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SERVING THE PUBLIC AND DELIVERING ESSENTIAL SERVICES TO STATE GOVERNMENT

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*Testimony of Anya Trundy, Director of Legislative Affairs
Department of Administrative and Financial Services
testifying in opposition to*

LD 1411, An Act To Establish the Maine Buy American and Build Maine Act

Sponsored by Senate President Jackson
Before the Joint Standing Committee on State and Local Government

Senator Baldacci, Representative Matlack, and honorable members of the Joint Standing Committee on State and Local Government, my name is Anya Trundy, I am the Director of Legislative Affairs for the Department of Administrative and Financial Services (DAFS), and I am submitting written testimony in opposition to LD 1411, An Act To Establish the Maine Buy American and Build Maine Act.

LD 1411 consists of two components: the Buy American component which requires that manufactured goods used in the construction of public works projects or purchased by State agencies must be manufactured in the United States; and the Build Maine component which establishes an in-state preference for Maine contractors and vendors. Although updates have been made to the bill from previous versions that came before past legislatures, DAFS remains opposed to the bill on a fundamental level.

Buy American

DAFS is concerned that the Buy American component of this legislation will result in higher project bids than previously. The number of projects that the Bureau of General Services can undertake is inversely proportionate to the cost of each project. This Committee is aware of the deferred maintenance on our State Buildings and the limited resources currently dedicated to capital repairs. In addition, the work required to comply with the Buy American provisions of the bill are significant and cannot be absorbed by existing staff. In recent years, the Planning and Construction Division of BGS has been reduced from 7 to 5 licensed professionals who are currently responsible for more than 400 ongoing projects for state agencies, as well as responding to myriad building issues that have arisen due to COVID-19. Compliance with the Buy American provisions would require research of which products are manufactured in the U.S. This would be a full-time endeavor on large projects involving tens of thousands of components. Obtaining a waiver, as provided in the legislation, would also necessitate significant research to determine and demonstrate that inclusion of U.S. manufactured goods would increase project costs by an unreasonable amount.

Build Maine

Procurement laws and regulations provide a legal, ethical, and predictable framework which balance the State's desire to get the best value for its dollars, while ensuring that the process is fair and open to the maximum number of participants. Maine's procurement laws and regulations uphold a closed-bid process that: makes awards on straight-forward, objective bases; offers aggrieved parties recourse through a well-established,

expedient appeals process; and provides the public with accountability and transparency. To the contrary, LD 1411 inserts subjectivity into the procurement process, would call the fairness of the process into question generating increased appeals, and then establishes a drawn-out appeals process. Based upon our analysis of the State's actual construction contracts and procurement of services and goods, it is difficult to see how this bill would substantially grow the number of successful Maine contractors and vendors without jeopardizing quality or increasing costs.

By the Numbers

Updating statistics that I provided last spring in my testimony on this bill's predecessor, a review of construction contracts awarded by the Bureau of General Services in FY20 reveals that 97.6% of the total spend was awarded to 62 companies with an established presence in Maine. The remaining 2.4% of the total spend was split among six out-of-state companies, five of which provided highly specialized equipment or services not available through Maine companies. In the only instance in which a Maine company lost out to an out-of-state company, their bid came in 30% higher than the low bid.

This year we also expanded our review to the State's procurement of services and goods. In 2020, 113 RFPS were issued—52 awards were made to Maine bidders, and 45 awards went to out-of-state bidders. For the remaining 16, bids were received from Maine bidders, but ultimately the agency decided not to make an award. In addition, the Division of Procurement Services issued 19,056 other procurement documents (purchase orders, service contracts, etc.) to Maine businesses, as compared to 18,921 issued to non-Maine businesses. We are keeping more than 50% of our spending right here in Maine. When that isn't possible, it is because the out-of-state vendor offered the best value—a combination of quality of product and/or service and price. Given procurement volume, we are unable to look back know in many instances the product could not be obtained from a Maine business.

Maine based contractors and vendors have proven themselves more than competitive; they are capable of performing the work, offer quality services and goods, and more often than not, their bids come in cheaper than their competitors; they are winning the State's contracts fair and square without us stacking the deck in their favor.

Opportunity to Match

The "Opportunity to Match" states that if an in-state contractor submits a bid that is substantially higher than other submitted bids, the department shall give that in-state contractor the opportunity to match the lowest bid submitted. First, it is problematic that "substantially similar" and "substantially higher" are completely subjective, undefined terms. Second, the Department doesn't believe that allowing in-state contractors another bite at the apple when they've significantly priced themselves out of competition with their initial bid, is fair. It provides them an opportunity to undercut their out-of-state counterparts after bids have been opened. It isn't soliciting bids in good faith and is a practice that will draw appeals and lawsuits. We must question: if the in-state contractor can match the lowest bid, why wasn't their bid substantially similar in the first place? Or conversely, to match the low bid, will they now have to cut corners to cut costs?

Grievance; Investigation; Mediation

The "grievance; investigation; mediation" process laid out in this legislation conflicts with the appeals processes already in place under 5 M.R.S. §1749 for public improvements and §1825-E for purchasing. Particularly in comparison to the existing public improvements appeal process, which can take as little as 10 days, the "grievance; investigation; mediation" process set forth in LD 1411 is protracted.

Additionally, LD 1411 tasks the Attorney General with investigating complaints, brought by an aggrieved in-state bidder and allows the Attorney General to act as a mediator between the in-state bidder and the State. This would seem to create a conflict given that the Office of the Attorney General represents the State, thus denying the agency full benefit of their counsel.

Alternatives to Establishing Preference

The Division of Procurement Services has surveyed their counterparts in other states. It is true that many other states have preferences established in their statutes. In many instances, the state only goes so far as to give preference to the in-state bidder in the event of a tie-bid. Maine similarly already has a tie-bid provision in statute (Title 26, §1301). Some states go further and award a percentage- or points-based advantage for targeted business profiles—though I'm not aware of any state that employs the Opportunity to Match approach proposed in LD 1411. Some states give preference to resident-owned businesses, while some states additionally or alternatively have preferences that advantage minority-owned, women-owned, veteran-owned, or small businesses.

Especially as states attempt to increase diversity, equity and inclusion among their contractors and vendors, states are moving away from percentage- or points-based preferences and looking to alternate approaches that better address the systemic inequalities that cause certain groups to be disadvantaged by the procurement process.

A handful of states are currently engaged in studies that: 1) identify the types of disadvantaged business enterprises their state desires to lift-up, and 2) determine where in the procurement process they are being excluded. Are they consistently in the hunt for state contracts? Are they not winning bids because their costs aren't competitive? Are they not winning bids because they don't meet the qualification? Or, are they failing to compete for contracts because they're not correctly submitting complete bids? Are they not submitting bids because of a barrier we're unaware of? Are they not submitting bids because the public advertisements of RFPs aren't reaching them?

A percentage- or points- based preference doesn't do anything to address the latter situations where disadvantaged business enterprises are left-out of procurement opportunities. Meanwhile, in the former situations a percentage- or point- based preference could give way to a problematic result in which a lesser qualified contractor or a higher bid prevails, raising questions of fairness.

Conclusion

The desire to harness the State's purchasing power and reinvest our tax dollars into the Maine and American economy is laudable but creating a subjective in-state preference for Maine bidders is not the best solution. Considering all the issues we've identified, DAFS respectfully asks the Committee to recommend LD 1411 ought not to pass.