

STRATEGIC PLAN:

**An analysis of the Pacheco Law,
& suggestions for amending or repeal**

PAD 759AE: Strategic Management

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EXECUTIVE SUMMARY

Focused on protecting the public interest and saving unnecessary taxpayer dollars, the Massachusetts legislature passed a first-in-the-nation bill in 1993 that charges the state auditor with veto power over any privatization contract, valued at \$210,000 or more, that seeks to replace the role of public employees with private enterprise. State agencies, seeking to privatize services, programs, or operations, are required to conduct solicitations and prepare comprehensive fiscal and managerial assessments to analyze and competitively compete with bidders for lowest cost. Over the past 14 years, 10 privatization proposals reached the auditor's office, and two were rejected for failing to meet specific cost accounting criteria. While it is common for other states to ensure regulatory approval by third-party authorities as a checks-and-balances mechanism against agencies contracting themselves, Massachusetts stands alone in its strictness and rigor.

The stipulation for calculating in-house costs is they can't include government overhead, so while the lowest bidder is using actual figures, the agency is forced to use estimated or avoidable accounting. Proponents of the law believe this firmness enables public managers to think like private managers (Sclar, 2004, p. 5). This is a sound fiscal policy for agencies to take on, and various agencies of different sizes have successfully championed the process, from MassHighway to Holyoke Community College. But just because the legal hurdles are passed by some agencies, doesn't mean it is 'good' management. Opponents of the law, such as the fiscal conservative think tank, the Pioneer Institute for Public Policy Research, argue that stagnancy of privatization approvals in recent years imply the law serves as an "ineffective policy tool," limits competitive contracting, and should be repealed (Policy Dialogue, 2002, p. 2; personal communication, Mass. Taxpayers Foundation, March 30, 2007).

Despite the binding decision of the auditor, few agencies opt to appeal due to hefty legal fees. The law has no language about appeal, but it doesn't frequently occur. In the 14-year history of the law, there have been no appeals. Still, personal communications with stakeholders indicate a positive outlook for a standardized appeal process.

Massachusetts does privatize some of its services, such as Medicaid and point of service plans, but it's not often and to some it's not enough. From 1991 to 1993, Massachusetts issued 36 privatization contracts, with alleged cost savings of \$273 million. But in the two years after the Pacheco Law's passage in 1993, only six contracts were awarded; two were rejected by the auditor for failing cost accounting.

This document is a roadmap to suggest specific and reasonable guidelines aimed at amending the Pacheco Law. By design, this strategic plan is unorthodox, for no other reason than the lack of a defined organization. Bryson (2004) writes of strategic planning as a "disciplined effort to produce fundamental decisions and actions that shape and guide what an organization (or other entity) is, what it does, and why it does it" (p. 6). In response to Bryson, because this plan is about a law, and not an organization (or other entity), there are no mission or vision statements. Rather, the author defines strategic goals, details a legislative history, writes a primer on privatization, analyzes the internal and external legal environment, and suggests key and alternative strategies. Taking the characteristics of a research paper, this is primarily a draft strategic plan, with the assumption it will be reviewed by stakeholders before final submission to a taskforce or other entity.

SCOPE & METHODOLOGY

Designing this strategic plan was complicated by the lack of a strategic planning team, as Bryson suggests, comprised of key decision makers to assist the author in identifying issues for the strategic planning process (p. 35). Due to the statewide, if not national domino effect impact of amending or repealing the law, Bryson adds a team would be very useful (pp. 89-90).

Privatization is a vast subject, encompassing numerous applications, fields, and industries. In this regard, the author chose not to delve into economic theories or contract laws regarding privatization, but focus specifically on Massachusetts and its privatization statute. Case studies of successful national and regional privatization projects are also kept to a minimum.

After researching the general background and typologies of privatization, as well as the statute's legislative history, the author defined strategic goals.

Because of a 14-year timeline between the bill's passage and today, and the lack of significant text or journal citations since 2003, most of the anecdotal evidence came from key stakeholders contacted by email or telephone. In doing so, it was learned early on that the primary opponent pushing for repeal is the aforementioned Pioneer Institute, which wrote policy briefs in 2002, and a primary proponent of the law was Northeastern University professor Elliott Sclar who favorably evaluated the law in a 2004 report. As such, the plan's current reality takes into account the alternate perspectives in order to qualify different strategies.

Assessing the current reality of the Pacheco Law, a SWOC analysis was undertaken to identify the strengths and weaknesses of the internal environment (the law) and the opportunities and challenges of the external environment (the law's stakeholders). Finally, the author identified trends, assumptions, and implications.

Based on the above, the author identified key strategic issues to be answered at a later date. Additionally, alternative strategies, in the form of combination strategies due to the scope of the organization (the entire state government) were defined to further respond to the strategic vision and key strategic objectives.

