

CHAPTER 471A

WATER OR WASTEWATER TREATMENT; PRIVATIZATION

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471A.01 PUBLIC PURPOSE FINDINGS.

The legislature finds that the privatization of facilities for the prevention, control, and abatement of water pollution, and the furnishing of potable water provides municipalities an opportunity under appropriate circumstances to provide those capital intensive public services in a manner that will speed construction and is less costly and more efficient than the furnishing of those services through facilities exclusively owned and operated by municipalities. The legislature further finds that other law may create unnecessary and costly obstacles to the privatization of those capital intensive public services and that a comprehensive act is required to permit municipalities to enter into appropriate contractual arrangements with private parties to facilitate the privatization of those capital intensive public services.

History: 1986 c 465 art 4 s 2

471A.02 DEFINITIONS.

Subdivision 1. **Applicability.** The definitions in this section apply to sections 471A.01 to 471A.12.

Subd. 2. [Repealed, 1997 c 7 art 1 s 148]

Subd. 3. **Capital cost component.** "Capital cost component" means that part of the service fee that the municipality determines is intended to reimburse the private vendor for the capital cost, including debt service expense, of the related facilities.

Subd. 4. **Capital cost component grant.** "Capital cost component grant" means any grant made to the municipality by the pollution control agency over a term of at least ten years to pay or reimburse the municipality for the payment of all or part of the capital cost component of the service fee.

Subd. 5. **Capital cost component loan.** "Capital cost component loan" means any loan made to the municipality by the pollution control agency over a term of at least ten years to pay or reimburse the municipality for the payment of all or part of the capital cost component of the service fee.

Subd. 6. **Capital intensive public services.** "Capital intensive public services" means the prevention, control, and abatement of water pollution through wastewater treatment facilities as defined by section 115.71, subdivision 6, and the furnishing of potable water. Capital intensive public services may be limited (1) to the design and construction, or (2) to the operation and maintenance, by the private vendor of related facilities. Capital intensive public services does not include the furnishing of heating or cooling energy.

Subd. 7. **Controlling interest.** "Controlling interest" means either (1) the power, by ownership interest, contract, or otherwise, to direct the management of the private vendor or to designate or elect at least a majority of the private vendor's governing body or board, or (2) having more than a 50 percent ownership interest in the private vendor.

Subd. 8. **Municipality.** "Municipality" means a home rule charter or statutory city, county, sanitary district, or other governmental subdivision or public corporation, including the metropolitan council.

Subd. 9. **Permitted obligation.** "Permitted obligation" means the obligation of the municipality under the service contract to pay a service fee or perform any other obligation under the service contract except an obligation to pay, in a future fiscal year of the municipality from a revenue source other than funds on hand, a stated amount of money for money borrowed or for related facilities purchased by the municipality under the service contract.

Subd. 10. **Private vendor.** "Private vendor" means one or more persons who are not a municipality and in which no governmental entity or group of governmental entities has a controlling interest.

Subd. 11. **Related facilities.** "Related facilities" means all real and personal property used by the private vendor in furnishing capital intensive public services, excluding any product of the related facilities, such as drinking water, furnished under the service contract. Related facilities may be owned by the municipality or the private vendor or jointly by both.

Subd. 12. **Service contract.** "Service contract" means any agreement or agreements between a municipality and a private vendor under which:

(1) the private vendor agrees to furnish to the municipality or any other user capital intensive public services in accordance with performance standards set forth in the agreement or agreements and the municipality agrees to pay or cause to be paid to the private vendor a service fee for the services, and

(2) other covenants incident to clause (1) are made.

Subd. 13. **Service fee.** "Service fee" means the payments the municipality is required under the service contract to make, or cause to be made, to the private vendor, including payments made by third parties to the private vendor for products or services and credited against payments the municipality would otherwise have to make, or cause to be made, under the service contract. The capital cost component of the service fee may be paid over the term of the service contract or in one or more lump sum payments during the term.

Subd. 14. **Useful life of the related facilities.** "Useful life of the related facilities" means the economic useful life of the related facilities as determined by the municipality.

Subd. 15. [Repealed, 1997 c 7 art 1 s 148]

Subd. 16. **User.** "User" means the municipality and all other persons which use the capital intensive public services furnished by the private vendor.

History: 1986 c 465 art 4 s 3; 1994 c 628 art 3 s 35; 1997 c 111 s 1-3

471A.03 BASIC AUTHORIZATION AND RELATED POWERS.

