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## **An Act To Implement Recommendations of the Government Oversight Committee To Clarify That Competitive Bid Provisions Apply to Grant Awards**

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

**Sec. 1. 5 MRSA §1825-A, sub-§§1, 6 and 8**, as enacted by PL 1989, c. 785, §2, are amended to read:

**1. Aggrieved person.** "Aggrieved person" means any person who bids on a contract or grant and who is adversely affected, financially, professionally or personally, by that contract or grant award decision.

**6. Petitioner.** "Petitioner" means any person who has requested a stay of a contract or grant award decision or a hearing of appeal.

**8. Stay.** "Stay" means the temporary suspension of a contract or grant award pending an appeal under this subchapter.

**Sec. 2. 5 MRSA §1825-B**, as amended by PL 2011, c. 555, §1, is further amended to read:

### **§ 1825-B. Bids, awards, contracts and grants**

**1. Purchases by competitive bidding.** The Director of the Bureau of General Services shall purchase collectively all goods and services for the State or any department or agency of the State in a manner that best secures the greatest possible economy consistent with the required grade or quality of the goods or services. Except as otherwise provided by law, the Director of the Bureau of General Services shall make purchases of goods or services needed by the State or any department or agency of the State through competitive bidding.

**2. Waiver.** The requirement of competitive bidding may be waived by the Director of the Bureau of General Services when:

A. The procurement of goods or services by the State for county commissioners pursuant to Title 30-A, section 124, involves the expenditure of \$2,500 or less, and the interests of the State would best be served;

B. The Director of the Bureau of General Services is authorized by the Governor or the Governor's designee to make purchases without competitive bidding because in the opinion of the Governor or the Governor's designee an emergency exists that requires the immediate procurement of goods or services;

C. After reasonable investigation by the Director of the Bureau of General Services, it appears that any required unit or item of supply, or brand of that unit or item, is procurable by the State from only one source;

D. It appears to be in the best interest of the State to negotiate for the procurement of petroleum products;

E. The purchase is part of a cooperative project between the State and the University of Maine System, the Maine Community College System, the Maine Maritime Academy or a private, nonprofit, regionally accredited institution of higher education with a main campus in this State involving:

(1) An activity assisting a state agency and enhancing the ability of the university system, community college system, Maine Maritime Academy or a private, nonprofit, regionally accredited institution of higher education with a main campus in this State to fulfill its mission of teaching, research and public service; and

(2) A sharing of project responsibilities and, when appropriate, costs;

F. The procurement of goods or services involves expenditures of \$10,000 or less, in which case the Director of the Bureau of General Services may accept oral proposals or bids; or

G. The procurement of goods or services involves expenditures of \$10,000 or less, and procurement from a single source is the most economical, effective and appropriate means of fulfilling a demonstrated need.

**3. Report.** By January 15th of each year the Director of the Bureau of General Services shall submit to the joint standing committee of the Legislature having jurisdiction over state and local government a report concerning any waivers from the competitive bidding provisions established in subsection 2, paragraph E.

**4. Registry of suppliers.** Suppliers desiring to have their names entered on a registry of suppliers must submit a request to the Director of the Bureau of General Services in writing. The Director of the Bureau of General Services may prescribe the manner and form in which such a request must be submitted and may limit the number of names of out-of-state bidders on any registry. The name of any supplier entered in such a registry who fails to submit a bid on 3 consecutive proposals or invitations to bid may be removed from the registry at the discretion of the Director of the Bureau of General Services, except that the Department of Corrections remains on any registry until the Department of Corrections requests that the department be removed from that registry.

