

PLEASE NOTE: Legislative Information **cannot** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

## **An Act To Protect Taxpayers in the Privatization of State Services**

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

**Sec. 1. 5 MRSA §18, sub-§1, ¶D**, as enacted by PL 1979, c. 734, §2, is amended to read:

D. "Proceeding" means a proceeding, application, request, ruling, determination, award, contract, claim, controversy, charge, accusation, arrest or other matter relating to governmental action or inaction, but does not include an employee bid or contract to provide agency services under section 482, subsections 6 and 7.

**Sec. 2. 5 MRSA §18-A, sub-§4**, as enacted by PL 2001, c. 203, §2, is amended to read:

**4. Exemptions.** This section does not apply:

A. To purchases by the Governor under authority of Title 1, section 814;

B. To contracts made with a corporation that has issued shares to the public for the general benefit of that corporation; ~~or~~

C. If an exemption is approved by the Director of the Bureau of General Services within the Department of Administrative and Financial Services or the director's designee based upon one of the following and if the director gives notice of the granting of this exemption to all parties bidding on the contract in question with a statement of the reason for the exemption and if an opportunity is provided for any party to appeal the granting of the exemption:

(1) When the private entity or party that proposes to contract with the State and that employs the executive employee, based upon all relevant facts, is the only reasonably available source to provide the service or product to the State, as determined by the director; or

(2) When the director determines that the amount of compensation to be paid to the private entity or party providing the service or product to the State is de minimis; ~~or~~

D. To a contract by employees to provide agency services under section 482, subsection 7.

**Sec. 3. 5 MRSA c. 21** is enacted to read:

### **CHAPTER 21**

## **PRIVATIZATION OF AGENCY SERVICES**

### **§ 481. Definitions**

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

- 1. Agency.** "Agency" means a state agency as defined in section 1552, subsection 6.
- 2. Business day.** "Business day" means any calendar day excluding Saturdays, Sundays and legal holidays.
- 3. Contractor.** "Contractor" means a nongovernmental person who has entered into a privatization contract with the State.
- 4. Dependent.** "Dependent" means the spouse or child of an employee if the spouse or child would qualify for dependent status under the United States Internal Revenue Code of 1986 or for whom a support order has been or could be granted under Title 19-A, section 1653, subsection 2.
- 5. Employee organization.** "Employee organization" means an organization that has as its primary purpose the representation of employees in their employment relations with an employer under Title 26, chapter 9-B.
- 6. Privatization contract.** "Privatization contract" means an agreement or combination or series of agreements by which a nongovernmental person agrees with an agency to provide services that are of at least \$500,000 in value as of October 1, 2017 and annually increased by the amount of increase in the Consumer Price Index calculated by the United States Department of Labor, Bureau of Labor Statistics for the most recent 12-month period for which data are available and that are substantially similar to and in lieu of services provided, in whole or in part, by regular employees of the agency. "Privatization contract" does not include:
  - A. Any subsequent agreement to a privatization contract, including any agreement resulting from a rebidding of previously privatized service, or any agreement renewing or extending a privatization contract;
  - B. A contract for information technology services if an employee organization agrees to the terms of the contract in writing; or
  - C. An agreement solely to provide legal, management consulting, planning, engineering or design services.

## **§ 482. Privatization contracts**

- 1. Privatization contracts.** Notwithstanding the provisions of chapters 155 and 156, an agency entering into a privatization contract shall, in consultation with the Commissioner of Administrative and Financial Services, follow the requirements of this section.
- 2. Written statement of services; sealed bids; contract terms.** An agency shall prepare a specific written statement of the services proposed to be the subject of a privatization contract, including the specific quantity and standard of quality of the subject services. The agency shall solicit

competitive sealed bids for the privatization contracts based upon this statement. The day designated by the agency upon which it will accept these sealed bids must be the same for all parties. The statement of services is a public record and must be filed in the agency and with the Commissioner of Administrative and Financial Services and transmitted to the State Auditor for review pursuant to section 483. The term of a privatization contract may not exceed 5 years. A privatization contract may not be amended for the purpose or effect of avoiding a requirement of this section.

