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129th MAINE LEGISLATURE

FIRST REGULAR SESSION-2019

Legislative Document

No. 1639

S.P. 529

In Senate, April 25, 2019

**An Act To Require Comprehensive Responsible Contracting
Practices for Public Construction Projects**

Reference to the Committee on Labor and Housing suggested and ordered printed.

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT
Secretary of the Senate

Presented by President JACKSON of Aroostook.
Cosponsored by Speaker GIDEON of Freeport and
Senators: BELLOWS of Kennebec, LIBBY of Androscoggin, VITELLI of Sagadahoc,
Representatives: CARNEY of Cape Elizabeth, FECTEAU of Biddeford, SYLVESTER of
Portland.

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

2 **PART A**

3 **Sec. A-1. 5 MRSA c. 155, sub-c. 3** is enacted to read:

4 **SUBCHAPTER 3**

5 **RESPONSIBLE CONTRACTING**

6 **§1826-P. Definitions**

7 As used in this subchapter, unless the context otherwise indicates, the following
8 terms have the following meanings.

9 **1. Bureau.** "Bureau" means the Bureau of General Services within the Department
10 of Administrative and Financial Services.

11 **2. Class A apprenticeship program.** "Class A apprenticeship program" means an
12 apprenticeship program that is registered with and approved by the United States
13 Department of Labor or a state apprenticeship agency as defined in Title 26, section 3201,
14 subsection 22 and has graduated apprentices to journeyman status for at least 3 of the past
15 5 years.

16 **3. Construction project.** "Construction project" or "project" means a publicly
17 funded project to build, construct or complete major alteration or repair of buildings or
18 public works that is funded with state funds.

19 **4. Contractor.** "Contractor" means a developer, construction manager, prime
20 contractor, subcontractor or any other entity that performs work on a construction project
21 or submits a bid to perform such work.

22 **5. Craft worker.** "Craft worker" is a person who possesses experience and
23 proficiency in a trade involved in building construction.

24 **6. Prime contractor.** "Prime contractor" is a contractor that has entered into a
25 contract with the State for a construction project and that is responsible for completion of
26 the project even if that prime contractor employs one or more subcontractors to carry out
27 portions of the project.

28 **§1826-Q. Contractor responsibility certification**

29 A contractor that submits a bid or is included as a contractor on a bid for a
30 construction project shall submit a contractor responsibility certification form at the time
31 of the bid and meet all requirements of this section. The bureau shall administer the
32 contractor responsibility certification process and provide necessary forms to potential
33 bidders.

1 **1. Certification requirements.** A contractor submitting a contractor responsibility
2 certification form under this section shall make the certifications and meet the
3 requirements as set out in this subsection.

4 A. The contractor and its employees shall hold all valid and effective licenses,
5 registrations or certificates required by federal, state, county or local law, rules or
6 ordinances, including, but not limited to, licenses, registrations or certificates
7 required to conduct business in the designated location and to perform the
8 construction, trade or specialty work the contractor proposes to perform.

9 B. The contractor shall meet any bonding requirements and insurance requirements
10 of applicable law or the contract. Insurance requirements may include, but are not
11 limited to, general liability insurance, workers' compensation insurance and
12 unemployment insurance.

13 C. The contractor shall certify that it has not been suspended or debarred from
14 eligibility to receive government contracts, including subcontracts, by any federal,
15 state or local government entity or authority in the 3 years prior to the date of the bid.

16 D. The contractor shall certify that it has not defaulted on any construction project in
17 the 3 years prior to the date of the bid.

18 E. The contractor shall certify that it has not been convicted of any crime relating to
19 its contracting business in the 10 years prior to the date of the bid.

20 F. The contractor shall certify that it has not been found in violation of any law
21 applicable to its contracting business and required, as a result of the violation, to
22 make payment of a fine, back pay, damages or any other type of penalty in the
23 amount of \$1,000 or more within the 3 years prior to the date of the bid.

24 G. If the contractor is the prime contractor on the bid and the bid is for a project for a
25 municipality or school administrative unit for which the State provides any portion of
26 the funding, the contractor shall commit to paying all craft workers employed on the
27 project the wage rates and fringe benefits required under Title 26, chapter 15 and
28 shall commit to requiring all craft workers employed on the project to complete a
29 10-hour training course for safety established by the United States Department of
30 Labor, Occupational Safety and Health Administration prior to work on the project.

31 H. The contractor must have participated in a Class A apprenticeship program for the
32 3 years prior to the date of the bid for each separate trade or occupational
33 classification in which it proposes to employ craft workers on the project and shall
34 commit to continuing such participation for the duration of the contract, except that if
35 the contractor participates in a recently formed apprenticeship program for craft
36 workers it employs, it may satisfy the apprenticeship requirement by providing
37 documentation that the program in which it participates:

38 (1) Has been established within the 5 years prior to the date of the bid;

39 (2) Is currently registered with and approved by the United States Department of
40 Labor or a state apprenticeship agency as defined in Title 26, section 3201,
41 subsection 22;

42 (3) Provides bona fide apprenticeship training to participants; and

1 (4) Is in compliance with the standards and requirements applicable to registered
2 apprenticeship programs under 29 Code of Federal Regulations, Part 29.

