the context of privatization involves Dismas Charities, Inc., one of the nation's largest not-for-profit providers of community-based

supervision and treatment services to individuals within the federal, state and local criminal justice systems. The Louisville-based company operates 28 halfway houses in 12 states. It operates 7 halfway houses in Kentucky and received a total of $23 million over the last three years from the Kentucky Department of Corrections. In 2009 alone, Dismas received another $27 million in U.S. Bureau of Prison funds. Altogether, its funding is about 97 percent public dollars.

Nonetheless, Dismas refused the Kentucky State Auditor's request for certain financial information on how the state money – tax dollars – was being spent after certain high profile expenditures by Dismas came to light.[63]Such expenditures included $155,000 for suites at the KFC Yum! Center and at Papa John's Cardinal Stadium; spending $15,000 to $20,000 annually for a hospitality train car for University of Louisville football games; financially sponsoring the basketball team of Bellarmine University (the alma mater of the company's President/CEO); and hosting extravagant social events such as an annual derby gala and exclusive golf outings. Excessive and disproportionate salaries (in 2009, its president's total compensation was $602,000 and its executive vice president's total compensation was $469,955) also were of concern to the State Auditor, who questioned whether such salaries were perhaps not a proper use of public funds in light of Dismas Charities' mission of providing transitional services for inmates being released into the community from prison and outpatient substance abuse treatment programs.[64]

The trouble for the State Auditor, however, was that not only was Dismas refusing (through its attorney) to provide the requested financial information,[65] but the then current state contract with Dismas for transitional services did not contain the standard language authorizing the Auditor's Office or any other Kentucky state agency to review the Dismas's records of. As a result, the State Auditor's examination and resulting report (issued April 2011) was limited as the Auditor was not able to determine fully either the expenditure of state funds by Dismas or the amount of excessive or unusual expenditures of public money.

The Louisville case illustrates the importance of yet another option for furthering the transparent operations of privatizer-entities. Irrespective of any particular court decisions or state statute, government officials may ensure public access to certain information and records of the private sector entity through the privatization agreement itself. In other words, the requirement that certain information and documents in the hands of the private contractor be available to the government agency with which it is contracting (or directly to the public itself) may be included in the public bidding process or contract negotiations before any privatization contract is put into place. Moreover, such provisions may include strict contractual remedies for any failure to comply by the contractor (including termination of the contract or reversion of any assets transferred). Although such provisions might not be favored by the private entity, particularly where it perceives such information to be proprietary, such considerations simply speak to the broader issue of relative bargaining power of the government entity and the private entity when negotiating a privatization deal.

Contractual solutions to privatization transparency have their own challenges, however, as illustrated by a recent dispute between the Kentucky Department of Corrections and Aramark Corporation, a private firm providing all food services to the entire state prison system. Although, in this case, there is a contract term requiring Aramark to make available to the contracting agency "all records pertinent to the contract," Aramark has refused to provide certain documents, arguing that (in its view) the requested records are "not pertinent to the contract." Thus, the continuing challenge for public entities is to ensure that any contract terms addressing transparency in privatization agreements are carefully conceptualized and drafted in order to best avoid protracted battles over contract interpretation.

Finally, there is yet another way in which issues of public accountability and transparency are relevant to considerations of privatization. Government transparency advocates have lamented the often abbreviated public processes by which government officials consider and approve privatization transactions. USPIRG, the federation of state Public Interest Research Groups, for instance, recently issued a report on Chicago's ambitious privatization efforts since 2004, which included privatizing the Chicago Skyway toll road, four downtown parking garages and the city's system of 36,000 parking meters.[66] According to USPIRG, the decision process regarding privatization of the city's parking meters – a $1.16 billion transaction – itself lacked adequate transparency and was, "originally conceived of behind closed doors and months of preparatory work took place before the idea became public. The lead consultant to the deal received a no-bid contract. The City Council, which had already included expected revenues from privatization in the city budget, took only two days to approve the plan, and had minimal time to review the key documents." These efforts, moreover, have resulted in public anger due to sharp rate hikes, repeated equipment malfunctions and questions about whether the city received fair value.[67] The USPIRG report concludes by calling for the adoption of special rules and procedures[60] going forward to ensure that privatization proposals themselves receive thorough public vetting in advance of any transaction in order to prevent bad privatization deals in the future.