Finally, it is necessary to explain how the concept of “organization” fits into this strategic plan. Bryson describes organizational legitimacy as the social justification for existence (p. 115). It’s already been mentioned there is no organization, per se, being formulated here. However, the concept is symbolically defined as either the law itself, the entire government, or not applicable; throughout the plan are instances where one of those three definitions is used.

The following tools and resources were used in developing this strategic plan:

- Numerous research journals and books, retrieved at Suffolk University’s Sawyer and law school libraries, Tufts University’s Tisch Library, and the State Library.
- Text readings associated with the course, PAD 759.
- Personal communication with a range of stakeholders who guided research and policy objectives, including Steve Poftak and Charlie Chieppo of the Pioneer Institute for Public Policy Research; John Parsons of the state auditor’s office; Michael Widmer of the Massachusetts Taxpayers Foundation; Chip Faulkner of Citizens for Limited Taxation; and Frank Conte of the Beacon Hill Institute.

PURPOSE

The purpose of the Pacheco Law is to regulate state agencies wishing to privatize operations.

STRATEGIC GOALS

1. Evaluate amending or repealing the Pacheco Law, whether in whole or in part.
2. Establish a bipartisan commission or task force to evaluate the law and/or serve in an advisory role.
3. Enable state agencies to continue public contracting with private firms.
4. Facilitate state agencies to be held accountable for pre-contractual cost accounting and post-contractual oversight.
5. Ensure the viability of managed competition so that state agencies can compete with private firms for the same contract award.
6. Define a process for agencies to appeal decisions, and identify a venue to hold such appeal cases.
7. Improve economic prosperity.

BACKGROUND

➤ What is privatization?

Simply stated, privatization takes a ‘public’ entity and turns it into a ‘public’ company. The use of quotations is purposeful due to the ideological debate over what the word ‘public’ means. Some people describe public as belonging to the public sector, public employees, public infrastructure, and the public domain. Sampford (1998) thinks of public companies which are traded and owned by shareholders (p. 250). Minow (2002) adds that some families consider their lives private and everything else is public (p. 29). For the purposes of this paper, it is assumed that the government is public, and privatization occurs when the government either contracts out or transfers public ownership to private enterprise.

For the past 25 years, as Savas (1987) writes, privatization has been defined as “the act of reducing the role of government, or increasing the role of the private sector, in an activity or in the ownership of assets” (p. 3). Megginson (2000) adds, “Governments pursue privatization in order to promote increased efficiency, introduce competition, expose state-owned enterprises to market discipline, encourage foreign investment, foster wider share ownership... and raise revenue for the state.”

There are three major typologies of privatization. Public contracting, according to the General Accounting Office (1997), entails a government agency to finance, manage, and control policy throughout the contract period; this is the type of privatization covered by the Pacheco Law. Public contracting has three preconditions: specify the service to be contracted; conduct pre-privatization cost accounting of the service to be contracted; and be aware of historical precedent and of existing expertise of public employees and the costs for any learning curve of new employees (Sclar, 2000, pp. 44-45).

When a government transfers the ownership of assets to a private firm (known as asset sale), the agency loses any protection of financial, managerial, or regulatory oversight. Transfer of ownership is costly, which can include “legislation, legal advice, due diligence, brokerage and underwriting fees” and could reach up to 5 percent of the enterprise value being transferred (Sampford, p. 254).

The third type of privatization is managed competition, which enables the agency to competitively bid on work projects alongside private firms. In the city of Indianapolis, for instance, managed competition works to reduce costs, improve services, improve employee morale, and increase innovation (GAO, p. 9). Managed competition was authorized by the Massachusetts legislature prior to the Pacheco Law. The Mass. Highway Department, the Department of Mental Health, the Department of Mental Retardation, and the Department of Social Services routinely compete for projects against private vendors.

The most common privatization method, according to the Council on State Governments, is public contracting, typically in health services, youth services, social services, and transportation. Other methods include “franchises, sale of assets, vouchers, deregulation, private donations, volunteerism, and service shedding” (Chi, 2000, pp. 22-23).

The rule of thumb for whether a government operation should be privatized is to open the Yellow Pages and see if the government holds a monopoly. If there are private companies that perform the same service as the government, then the government should divest or sell its assets to ensure a competitive playing field. If the government service is not in that directory, then management must determine the cost effectiveness to either maintain public control or contract the service out.

➤ **Where did privatization come from?**

Privatization emerged in 17th century England, with the enclosure of parcels of land previously considered to be common (Kahn, 2005, pp. 201-202). At the time, common people lived off public land given to them by the king. As time went on, rich nobles, in a capitalistic opportunity, seized land for their own uses by enclosing land with the equivalent of today's fences.

When the Massachusetts Bay Company's charter was signed by King Charles I with the assumption that the company would initiate England's first venture in the New World, the king inadvertently forgot to require the company directors live in England. As a result, the Puritans essentially were privatized, embarked for America and founded a theocracy, which led to the beginning of colonial self-governance (Kahn, pp. 207-208).

