

CHAPTER 299

GOVERNMENT - STATE

SENATE BILL 04-171

BY SENATOR(S) Teck, Owen, Reeves, Arnold, Chlouber, Fitz-Gerald, Grossman, Isgar, Keller, Phillips, Tupa, and Veiga;
also REPRESENTATIVE(S) Plant, Witwer, Young, Cadman, Carroll, Fairbank, Hoppe, Rippey, Smith, Spradley, Weissmann,
Williams S., and Williams T.

AN ACT

CONCERNING CONTINGENCY-BASED CONTRACTS, AND, IN CONNECTION THEREWITH, ALLOWING A STATE AGENCY TO ENTER INTO A CONTINGENCY-BASED CONTRACT ONLY WHEN SPECIFICALLY AUTHORIZED TO DO SO BY LAW OR WHEN THE OFFICE OF STATE PLANNING AND BUDGETING APPROVES THE CONTRACT.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 17 of title 24, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW PART to read:

**PART 2
STATE CONTINGENCY-BASED CONTRACTS**

24-17-201. Short title. THIS PART 2 SHALL BE KNOWN AND MAY BE CITED AS THE "STATE CONTINGENCY-BASED CONTRACTS ACT".

24-17-202. Legislative declaration. (1) THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT:

(a) UNDER CERTAIN CIRCUMSTANCES, CONTINGENCY-BASED CONTRACTS CAN BENEFIT THE STATE BY REDUCING STATE AGENCIES' FIXED CONTRACTUAL COSTS AND LINKING STATE AGENCY EXPENDITURES TO THE ACHIEVEMENT OF DESIRED RESULTS, BUT CONTINGENCY-BASED CONTRACTS CAN ALSO HAVE UNINTENDED ADVERSE CONSEQUENCES THAT IMPACT STATE FINANCES IN WAYS THAT A CONTRACTING STATE AGENCY MIGHT NOT FORESEE.

(b) CONTRACTING IS A FUNCTION OF THE EXECUTIVE BRANCH OF STATE GOVERNMENT, BUT THE POWER TO APPROPRIATE STATE MONEYS IS A LEGISLATIVE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

FUNCTION, AND IT IS NECESSARY AND APPROPRIATE TO PROVIDE LIMITED LEGISLATIVE GUIDANCE TO THE EXECUTIVE BRANCH REGARDING CONTINGENCY-BASED CONTRACTS IN ORDER TO PROTECT STATE FINANCES AND THE APPROPRIATIONS PROCESS FROM POSSIBLE UNINTENDED ADVERSE EFFECTS OF CONTINGENCY-BASED CONTRACTS.

(2) THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT:

(a) EXISTING STATUTES EXPRESSLY AUTHORIZE CERTAIN STATE AGENCIES TO ENTER INTO CONTINGENCY-BASED CONTRACTS IN SPECIFIED CIRCUMSTANCES, AND THESE STATUTES REFLECT THE CONSIDERED JUDGMENT OF THE GENERAL ASSEMBLY THAT CONTINGENCY-BASED CONTRACTS ARE APPROPRIATE IN THOSE CIRCUMSTANCES. IT IS NOT THE INTENT OF THE GENERAL ASSEMBLY TO SUBJECT CONTINGENCY-BASED CONTRACTS ENTERED INTO PURSUANT TO SPECIFIC STATUTORY AUTHORIZATION TO THE REQUIREMENTS OF THIS PART 2.

(b) BECAUSE THE OFFICE OF STATE PLANNING AND BUDGETING IS THE EXECUTIVE BRANCH AGENCY THAT MAKES STATE ECONOMIC FORECASTS FOR THE EXECUTIVE BRANCH AND OVERSEES THE PARTICIPATION OF THE EXECUTIVE BRANCH IN THE STATE BUDGETING PROCESS, IT IS THE STATE AGENCY BEST SUITED TO DETERMINE, IN ACCORDANCE WITH THE GUIDELINES SET FORTH IN THIS PART 2, WHETHER A CONTINGENCY-BASED CONTRACT NOT EXPRESSLY AUTHORIZED BY STATUTE IS APPROPRIATE.

24-17-203. Definitions. AS USED IN THIS PART 2, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "CONTINGENCY-BASED CONTRACT" MEANS A CONTRACT ENTERED INTO BY A STATE AGENCY AND A VENDOR FOR SERVICES THAT:

(a) REQUIRES ALL OR PART OF THE VENDOR'S COMPENSATION TO BE COMPUTED BY MULTIPLYING A STATED PERCENTAGE TIMES THE AMOUNT OF MEASURABLE SAVINGS IN THE STATE AGENCY'S EXPENDITURES OR COSTS OF OPERATION THAT ARE DEMONSTRABLY ATTRIBUTABLE TO THE VENDOR'S SERVICES UNDER THE CONTRACT; AND

(b) IS ENTERED INTO WITHOUT THE AUTHORITY OF A STATE STATUTE THAT SPECIFICALLY AUTHORIZES THE AGENCY TO ENTER INTO SUCH A CONTRACT.

(2) "OFFICE" MEANS THE OFFICE OF STATE PLANNING AND BUDGETING CREATED IN SECTION 24-37-102.