Conclusion

The privatization of government function is of such weight and import that special attention must be given to ensuring full transparency both in advance of the consideration and approval of any such proposal, and with respect to the subsequent operations of the private entity performing such government services or functions in the event a privatization proposal is adopted. Mechanisms to ensure such transparency may be legislative, judicial or contractual in nature, and may include a hyper-transparency of the initial public process by which a privatization plan is vetted. Only through a jurisdiction's heightened attention and commitment to the essential democratic principles of true public

transparency, may the People's constitutional role as sovereign and overseer of government be assured.

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ENDNOTES

1. In addition, such laws as public disclosure acts (e.g., federal employee financial disclosure requirements; campaign finance requirements), conflicts of interest laws, and public employee codes of ethics also may be considered to be part of transparent and accountable government practice.

2. Paul Starr, "The Meaning of Privatization," Yale Law and Policy Review 6, 1988.

3. Paul Starr, "The Meaning of Privatization," Yale Law and Policy Review 6, 1988.

4. Today, entities may be categorized as not only public or private, but as semi-private or quasi-public or mixed public-private as hybrid organizations with both public and private attributes proliferate. For purposes of this paper, public sector and private sector entities, respectively, shall refer to exclusively public and exclusively private entities.

5. Mahajan, G., Editor, *The Public, The Private, Issues of Democratic Citizenship*, Sage Publications, 2003, pages 9-11.

6. Mahajan, G., Editor, *The Public, The Private, Issues of Democratic Citizenship*, Sage Publications, 2003, pages 11-12.

7. In noting the fuzzy boundaries between public and private entities today, "some theorists . . . argue[] that the distinction itself is outdated or so ideologically loaded that it should be discarded." Paul Starr, "The Meaning of Privatization," *Yale Law and Policy Review* 6, 1988.

8. Mahajan, G., Editor, *The Public, The Private, Issues of Democratic Citizenship*, Sage Publications (2003), at 11-14.

9. Mahajan, G., Editor, *The Public, The Private, Issues of Democratic Citizenship*, Sage Publications (2003), at 11-14; The United States Declaration of Independence.

10. The United States Declaration of Independence.

11. For instance, the limitations on State powers in the U.S. Constitution serves as a doctrinal check on tyranny.

12. The First Amendment of the U.S. Constitution.

13. The United States Declaration of Independence.

14. Thus, according to one commentator, the notion of the government implies "an elaborate structure of rules limiting the exercise of state power. Those who wield power are to be held publicly accountable--that is, answerable to the citizens--for their performance. Government decisions and deliberations must be publicly reported and open to general participation. In short, the citizens of a liberal state are understood to have a right to expect their government to be public not only in its ends but also in its processes." Paul Starr, "The Meaning of Privatization," *Yale Law and Policy Review* 6, 1988.

15. It is interesting to note that the People's Republic of China unveiled a new constitutional amendment in 2004 that similarly recognizes private property, providing that the lawful, private assets of citizens are "inviolable." The current version of the PRC Constitution, however, emphasizes that, in contrast, *public* property is not only inviolable, but "sacred." Zimmerman, James, *China Law Deskbook*, American Bar Association (2005), pages 2-3.

16. Luckey, J., Grasso, V., Manuel, K., Inherently Governmental Functions and DOD Operations: Background, Issues, and Options for Congress, Congressional Research Services (2009).

17. Mahajan, G., Editor , *The Public, The Private, Issues of Democratic Citizenship*, Sage Publications (2003), at 13.

18. Mahajan, G., Editor , *The Public, The Private, Issues of Democratic Citizenship*, Sage Publications (2003), at 15.

19. Mahajan, G., Editor , *The Public, The Private, Issues of Democratic Citizenship*, Sage Publications (2003), at 15.

20. However, what properly constitutes government functions (and the related issue of the proper size of government), is not necessarily self-evident, and a central debate in public policy has long been "who should do what?" Ross, R., *Government and the Private Sector, Who Should Do What*, Crane Russak & Co. (1988), at xii. What has been called the "assignment problem," that is, the issue of the appropriate division of roles and responsibilities between public and private sector entities, has given rise to the concept of "an inherently or essential government function." *Id.* An "inherently governmental function" is one that, as a matter of law and policy, must be performed by . . . government employees and cannot be