Subdivision 1. **Basic authorization.** A municipality may contract with a private vendor to furnish in accordance with a service contract any capital intensive public services the municipality is authorized by law to furnish, and for that purpose a municipality may exercise any and all of the powers provided in this section.

Subd. 2. **Service contract.** Subject to the provisions of section 471A.08, a municipality may enter into a service contract for a term of not more than 30 years. However, the service contract may permit the municipality to either extend or renew the term of the service contract so long as the municipality is not bound under the service contract for an extended or renewal period of more than 30 years. Under the service contract the municipality may, under terms and conditions agreed to by the municipality and the private vendor:

(1) obligate itself to pay or cause to be paid a service fee for the availability and use of the capital intensive public services to be furnished under the service contract;

(2) enter into other agreements relating to the service to be provided and which the municipality considers appropriate that are not otherwise contrary to law; and

(3) either pledge its full faith and credit or obligate a specific source of payment for the payment of the service fee and the performance of other obligations under the service contract and the payment of damages for failure to perform the obligations.

The obligation of the municipality to pay the service fee and perform any other permitted obligations under the service contract are not considered a debt within the meaning of any statutory or charter limitation, and no election is required as a precondition to the municipality entering into any permitted obligation or undertaking a project under a service contract.

Subd. 3. Procurement procedures. The municipality may agree under the service contract that the private vendor will acquire, construct, alter, repair, or maintain any and all related facilities without compliance with any competitive bidding requirements. The municipality may enter into the service contract only after requesting from two or more private vendors proposals for the furnishing of the capital intensive public services under terms and conditions the municipality determines to be fair and reasonable. After making the request and receiving any proposals in response to the request, the municipality may negotiate the service contract with any private vendor that responds to the request for proposals. The municipality, at its discretion, may classify all or portions of any (1) proposals received from vendors, and (2) government data received from vendors or generated by the municipality relating to negotiations with the vendors, as nonpublic data under section 13.02, subdivision 9, or as protected nonpublic data under section 13.02, subdivision 13, until completion of negotiations with all the vendors and, if the municipality solicits a best and final offer from one or more vendors, until the offers are received from all vendors who are requested to submit such an offer.

Subd. 4. Sources of payment; collection procedure. (a) For the payment of a service fee or other monetary obligation under an existing service contract or in anticipation of need under a future service contract, the municipality may:

(1) levy property taxes, impose rates and charges, levy special assessments, and exercise any other revenue producing authority granted to it and apply public funds for the payment of the service fee and any other monetary obligations under the service contract in the same manner, and subject to the same conditions that would apply if the related facilities were acquired, constructed, owned, and operated exclusively by the municipality; and

(2) establish by ordinance, revise when considered advisable, and collect just and reasonable rates and charges for the capital intensive public services provided under the service contract. The ordinance may obligate the owners, lessees, or occupants of property, or any or all of them, to pay charges for the capital intensive public services available for their properties and may obligate the user of a related facility to pay a reasonable charge for the use of the related facility. Rates and charges may take into account the character, kind, and quality of the capital intensive public service and all other factors that enter into the cost of the capital intensive public service, including but not limited to the service fee payable with respect to it, depreciation, and payment of principal and interest on money borrowed for the acquisition or betterment of related facilities.

(b) The rates and charges may be billed and collected in a manner the municipality shall determine consistent with this paragraph and other applicable law. On or before October 15 in each year, the municipality shall certify to the county auditor all unpaid outstanding charges for services provided under the service contract and a statement of the description of the lands against which the charges arose. It is the duty of the county auditor, upon order of the governing body of the municipality, to extend the rates and charges with interest as provided for by ordinance upon the tax rolls of the county for the taxes of the year in which the rate or charge is filed. For each year ending October 15 the rates and charges with interest shall be carried into the tax becoming due and payable in January of the following year, and shall be enforced and collected in the manner provided for the enforcement and collection of real property taxes in accordance with the provisions of the laws of the state. The rates and charges, if not paid,

shall become delinquent and be subject to the same penalties and the same rate of interest as the taxes under the general laws of the state. All rates and charges shall be uniform in their application to use and service of the same character or quantity.

