



STATE OF MAINE  
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES  
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SERVING THE PUBLIC AND DELIVERING ESSENTIAL SERVICES TO STATE GOVERNMENT

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

**LD 1983, 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 Nangle, Representative Stover, and honorable members of the Joint Standing Committee on State and Local Government, my name is Anya Trundy, I am the Chief of Legislative and Strategic Operations for the Department of Administrative and Financial Services (DAFS), and I am submitting written testimony in opposition to LD 1983, An Act To Establish the Maine Buy American and Build Maine Act.

LD 1983 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 despite significant funds authorized in the past several years, a major backlog of repairs still exists. In addition, the work required to comply with the Buy American provisions of the bill are significant and cannot be absorbed by existing staff. Prior to 2019, the Planning and Construction Division of BGS had been reduced from 7 to 5 professionals who are currently responsible for more than 479 ongoing projects for State agencies. Compliance with the Buy American provisions would require research not only of which products are manufactured in the U.S., but for which products the cost of the components of the manufactured good is greater than 65%. 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, demonstrate and defend any stated justification that inclusion of U.S. manufactured goods would be "inconsistent with the public interest"; of insufficient quantity or quality; or would increase the cost of the public improvement by 25% or more. DAFS also can't conceptualize how application for a waiver would integrate into the existing closed bid process where material costs are part of the bid

submission, and especially in an instance when one bidder requests a waiver, and a competing bidder does not. Further, allowing public review and comment on waiver requests would halt progress on projects, all of which depend on certainty as to project specifications and time frames.

In summary, several additional staff would be needed to implement the work generated by LD 1983, and its procedures would slow or stop the progress of public improvement projects, causing contractors to withdraw bids or add inflation/escalation due to delay. This is not beneficial to public improvement projects that have finite and fixed resources.

### **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 taxpayer 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 1983 inserts subjectivity into the bidding and award process, by requiring bid recipients to assess whether bids are "substantially similar." The term is undefined and open to anyone's interpretation. Does "substantially similar" refer to costs, schedule of values, timeline, materials, bid alternates, or subcontractors selected for the project? Inserting such an imprecise standard of measurement into the procurement process would call the fairness of the process into question, generating increased appeals, a drawn-out appeals process, and invalidated awards requiring the bid process to start over. Uncertainty in the bidding environment has one of two effects: it either deters bidding, or it leads to higher costs. 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 deterring bids, increasing costs, and/or compromising quality.

### **By the Numbers**

Updating statistics provided in DAFS' testimony on this bill's predecessors, a review of construction contracts awarded by the Bureau of General Services in FY22 reveals that 98.66% of the total spend was awarded to 86 companies with an established presence in Maine. The remaining 1.34% of the total spend was split among four out-of-state companies. In FY23, 95.33% of the total spend was awarded to 91 Maine-based companies. The remaining 4.67% was split among eight out of state vendors. Out of state vendors supplied services or materials that were unavailable in Maine. For example, 1) the only vendors who bid on EV charging equipment were located out of state, and 3) the bidders on IT hardware and software are almost exclusively out-of-state companies, as a function of the technology industry being largely concentrated elsewhere in the county. Still our review of the State's procurement of services and goods shows a majority of RFPs were won by Maine bidders: in 2022, 91 awards (64%) were made to Maine bidders, and 52 awards went to out-of-state bidders; in 2023, 97 awards (63%) were made to Maine bidders and 57 awards went to out-of-state bidders.

In 2022, the Division of Procurement Services issued 10,768 other procurement documents such as purchase orders and service contracts to Maine businesses, as compared to 10,233 issued to non-Maine businesses. In 2023, the Division of Procurement Services issued 16,097 other procurement documents to Maine businesses, as compared to 14,705 issued to non-Maine businesses. This represents more than 52% of spending being kept in Maine last year. When awards are made to out of state vendors, it is because those out-of-state vendors are offering the best value—a combination of quality of product, service and price. There are also instances when a product or service cannot be obtained from a Maine Business, such as with the procurement of highly specialized goods. Procurement volume makes it impossible to look back and know with certainty in how many instances this was the case.

It is also worth noting the State's high-volume vendors like our office supply vendor maintain an in-state office and warehouse presence specifically to accommodate our order volume. Other vendors, like our institutional food provider, source extensively from local Maine-based food producers and suppliers.