contracted out [to the private sector] because it is "intimately related to the public interest." Luckey, J., Grasso, V., Manuel, K., Inherently Governmental Functions and DOD Operations: Background, Issues, and Options for Congress, Congressional Research Services (2009). Indeed, the current debate over privatization, and the question of which overall functions are inherently governmental and thus not subject to transferring to the private sector, are as old as the Republic. *Id.* The Constitution itself prohibits privatization of certain functions (e.g., Congress's legislative function), a prohibition that courts have enforced since the early years of this country under various judicial tests and doctrines (for example, the non-delegation doctrine and the test relating to functions "affected with the public interest," among others.) *Id.* Indeed, the question of "what the State ought to take upon itself to direct by the public wisdom, and what it ought to leave, with as little interference as possible, to individual discretion" was referred to by Edmund Burke in 1795 as "one of the finest problems in legislation." Parker, D. and Saal, D., *International Handbook on Privatization*, Edward Elgar Publishing, Inc. (2003), at 25.

21"> To further the point, public service is considered a public trust, requiring federal employees, for instance, to place loyalty to the Constitution, the laws, and ethical principals above private gain, and to act impartially and not give preferential treatment to any private organization or individual. See Executive Order 12674 (found at 5 C.F.R. part 2635), which sets forth 14 principles of ethical conduct for federal employees.

22. As noted above, certain activities of private enterprises and private actors are subject to state regulation to ensure such public benefits as fairness and security. Such regulation, in fact, may be viewed as a fundamental responsibility of the government in its role as protector of its citizens. Still, even in a modern, democratic state there are limits on the public sector's power to intervene and regulate private sector transactions and businesses (as well as other private conduct within the realm of home, church, and other private associations), but such limits are not absolute. Private property rights, for example, while constitutionally recognized, are not immune from public control or regulation, such as in the case of restrictive zoning laws. However, as one commentator noted, when crossing from public to private, the presumptions shift away from the State and any State intervention must meet more stringent tests of the public interest. Paul Starr, "The Meaning of Privatization," *Yale Law and Policy Review* 6, 1988.

23. Private sector entities are most often operated for profit. However, not-for-profit and low profit entities (such as a low profit limited liability corporation that combines features of a non-profit and for-profit), also may be established where the organization's charitable mission or social purpose has been properly established. In exchange, such entities receive favorable tax treatment, and other statutory benefits.

24. Factors affecting how a private entity is organized may include such considerations as the size and scope of its enterprise; its ownership structure; its capital needs and leverage potential; its goals and business plan, whether an ownership interest is to be publicly offered, for instance, on a securities exchange; the extent to which its owners wish to be shielded from business failure and to limit potential liability; management and tax considerations, and issues of legal compliance and disclosures, among others.

25. *The Federalist Paper*, No. 49.

26. Lathrop, Daniel; Ruma, Laurel, Eds, *Open Government: Transparency, Collaboration and Participation in Practice*, O'Reilly Media (February 2010).

27. The preamble of the Illinois Public Records Act, for example, declares its legislative intent as follows: "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees . . . Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest. . . .[I]t is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1(from Ch. 116, par. 201).

28. The Government in the Sunshine Act, 5.U.S.C.§552(b), *et seq*..

29. Advance public notice of each meeting requires publication of the time, place, and subject matter of the meeting, and the name and phone number of the official responsible for responding to requests for information about the meeting. 5 U.S.C.§552b.

30. 5.U.S.C.§552(b), *et seq*..

31. 5 U.S.C.§552b(a)(1).

32. 5 U.S.C.§552b(a)(2).

33. The categories of information exempt from disclosure under the federal sunshine law include certain information relating to *i)* national defense and foreign policy; *ii)* internal personnel rules and practices of an agency; *iii)* matters specifically exempted from disclosure by statute; *iv)* privileged or confidential trade secrets and commercial or financial information obtained from a person; *v)* accusations of a crime or formal censure of a person; *vi)* information where disclosure would constitute an unwarranted breach of privacy; *vii)* investigatory records where the information would interfere with enforcement

proceedings, deprive a person of a fair trial, disclose a confidential source, or endanger law enforcement personnel; *viii)* an agency's regulation or supervision of a financial institution; *ix)* a financial institution's stability or lead to financial speculation; and *x)* the agency's issuance of a subpoena or participation in legal proceedings. 5 U.S.C.§552b.

