

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-ONE

—
S.P. 289 - L.D. 875

**An Act To Protect Taxpayers in the Privatization of Services and To
Establish the State Procurement Review Committee**

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 organization bid or contract to provide agency services under section 1816-B.

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 an employee organization to provide agency services under section 1816-B.

Sec. 3. 5 MRSA §1816-B is enacted to read:

§1816-B. Privatization of agency services

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Agency" means a state agency as defined in section 1552, subsection 6, but does not include the quasi-independent state entities listed in section 12021, subsection 6.

B. "Agency cost estimate" means the cost to the agency seeking to privatize services to provide the services in the most cost-efficient manner. "Agency cost estimate" is the total of all direct and indirect costs to provide the services, including but not limited to wages and pension, insurance and other employee benefit costs of agency employees.

C. "Agency employee" means an employee of the agency seeking to privatize services.

D. "Business day" means any calendar day, excluding Saturdays, Sundays and legal holidays listed in Title 4, section 1051.

E. "Commissioner" means the Commissioner of Administrative and Financial Services.

F. "Contract cost" means the total cost to the agency to privatize services. The total cost is the sum of the cost of the proposed bid designated pursuant to subsection 7, the costs of transition from public to private operation, the costs of any additional unemployment and retirement benefits and the costs of monitoring and otherwise administering contract performance.

G. "Contractor" means a nongovernmental person that has entered into a privatization contract with the State.

H. "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 1652, subsection 2.

I. "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.

J. "Privatization contract" means an agreement or a combination or series of agreements by which a nongovernmental person agrees with an agency to provide services that are substantially similar to and in lieu of services provided, in whole or in part, by agency employees and that has an agency cost estimate of at least \$500,000 as of October 1, 2021 and annually increased by the amount of increase in the Consumer Price Index compiled by the United States Department of Labor, Bureau of Labor Statistics for the most recent 12-month period for which data are available. "Privatization contract" does not include:

(1) Any subsequent agreement to a privatization contract, including an agreement resulting from a rebidding of previously privatized service, or an agreement renewing or extending a privatization contract;

(2) A contract for information technology services provided to an agency if an employee organization representing the agency employees agrees to the terms of the contract in writing; or

(3) An agreement solely to provide legal, management consulting, planning, engineering or design services.

2. Privatization of services. Notwithstanding any provision of this chapter or chapter 156 to the contrary, an agency seeking to enter into a privatization contract shall, in consultation with the commissioner, comply with the requirements of this section.

A. Prior to issuing a request for proposals under subsection 5 for the privatization of services, an agency seeking to enter into a privatization contract shall prepare a written statement that includes:

(1) A summary of the services proposed to be the subject of the privatization contract, including the specific quantity and standard of quality of the services;

(2) The minimum wage rate for each position for which a contractor may employ a person pursuant to the privatization contract and for which the duties are substantially similar to the duties performed by an agency employee. The minimum wage rate must be the lowest classification under chapter 372 under which the comparable agency employee is paid or the average private sector wage rate for the position as determined by the commissioner from data collected by the Department of Administrative and Financial Services, Bureau of Human Resources and Bureau of General Services, whichever is lower; and

(3) The percentage paid by the State for the costs of health insurance plan coverage for the agency employees who are employed for not less than 20 hours per week and the percentage paid by the State for such costs for any dependent of such an employee.

B. A written statement created by an agency under paragraph A is a public record and must be filed, prior to issuance of a request for proposals, with the commissioner, the Attorney General and employee organizations that represent agency employees.

C. Prior to issuing a request for proposals under subsection 5 for the privatization of services, an agency seeking to enter into a privatization contract shall determine the agency cost estimate. The agency cost estimate is confidential and not a public record until the day after the final day for the agency to receive sealed bids for the privatization contract pursuant to subsection 5, at which time the agency cost estimate becomes a public record and must be filed with the commissioner and the Attorney General.

3. Employee organization request for review; final agency action. An employee organization representing agency employees may file a written request for review with the commissioner regarding the contents of the written statement required in subsection 2, paragraph A within 10 business days of the date the statement was filed. The commissioner shall issue a written decision on the request for review within 15 business days of receiving the request for review. The commissioner's decision under this subsection constitutes final agency action for the purposes of judicial review under chapter 375, subchapter 7.

4. Collective bargaining agreement amendment. An employee organization representing agency employees may at any time before the final day for the agency to receive sealed bids pursuant to subsection 5 propose an amendment to any relevant

collective bargaining agreement to which the employee organization is a party, but such a proposed amendment may take effect only if the effect of the proposed amendment is to reduce the agency cost estimate below the contract cost. A proposed amendment under this subsection is confidential and not a public record until the day after the final day for the agency to receive sealed bids for the privatization contract pursuant to subsection 5, at which time the proposed amendment becomes a public record and must be filed with the agency, the commissioner and the Attorney General.

