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S.P. 234

In Senate, February 21, 2013

An Act To Strengthen the State's Wholesale Liquor Business

(EMERGENCY)

Reference to the Committee on Veterans and Legal Affairs suggested and ordered printed.

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT
Secretary of the Senate

Presented by Senator GOODALL of Sagadahoc.

1 **Emergency preamble. Whereas,** acts and resolves of the Legislature do not
2 become effective until 90 days after adjournment unless enacted as emergencies; and

3 **Whereas,** the State contracted with a private entity for the operation of the State's
4 wholesale liquor business; and

5 **Whereas,** that contract is set to expire on June 30, 2014; and

6 **Whereas,** prior to the expiration of the contract, and in order to continue with the
7 privatization of the State's wholesale liquor business, new measures must be enacted to
8 ensure that the State receives the best return on the lease of its wholesale liquor
9 operations; and

10 **Whereas,** in the judgment of the Legislature, these facts create an emergency within
11 the meaning of the Constitution of Maine and require the following legislation as
12 immediately necessary for the preservation of the public peace, health and safety; now,
13 therefore,

14 **Be it enacted by the People of the State of Maine as follows:**

15 **Sec. 1. 28-A MRSA §88,** as enacted by PL 2003, c. 20, Pt. LLL, §2 and affected
16 by §4, is amended to read:

17 **§88. Transfer of wholesale liquor activities**

18 **1. Statement of purpose.** The Legislature finds that it is in the public interest to
19 ~~seek~~ continue the efficiencies and cost savings from ~~privatizing the privatization of~~ the
20 State's wholesale liquor business. Privatization ~~may~~ must include the grant of ~~one or~~
21 ~~more~~ the exclusive ~~service territories in which~~ right to a private sector entity ~~has the~~
22 ~~exclusive right~~ to distribute certain spirits subject to price regulation by the alcohol
23 bureau.

24 **2. Authority.** The Commissioner of Administrative and Financial Services ~~may~~
25 shall enter into a contract for the ~~sale, franchise, license or~~ lease of ~~and may sell,~~
26 ~~franchise, license or lease~~ the State's wholesale liquor activities associated with
27 distributing and selling spirits and fortified wines sold by the State on January 1, 2003.
28 The ~~buyer, franchisee, licensee or~~ lessee may sell and distribute to licensed agency liquor
29 stores all spirits and fortified wines sold by the State on January 1, 2003.

30 **3. Members of legislative committee of jurisdiction to participate.** ~~A member~~
31 The chairs of the joint standing committee of the Legislature having jurisdiction over
32 alcoholic beverages matters ~~appointed by the committee's chairs~~ shall appoint 2 members
33 of the committee, one from each of the political parties having the largest and 2nd largest
34 number of members in the Legislature, who must be included in meetings held by the
35 Commissioner of Administrative and Financial Services, or the commissioner's designee,
36 regarding developing a request for ~~proposal~~ proposals to ~~transfer~~ maintain the
37 privatization of the wholesale liquor business, reviewing bids received and awarding the
38 contract.

1 **4. Bidding procedures.** The Commissioner of Administrative and Financial
2 Services shall adopt or amend rules to effect the ~~transfer~~ continued privatization of the
3 State's wholesale liquor business ~~to a private entity~~. The rules must include:

4 A. A finding by the Commissioner of Administrative and Financial Services setting
5 forth the method of ~~transfer~~ continued privatization that promotes the Legislature's
6 intent in ~~enacting this section~~ optimizing the growth of the wholesale liquor business
7 over the period during which it has been operated by a private entity;

8 B. Procedures designed to encourage vigorous bidding and maximization of return of
9 value for the State's wholesale liquor business by qualifying bidders considered
10 financially capable and qualified to operate the wholesale liquor business;

11 C. Criteria for eligibility for service as a wholesale liquor provider. For purposes of
12 this section, "wholesale liquor provider" means an entity or entities, including a
13 subcontractor of an entity contracted by the State as an agent of the State for the
14 purpose of providing wholesale spirits and fortified wine to establishments licensed
15 by the State to sell spirits and fortified wine for off-premises consumption;

16 D. Criteria for eligibility as a wholesale liquor provider, which must include a
17 commitment to offer split cases of spirits and fortified wine to licensed agents and a
18 commitment to provide timely delivery 2 times per week of spirits and fortified wine
19 to all agents, particularly those located in geographically remote areas of the State;

20 ~~E. A plan for the continued employment of state employees in the wholesale liquor~~
21 ~~business in the State for a period of 2 years from the date of privatization; and~~

22 F. Any rules that the Commissioner of Administrative and Financial Services
23 determines are consistent with the Legislature's intent;

24 G. Criteria for the award of a contract. A contract awarded pursuant to this chapter
25 for the lease of the State's wholesale liquor activities associated with distributing and
26 selling spirits and fortified wine must be to the best-value bidder, taking into
27 consideration the quality of capabilities and service to be supplied by the bidder and
28 conformity with the specifications of the contract.