34. The Act provides that: "[t]he agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to [certain exemptions] . . . the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any action taken, and the reasons therefore, including a description of each of the views expressed on any item and the record of any roll call vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes." 5 U.S.C.§552b(f)(1).

35. For instance, in enacting its open meeting law, the Tennessee General Assembly expressly declared "it to be the policy of th[e] state that the formation of public policy and decisions is public business and shall not be conducted in secret." T.C.A. 8-44-101.

36. For example, the Massachusetts Open Meeting law includes in its definition of "meeting" (deliberations) an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction. M.G.L.30A, §18. The Maryland Attorney General, on the other hand, has opined that that state's open meeting law did not apply to email messages unless by pre-arrangement a quorum of a public body is present together on line.19. 81 Opinions of the Attorney General 140 (1996); 2 OMCB Opinions 78 (1999) (Opinion 99-15). Schwartz, Jack, *Maryland Attorney General's Open Meeting Manua*l, Fourth Edition, 2000, page 8.

37. For instance, in Tennessee, the state Supreme Court interpreted the lengthy statutory definition of the term governing body," to mean "any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector." *Dorrier v. Dark*,537 S.W.2d 888, 892 (Tenn. 1976).

38. For instance, in Massachusetts, exceptions to its open meeting law include discussion of such things as a person's reputation, character, physical condition or mental health in order to protect individual rights and reputation; complaints or charges brought against a public officer, staff member or employee; matters relating to litigation or collective bargaining if the open meeting may have a detrimental effect on the position of a governmental body; the deployment of security personnel or devices; and the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body, among others. M.G.L.ch. 39, section 23B.

39. The Freedom of Information Act, 5 U.S.C. §552, originally enacted in 1966, has been amended over the years, most recently by the "Openness Promotes Effectiveness in our National Government Act of 2007" (Public Law No. 110-175) and the "OPEN FOIA Act of 2009."(Public Law No. 111-83, § 564).

40. The term "agency" is statutorily defined to include any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. 5 U.S.C. §552(f)(1).

41. The Act also provides that in making any record available to a person, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format and that each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for such purposes. 5 U.S.C. §552(f)(1).

42. *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

43. To the extent required to prevent a clearly unwarranted invasion of personal privacy, the Act permits an agency to delete identifying details when it makes records public or available pursuant to a public request. However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless otherwise exempt. 5 U.S.C. §552(f).

44. 5 U.S.C. Sec. 552(a)(1).

45. The enumerated statutory exceptions include such matters as those relating to national defense or foreign policy, internal personnel rules; certain matters specifically exempted from disclosure by statute, trade secrets and privileged or confidential commercial or financial information; inter-agency or intra-agency memorandums or letters; personnel and medical files; certain records or information compiled for law enforcement purposes; certain records relating to an agency's regulation or supervision of financial institutions; and certain geological and geophysical information and data. 5 U.S.C. Sec. 552(b).

46. It also requires production of a record where any exempt content may be deleted and the reasonably segregable portion of a record provided.

47. 5 U.S.C. Sec. 552(a)(4)(b).

48. For instance, although state public record laws typically apply only to public bodies within the jurisdiction's executive branch of government, a few state acts include, to a greater or lesser extent, records of other public bodies as well (i.e., those in the legislative or judicial branch).

49. Mitchell W. Pearlman, "Looking For An Invisible Government," Connecticut Foundation For Open Government, Inc., www.ctfog.org/Publications/Articles/Invisible_Govt.Htm.

50. *Friedmann v. Corrections Corporation of America*, 310 S.W.3d 366 (2009).

51. CCA argued, among other things, that it was neither created nor controlled by a public body and that it had numerous contracts with federal and state jurisdictions throughout the country, receiving only 11.5 percent of its total revenue for the year in question from Tennessee. *Friedmann*, 310 S.W.3d 366.