Privatization re-emerged in Massachusetts in the late 1960s with the sale of several mental health institutions and youth service programs (Wallin, 1997), partially due to state officials' suit against filmmaker Frederick Wiseman for his documentary about the Bridgewater correctional prison. By the early 1980s, the government began replacing public employees with private service providers to increase public services, lower costs, and allegedly lower taxes (Sclar, 2004, p. 3).

LEGISLATIVE HISTORY

Upon election in 1991, William Weld became the first Republican Governor in Massachusetts in 17 years. A fiscal conservative and social moderate, Weld sought to gain control over an executive branch that had progressively grown since the Sargent Administration in 1974 (Wallin).

Six months into the job, Weld charged his cabinet secretaries and agency directors to select privatization projects that the Administration could target. Wallin writes that the memo, circulated by the Secretary of Administration & Finance, stated three criteria were required when selecting projects: the privatized service needed to be defined in an RFP; there needed to be performance standards attached to each project; and there needed to be multiple vendors who could offer the service, for fear of reducing competition.

While Weld's senior staff investigated options, public employee unions stood up to oppose his privatization efforts. The American Federation of State, County and Municipal Employees argued that alleged cost savings from privatized services failed to include training costs, decreased productivity from employee turnover, decreased government accountability, caused potential bankruptcy of private firms, and may have led to gubernatorial favoritism for business groups that were politically connected (Wallin).

Over the next two and a half years, Weld privatized 36 government services and saved \$273 million (Pioneer Institute, Policy Dialogue, 2002). Under his leadership, the state left the business of managing state hospitals, prison food services, and ice rinks. The powerful Democratic-controlled legislature, playing the party ticket, disapproved and fought the governor's efforts.

A leading opponent was Senator Marc Pacheco, who, on behalf of his constituents, had become increasingly disappointed of the state's plans to privatize mental health services in his region. A year earlier, Pacheco had drafted a bill to regulate privatization through an internal cost analysis.¹ Aided by Senator Joan Menard, Pacheco designed the bill with a series of steps to provide a roadmap to taxpayer savings, and make it difficult for private companies to thrive in what became an anti-competitive market. Pacheco was concerned that the costs of unemployment, health insurance, and retraining of displaced workers were absent from prior privatized transactions (Wallin).

After a series of bill drafts, the Senate Ways & Means Committee submitted The Taxpayer Protection Act of 1993 (S. 1664) in May 1993, with a companion bill in the House. The bill authorized the constitutionally-elected State Auditor to have veto power over any privatization proposal valued over \$100,000 that emanated from a state agency. Both houses passed their bills in November 1993; Weld vetoed the bills; the legislature overrode the veto; and Chapter 296 of the Acts of 1993 became the law of the land. In the Massachusetts General Laws, the statute can be found in Chapter 7, Sections 52-56.

Ten years after the law's passage (and four years ago), Governor Mitt Romney proposed a repeal. The still Democratic-controlled legislature (including Senator Pacheco) rejected the idea of repeal but agreed to enact two slight changes that were amended into the fiscal 2004 budget. One change increased the contract ceiling from \$100,000 to \$200,000², to more accurately reflect the cost of living adjustments a decade later; and the other change required the state auditor to apply a more efficient standard for cost accounting.

¹ This bill was partially based on a 1983 federal Office of Management and Budget memo, Circular #A-76, which established federal policy on privatization. Source: <http://www.whitehouse.gov/omb/circulars/a076/a076.html>

² The threshold is currently set at \$210,000, effective January 1, 2007. This slight increase is reflective of inflation.

STATUTORY REQUIREMENTS

In March 1994, the state auditor's office circulated a 43-page handbook (Guidelines) that outlined the process for agencies to adhere to the law. Among the requirements, agencies are mandated to prepare a written statement that details the scope of the privatization contract, which serves as the basis for the solicitation of competitive bids. The guidelines specify agencies seeking to privatize a service are asked to spell out and compare five performance metrics in the areas of quality, quantity, timeliness, effectiveness, and cost. Minimum wage and health insurance coverage rates must be detailed, so that a private vendor's payroll for any employee is no less than the equivalent public employee payroll.

Detailed cost accounting is also required in a comprehensive statement, documenting the contract price supported by a bid; contract administration costs, such as operational monitoring and quality assurance, and direct and indirect costs; transition costs relating to one-time or recurring costs, including retirement benefits, unemployment benefits, severance pay, lease termination, asset disposition, and any cost savings; lost tax revenue if the private company opts to perform services outside Massachusetts; and state income taxes.

The above accounting is specified for the designated bidder contract. Agencies must also provide matching data but on an estimated, or avoidable, cost if performed in-house. The auditor's guidelines specify five steps to determining this avoidable cost:

1. Is the agency operating at full efficiency and effectiveness?

The manager must analytically evaluate the in-house workforce, materials, facilities, and equipment, and its procedures for service delivery.