29 The evaluation criteria for determining the best-value bidder must include but are not
30 limited to:

31 (1) Financial capacity and capability;

32 (2) Technical capacity and capability;

33 (3) Management capacity and capability;

34 (4) Warehousing and delivery capacity and capability;

35 (5) Knowledge of the industry and historical performance;

36 (6) Marketing knowledge and capability;

37 (7) Ability to preserve and enhance the value of the State's wholesale liquor
38 business and maximize the financial return for the State; and

39 (8) Ability to make a positive impact on the State's economy, employment and
40 revenue; and

1 H. The requirement that an applicant submit, with the bid, a nonrefundable
2 application processing fee of \$25,000 for the cost of reviewing and awarding the
3 contract and a financial instrument guaranteeing the availability of the funds required
4 pursuant to section 89, subsection 1-A.

5 **5. Price regulation; immunity.** The alcohol bureau shall regulate the wholesale and
6 retail prices of all liquor sold by private entities under this section but may not lower
7 prices in a manner that lowers the wholesale gross profit margin as described in the
8 contract for the State's wholesale liquor activities awarded to a private entity pursuant to
9 section 89. The alcohol bureau shall adopt rules for the effective implementation of price
10 regulation of the wholesale and retail liquor business by January 1, ~~2004~~ 2014. A private
11 entity awarded the exclusive right to distribute liquor pursuant to this section is immune
12 from antitrust action so long as the entity is in compliance with the alcohol bureau's rules
13 and all other applicable laws and regulations.

14 **6. Limitation on conveyances of rights.** The State may not convey or assign to
15 private entities any rights in the distilled spirits business that extend beyond June 30,
16 ~~2014~~ 2024. Any renewal of such rights is subject to approval of the Legislature but only
17 after review by, and opportunity for public comment before, the joint standing committee
18 of the Legislature having jurisdiction over alcoholic beverage matters. This section does
19 not affect the State's continuing right to collect the alcohol premium tax, sales taxes or
20 income taxes arising from the sale of distilled spirits and fortified wines.

21 **7. Rules.** Rules adopted pursuant to this section are routine technical rules as
22 defined in Title 5, chapter 375, subchapter 2-A.

23 **Sec. 2. 28-A MRSA §89, sub-§1,** as enacted by PL 2011, c. 380, Pt. S, §1, is
24 repealed.

25 **Sec. 3. 28-A MRSA §89, sub-§1-A** is enacted to read:

26 **1-A. Minimum requirements.** The Commissioner of Administrative and Financial
27 Services shall enter into competitive bidding to continue the privatization of the State's
28 wholesale liquor activities by contract awarded pursuant to this section and section 88 for
29 the lease of the State's wholesale liquor activities associated with distributing and selling
30 spirits and fortified wines and shall award the contract no later than July 15, 2013. An
31 entity awarded a contract pursuant to this section is subject to the requirements of the
32 laws of this State, including but not limited to chapter 21. A contract awarded under this
33 subsection may not extend for more than 10 years and must meet one of the following
34 payment requirements:

35 A. The entity awarded the contract, or the entity's financier, shall make a minimum
36 initial payment of \$200,000,000 followed by a guaranteed fixed annual payment over
37 the life of the contract paid on July 1st of each year the contract is in effect. The
38 entity awarded the contract also shall enter into a revenue sharing agreement with the
39 State for the length of the contract. An entity submitting a bid pursuant to this
40 paragraph shall state in that bid:

41 (1) The entity's ability to make the minimum initial payment of \$200,000,000;

1 (2) The amount of the guaranteed fixed annual payment the entity expects to
2 make to the State along with appropriate financial assurances;

3 (3) The revenue sharing formula the entity proposes to enter into with the State;
4 and

5 (4) The minimum guaranteed profit margin the entity would require for its bid to
6 be feasible; or

7 B. The entity awarded the contract, or the entity's financier, shall make a minimum
8 initial payment of \$20,000,000 followed by a guaranteed fixed annual payment over
9 the life of the contract paid on July 1st of each year the contract is in effect. The
10 entity awarded the contract also shall enter into a revenue sharing agreement with the
11 State for the length of the contract. An entity submitting a bid pursuant to this
12 paragraph shall state in that bid:

13 (1) The entity's ability to make the minimum initial payment of \$20,000,000;

14 (2) The amount of the guaranteed fixed annual payment the entity expects to
15 make to the State along with appropriate financial assurances;

16 (3) The revenue sharing formula the entity proposes to enter into with the State;
17 and

18 (4) The minimum guaranteed profit margin the entity would require for its bid to
19 be feasible.