52. In its decision, the *Friedmann* Court cited a law review article ("The Privatization of Correctional Institutions: The Tennessee Experience," 40 Vand. L.Rev. 829 (1987)), which stated that "[o]perating correctional facilities is more than a traditional state function: the state has no higher duty than to ensure that those persons who violate society's laws are punished. Fulfilling that duty is essential to the integrity of the government and to the protection of the public. It is not a duty that can legally or morally be handed to a private party and then ignored. The involvement of private parties in the corrections process may produce benefits, but it must be limited to its proper scope under state control."

53. *Memphis Publ'g Co. v. Cherokee Children & Family Services, 87 S.W.3d 67 (Tenn.2002).*

54. Tenn.Code Ann. § 10-7-301(6) defines public record to mean "[A]ll documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency."

55. *Memphis Publ'g Co. v. Cherokee Children & Family Services, 87 S.W.3d 67,78-79 (Tenn.2002)* "The functional equivalency approach... provides a superior means for applying public records laws to private entities which perform 'contracted out' governmental services.... [P]rivate entities that perform public services on behalf of a government often do so as independent contractors. Nonetheless, the public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor.")

56. *Union Leader Corporation vs. NH Housing Financing Authority*, 142. N.H. 540, 546 (1997).

57. *City of Baltimore Development Corporation v. Carmel Realty* Associates, et al., 392 Md. 724, 898 A.2d 1004 (2006)

58. *Kimberly Kay Allen et al. v. John Day & Powers Mgt., LLC*, 213 S.W.3d 244 (Tenn. Ct. App. 2006).

59. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*,596 So. 2d 1029 (Fla. 1992).

60. See discussion of the 1991 case, *Connecticut Humane Society v. Freedom of Information Commission*, in Christine Beckett's article, "Government Privatization and Government Transparency, What happens when private companies do the governing?" *The News Media and the Law*, Winter 2011 (Vol. 35, No. 1), page 21, www.rcfp.org/news/mag.

61. The federal FOIA law was amended in 2007 to clarify that agency records maintained for an agency by a private entity under government contract, for the purposes of records management, remains subject to FOIA. Section 9 of the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

62. The Sunshine Review, at www.sunshinereview.org.

63. Press Release, Kentucky State Auditor's Office, April 5, 2011, www.auditor.ky.gov/Public/Audit_Reports/Archive/2011DismasCharitiesexamination-PR.htm.

64. Kentucky State Auditor's Office, April 5, 2011 Auditor's Report, page 46; www.auditor.ky.gov/Public/Audit_Reports/Archive/2011DismasCharitiesexamination-PR.htm

65. The Kentucky Open Records Act (KRS 61.870.1(h)), was no help. Although it defined "public agency" to include any entity that "derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds," Dismas took the position that the provision did not apply to it because, given its operations in 11 other states, the funds it expended in Kentucky did not rise to the requisite level of 25 percent of its national expenditures. Nor was a judicial solution at a hand as two Jefferson County circuit courts came to opposite conclusions as to the constitutionality (and thus enforceability) of the specific ORA provision at issue. (Per telephone discussion with Kentucky State Auditor's General Counsel, July 29, 2011).

66. USPIRG, *Privatization and the Public Interest: The Need for Transparency and Accountability in Chicago's Public Asset Lease Deals*, October 7, 2009, www.uspirg.org/home/reports/report-archives/transportation /transportation2/privatization-and-the-public-interest-the-need-for-transparency-and-accountability-in-chicagos-public-asset-lease-deals.

67. The USPIRG report states that the Chicago's Inspector General found that meter system would have been worth more to the city ($2 billion), had it remained in public hands.

68. Several best practices included in the 2009 USPIRG report were ensuring complete transparency in vetting of privatization proposals; full accountability such that the elected legislative body must approve both the authority to negotiate a deal and any terms of a final deal; a minimum waiting period of 30 days between publication of the final terms of a privatization agreement and a vote (45 days for privatization of assets or services valued at more than $50 million); competitive, transparent bidding for all professional services provided during the privatization process and for the privatization contract itself; prompt public disclosure of all documents related to privatization bids; and thorough, independent analysis of the valuation of assets proposed for concession agreements along with a comparison of privatization with other alternatives (including the option of bonding against future revenues with the same schedule of user fee increases without a private lease or transfer of ownership), among others.