2. Can the agency calculate an in-house cost estimate to match the bidder's services?

The manager must detail the agency's operating budget, depreciating capital expenditures, excluding supply expenditures, reviewing cost functions, and cross-referencing line items. The goal is to prepare a cost estimate of performing the same job in-house as could be done privatized.

3. How are direct and indirect costs allocated?

The guidelines specify direct costs only benefit the function being privatized, including personnel costs, fringe benefits, materials and supplies, equipment depreciation, utilities, rent, maintenance and repair, casualty or liability insurance losses, and other costs. Indirect costs support the function and are considered overhead. These include department, executive office, and central service costs, such as administrative personnel costs and employee relations activity costs.

4. Which in-house costs are avoidable?

This is the part of the statute that upsets its opponents, such as the Pioneer Institute. The avoidable cost is the amount an agency can save by privatizing a function, which for all intents and purposes here is its total indirect cost. The guidelines specify a matrix of resource reallocation efficiency, resource allocation time, and the size of the privatizing service as factors to determine the avoidable cost. The argument is that agencies consider total costs when opting to privatize, not overhead reduction.

5. Document the avoidable indirect costs.

There are formulas to follow, involving supervisory and support personnel being eliminated as a result of the privatization contract, computation of material and supply costs, etc.

In order for the state auditor to justify the agency using a privatization contract, there must be a cost savings built into the comparison between estimated in-house costs and designated bidder costs. Because agency employees are allowed to bid against private vendors, essentially, as managed competition, the auditor could award the contract to the agency. Alternatively, if the bidder's cost is higher than the in-house cost, the contract would be rejected.

APPROVED AND REJECTED CONTRACTS

Based on available data, the state auditor reviewed 10 privatization contracts between 1993 and 2006. The auditor approved eight cases and rejected two.

	Date	Case	Approved/Rejected
1	1/96	Department of Employment & Training – Storage and Retrieval of Records	Approved
2	6/96	MBTA – Real Estate and Property Management	Approved
3	8/96	Massachusetts Highway Department – Highway Maintenance in Central and Western Massachusetts	Approved
4	9/96	Holyoke Community College – Food Services	Approved
5	12/96	MBTA – Bus Shelter Maintenance	Rejected
6	12/96	Massachusetts Highway Department – Highway Maintenance in Worcester County	Approved
7	6/97	MBTA – Operation and Maintenance of Bus Routes Originating in Quincy and Charlestown	Rejected
8	6/00	University of Massachusetts – University Store	Approved
9	4/04	Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority – Passenger Ferry Service between New Bedford and Martha’s Vineyard	Approved
10	8/06	Soldiers’ Home in Holyoke – Pharmacy Services	Approved

Source: Sclar, 2004, p. 10; personal communication with state auditor’s office, April 24, 2007

ASSESSMENT OF THE CURRENT REALITY

In any strategic plan, it is important to identify an organization's internal strengths and weaknesses, and external opportunities and challenges. These four lists are a tool known as a SWOC analysis (or SWOT, if a challenge is called a threat) and can be effectively used by planning teams to gain insight into how strategic and operational issues may be resolved (Bryson, pp. 124-125).

The external environment is further documented by modeling trends, assumptions, and implications (Seymour, 2006, p. 3). Trends are in the measurable statistics, looking at privatization at a national level. The future trajectories of the trends are assumptions, and their short- and long-term impacts are implications. In this paper, many more trends are listed than assumptions or implications, for trends characterize emerging data that is easily perceived with incalculable perceptions of the market (Jennings, 2000, pp. 39-46).

Strengths:

- The law forces agency directors "to consider the impact of contracting out" (Sclar, 2004, p. 36) before making a decision.

- Agencies must account for avoidable in-house operational costs and compare them to contractual operation costs. To this point, John Parsons, the general counsel for the state auditor's office said, "We believe avoidable cost accounting most accurately reflects the change from public to private; this method is what is employed in other states with similar statutes" (personal communication, April 24, 2007).

- Agencies with good management and good management processes are rewarded by the auditor with an approved contract.

- The state auditor, as a constitutionally-elected official, is representative of an “independent or bipartisan oversight” (Wallin).

- An agency’s size is not a factor to receive an approved privatization contract.

- Agencies must submit comprehensive written statements and conduct rigorous cost analyses, forcing them to think like private firms (Sclar, 2004, p. 36).

The privatization law has created an atmosphere where state agencies are forced to think like private firms as opposed to assuming that a private provider working under contract will automatically solve any problem at a lower cost. It compels state agencies to think through the pitfalls that lie ahead and prods them to be sure they are making the highest and best use of scarce resources in difficult fiscal times.

Source: Sclar, 2004, p. 5

Weaknesses:

- The state auditor has veto power over all privatization contracts.

- The state auditor does not need to tell an agency why a contract is rejected.

- The law requires agencies to prepare in-house cost accounting “in the most cost-efficient manner” (MGL §7.54(4)).

- Collective bargaining unions seeking to compete with private vendors in bid solicitations are not required to engage in performance monitoring (Pioneer Institute, White Paper, p. 23).