20 **Sec. 4. 28-A MRSA §89, sub-§2**, as enacted by PL 2011, c. 380, Pt. S, §1, is
21 repealed.

22 **Sec. 5. 28-A MRSA §504** is enacted to read:

23 **§504. Return of product**

24 A wholesale liquor provider shall comply with the regulations regarding unlawful
25 sales arrangements and returns of distilled spirits, wine and malt beverages specified in
26 27 Code of Federal Regulations, Part 11, Subparts C and D (2012).

27 **Sec. 6. 28-A MRSA §606, sub-§4**, as amended by PL 2003, c. 20, Pt. SS, §6 and
28 affected by §8 and c. 51, Pt. C, §2, is repealed and the following enacted in its place:

29 **4. Discount for agency liquor stores.** The alcohol bureau or any person awarded a
30 contract pursuant to section 89 shall sell spirits and fortified wines to agency liquor stores
31 at the following minimum discounts of the retail price set by the alcohol bureau pursuant
32 to section 88:

33 A. If the retail price is less than \$15, 12%;

34 B. If the retail price is at least \$15 but less than \$25, 14%; and

35 C. If the retail price is at least \$25, 15%.

36 **Sec. 7. Bid schedule.** The Commissioner of Administrative and Financial
37 Services shall issue and publish a request for proposals for the continued privatization of

1 the State's wholesale liquor business pursuant to the Maine Revised Statutes, Title 28-A,
2 section 88 within 60 days of the effective date of this Act or July 1, 2013, whichever is
3 earlier.

4 **Sec. 8. Extension of contract to operate State's wholesale liquor activities.**
5 Notwithstanding the Maine Revised Statutes, Title 28-A, section 89, the Commissioner of
6 Administrative and Financial Services, for the purpose of preserving service and the
7 State's wholesale liquor business, may extend the contract for the operation of the State's
8 wholesale liquor activities for one year beyond the expiration date of June 30, 2014. The
9 contract may be extended only after all of the following conditions have been met:

- 10 1. A public hearing has been held on the issuance of a new contract;
- 11 2. The commissioner determines that:
 - 12 A. There were no qualifying or acceptable bids received pursuant to the bidding
13 process established in Title 28-A, section 88;
 - 14 B. There is inadequate time to award a contract under the process established in Title
15 28-A, section 88; or
 - 16 C. The award of the contract has been delayed beyond a time when it can be issued
17 in a timely fashion due to administrative or judicial appeals; and
- 18 3. A price of not less than \$34,000,000 is obtained for the one-year extension.

19 **Emergency clause.** In view of the emergency cited in the preamble, this
20 legislation takes effect when approved.

21 SUMMARY

22 This bill requires the State to continue the privatization of its wholesale liquor
23 operations beyond the current contract, set to expire on June 30, 2014. This bill
24 establishes new criteria a successful bidder must meet, including financial and technical
25 capacity and capability, knowledge of the industry, historical performance, warehousing
26 and delivery capacity and capability and the ability to preserve and enhance the value of
27 the State's wholesale liquor business and maximize the financial return for the State.

28 This bill allows a bidder to choose between an initial payment of either \$200,000,000
29 or \$20,000,000 and to specify the amount of the guaranteed fixed annual payment, the
30 formula for sharing revenue with the State during the life of the contract and the
31 minimum profit margin the entity would need to be guaranteed to make its bid feasible.
32 The maximum length of a contract is 10 years. This bill requires a nonrefundable
33 application fee of \$25,000, which is used to defray the cost of reviewing and awarding
34 the contract and requires appropriate financial assurances guaranteeing the availability of
35 the funds. The bill repeals the section of law specifying the allocation of contract
36 payments.

37 The bill allows the Commissioner of Administrative and Financial Services to extend
38 the current wholesale liquor operations contract for one year if, following a public

1 hearing, the commissioner determines that a new contract cannot be bid or ratified before
2 the current contract expires or that inadequate bids have been received; a minimum
3 payment of not less than \$34,000,000 to extend the contract for one year must be made.

4 The bill specifies a number of operational measures, including:

5 1. Specifying the minimum discount that the Department of Administrative and
6 Financial Services, Bureau of Alcoholic Beverages and Lottery Operations or a person
7 awarded the contract to operate the State's wholesale liquor business must provide to an
8 agency liquor store, based on the retail price of the product; and

9 2. Requiring a wholesale liquor provider to comply with federal regulations
10 regarding returned or damaged product.