AVAILABLE DOWNLOADS

BP_PrivStudy_LegalFramework.pdf

League of Women Voters

SUBCONTRACTING PUBLIC EDUCATION

November 07, 2011 | by Gretchen Knell

By Ted Volskay

BACKGROUND

An education management organization (EMO) is a private entity that is subcontracted to manage one or more traditional public schools charter schools, or an entire school district. The EMO objective is to achieve efficiencies that translate into improvements in academic performance, cost savings for the school districts or profits in the case of for-profit EMOs. As a result, EMOs operate schools with the same or fewer financial resources than had been provided to the schools by the public sector. In 2007, it was estimated that for-profit EMOs operated approximately 20 percent of all charter schools.1

Education Alternatives, Inc., (EAI) was a publicly traded, for-profit EMO that was headquartered in Minneapolis, Minnesota. Established in 1986, EAI stock was traded in the over-the-counter market and quoted on the NASDAQ Exchange.2 An EAIs ability to make a profit for stockholders is directly tied to EAI's success in cutting the operating costs of the schools that it is managing.3

In 1992, the Baltimore City Public Schools entered into a $133 million, five-year contract with EAI to oversee the management and instruction at nine of the 182 schools within the district. The schools to be managed by EAI included eight elementary schools and one middle school. The contract was later modified to include three additional schools. The contract called for yearly reviews and a provision for the Baltimore City Public Schools to terminate the contract at any time following a 90-day notice.4

Under terms of the contract, EAI responsibilities included facilities management, financial management and some staff development. Under the contract, EAI had the autonomy to determine which services it would provide directly and which services it would subcontract with the school system to deliver where it did not wish to provide such services directly. EAI also had partial discretion to select staff, curriculum delivery, instructional methodology, training and other areas supporting instruction. The contract provided for a periodic transfer of funds based upon a negotiated per-pupil allocation for educational and most non-instructional services.5

EAI management expected a 25 percent reduction in operating and administration expenses. Of these savings, 20 percent would be reinvested back into the classroom and the remaining 5 percent of savings would be profit for EAI stockholders. In turn, the Baltimore City Public Schools would not incur any additional cost beyond what already was allocated for public education or approximately $5,500 in average annual per-pupil cost.6

EAI and school system staff agreed to appoint a school district employee to serve as a liaison to represent the superintendent. The liaison was responsible for staffing decisions and disciplinary measures, and for adhering to thepolicies and procedures of the Baltimore City Public Schools.7

In November 1995, the Baltimore City Board of School Commissioners agreed to serve EAI with a 90-day notice to terminate the contract, and the contract was terminated in the spring of 1996, one year prior to completion of the original five-year contract.8

Privatization Case Study: Subcontracting Public Education – Baltimore City Public Schools and Education Alternatives, Inc. (EAI).
Governmental Level: City (Baltimore, Maryland)
Primary Privatization Mechanism: Subcontracting/Outsourcing

EAI proposed to operate the schools for the average annual per-pupil cost of approximately $5,500. One criticism of the annual per-pupil cost approach was that the contract called for the district to provide EAI the average cost per pupil for the district as a whole. However, all but one of the schools managed by EAI were elementary schools, which are less costly to operate than high schools on a per pupil basis. Furthermore, on a per pupil basis, the cost to teach special needs students is much higher than the cost to teach students without special needs. This is an important cost consideration because the schools managed by EAI served proportionally fewer special needs students than the other schools served by the Baltimore City Public School District.9

According to the Superintendent of Baltimore City Public Schools, during the time EAI was managing the schools, EAI had the autonomy to determine whether it would provide the services directly or whether it would contract back to the school system for delivering those services. However, EAI had partial discretion with respect to selecting staff, curriculum delivery, instructional methodology, training and other areas supporting instruction, although the contract language on this point was ambiguous.10