(c) An ordinance establishing rates and charges shall also establish a procedure by which a person obligated to pay the rates and charges may, each year at a public hearing held before August 1 of each year, protest the payment of the rates and charges on the grounds that services to be provided under the service contract are not available to the person. The services shall be deemed available for the property of the person if the vendor agrees, and the related facilities have the capacity, to provide the services to the person as soon as the municipality or any other entity provides the property of the person with access to the services. Notice of the hearing shall be published at least 30 days prior to the hearing in an official newspaper in general circulation in the municipality. A person protesting the assessment of rates and charges under this paragraph shall file the objection in writing with the municipality at least five days prior to the hearing. Within ten days after the hearing, the municipality shall determine whether the rates and charges were properly assessed. A person protesting the assessment of rates and charges may appeal the assessment, and a private vendor may appeal a reduction in rates and charges for any person, to the district court in the same manner as appeal of other civil cases. Rates and charges erroneously collected shall be refunded with the same rate of interest as taxes refunded with interest under the general laws of this state.

(d) A public hearing on the proposed ordinance shall be held prior to the meeting at which it is to be considered by the governing body of the municipality and after notice of the hearing has been published in the official newspaper of the municipality not less than ten days prior to the hearing. The notice shall state the subject matter and the general purpose of the proposed ordinance.

Subd. 5. Sale or lease of existing facilities. For purposes of carrying out the service contract, the municipality may, in compliance with subdivision 3, sell or lease to the private vendor or any other municipality on terms and conditions as the municipality considers appropriate any existing related facilities, including land, owned by the municipality.

Subd. 6. Remedies. The municipality may provide that title to the facilities shall vest in or revert to the municipality if the private vendor defaults under any specified provisions in the service contract. The municipality may acquire or reacquire any facilities and terminate the service contract in accordance with its terms notwithstanding that the service contract may constitute an equitable mortgage. No lease of facilities by the municipality to the private vendor is subject to the provisions of section 504B.291, unless expressly so provided in the service contract.

Subd. 7. Interest in related facilities. The municipality may retain or acquire, on terms and conditions it considers appropriate, a present or future interest in all or part of the related facilities and grant a mortgage or security interest in its interest in the related facilities.

Subd. 8. Interest in private vendor. The municipality may, on terms and conditions it considers appropriate, acquire an interest in the private vendor as a joint venturer, including a share in the revenues derived from the related facilities, and grant a security interest in its interest in the private vendor and such revenues. However, no municipality or group of municipalities may have a controlling interest in the private vendor.

Subd. 9. Use of bond proceeds. The municipality may issue bonds and other obligations and apply their proceeds toward the payment of the costs of the related facilities in the same manner and subject to the same conditions and limitations that would apply if the related facilities were acquired, constructed, owned, and operated exclusively by the municipality and for these purposes, related facilities shall be considered to be a project within the meaning of section 469.153, subdivision 2, paragraph (b).

Subd. 10. **Required public use.** The municipality may agree, subject to any applicable state statutory requirements as to designated use of the related facilities, that the sole and exclusive right to provide the capital intensive public services within its jurisdiction be assumed by the private vendor under the service contract and may require that any and all members of the public within its jurisdiction use the services provided under the service contract in the same manner and subject to the same limitations and conditions that would apply if the related facilities were acquired, constructed, owned, and operated exclusively by the municipality.

Subd. 11. **Condemnation powers.** The municipality may exercise the right of eminent domain in the manner provided by chapter 117, for the purpose of acquiring for itself or the private vendor any and all related facilities. If the related facilities are acquired for the private vendor, the service contract shall be for a term of at least five years.

Subd. 12. **Contractor's bond and mechanics' liens.** The municipality may waive or require the furnishing of a contractor's payment and performance bond of the kind described in section 574.26 in connection with the installation and construction of any related facilities. If the bond is required, the provisions of chapter 514 relating to liens for labor and materials are not applicable with respect to work done or labor or materials supplied for the related facilities. If the bond is waived, the provisions of chapter 514 apply with respect to work done or labor or materials supplied for the related facilities.

History: 1986 c 465 art 4 s 4; 1987 c 291 s 226; 1987 c 384 art 1 s 43; 1Sp1989 c 1 art 5 s 39; 1997 c 111 s 4; 1998 c 371 s 17; 1999 c 199 art 2 s 18

471A.04 [Repealed, 1Sp1989 c 1 art 5 s 51]

471A.05 EXEMPTION FROM PROPERTY TAXES.

If the service contract provides that property taxes imposed with respect to the related facilities are to be included in the service fee as pass-through costs, the municipality may apply to the commissioner of revenue for an exemption from property taxation of the related facilities. The property is exempt from ad valorem taxation, if the commissioner of revenue determines that the related facilities serve the general public and that similar municipally-owned facilities are exempt from ad valorem property taxation. The commissioner of revenue must notify the assessor that the property is exempt from taxation. The exemption is only effective during the term of the service contract from and after the date of filing the certificate in the case of property taxes. The exemption is not effective with respect to any property taxes levied or imposed but not collected prior to the date of approval of the exemption by the commissioner of revenue.