3 I. The contractor shall certify that it has verified the employment eligibility of all
4 craft workers to be used on the project using the Internet-based program operated by
5 the United States Government to allow businesses to determine the eligibility of their
6 employees to work in the United States.

7 J. The contractor shall certify that it will require craft workers used on the project to
8 pass a drug and alcohol test administered by a 3rd-party entity approved by the
9 bureau that provides at least preemployment and postaccident testing.

10 K. The contractor shall certify that it possesses the technical qualifications and
11 resources, including equipment, personnel and financial resources, to meet the
12 requirements of the contract.

13 L. The contractor shall commit to maintaining all qualifications, resources and
14 capabilities referenced in the certification form throughout the duration of the project.

15 M. The contractor shall certify that it will notify the bureau within 7 days of any
16 material changes to any matters attested to in the certification form.

17 N. If the contractor is the prime contractor on the bid, the contractor shall certify
18 that, if it receives a notice of intent to award the contract, it will provide a list of all
19 subcontractors and all required subcontractor information under section 1826-R.

20 **2. Execution; additional requirements.** The contractor responsibility certification
21 form described in subsection 1 must be executed by a person who has sufficient
22 knowledge to address all matters in the certification form and must include an attestation
23 stating, under penalty of perjury, that the information submitted is true, complete and
24 accurate. Execution of the certification form does not establish a presumption of
25 contractor responsibility. The bureau may require any additional information it considers
26 necessary to evaluate a contractor's status as a responsible contractor, including technical
27 qualifications, financial capacity or evidence of other resources and performance
28 capabilities. The bureau may require that such information be included in a separate
29 statement of qualifications and experience or as an attachment to the certification form.

30 **3. Statement relating to control of or by separate entity.** If the contractor has
31 operated under another name or has controlled or been controlled by another company or
32 business entity in the 5 years prior to the date of the bid, the contractor shall attach a
33 separate statement to its bid that explains in detail the nature of any such change of
34 relationship. The bureau may require additional information if the change of relationship
35 in question could potentially affect contract performance.

36 **4. Disqualification.** Failure to provide a contractor responsibility certification form
37 in accordance with subsection 1 or to meet all requirements of this section disqualifies a
38 contractor from bidding on a contract.

39 **§1826-R. Contract award; public review; bureau review**

40 **1. Notice of intent to award.** After an evaluation of bids received, the bureau shall
41 issue a notice that it intends to award the contract to the best-value bidder in accordance

1 with section 1825-B. The notice must be issued as soon as practicable after bids are
2 submitted. The notice must stipulate that the contract award is conditioned on the
3 issuance of a written determination of contractor responsibility as required by subsection
4 5 and any other conditions determined appropriate by the bureau.

5 **2. Subcontractor list and certifications.** Within 7 days from the date of notice of
6 intent to award the contract under subsection 1, a prospective awardee shall submit to the
7 bureau a subcontractor list containing the names of subcontractors that will be used for
8 the referenced project, the addresses of the subcontractors and a description of the work
9 each listed subcontractor will perform on the project, along with an executed contractor
10 responsibility certification form for each listed subcontractor in accordance with the
11 requirements of section 1826-Q.

12 **3. Public review period.** The bureau shall provide a public review period of 21
13 days following the issuance of the notice of intent to award the contract. Upon issuing the
14 notice of intent to award the contract, the bureau shall make available to the public the
15 contractor responsibility certification forms submitted pursuant to section 1826-Q and the
16 subcontractor list for the prospective awardee through a publicly accessible website or by
17 other comparable means. During the public review period, any person may protest a
18 contractor or subcontractor for failing to meet applicable requirements of this subchapter
19 or on any other relevant grounds by submitting a letter with supporting evidence to the
20 bureau.

21 **4. Bureau review of contractor and subcontractor.** After issuing a notice of intent
22 to award the contract, the bureau shall conduct a review, over a period of 30 days, to
23 verify whether the prospective awardee, including the prime contractor and any
24 subcontractors, meets the responsible contractor requirements of this subchapter, meets
25 the requirements of any other applicable laws and rules and possesses the resources,
26 qualifications and capabilities to successfully perform the contract. As part of this
27 review, the bureau shall verify that the contractor responsibility certification form under
28 section 1826-Q has been submitted and properly executed for all contractors. The bureau
29 may conduct any additional inquiries necessary to verify that the prospective awardee and
30 its subcontractors have a sufficient record of compliance with the law and business
31 integrity to justify the award of the contract. In conducting the inquiries, the bureau may
32 seek relevant information from the contractor, its prior clients or customers, its
33 subcontractors or any other relevant source.