**5. Alternate bids.** When, in bid forms and specifications, an article or material is identified by using a trade name and catalog number of a manufacturer or vendor, the term "or approved equal," if not inserted with the identification, is implied. There is a presumption that any reference to a particular manufacturer's product either by trade name or by limited description has been made solely for the purpose

of more clearly indicating the minimum standard of quality desired. Consideration must be given to proposals submitted on approved equal alternate commodities to the extent that such action serves the best interest of the State. The bidder submitting a proposal on a commodity other than as specified shall furnish complete identification, descriptive literature or data with respect to the alternate commodity that the bidder proposes to furnish. Lack of such information on the bid must be construed to mean that the bidder proposes to furnish the exact commodity described. The State reserves the right to reject any bids, in whole or in part, to waive any formality or technicality in any bid and to accept any item in any bid.

**6. Record of bids.** Each bid, with the name of the bidder, must be entered on a record. Each record, with the successful bid indicated, must be open to public inspection after the letting of the contract or grant. A bond for the proper performance of each contract or grant may be required of each successful bidder at the discretion of the Director of the Bureau of General Services, with the approval of the Commissioner of Administrative and Financial Services.

**7. Awards to best-value bidder.** Except as otherwise provided by law, competitively awarded orders awarded, grants or contracts made by the Director of the Bureau of General Services or by any department or agency of the State must be awarded to the best-value bidder, taking into consideration the qualities of the goods or services to be supplied, their conformity with the specifications, the purposes for which they are required, the date of delivery and the best interest of the State. If the bidder that was initially awarded the order, grant or contract does not perform, the Director of the Bureau of General Services may cancel the order, grant or contract and award a new order, grant or contract to the 2nd best-value bidder. The order, grant or contract may not be awarded to a bidder that the Director of the Bureau of General Services determined was not in compliance at the time the initial bid was submitted.

**8. Tie bids.** The Director of the Bureau of General Services shall award contracts, grants or purchases to in-state bidders or to bidders offering commodities produced or manufactured in the State if the price, quality, availability and other factors are equivalent.

**9. Determination of best-value bidder.** In determining the best-value bidder, the Director of the Bureau of General Services or any department or agency of the State shall, for the purpose of competitively awarding a contract or grant, add a percent increase on the bid of a nonresident bidder equal to the percent, if any, of the preference given to that bidder in the state in which the bidder resides.

**10. List of state preferences published.** The Director of the Bureau of General Services on or before January 1st of each year shall publish a list of states that give preference to in-state bidders with the percent increase applied in each such state. The Director of the Bureau of General Services or any department or agency of the State may rely on the names of states and percentages as published in determining the best-value bidder without incurring any liability to any bidder.

**11. Rulemaking; unfair competition.** State departments and agencies may not achieve cost savings due to cost differentials that derive from a bidder's failure to provide health and retirement benefits to its employees. The State Purchasing Agent shall adopt rules governing the purchase of services and the awarding of grants or contracts for personal services to establish a basis for bid price and cost comparison among businesses that provide health and retirement benefits to their employees and those that do not provide these benefits. The rules must include a methodology for calculating bid price and

cost differentials for services provided by businesses and state employees due to the provision of health and retirement benefits for employees. The rules must adjust the bid prices to establish an equivalent basis for bid price and cost comparison among businesses when awarding contracts or grants and between businesses and state employees when determining whether or not a contract or grant is permitted under section 1816-A. These rules must apply to all state departments and agencies. Rules adopted pursuant to this subsection are routine technical rules as defined in chapter 375, subchapter 2-A.

**12. Vendor's fee.** The State Purchasing Agent may collect a fee in an amount equal to 1% of the bid from a supplier of apparel, footwear or textiles with a winning bid under this section. The State Purchasing Agent shall apply the fee under this subsection to the costs of implementing and administering the state purchasing code of conduct under section 1825-L, including developing a consortium to monitor and investigate alleged violations of the code of conduct. The State Purchasing Agent shall adopt routine technical rules under chapter 375, subchapter 2-A to carry out the purposes of this subsection.

**13. Vendor's fee report.** By January 15th of each year the Director of the Bureau of General Services shall submit a report to the joint standing committee of the Legislature having jurisdiction over state and local government matters concerning revenue generated by the vendor's fee established in subsection 12.

