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Written Testimony for Arkansas Senate Committee on State Agencies and Governmental Affairs and
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Joint Meeting

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Distinguished Members of Arkansas Senate and House Committees on State Agencies and Governmental Affairs:

In the Public Interest is a non-profit resource center dedicated to responsible contracting. We are committed to equipping citizens, public officials, advocacy groups, and researchers with the information, ideas, and other resources they need to ensure that public contracts with private entities are transparent, fair, well-managed, and effectively monitored, and that those contracts meet the long-term needs of communities.

ITPI does not believe that outsourcing public services is an inherently bad thing. For example, contracting can be an important tool for government to bring in specialized expertise if that capacity does not exist in the public sector. However, to protect taxpayers, it must be done right, done well and done responsibly with the upmost transparency, which is at the heart of our policy recommendations today.

We've reviewed dozens if not hundreds of government contracting laws and private sector outsourcing practices. The recommendations that I'll share today represent best practices in contracting— in both private sector contracting and government outsourcing, focused on the important themes of accountability and transparency in contracting. It's critical to keep in mind our common goal of providing high quality services in the most cost effective way regardless of who is providing the service – public employees, large corporations, or smaller businesses seeking to grow.

Demonstrate a commitment to transparency in the procurement process.

Regularly post online how much taxpayers are spending on private contracts and how many workers are employed by those contracts - the same way government must report these things for public work.

First, Arkansas should collect and make publicly available how much taxpayers are spending on private contracts and how many workers are employed by those contracts - the same way the state must report these things for public work. Tracking this spending and personnel data, which all public agencies do for their own workforce, would allow policymakers and taxpayers to better understand where tax dollars are going and the level of service they can expect. Too many state governments do not keep track of this information, making it difficult to assess how much of its budget it is spending on contracting and

other important trends because aggregate data does not exist. Collecting this data will help the state better compare the costs and efficiencies of contracting versus public provision of services.

Require any company being paid with tax dollars to open its books and meetings to the public, just as government does.

Second, the state should require any company being paid with tax dollars to open its books and meetings to the public, just as government does. When a contractor performs a public function, it should be required to open its books and meetings to the public, just as any public agency would be required to under state sunshine laws. This allows taxpayers to understand how public dollars are being spent and understand important decisions that a contractor makes related to important public services and assets. Without strong sunshine laws that fully apply to government contractors, companies will continue to operate in the dark, without public oversight. Meaningful oversight dictates that the county must have access to important information from contractors related to the public services they are providing.

Just last fall in Arkansas, a *Jonesboro Sun* journalist asked the CEO of Tiger Correctional Services, a company that contracts for jail commissary services with the Craighead County Sheriff's Department, about information regarding the company's monthly sales and profits related to the contract. The chief executive officer of the company told the reporter, "That's none of your damn business."¹ Tiger's attorneys have asserted that none of the company's records are subject to public open records laws, even though all financial information related to commissary services was public when it was operated by the Sheriff's Department. Strong sunshine laws that explicitly encompass government contractors can prevent once public information from being lost.

In another recent example, the Jenkinsville Water Company in South Carolina, failed to pay state employee payroll taxes, lost millions of gallons of water, and could not account for tens of thousands of dollars. Concerned about mismanagement of funds, residents and journalists submitted open records requests to the company seeking copies of financial records, including audited financial statements and budgets. The company refused to comply.²

State Senator Creighton Coleman (D-Fairfield) sought an opinion from South Carolina Attorney General Alan Wilson to determine whether the company was bound by the state's open records laws. The Attorney General's office stated that the Jenkinsville Water Company had to disclose the records. But even after the opinion was issued, the company refused to hand over documents, leading to a lawsuit filed by The Independent Herald newspaper.³

Additional recommendations related to transparency and accountability

In the Public Interest makes the following additional recommendations to ensure transparency and accountability of government contracts.

Trust but verify. Maintain a rigorous commitment to accountability.

¹ Roy Ockert, "FOIA issue arises when private entity becomes entwined with public agency," *Jonesboro Sun*, October 28, 2013. <http://arkansasnews.com/roy-ockert/foia-issue-arises-when-private-entity-becomes-entwined-public-agency>

² Jill Cincotta, "Questions Fly at Water Board Meeting," *The Herald Independent*, January 19, 2012. http://www.heraldindependent.com/view/full_story/17189711/article-Questions-Fly-at-Water-Board-Meeting?