5. Request for proposals. An agency seeking to enter into a privatization contract shall solicit competitive sealed bids for the privatization contract through the request for proposals process. The day designated by the agency upon which it will accept sealed bids must be the same for all parties.

A. The request for proposals for a privatization contract and the privatization contract must require the contractor to:

(1) Pay a rate no less than the minimum wage rate established pursuant to subsection 2, paragraph A, subparagraph (2) for each position subject to a minimum wage rate;

(2) Provide, to an employee employed for not less than 20 hours per week and to any dependent of the employee, health insurance plan coverage that is comparable to the health insurance plan coverage provided to agency employees;

(3) Pay not less than the percentage established pursuant to subsection 2, paragraph A, subparagraph (3) toward the cost of health insurance plan coverage for an employee employed for not less than 20 hours per week and for any dependent of such an employee;

(4) Submit quarterly payroll records to the agency, listing the name, address, social security number, hours worked and hourly wage rate paid for each employee in the previous quarter. Employee names, addresses and social security numbers are confidential;

(5) Offer available employee positions under the privatization contract to qualified agency employees who are displaced or terminated because of the privatization contract and who satisfy the nondiscriminatory hiring criteria of the contractor under subparagraph (6); and

(6) Comply with a policy of nondiscrimination and take affirmative steps to provide equal opportunity for any person protected by the Maine Human Rights Act.

B. The Attorney General may bring a civil action for equitable relief in Superior Court to enforce paragraph A or to prevent or remedy the dismissal, demotion or other action prejudicing any employee as a result of a report of a violation of paragraph A.

C. The term of a privatization contract, including renewals provided for in a privatization contract, may not exceed 5 years unless a longer term is approved by the commissioner.

D. A privatization contract may not be amended for the purpose or effect of avoiding a requirement of this section.

6. Employee organization bids. Agency employees who are represented by an employee organization may organize and request that the employee organization submit a bid on their behalf to provide the services to be privatized.

A. An employee organization, after consulting with any agency employees seeking to bid on 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 services to be privatized. For purposes of this paragraph, "adequate resources" means no less than the minimum level of assistance provided for in:

(1) The terms of the existing collective bargaining agreement covering the agency employees seeking to submit a bid;

(2) The terms of the expired collective bargaining agreement covering the agency employees seeking to submit a bid during the period of collective bargaining negotiations for a new agreement; or

(3) The terms of a comparable collective bargaining agreement covering individuals who provide similar services if the existing or expired collective bargaining agreement does not provide for a minimum level of assistance.

B. An employee organization bid under this subsection may be made as a joint venture with other persons.

C. An employee organization bid under this subsection is confidential and not a public record until the day after the agency designates the proposed winning bidder under subsection 7.

7. Review of bids; designation of winning bidder. After soliciting and receiving the submitted bids, an agency shall:

A. Publicly designate the bidder to which the agency proposes to award a privatization contract;

B. Determine the contract cost of the designated bid and file a cost analysis with the commissioner and the Attorney General. If the proposed bidder under paragraph A 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 caused by the corresponding elimination of agency employees, as determined by the State Tax Assessor; and

C. Determine whether the contract cost under paragraph B is less than the agency cost estimate prepared pursuant to subsection 2, paragraph C. If the contract cost is equal to or more than the agency cost estimate, the agency may not enter into a privatization contract.

If a bid is received from an employee organization, the commissioner, or the commissioner's designee, may include staff from the Department of Administrative and Financial Services, Bureau of Human Resources in the bid review process authorized by section 1825-D.

8. Negotiation of privatization contract. If the contract cost calculated pursuant to subsection 7, paragraph B is less than the agency cost estimate, the agency may begin negotiating the terms of the privatization contract except that, if an employee organization bid is awarded the privatization contract pursuant to subsection 7, the Department of

Administrative and Financial Services, Bureau of Human Resources shall negotiate the terms of the privatization contract with the employee organization. If the contract cost is equal to or more than the agency cost estimate, the agency may not enter into a privatization contract. The privatization contract must be filed with the commissioner and the Attorney General prior to execution.

9. Attorney General authority. The authority of the Attorney General over the privatization of services is governed by this subsection.