Opportunities:

- Force agencies to be accountable for their own budgets.
- Modify the role of the auditor from approving contracts to only reviewing contracts that violate the law (Pioneer Institute, White Paper, p. 23).
- Contractual monitoring is necessary to assess private vendors and protect the government's assets (Pioneer Institute, White Paper, p. 23).
- Because contracting is a costly enterprise, a trial period should be instituted before awarding the service delivery (Sampford, p. 254).
- Establish an appeals process that objectionable contracts are paid out of both the auditor's and the appealing agency's budgets (Pioneer Institute, White Paper, p. 23).
- Let the appeals case be heard by magistrates at either the Division of Administrative Law Appeals or at the Massachusetts Supreme Court (personal communication, Joan Freiman-Fink, DALA Administrative Magistrate, April 24, 2007).

Challenges:

- Considering the statute only protects replaced public employees as the result of privatization, how can the statute protect future potential terminated employees?
- Despite the statutory requirement for detailed unemployment costs for terminated public employees, the state's unemployment rate could increase. Moreover, the costs associated with unemployment insurance could increase. Is the state prepared?
- The investor of a privatized public program may cease funding the agency and begin funding the vendor. In this sense, privatization is viewed as a type of disinvestment and economic loss. Sampford takes this line of reasoning and suggests government agencies may be forced to compete against each other for the same funding (p. 257).
- A privatized firm may not share any loyalty to Massachusetts or its citizens (Kahn, 2005, p. 4). The statute requires the bidder to ascertain state income taxes lost as the result of shifting business outside the state. With a future outlook toward globalization and the current increase in off-shoring, this is more practical to consider.
- There is potential of public employee corruption by favoring political allies as designated bidders. These hypothetical political allies could become campaign contributors (Sampford, p. 254), which has ethical consequences.

- Because the state auditor's objection is binding, agencies are not barred from filing legal suits. The MBTA issued such a suit over the constitutionality of a decision, but lost the appeal.
- There are risks associated public contracting, in the wake of bribery and price fixing scandals at Enron and Ameriquest.

Trends:

- A LexisNexis search of the keyword "privatization" in 2005 resulted in over 20,000 articles in major U.S. periodicals; in 1986, the same keyword search indicated only 957 articles (Reason Foundation, 2006).
- In April 2007, CEO Magazine ranked Massachusetts as the 2nd worst state to conduct business. In the same op-ed in the Boston Business Journal, the state was ranked 47th for having a fair and predictable state tax environment, and 46th for its negative influence of Department of Revenue policies on location and expansion decisions.
- In a 2002 report, the Syracuse University Government Performance Project indicated that only 7 of the 50 states used cost analysis for making decisions about public contracting.
- Between 1997 and 2002, according to the Council on State Governments, 60 percent of state agencies around the country privatized essential services, and 55 percent of agencies

predicted to privatize in the next five years (Pioneer Institute, Policy Dialogue).

- Geoffrey Segal of the Reason Foundation claims that anywhere between 13 and 60 percent can be saved through privatizing the maintenance of public-owned buildings, and 10 to 15 percent can be saved in prison operations (Pioneer Institute, Policy Dialogue).

- According to a 1997 survey by the Council on State Governments (Chi, p. 21), 43 percent of state agencies privatized less than 5 percent of programs and services; and 31 percent privatized more than 15 percent. These numbers indicate a disparity in privatized services, but they also indicate a growing trend of contracting out state services to private vendors.

- At first glance, one would think that privatization is favored by Republicans, who seek to downsize government, and opposed by Democrats, who seek to expand government's reach and reduce taxes. If only that was so. While the Pacheco Law was sponsored by a Democratic senator under a Republican governor, research indicates privatization cuts across political party lines.

With the exception of President George H. W. Bush, every president since Ronald Reagan has embraced the concept and cut billions off the federal budget. The Reason Foundation, in its 20th annual privatization report, showcases President Reagan who established a presidential commission on privatization, privatized Conrail, and sold two airports to a private authority. In the Clinton Administration, over \$10 billion was saved

by privatizing petroleum reserves, airport control towers, and military base functions. And the incumbent President George W. Bush adopted “competitive sourcing,” by conducting over 1,100 public-private competitions for 41,000 federal jobs, generating over \$5 billion in cost savings.

Assumptions:

- Just because everyone else is doing it, doesn't mean Massachusetts should do it too. This state is not going to win a privatization battle with Illinois or Kentucky, for instance, because both of those states are contracting out non-monopolistic services like crazy.
- If Governor Romney hadn't proposed amending the law in 2003, would the legislature (or any other stakeholder) have stepped forward with a proposal?³
- The political climate is partially to blame. The Pacheco Law was born during the first Republican gubernatorial administration in Massachusetts in 17 years, and while the law was briefly amended 10 years later, the tables have since shifted. In 2007, Massachusetts has a Democratic Governor and a Democratic-controlled legislature, which is not to say pro-privatization measures won't occur but it won't be as easy as before.
- As privatization cases increase, private vendors may recognize their workforce lacks the specialized knowledge held by public employees.