***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.***

### **Preference Tied to Apprenticeship Programs**

The in-state preference language provides that if an in-state contractor submits a bid that is substantially similar to other submitted bids, the public agency soliciting the bid shall award the contract to an in-state contractor that has a registered apprenticeship program. While the Department is generally supportive of apprenticeship programs, interjecting them into the bidding process is misplaced. The practice will hurt smaller in-state contractors who do not have the resources to pay for registered apprenticeship programs, creating an unfair advantage for larger companies with greater resources.

### **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 1983 is protracted. It would slow the procurement process and seriously interfere with work getting underway on time, which matters in Maine's short construction season. Additionally, LD 1983 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. The language also does not address the additional complexity of multiple aggrieved in-state bidders who believe their bid was "substantially similar" to other bids.

### **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 1983 ought not to pass.

Governor Mills vetoed LD 1983's, predecessor bill LD 1411 during the 130<sup>th</sup> Legislature—her veto letter is attached to this testimony. LD 1983 is not substantially different in concept or in substance to alleviate the Governor's concerns.



Janet T. Mills  
GOVERNOR

STATE OF MAINE  
OFFICE OF THE GOVERNOR  
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04333-0001

July 13, 2021

The 130th Legislature of the State of Maine  
State House  
Augusta, Maine

Dear Honorable Members of the 130th Legislature:

Under the authority vested in me by Article IV, Part Third, Section 2 of the Constitution of the State of Maine, I am hereby vetoing L.D. 1411, *An Act to Establish the Maine Buy American and Build Maine Act*.

L.D. 1411 would require that all contracts for the construction, reconstruction, alteration, repair, improvement or maintenance of a public building or public work made by a state agency, board, commission or institution contain a provision that any manufactured good valued over \$5000 be manufactured in the United States. The bill also requires that if an in-state contractor submits a bid that is similar to but substantially higher than other submitted bids, the public agency shall give the in-state contractor a preference of 10 percent.

The provisions of this bill are problematic for several reasons.

First, the Federal Highway Administration (FHWA) strictly prohibits the use of in-state preferences in the selection of contractors, labor, and materials, FHWA's Contract Manual stating that "State transportation agency (STA) shall not impose any requirement or enforce any procedure which requires the use of, or provides a price differential in favor of contractors, labor, articles or materials produced within the State." L.D. 1411 would jeopardize a source of substantial federal funding and significantly impede our ability to repair and upgrade our public infrastructure.

Allowing the bill to become law would also create confusion in the bidding process and pose other serious financial consequences. Maine's contractors are not land-locked and often rely on work outside the state. Many states have adopted reciprocal laws, so that a 10 percent advantage for Maine businesses in Maine would result in a 10 percent *disadvantage* when Maine companies compete for bids out-of-state. This bill would therefore harm the very same Maine contractors it proposes to favor, many of whom are already struggling with increased materials costs and labor shortages.



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Like most states, Maine already offers preference to Maine-based companies in two ways: 1) tie-bid preference, and 2) reciprocal preference. The tie-bid preference favors the in-state bidder in the event of a tie-bid. In the event of another state applying an in-state preference that works against a Maine business, then the reciprocal preference requires Maine to apply the same preference against that state's businesses when they bid on Maine State contract. These preferences are legal under federal law and widely-used across many states.

Existing preferences are working in Maine. Because of these existing preferences and strong competitive bids by Maine companies, more than 90 percent of State contracts are awarded to Maine-based companies. In fact, the Maine Department of Transportation reports that, on average, 93 percent of their work is awarded to Maine firms, and the Bureau of General Services reports that in FY20 97.6 percent of the total spent was awarded to 62 companies with an established presence in Maine.

Maine work is going to Maine firms. And based upon an 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. Finally, it goes without saying that it is virtually impossible to determine the exact origin of each component of each "article, material or supply" valued over \$5,000 purchased by a public agency, whether a vehicle, heat pump, ventilation equipment, engine, camera or plow attachment.

Finally, this bill had a substantial fiscal note that included General Fund appropriations of \$252,784 in fiscal year 2021-22 and \$260,873 in fiscal year 2022-23 for two Planning and Research Associate I positions in the Bureau of General Services (BGS) Division of Planning/Design/Construction and two Procurement Analyst I positions in the BGS Division of Procurement Services. The fiscal note was deleted by a floor amendment which stated simply that the added responsibilities required by the bill would have to be accomplished "within existing resources." This amendment was unrealistic and fiscally irresponsible, rendering the bill even more unacceptable despite its bright sounding title.

For the above reasons, I return L.D. 1411 unsigned and vetoed. I urge the Legislature to sustain it.

Respectfully,



Janet T. Mills  
Governor



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