**3. Wage rate and benefits for employees in bids for privatization and privatization contracts.** For each position for which a bidder under subsection 2 will employ a person pursuant to the privatization contract and for which the duties are substantially similar to the duties performed by a regular agency employee or employees, the statement required by subsection 2 must include a statement of the minimum wage rate to be paid for the position. The minimum wage rate must be the lowest classification under chapter 372 under which the comparable regular agency employee is paid or the average private sector wage rate for the position as determined by the Commissioner of Administrative and Financial Services from data collected by the Department of Administrative and Financial Services, Bureau of Human Resources and Bureau of General Services. A bid for a privatization contract and a privatization contract must establish the wage rate for each position subject to a minimum wage rate under this subsection at no less than the minimum wage rate for that position. A bid for a privatization contract and a privatization contract must include provisions for the contractor to pay not less than a percentage, comparable to the percentage paid by the State for state employees, of the costs of health insurance plans with coverage comparable to the coverage provided by the State for state employees for every employee employed for not less than 20 hours per week pursuant to the contract and for a dependent of the employee. A contractor shall submit quarterly payroll records to the agency, listing the name, address, social security number, hours worked and hourly wage paid for each employee in the previous quarter. The Attorney General may bring a civil action for equitable relief in the Superior Court to enforce this subsection or to prevent or remedy the dismissal, demotion or other action prejudicing any employee as a result of a report of a violation of this subsection.

**4. Offers of employment to terminated state employees.** A privatization contract must contain a provision requiring the contractor to offer available employee positions pursuant to the contract to qualified regular employees of the agency whose state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor. A privatization contract must contain provisions requiring the contractor to comply with a policy of and to take affirmative steps to provide nondiscrimination and equal opportunity for any person protected by chapter 337.

**5. Estimate of subject services.** An agency seeking to enter into a privatization contract shall prepare a comprehensive written estimate of the costs of regular agency employees providing the subject services in the most cost-efficient manner. The estimate must include all direct and indirect costs of regular agency employees providing the subject services, including, but not limited to, pension, insurance and other employee benefit costs. For the purpose of reducing this estimate, an employee organization representing employees of the agency may at any time before the final day for the agency to receive sealed bids pursuant to subsection 2 propose an amendment to any relevant collective bargaining agreement to which the employee organization is a party, but such an amendment may take effect only if the effect of the amendment is to reduce the estimate below the contract cost pursuant to subsection 7. An estimate

under this subsection remains confidential until after the final day for the agency to receive sealed bids for the privatization contract pursuant to subsection 2, at which time the estimate becomes a public record and must be filed in the agency and with the Commissioner of Administrative and Financial Services and transmitted to the State Auditor for review pursuant to section 483.

**6. Employee bids.** Employees of an agency seeking a privatization contract under subsection 1 and who are represented by an employee organization may organize and submit a bid to provide the subject services under this section. After consulting any relevant employee organizations, an agency seeking to enter into a privatization contract shall provide adequate resources for the purpose of encouraging and assisting agency employees to organize and submit a bid to provide the subject services. In determining what resources are adequate for this purpose, the agency shall refer to an existing collective bargaining agreement of a similar employee organization whose members perform the subject services that provides similar resources in the same or other agencies, except that, if no such collective bargaining agreement exists, the agency shall refer to any existing comparable collective bargaining agreement providing similar resources and shall provide such resources at the minimum level of assistance provided in the similar agreement. The agency shall consider an employee bid under this subsection on the same basis as all other bids received under subsection 2. An employee bid under this subsection is not a public record under Title 1, chapter 13, subchapter 1 before the designation of the winning bidder under subsection 7. An employee bid under this subsection may be made as a joint venture with other persons.