³ In “Sharpening Your Business Acumen” by Ram Charan, *Strategy+Business*, 2006, the author states the only way to rethink a focus is through the lenses of other people. Who are those other people here?

Implications:

- There is a shortage of available data relating to the Pacheco Law since 2002-2004. Similar data does not exist relating to privatization attempts or awards in Massachusetts state government.

- At a 2002 public forum (Pioneer Institute, Policy Dialogue, 2002), John Parsons, general counsel and director of privatization for the state auditor's office, said privatization efforts in Massachusetts amount to nearly 25 percent of the state budget, citing savings of \$3.5 billion for a purchase of human service system and the majority of the Medicaid program.

- While many believe privatization leads to increased efficiency and consumption by production gains with the same workforce, Sampford (pp. 256-257) implicates a public agency could be weakened by a workforce reduction.

- Policy managers in agencies need to be trained on cost accounting methods and principles (Mass. House Post Audit and Oversight Bureau, 1993).

STRATEGIC ISSUES

1. Should the Pacheco Law be amended in some form, or repealed as a whole, taking into account the viewpoints of proponents and opponents and considering 14 years elapsed since the bill became law?
2. Should the State Auditor, the Secretary of Administration & Finance, the Governor's office, and the Department of Revenue collectively weigh in on amending or repealing the Pacheco Law?
3. Should a special commission or task force be created to investigate viable responses to this strategic plan? If so, what should the structure be and who should decide or define that structure?
4. Should a dialogue be initiated between academic and business leaders who support and oppose the Pacheco Law, to identify agreed-upon areas for modification?
5. What are the steps needed to modify the Pacheco Law from using avoidable cost accounting to using full cost accounting?
6. If it is agreed that state agencies be given the right to appeal rejected privatization contracts, what entity should best hear such appeals—the Division of Administrative Law Appeals or the Massachusetts Supreme Court?

7. If it is agreed that state agencies be given the right to appeal rejected privatization contracts, should the court and attorney fees be deducted equally from both the agency and auditor's office?
8. What steps are needed for a state agency to maintain public control over privatized services?
9. Aside from the routine duties of the State Auditor, what steps are needed for a state agency to monitor its privatized contract?
10. Is there any concern that incoming state legislators may be ignorant about the Pacheco Law and its successes and failures? If so, who should be charged with instructing them? If not, why not?
11. If privatization saves money, then what will be in place if the quality of privatized service decreases?
12. Should agencies, when preparing to solicit privatization bids, specify public contractors to have apprenticeship programs and minority hiring, as their indirect costs?
13. Should Massachusetts have a privatization champion to advise all parties on the viability of privatizing operations? Should this person be a public official or a private leader?

14. Among other duties, the state auditor's office is tasked with contract monitoring. How can agencies, with approved privatization contracts, ensure the managerial oversight, administrative monitoring, and enforcement of the contract (National Research Council, 2002, p. 102)?

15. Regardless if an agency is involved in public contracting or managed competition, how can an agency develop cost advantage (Swayne, Duncan & Ginter, 2006, p. 105) to distinguish its operations from other organizations, whether another agency or a private vendor?

STRATEGIC ALTERNATIVES

It is construed that the Pacheco Law is an instrument and management tool of the organization known as the Commonwealth of Massachusetts. While smaller organization can afford to sequentially proceed through directional, adaptive, market entry, competitive, and implementation strategies, the Massachusetts government, because of its vast geography and population, is better suited utilizing combination strategies.

- **Divestiture and liquidation** are corporate level strategies that the government, as a whole organization, already uses to sell off assets. These contraction strategies (Swayne, Duncan & Ginter, pp. 244-245) are better utilized as part of a legislative Article 87 reorganization.

- **Internal ventures** could be pursued by privatizing agencies. If the privatized service encompassed facets of different service areas, it is feasible to vertically integrate the unrelated parts together. The agency's culture, though, may prove unsuitable for such a strategy.

CONCLUSION

This strategic plan should be reviewed by key stakeholders in both the internal and external environments of the law. The purpose of the review would be to note any consensus or confusion over the strategies, but also to learn if additional content is necessary to go forward. This plan would be presented as a draft document, and after any comments, it would be finalized for final review and implementation. The review committee might include public and private union directors, project managers in different executive branch departments and nonprofit organizations.

Personal communications with key stakeholders indicate a common desire to change the law, but a frustration with the political frame of current leadership. It's been said a Democratic governor could enable privatization contracts as much as a Republican governor, but the popular opinion is State House officials would be apathetic to enacting any changes any time soon.

This strategic plan should be revisited in the future, when the time is right.

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APPENDIX A: MASS. GENERAL LAW §7.52-56

GENERAL LAWS OF MASSACHUSETTS

CHAPTER 7. EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE.