History: 1986 c 465 art 4 s 6

471A.06 JOINT POWERS AGREEMENT.

Two or more municipalities may enter into joint powers agreements they consider appropriate under the provisions of section 471.59 for purposes of exercising the powers granted in sections 471A.01 to 471A.12.

History: 1986 c 465 art 4 s 7

471A.07 [Repealed, 1996 c 310 s 1]

471A.08 HEARING.

Subdivision 1. **Public hearing required.** Except as provided in subdivision 2, a municipality shall, before entering into a service contract under sections 471A.01 to 471A.12, conduct a public hearing on the proposal to provide specified capital intensive public services under sections 471A.01 to 471A.12. The hearing may be conducted either before or after the date on which any request for proposals is made under section 471A.03, subdivision 3, clause (2). A notice of the hearing shall be published in

the local official newspaper of the municipality no less than 15 and no more than 45 days prior to the date set for hearing and shall describe the general nature of the proposal. Any written information developed for the proposal prior to the hearing shall be available to the public for inspection prior to the hearing. The hearing on the proposal shall be sufficient even though the site of the related facilities, the name of the private vendor, and the specific structure of the contractual arrangements with the private vendor are not known at the time of the hearing.

Subd. 2. **Existing contracts.** A municipality that entered into a service contract prior to March 26, 1986 may exercise any of the powers authorized by those sections without complying with subdivision 1.

History: 1986 c 465 art 4 s 9

471A.09 INVESTMENT OF FUNDS.

Any sums paid to the private vendor under the service contract are not considered public funds and may be invested in any securities in which the private vendor is authorized by law to invest.

History: 1986 c 465 art 4 s 10

471A.10 PUBLIC EMPLOYEE LAWS; SALE OR LEASE OF EXISTING FACILITY.

(a) Unless expressly provided therein, and except as provided in this section, no state law, charter provision, or ordinance of a municipality relating to public employees shall apply to a person solely by reason of that person's employment by a private vendor in connection with services rendered under a service contract.

(b) A private vendor purchasing or leasing existing related facilities from a municipality or operating or maintaining the facility shall recognize all exclusive bargaining representatives and existing labor agreements and those agreements shall remain in force until they expire by their terms. Persons who are not employed by a municipality in a related facility at the time of a lease or purchase of the facility by the private vendor are not "public employees" within the meaning of the Public Employees Retirement Act, chapter 353. Persons employed by a municipality in a related facility at the time of a lease or purchase of the facility by a private vendor shall continue to be considered to be "public employees" within the meaning of the Public Employees Retirement Act, chapter 353, but may elect to terminate their participation in the public employees retirement association as provided in this section. Each such employee may exercise the election annually on the anniversary of the person's initial employment by the municipality. An employee electing to terminate participation in the association is entitled to benefits that the employee would be entitled to if terminating public employment and may participate in a retirement program established by the private vendor.

History: 1986 c 465 art 4 s 11; 1997 c 111 s 5

471A.11 REGULATION OF RATES AND CHARGES AND PUBLIC UTILITY LAWS.

A municipality may regulate by ordinance, contract, or otherwise the rates and charges imposed by the private vendor with respect to any capital intensive public services provided to the public under the service contract. Whether or not the imposition of such rates and charges is so regulated, no capital intensive public services provided under the service contract are subject to regulation under the provisions of chapter 216B, unless the municipality elects to subject the services to regulation under that chapter. An election for regulation may be made by resolution of the governing body of the municipality requesting regulation and filing the resolution with the state public utilities commission.

History: 1986 c 465 art 4 s 12; 1994 c 465 art 1 s 55

471A.12 POWERS; ADDITIONAL AND SUPPLEMENTAL.

The powers conferred by sections 471A.01 to 471A.12 shall be liberally construed in order to accomplish their purposes and shall be in addition and supplemental to the powers conferred by any other law or charter. If any other law or charter is inconsistent with sections 471A.01 to 471A.12, these sections are controlling as to service contracts entered into under sections 471A.01 to 471A.12. However, nothing in sections 471A.01 to 471A.12 limits or qualifies (1) any other law that a municipality must comply with to obtain any permit in connection with related facilities, (2) any performance standard or effluent limitations applicable to related facilities, or (3) the provisions of any law relating to conflict of interest.

History: 1986 c 465 art 4 s 13