**14. Condition of doing business with the State.** Notwithstanding any provision of law to the contrary, any purchase by the State of \$100,000 or more of tangible personal property, except for public utility purchases, as defined in Title 36, section 1752, subsection 17, or emergency purchases pursuant to subsection 2, paragraph B, may be made only from a person who is registered as a seller pursuant to Title 36, section 1754-B. As a condition of doing business with the State, the seller must collect, report and remit taxes in accordance with Title 36, Part 3. As provided in this subsection, the State is prohibited from doing business with a person who is not registered as a seller pursuant to Title 36, section 1754-B and is not in compliance with the requirement to collect, report and remit taxes pursuant to Title 36, Part 3. After notification of the award, the seller must provide the State Purchasing Agent with a valid retailer certificate issued by the State Tax Assessor within 7 business days. If the seller fails to provide the registration certificate within 7 business days, the State Purchasing Agent may cancel the award and make a new award pursuant to subsection 7. The State Purchasing Agent shall provide the State Tax Assessor with a copy of all contracts and grants awarded pursuant to this section. The State Tax Assessor shall notify the State Purchasing Agent if at any time during the term of the contract or grant the person is no longer registered or is not collecting, reporting and remitting taxes in compliance with the requirements of Title 36, Part 3. Until the noncompliance is corrected, the State Purchasing Agent may withhold any payments to the person.

**Sec. 3. 5 MRSA §1825-C**, as amended by PL 2007, c. 466, Pt. A, §12, is further amended to read:

### **§ 1825-C.Rulemaking**

The State Purchasing Agent shall adopt rules under this subchapter governing the purchase of services, the awarding of grants or contracts and the procedure by which aggrieved persons may appeal ~~contract~~ award decisions made by a department or agency of State Government. These rules must be

adopted in accordance with the Maine Administrative Procedure Act and apply to all departments and agencies of State Government subject to the authority of the Department of Administrative and Financial Services as set forth in this chapter.

**Sec. 4. 5 MRSA §1825-D, first ¶**, as enacted by PL 1989, c. 785, §2, is amended to read:

The State Purchasing Agent shall make the public aware of contracts and grants for which bids are being requested and the procedure to be used in reviewing bids. Rules adopted under this subchapter must include a clear procedure:

**Sec. 5. 5 MRSA §1825-D, sub-§§1, 3 and 4**, as enacted by PL 1989, c. 785, §2, are amended to read:

**1. Notice.** For informing the public about contracts and grants for which proposals are being requested;

**3. Contract or grant award.** For determining successful bidders and awarding contracts and grants, including written notification to all bidders upon an award decision made pursuant to a request for proposals and criteria to be used to resolve tie bids; and

**4. Criteria for appeals.** For the review of any contract or grant award decision appealed under this subchapter.

**Sec. 6. 5 MRSA §1825-E**, as amended by PL 1993, c. 192, §1, is further amended to read:

### **§ 1825-E. Appeal procedures**

The Director of the Bureau of General Services shall ensure that every department or agency of State Government affords aggrieved persons an opportunity to appeal a contract or grant award decision. As provided by this section, rules adopted under this subchapter must establish clear procedures by which an aggrieved person may appeal a contract or grant award decision.

**1. Stay.** Persons aggrieved by a contract or grant award decision may request a stay of a ~~contract~~ award decision. Such a request must be made to the Director of the Bureau of General Services in writing within 10 days of notification of the contract or grant award and must state the nature of the grievance.

The Director of the Bureau of General Services shall issue a stay of a contract or grant award decision, pending appeal, upon a showing of irreparable injury to the petitioner, a reasonable likelihood of success on the merits, and no substantial harm to adverse parties or to the general public.

The Director of the Bureau of General Services shall notify the petitioner in writing of the director's decision regarding the issuance of a stay within 7 days of receipt of the request.

Failure of the petitioner to obtain a stay does not affect the petitioner's right to a hearing of appeal under this subchapter.