24-17-204. Review of contingency-based contracts by office of state planning and budgeting. (1) NO CONTINGENCY-BASED CONTRACT SHALL BE DEEMED VALID UNLESS THE HEAD OF THE PRINCIPAL DEPARTMENT OF STATE GOVERNMENT ENTERING INTO THE CONTRACT OR CONTAINING THE AGENCY ENTERING INTO THE CONTRACT SUBMITS THE CONTRACT AND AN ANALYSIS OF THE CONTRACT TO THE OFFICE AS REQUIRED BY PARAGRAPH (b) OF SUBSECTION (2) OF THIS SECTION AND THE OFFICE APPROVES THE CONTRACT AND TRANSMITS ITS APPROVAL IN WRITING TO THE DEPARTMENT. THE STATE CONTROLLER SHALL ALSO PROMPTLY FORWARD EACH CONTINGENCY-BASED CONTRACT THAT IT REVIEWS PURSUANT TO SECTION 24-30-202 TO THE OFFICE.

(2) (a) WHENEVER A PRINCIPAL DEPARTMENT OF STATE GOVERNMENT OR ANOTHER STATE AGENCY ENTERS INTO A CONTINGENCY-BASED CONTRACT, THE DEPARTMENT OR AGENCY SHALL PREPARE AN ANALYSIS OF THE CONTRACT THAT ADDRESSES:

(I) THE EXTENT TO WHICH THE CONTRACT REQUIRES THE VENDOR'S COMPENSATION TO BE COMPUTED ON A CONTINGENCY BASIS AND THE MAXIMUM POTENTIAL CONTRACTUAL LIABILITY TO PAY CONTINGENCY-BASED COMPENSATION TO THE VENDOR;

(II) THE EXTENT TO WHICH IT IS NECESSARY TO OFFER CONTINGENCY-BASED COMPENSATION TO THE VENDOR AND THE AMOUNT OF ANY REDUCTION IN FIXED CONTRACTUAL COSTS ACHIEVED BY OFFERING CONTINGENCY-BASED COMPENSATION;

(III) THE EXTENT TO WHICH THE CONTRACTUALLY SPECIFIED PERFORMANCE MEASURE USED TO DETERMINE CONTINGENCY-BASED COMPENSATION IS APPROPRIATE AND CAPABLE OF BEING ACCURATELY DETERMINED;

(IV) THE EXTENT TO WHICH THE CONTINGENCY-BASED COMPENSATION SPECIFIED IN THE CONTRACT MIGHT AFFECT THE STATE BUDGETING AND APPROPRIATIONS PROCESS; AND

(V) ANY OTHER FACTORS THAT THE DEPARTMENT OR AGENCY DEEMS RELEVANT TO CONSIDER IN EVALUATING THE CONTRACT.

(b) THE HEAD OF A PRINCIPAL DEPARTMENT OF STATE GOVERNMENT ENTERING INTO A CONTINGENCY-BASED CONTRACT OR CONTAINING AN AGENCY ENTERING INTO A CONTINGENCY-BASED CONTRACT SHALL SIGN BOTH THE CONTRACT AND THE ANALYSIS PREPARED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (2) AND SHALL SUBMIT BOTH THE CONTRACT AND THE ANALYSIS TO THE OFFICE SO THAT THE OFFICE MAY APPROVE OR DISAPPROVE THE CONTRACT.

(c) UPON RECEIPT OF A CONTINGENCY-BASED CONTRACT AND ANALYSIS, THE OFFICE SHALL REVIEW AND EITHER APPROVE OR DISAPPROVE THE CONTRACT. THE OFFICE SHALL PROMPTLY TRANSMIT WRITTEN NOTIFICATION OF A DECISION TO APPROVE A CONTINGENCY-BASED CONTRACT TO THE HEAD OF THE PRINCIPAL DEPARTMENT THAT SUBMITTED THE CONTRACT TO THE OFFICE AND THE JOINT BUDGET COMMITTEE OF THE GENERAL ASSEMBLY. THE OFFICE SHALL PROMPTLY TRANSMIT WRITTEN NOTIFICATION OF A DECISION TO DISAPPROVE A CONTINGENCY-BASED CONTRACT ONLY TO THE HEAD OF THE PRINCIPAL DEPARTMENT THAT SUBMITTED THE CONTRACT TO THE OFFICE.

24-17-205. Existing legal requirements not superseded. THE PROVISIONS OF THIS PART 2 SHALL NOT BE CONSTRUED TO REPEAL, SUPERSEDE, OR OTHERWISE AFFECT ANY OTHER STATUTORY PROVISIONS THAT LIMIT THE USE OF OR REQUIRE REVIEW OR APPROVAL OF CONTINGENCY-BASED CONTRACTS. NOTHING IN THIS PART 2 SHALL BE CONSTRUED TO AUTHORIZE OR PROHIBIT A STATE AGENCY FROM ENTERING INTO A CONTINGENCY-BASED CONTRACT IN THE ABSENCE OF A STATUTE THAT SPECIFICALLY AUTHORIZES THE STATE AGENCY TO ENTER INTO SUCH A CONTRACT.

SECTION 2. 24-17-101, Colorado Revised Statutes, is amended to read:

24-17-101. Short title. This ~~article~~ PART 1 shall be known and may be cited as the "State Department Financial Responsibility and Accountability Act".

SECTION 3. Applicability. This act shall apply to contingency-based contracts entered into on a preliminary basis subject to subsequent approval by the state controller and the office of state planning and budgeting on or after the effective date of this act.

SECTION 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 27, 2004