Chapter 7: Section 52. Privatization contracts; need to regulate

The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest. To ensure that citizens of the commonwealth receive high quality public services at low cost, with due regard for the taxpayers of the commonwealth and the needs of public and private workers, the general court finds it necessary to regulate such privatization contracts in accordance with sections fifty-three to fifty-five, inclusive. The general court does not intend to restrict the use of community facilities to provide care for clients of state agencies, if any privatization contract relating to such facilities otherwise complies with the provisions of said sections fifty-three to fifty-five, inclusive.

Chapter 7: Section 53. Definitions

As used in sections fifty-two to fifty-five, inclusive, the following words shall have the following meanings:—

“Agency”, an executive office, department, division, board, commission or other office or officer in the executive branch of the government of the commonwealth, the Massachusetts Bay Transportation Authority, the Massachusetts Turnpike Authority, the Massachusetts Port Authority and the Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority.

“Business day”, any calendar day excluding Saturdays, Sundays, and legal holidays.

“Dependent”, the spouse and children of an employee if such persons would qualify for dependent status under the Internal Revenue Code or for whom a support order has been or could be granted under chapter two hundred and eight, two hundred and nine, or two hundred and nine C.

“Privatization contract”, an agreement or combination or series of agreements by which a non-governmental person or entity agrees with an agency to provide services, valued at \$200,000, but as of January 1 each year, the amount shall increase to reflect increases in the consumer price index calculated by the United States Bureau of Labor Statistics for all urban consumers nationally during the most recent 12 month period for which data are available or more, which are substantially similar to and in lieu of, services theretofore provided, in whole or in part, by regular employees of an agency. Any subsequent agreement, including any agreement resulting from a rebidding of previously privatized service, or any agreement renewing or extending a privatization contract, shall not be considered a privatization contract. An agreement solely to

provide legal, management consulting, planning, engineering or design services shall not be considered a privatization contract.

Chapter 7: Section 54

No agency shall make any privatization contract and no such contract shall be valid unless the agency, in consultation with the executive office for administration and finance, first complies with each of the following requirements:—

(1) The agency shall prepare a specific written statement of the services proposed to be the subject of the privatization contract, including the specific quantity and standard of quality of the subject services. The agency shall solicit competitive sealed bids for the privatization contracts based upon this statement. The day designated by the agency upon which it will accept these sealed bids shall be the same for any and all parties. This statement shall be a public record, shall be filed in the agency and in the executive office for administration and finance, and shall be transmitted to the state auditor for review pursuant to section fifty-five. The term of any privatization contract shall not exceed five years. No amendment to a privatization contract shall be valid if it has the purpose or effect of avoiding any requirement of this section.

(2) For each position in which a bidder will employ any person pursuant to the privatization contract and for which the duties are substantially similar to the duties performed by a regular agency employee or employees, the statement required by paragraph (1) shall include a statement of the minimum wage rate to be paid for said position, which rate shall be the lesser of step one of the grade or classification under which the comparable regular agency employee is paid, or the average private sector wage rate for said position as determined by the executive office for administration and finance from data collected by the division of employment and training and the division of purchased services. Every bid for a privatization contract and every privatization contract shall include provisions specifically establishing the wage rate for each such position, which shall not be less than said minimum wage rate as defined above. Every such bid and contract shall also include provisions for the contractor to pay not less than a percentage, comparable to the percentage paid by the commonwealth for state employees, of the costs of health insurance plans for every employee employed for not less than twenty hours per week pursuant to such contract. Such health insurance plans shall satisfy the requirements of the fifth paragraph of section nine of chapter one hundred and eighteen F, and shall provide coverage to the employee and the employee's spouse and dependent children. Each contractor shall submit quarterly payroll records to the agency, listing the name, address, social security number, hours worked and the hourly wage paid for each employee in the previous quarter. The attorney general may bring a civil action for equitable relief in the superior court to enforce this paragraph or to prevent or remedy the dismissal, demotion or other action prejudicing any employee as a result of a report of a violation of this paragraph.

(3) Every privatization contract shall contain provisions requiring the contractor to offer available employee positions pursuant to the contract to qualified regular employees of the agency whose state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor. Every such contract shall also contain provisions

requiring the contractor to comply with a policy of nondiscrimination and equal opportunity for all persons protected by chapter one hundred and fifty-one B, and to take affirmative steps to provide such equal opportunity for all such persons.

(4) The agency shall prepare a comprehensive written estimate of the costs of regular agency employees' providing the subject services in the most cost-efficient manner. The estimate shall include all direct and indirect costs of regular agency employees' providing the subject services, including but not limited to, pension, insurance and other employee benefit costs. For the purpose of this estimate, any employee organization may, at any time before the final day for the agency to receive sealed bids pursuant to paragraph (1), propose amendments to any relevant collective bargaining agreement to which it is a party. Any such amendments shall take effect only if necessary to reduce the cost estimate pursuant to this paragraph below the contract cost pursuant to paragraph (6). Such estimate shall remain confidential until after the final day for the agency to receive sealed bids for the privatization contract pursuant to paragraph (1), at which time the estimate shall become a public record, shall be filed in the agency and in the executive office for administration and finance, and shall be transmitted to the state auditor for review pursuant to section fifty-five.