**2. Request for hearing of appeal.** Persons aggrieved by an agency contract or grant award decision under this subchapter may request a hearing of appeal. Such a request must be made to the Director of the Bureau of General Services in writing within 15 days of notification of the ~~contract~~ award. The Director of the Bureau of General Services shall grant a hearing of appeal unless:

A. The Director of the Bureau of General Services determines that:

- (1) The petitioner is not an aggrieved person;
- (2) A prior request by the same petitioner relating to the same contract or grant award has been granted;
- (3) The request was made more than 15 days after notice of contract or grant award; or
- (4) The request is capricious, frivolous or without merit; or

B. ~~No contract award was granted~~ or grant was awarded.

The Director of the Bureau of General Services shall notify the petitioner in writing of the director's decision regarding a request for a hearing of appeal within 15 days of receipt of the request. If a request for a hearing is granted, notification must be made at least 10 days before the hearing date and must include the date and location of the hearing and the names of the appeal committee members.

**3. Appeal committee.** A committee of 3 members shall hear a petitioner's appeal within 60 days of receipt of the request for an appeal. The Commissioner of Administrative and Financial Services shall appoint 2 members of an appeal committee, except that persons who have any direct or indirect personal, professional or financial conflict of interest in the appeal or employees of any department affected by the contract or grant may not serve on the appeal committee. The 3rd member is the Director of the Bureau of General Services or the director's designee.

Members of an appeal committee appointed under this section shall meet at the appointed time and place in the presence of the petitioner and such individuals as the petitioner determines necessary for a full and fair hearing. The petitioner may present to the appeal committee any materials the petitioner considers relevant to the appeal.

The appeal committee shall keep a written record of each hearing and shall submit its decision and the reasons for its decision to the Director of the Bureau of General Services in writing no later than 15 days following the hearing of appeal.

Subject to the requirements of rules adopted under this section and evidence presented during a hearing of appeal, the appeal committee may decide either to:

- A. Validate the contract or grant award decision under appeal; or
- B. Invalidate the contract or grant award decision under appeal.

Except as provided in paragraph B, an appeal committee may not modify the contract or grant award under appeal, or make a new ~~contract~~ award. Contracts or grants found invalid by an appeal committee under this subchapter become immediately void and of no legal effect.

**Sec. 7. 5 MRSA §1825-G**, as enacted by PL 1989, c. 785, §2, is amended to read:

### **§ 1825-G.Failure to act**

Failure or refusal of the State Purchasing Agent to adopt rules under this subchapter is sufficient grounds for an aggrieved person to request judicial review of agency rulemaking pursuant to section 8058. In the event that a judicial declaration of an invalid rule is made under this section and section 8058, the contract or grant award under appeal becomes immediately void and of no legal effect.

**Sec. 8. 5 MRSA §1825-I**, as enacted by PL 1993, c. 71, §1, is amended to read:

### **§ 1825-I.Consultants**

While under contract or working pursuant to a grant with the State, a consultant may use state facilities and state property only for the project or projects to which a contract or grant applies.

**Sec. 9. 5 MRSA §1825-J**, as enacted by PL 1999, c. 623, §1, is amended to read:

### **§ 1825-J.Reports**

When a state agency enters into a contract or grant with a nongovernmental entity, and the contract or grant includes a report to the agency, the contract or grant must require that the report be in writing or in another reproducible nontransitory medium and be submitted to the agency. The report must express all of the substantive conclusions disclosed to the agency and either summarize the information and data or identify the source of the information and data on which those conclusions are based. Once the report is submitted, the agency shall retain at least one copy of the report in its custody. This section applies to contracts and grants with a total cost of \$10,000 or more.

## **SUMMARY**

This bill implements a recommendation of the Government Oversight Committee stemming from the Office of Program Evaluation and Government Accountability report on Healthy Maine Partnerships' fiscal year 2013 contracts and funding. The bill adds the word "grant" where applicable to clarify that the statutory provisions requiring competitive bidding, and related provisions, apply to grant awards as well as contracts.