Critics have argued that as a result, EAI inappropriately exercised its discretion and transferred all counselors and specialists (art, music, physical education and special education teachers) out of the

schools managed by EAI.[11] For example, EAI eliminated all special education programs in favor of complete inclusion in the classroom. Since the student to teacher ratio is lower for special education classes than for traditional classrooms, this decision eliminated the more costly special education programs in favor of an increase in the number of less costly traditional classrooms. Students in need of special education services were simply moved into traditional instructional programs. These moves effectively lowered the student to teacher ratio for the majority of students. Integrating special education students into a traditional classroom setting helped a majority of students but came at the expense of students with special needs.[12]

EAI reportedly guaranteed improvement in student test scores after the first year. When compared to a control group (non-EAI students), reading and mathematics scores of EAI students dropped after the first and second years, but the test scores of the control group increased. The EAI student test scores caught up with those students in the control group after the third year.[13]

The University of Maryland Baltimore County (UMBC) evaluated and compared EAI managed schools with schools managed by Baltimore City Public Schools. Here are some of the conclusions cited by the study:

- Schools managed by EAI cost 11 percent *more* to operate than district run schools;
- Parent involvement levels in EAI and district run schools was approximately the same; and
- Overall effectiveness of teaching was the same among EAI and district run schools.

The UMBC study concluded that "the promise that EAI could improve instruction without spending more than Baltimore City was spending on schools has been discredited."[14]

The superintendent of the Baltimore City Public Schools at that time cited the following lessons learned:[15]

- Anticipate conflict – some in the education community embraced the EAI partnership while others were distrustful;
- Secure the support of all constituencies beforehand – school leaders cannot *impose* innovations on school communities;
- Establish specific performance objectives at the outset with milestones to monitor progress and accountability mechanisms linked to funding;
- Establish a reasonable time frame for changes to occur and inform the public about realistic expectations;
- Agree to terms of severance – when preparing the contract, be very specific about the disposition of leases, equipment, materials and supplies when the contract is terminated;
- Anticipate the need to reopen the contract and of the agreement as needed – when implementing innovative changes, flexibility is needed to resolve unexpected issues.

THINGS TO CONSIDER

- The first school managed by EAI was South Pointe Elementary School in Dade County (Miami) Florida in 1990. The contract to manage South Pointe Elementary School was not renewed by the school district.[16]
- In November 1994, EAI signed a 5-year contract with the Hartford, Connecticut, Board of Education to manage the school district. EAI was given the responsibility of operating 32 schools in the distric,t while the Board of Education retained authority for policymaking. Controversy began when EAI's proposed budget for the 1995-96 school year included cuts in teaching positions. Most school board members would not support the reduction in teachers. The school board terminated the contract with EAI in January 1996, reportedly because EAI would not operate under the contract as written. EAI countered, saying that it ceased services because the school district failed to pay for services rendered in accordance with the contract.[17]
- Maryland became the first state to exercise its authority to seize control of failing schools under the No Child Left Behind Act of 2001. The Maryland State Board of Education ordered new management of the schools, but the legislature immediately passed legislation to delay the takeover. The Governor subsequently vetoed the bill but the Governor's veto was overridden.[18]
- EAI was specifically mentioned as being less successful than privatization advocates predicted in a study comparing privatization of public schools in the United States and Great Britain. The study notes that the relatively low level of per capita funding for public education has made it difficult to make a profit and has contributed to a recent lull in public education privatization initiatives in the United States.[19]
- During the first year of the contract withBaltimore City Public Schools, EAI was paid $26.7 million and reported a gross profit of $1.9 million or 7.1 percent; however, EAI's refusal to produce a public budget aroused suspicions about the company's reported profits and losses.[20]
- One criticism of the EAI - Baltimore City Public Schools experience was that the administrators didn't give teachers time to develop an open attitude toward the program.[21]
- EAI changed its name to the Tesseract Group, Inc. The Tesseract Group filed for bankruptcy in October 2000.[22]

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Produced by the Privatization of Government Services, Assets and Functions Study, 2011

ENDNOTES

1. Miron, Gary. "Chapter 27 - Education Management Organizations," http://a100educationalpolicy.pbworks.com/f/Miron_EMO_Chpt27.pdf

2. Patricia Cazares. "The Private Management of Public Schools: The Hartford, Connecticut Experience," paper presented at the Annual Meeting of the American Educational Research Association, Chicago, IL, March 24-28, 1997.

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