**7. Designation of winning bidder.** After soliciting and receiving all bids under subsection 2, an agency shall publicly designate the bidder to which it proposes to award the privatization contract. The agency shall prepare a comprehensive written analysis of the contract cost based upon the designated bid, specifically including the costs of transition from public to private operation, of any additional unemployment and retirement benefits and of monitoring and otherwise administering contract performance. If the designated bidder proposes to perform any or all of the contract outside the boundaries of the State, the contract cost must be increased by the amount of any lost income tax revenue to the State by the corresponding elimination of agency employees, as determined by the State Tax Assessor.

**8. Certification to State Auditor.** For a privatization contract of a designated bidder under subsection 7, the head of the agency and the Commissioner of Administrative and Financial Services shall each certify in writing to the State Auditor that:

- A. The contract complies with all provisions of this section and of all other applicable laws;
- B. The quality of the services to be provided by the designated bidder is likely to satisfy the quality requirements of the statement prepared pursuant to subsection 2 and to equal or exceed the quality of services that could be provided by regular agency employees pursuant to subsection 5;
- C. The contract cost pursuant to subsection 7 will be less than the estimated cost pursuant to subsection 5;

D. The designated bidder and its supervisory employees while in the employ of the designated bidder have no adjudicated record of substantial or repeated willful noncompliance with any relevant federal or state regulatory statute, including, but not limited to, statutes concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection and conflicts of interest; and

E. The proposed privatization contract is in the public interest and meets all applicable quality and fiscal standards.

A copy of the proposed privatization contract must accompany the certification transmitted to the State Auditor under this subsection.

**9. Rules.** The Department of Administrative and Financial Services may adopt rules to carry out the provisions of this chapter and to ensure that the competitive bidding process under this section is consistent with the provisions of competitive bids under section 1825-B.

### **§ 483. Review by State Auditor**

**1. Review by State Auditor.** A privatization contract submitted to the State Auditor becomes valid 30 business days after receipt of the certification for the contract required by section 482, subsection 8 unless the State Auditor notifies the agency of an objection to the contract within 30 business days of receipt of the certification. An objection by the State Auditor under this subsection must be in writing and state specifically the State Auditor's finding that the agency has failed to comply with one or more of the requirements of section 482, including that based on independent review of all the relevant facts the State Auditor finds incorrect any of the findings required by section 482, subsection 8. The State Auditor may extend the time for objections for an additional period of 30 business days beyond the original 30 business days by written notice to the agency stating the reason for the extension.

**2. Summonses by State Auditor.** For the purpose of reviewing an agency's compliance and certification pursuant to section 482, the State Auditor or the State Auditor's designee may require by summons the attendance and testimony under oath of witnesses and the production of books, papers and other records relating to the review. All provisions of law relative to summonses in Title 14, chapter 203 apply to a summons under this subsection.

**3. Forms; rules.** The State Auditor may prescribe forms and adopt routine technical rules as defined in chapter 375, subchapter 2-A to carry out the provisions of this chapter.

**4. Finality of State Auditor objection.** An objection of the State Auditor pursuant to subsection 1 is final and binding, unless the State Auditor in writing withdraws the objection. If the State Auditor objects to a contract under subsection 1, the privatization process under section 482 is terminated unless the agency submits a revised certified contract to the State Auditor within 30 days of the date of the objection. The State Auditor shall review a revised certified contract in the same manner as a certified contract under subsection 1.

## **SUMMARY**

This bill creates a process by which a state agency can enter a privatization contract with a nongovernmental entity to perform basic agency services for up to 5 years if a number of criteria are met, including:

1. Wages and benefits for employees of the contractor are comparable to state employees performing the same services;
2. The contractor endeavors to hire agency employees terminated due to the privatization;
3. The agency provides an estimate of its costs in providing the subject services in the most efficient manner;
4. The agency provides support and resources to allow agency employees to submit a competing bid to provide the privatized services;
5. The agency considers as a contract cost any income tax revenue lost to the State as a result of services to be performed out of state under the contract; and
6. A review by the State Auditor to determine that all of the requirements of the bidding and privatization contract have been met.