(5) After consulting any relevant employee organization, the agency shall provide adequate resources for the purpose of encouraging and assisting present agency employees to organize and submit a bid to provide the subject services. In determining what resources are adequate for this purpose, the agency shall refer to an existing collective bargaining agreement of a similar employee organization whose members perform the subject services, if available, which agreement provides similar resources in the same or other agencies; provided, however, that if no such collective bargaining agreement exists, the agency shall refer to any existing collective bargaining agreements providing such resources, and shall provide such resources at the minimum level of assistance provided in said agreements. The agency shall consider any such employee bid on the same basis as all other bids. An employee bid may be made as a joint venture with other persons. Subclause (h) of clause Twenty-sixth of section seven of chapter four shall apply with respect to all employee bids. Sections four, five and six of chapter two hundred and sixty-eight A shall not apply to the activities of agency employees conducted pursuant to this paragraph.

(6) After soliciting and receiving bids, the agency shall publicly designate the bidder to which it proposes to award the contract. The agency shall prepare a comprehensive written analysis of the contract cost based upon the designated bid, specifically including the costs of transition from public to private operation, of additional unemployment and retirement benefits, if any, and of monitoring and otherwise administering contract performance. If the designated bidder proposes to perform any or all of the contract outside the boundaries of the commonwealth, said contract cost shall be increased by the amount of income tax revenue, if any, which will be lost to the commonwealth by the corresponding elimination of agency employees, as determined by the department of revenue to the extent that it is able to do so.

(7) The head of the agency and the commissioner of administration shall each certify in writing to the state auditor, that:

- (i) he has complied with all provisions of this section and of all other applicable laws;
- (ii) the quality of the services to be provided by the designated bidder is likely to satisfy the quality requirements of the statement prepared pursuant to paragraph (1), and to equal or exceed the quality of services which could be provided by regular agency employees pursuant to paragraph (4);
- (iii) the contract cost pursuant to paragraph (6) will be less than the estimated cost pursuant to paragraph (4), taking into account all comparable types of costs;
- (iv) the designated bidder and its supervisory employees, while in the employ of said designated bidder, have no adjudicated record of substantial or repeated willful noncompliance with any relevant federal or state regulatory statute including, but not limited to, statutes concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection and conflicts of interest; and
- (v) the proposed privatization contract is in the public interest, in that it meets the applicable quality and fiscal standards set forth herein.

A copy of the proposed privatization contract shall accompany the certificate transmitted to the state auditor.

No provision of this section shall apply in any circumstance to the extent that the provision is inconsistent with section thirty-nine M of chapter thirty or sections twenty-six to twenty-seven H, inclusive, or sections forty-four A to forty-four J, inclusive, of chapter one hundred and forty-nine.

Chapter 7: Section 55

(a) An agency shall not make any privatization contract and no such contract shall be valid if, within thirty business days after receiving the certificate required by section fifty-four, the state auditor notifies the agency of his objection. Such objection shall be in writing and shall state specifically the state auditor's finding that the agency has failed to comply with one or more requirements of said section fifty-four, including that the state auditor finds incorrect, based on independent review of all the relevant facts, any of the findings required by paragraph (7) of said section fifty-four. The state auditor may extend the time for such objection for an additional period of 30 business days beyond the original 30 business days by written notice to the submitting agency stating the reason for such extension.

(b) For the purpose of reviewing the agency's compliance and certificate pursuant to said section fifty-four, the state auditor or his designee may require by summons the attendance and testimony under oath of witnesses and the production of books, papers and other records relating to such review. All provisions of law relative to summonses in civil cases, including the manner of service, the scope and relevance to such review, and the compensation of witnesses who are

not state employees, shall apply to such summonses. Such summonses shall be enforced pursuant to section ten of chapter two hundred and thirty-three.

(c) The state auditor may adopt regulations and prescribe forms to carry out the provisions of this section and section fifty-four.

(d) The objection of the state auditor pursuant to subsection (a) shall be final and binding on the agency, unless the state auditor thereafter in writing withdraws the objection, stating the specific reasons, based upon a revised certificate by the agency and by the commissioner of administration and upon the state auditor's review thereof.

Chapter 7: Section 56

Payments by the commonwealth, or by any agency, authority or political subdivision thereof, pursuant to a contract with any person or entity shall not be made for the costs of any attorney, consultant or other person to advise, consult or provide any other service to such contracting person or entity relative to persuading employees thereof to support or oppose any organization of said employees or any other employee self-organization or concerted activity for mutual aid or protection. This section shall not apply to the costs of attorneys or consultants to assist in collective bargaining with a union or other employee organization recognized as said employees' bargaining agent or to administer a collective bargaining agreement.