³ Jill Cincotta, "Jenkinsville Water Co. Not in Compliance, CPA Says," *The Herald Independent*, February 11, 2011.

Too often, in both public and private sectors, contractors overpromise services and under-estimate costs in their bids, leading to cost overruns, expensive fixes by government employees and other problems. Many of you have probably hired contractors to paint your house, add a porch or some other house project. And halfway through the contractor says they need more money because they didn't anticipate some problem.

Arkansas can take the initial step of holding contractors accountable by not awarding contracts to companies that break laws. Not only does this give the state a means to reprimand companies that fail to abide by public laws, but also helps weed out contractors that may not have good judgment. States should make sure that they understand the track record of a company before outsourcing public functions. If a company has evaded taxes or broken laws, it should not be allowed to run critical services. If a contractor breaks the laws while engaged in a contract, the governmental entity should be able to bar the company from receiving future contracts. State and local governments that require prospective bidders to provide information about their company track record and policies, and use this information to identify "responsible" bidders, report that contracts result in better outcomes – higher quality, more reliable services, reduced cost overruns and project delays, and reduced compliance and litigation costs.⁴

Second, in the worst cases, the state should be able to cancel the contract if the company doesn't live up to its promises of quality and cost savings. Governments should not be locked into contracts with companies that fail to deliver.

Require excellent in-house contract management staffing

Hiring adequate staff with procurement expertise is a must -- to design performance specifications, supervise contractors, and to ensure taxpayers are getting what they paid for. Again, too often governments outsource important services but fail to assign enough monitoring staff. It's a basic and universal truth – whether contracting for public services or for a room addition to your home – if you don't watch, problems happen. Arkansas should ensure that agencies have rigorous contract management and monitoring procedures and require sufficient skilled in-house contract administration staffing.

In one recent example, an audit report by SC&H Group uncovered a host of problems with for-profit companies contracted by the North County Transit District in California, which is responsible for the bus and train systems in the northern region of San Diego County.⁵

Auditors found that private security guards did not have critical required training, private bus drivers did not complete drug and alcohol testing, bus performance was not tracked, and contractors did not pick up disabled passengers in a timely manner. The report concluded that "there are no clear documented requirements as to how contracts are monitored, communicated, and reported." As a result of the agency's lack of adequate oversight of their private contracts, serious problems occurred that jeopardized public safety.

⁴ David Madland, Karla Walter, Paul Sonn, Tsedeye Gebreselassie, "Contracting that Works: A Toolkit for State and Local Governments," Center for American Progress Action Fund and National Employment Law Project, 2010.

⁵ SC&H Group, "Review of Contracts Administration Performed by North County Transit District," September 14, 2012. <https://www.documentcloud.org/documents/698758-sept-2012-review-of-contract-administration.html>

Ensure the state can hold contractors accountable for their promises of cost savings

Business is in business to make a profit. It's the American way and there is nothing inherently wrong with that. But if a private entity promises to provide public services better, faster and cheaper, it's critical to do a thorough analysis of costs before decisions are made and after services are performed. That means all contract costs — including the costs of the contracting process, robust contract management, effects of service failures, change orders and potential cost overruns — must be included in the decision-making process and be monitored carefully.

Our proposal requires a thorough and rigorous analysis of costs, impacts, and risks before contracting decisions are made. A 10% cost savings requirement is one of the most important ways to ensure success. A number of states and cities across the country include these thresholds as a way to establish a clear and objective metric to guarantee that the decision to outsource will actually generate savings. For example, Maryland requires as much as 20%, Michigan as high as 25%, the city of San Diego has a 10% savings requirement.

Successful contracting is difficult – by ensuring maximum transparency from the start, providing expert contract accountability and oversight, and retaining control at all stages of the process, Arkansas can increase the probability of success. In The Public Interest solely focuses on public contracting. We are happy to lend our expertise and resources in helping Arkansas craft policy to strengthen its procurement process. Thank you for your time and consideration.