A. At any time during the process of privatizing any services pursuant to this section, the Attorney General may:

(1) Intervene in the process;

(2) Require by summons the attendance and testimony under oath of state employees and the production of documents for the purpose of investigating whether the provisions set forth in this chapter and chapter 156 are met. All documents produced and testimony given to the Attorney General pursuant to this subparagraph are confidential. The Attorney General may seek an order from the Superior Court compelling compliance with a summons issued under this subparagraph; and

(3) Bring an action in Superior Court in the name of the State against an agency when the Attorney General has reason to believe that a requirement of this section has not been met, the agency has acted unlawfully or beyond the scope of its authority, the actions or inactions of the agency are not supported by the record required by this section or the privatization of services is not in the public interest.

B. After the filing of a court action under this subsection, further action by an agency under this section must be stayed unless the court orders otherwise. During the period of the stay, any time period specified for agency action under this chapter or chapter 156 is tolled until the court action is dismissed by the Attorney General or the Superior Court orders an agency to take further action. Relief from the stay may be granted only upon a showing of compelling justification.

C. Except as provided in this paragraph, at least 10 business days prior to commencement of an action under this subsection, the Attorney General shall notify the agency and the commissioner of the proposed action and shall provide the commissioner and the agency an opportunity to confer with the Attorney General in person or by counsel or other representative as to the proposed action. The Attorney General may proceed without notice upon a showing by affidavit of immediate irreparable harm to the citizens of the State.

D. An action by the Attorney General under this subsection may seek to, among other things, restrain by temporary or permanent injunction the privatization of services under this section, and the court may make such other orders or judgments as may be necessary to prevent the privatization of services.

10. Rules; forms. The Department of Administrative and Financial Services may prescribe forms and adopt rules to carry out the provisions of this section and to ensure that the competitive bidding process under this section is consistent with the provisions of competitive bids under subchapter 1-A. Rules adopted pursuant to this subsection are routine technical rules as defined in chapter 375, subchapter 2-A.

Sec. 4. 5 MRSA §1824-B is enacted to read:

§1824-B. State Procurement Review Committee

The State Procurement Review Committee, referred to in this section as "the committee," is established to oversee, subject to the provisions of section 1825-B, subsection 2, the purchase of services subject to this chapter that cost \$1,000,000 or more. The purchase of services that cost less than \$1,000,000 may be subject to this section at the discretion of the chair of the committee.

1. Membership. The membership of the committee includes:

A. A member of the Governor's staff, appointed by the Governor;

B. The director of the division of procurement services within the Department of Administrative and Financial Services or the director's designee;

C. The State Budget Officer or the State Budget Officer's designee;

D. The State Controller or the State Controller's designee; and

E. The Attorney General or the Attorney General's designee, serving as a nonvoting member.

The Chief Information Officer or the Chief Information Officer's designee is a committee member when the services to be purchased by a department or agency are within the Chief Information Officer's responsibilities and duties under chapter 163.

2. Chair. The director of the division of procurement services within the Department of Administrative and Financial Services or the director's designee shall serve as chair of the committee.

3. Unanimous consent. A decision by the committee requires unanimous consent.

4. Requests for review. Prior to issuing a request for proposals, executing a contract or grant or renewing, extending, amending or otherwise altering an existing contract or grant to purchase services that cost \$1,000,000 or more, a department or agency shall submit a request for review to the chair of the committee. The department or agency shall submit to the chair the request for proposals, proposed contract, contract amendment and related contract bid documents, as appropriate. The committee may request additional information and documentation from the department or agency.

5. Attorney General review. If the cost of the request for proposals, contract or grant or renewal, extension, amendment or other alteration to an existing contract or grant is likely to equal or exceed \$3,000,000, the department or agency shall give the Attorney General the opportunity to review the proposal, contract or grant or the renewal, extension, amendment or other alteration to an existing contract or grant prior to submitting a request for review pursuant to subsection 4. The Attorney General, or the Attorney General's designee, may review the terms of the proposal, contract or grant or the renewal, extension, amendment or other alteration to an existing contract or grant and notify the department or agency of any concerns with the terms.

6. Duties. The committee may approve a request to issue a request for proposals, execute a contract or grant or renew, extend, amend or otherwise alter an existing contract or grant subject to this section if the committee finds that:

A. The service to be provided under the contract or grant cannot be economically provided by a department or agency;

B. The contract or grant is the most economical, effective and appropriate means of providing the service;

C. The contract or grant will not impair the ability of a department or agency to meet its statutory duties and responsibilities under state or federal laws, rules or regulations; and

D. The contract or grant will not diminish the impact of statewide or other budgetary cost-saving initiatives.

7. **Rules; forms.** The Department of Administrative and Financial Services may prescribe forms and adopt rules to carry out the provisions of this section. Rules adopted pursuant to this subsection are routine technical rules as defined in chapter 375, subchapter 2-A.