34 If, in the course of its review, the bureau determines that a subcontractor listed pursuant
35 to subsection 2 does not meet the requirements of this subchapter, the bureau may permit
36 the prospective awardee to substitute a qualified subcontractor that meets the
37 requirements of this section; require the prospective awardee to perform the work in
38 question if the prospective awardee has the required experience, licenses and other
39 qualifications to perform such work; or disqualify the prospective awardee. If the bureau
40 determines that a subcontractor does not meet the requirements of this subchapter, the
41 prospective awardee may not make any contractual claim against the bureau on the basis
42 of a subcontractor disqualification.

43 **5. Written determination.** If, at the conclusion of the review required by
44 subsection 4, the bureau determines that all contractor responsibility certification forms

1 under section 1826-Q have been properly completed and executed and the qualifications,
2 background and responsibility of the prospective awardee and its subcontractors are
3 satisfactory, it shall issue a written determination verifying that the prospective awardee
4 is a qualified responsible contractor. If the bureau determines that the prospective
5 awardee does not meet the requirements of this subchapter, the bureau shall advise the
6 prospective awardee of its determination in writing and proceed to consider the 2nd best-
7 value bidder or, if necessary, rebid the project. The determination of contractor
8 responsibility must be issued no less than 30 days after the date of the notice of intent to
9 award the contract. The bureau may revoke or revise the determination of contractor
10 responsibility at any time if the bureau obtains relevant information warranting any such
11 revocation or revision.

12 **§1826-S. False or misleading information**

13 If at any time the bureau determines that a contractor responsibility certification form
14 submitted pursuant to section 1826-Q contains false or misleading material information
15 provided by a contractor knowingly or with reckless disregard for the truth or evidences
16 an omission of material information knowingly or with reckless disregard for the truth by
17 the contractor, the bureau shall prohibit the contractor for which the certification form
18 was submitted from being awarded any contract covered by this subchapter for a period
19 of 3 years and apply any other penalties and sanctions, including contract termination,
20 available to the State. For a contract terminated under this section, the State may withhold
21 payment due to the contractor as damages.

22 **§1826-T. Contract execution**

23 The bureau may not execute a contract with a contractor subject to this subchapter
24 until all requirements of this subchapter are met by the contractor.

25 **§1826-U. Relationship to other requirements**

26 The requirements of this subchapter are intended to supplement, but not replace,
27 contractor qualification and performance standards required by any other law, rule or
28 contract documents. If any of the provisions of this subchapter conflict with any other
29 law, rule or contract documents, the requirements of this subchapter prevail.

30 **§1826-V. Application**

31 The requirements of this subchapter apply only to contracts executed after the
32 effective date of this subchapter, except that the exercise of an option on a contract
33 entered into prior to the effective date of this subchapter is deemed to create a new
34 contract for purposes of this subchapter.

35 **§1826-W. Rules**

36 The bureau shall adopt rules to implement this subchapter. Rules adopted under this
37 section are routine technical rules as defined in chapter 375, subchapter 2-A.

38 **Sec. A-2. 26 MRSA §1304, sub-§8,** as amended by PL 2009, c. 453, §1, is
39 further amended to read:

1 Employment Rehabilitation Fund. In determining the amount of the penalty to be
2 assessed under this paragraph, the board shall take into consideration the employer's
3 effort to comply with sections 401 and 403.

4 C. The employer, if organized as a corporation, is subject to administrative
5 dissolution as provided in Title 13-C, section 1421 or revocation of its authority to do
6 business in this State as provided in Title 13-C, section 1532. The employer, if
7 organized as a limited liability company, is subject to administrative dissolution as
8 provided in Title 31, section 1592. The employer, if licensed, certified, registered or
9 regulated by any board authorized by Title 5, section 12004-A or whose license may
10 be revoked or suspended by proceedings in the District Court or by the Secretary of
11 State, is subject to revocation or suspension of the license, certification or
12 registration. This paragraph applies only to cases in which the employer has
13 committed a knowing violation, has failed to pay a penalty assessed pursuant to this
14 subsection or continues to operate without required coverage after a penalty has been
15 assessed pursuant to this subsection.

16 D. The executive director or the executive director's designee shall immediately issue
17 a stop-work order to the employer pursuant to this subsection for failure to procure
18 insurance coverage. The executive director or the executive director's designee shall
19 hold a hearing to release the stop-work order within 24 to 48 hours after the employer
20 provides acceptable evidence to the executive director or the executive director's
21 designee that the employer has provided insurance coverage.

22 E. After giving the employer at least 3 business days' notice of a hearing regarding a
23 stop-work order, the executive director or the executive director's designee shall issue
24 a stop-work order pursuant to this subsection if the executive director or the executive
25 director's designee finds after the hearing that the employer knowingly
26 misrepresented employees as independent contractors or provided false, incomplete
27 or misleading information to an insurance company on the number of employees.
28 The executive director or the executive director's designee shall stay the issuance of a
29 stop-work order if the employer provides acceptable evidence of insurance to the
30 executive director or the executive director's designee. Upon receipt of such
31 evidence, a hearing regarding the stop-work order must take place within 24 to 48
32 hours to release the stop-work order.

33 For purposes of this subsection, a violation is considered a knowing violation if the
34 employer has previously obtained workers' compensation insurance and that insurance
35 has been cancelled or that insurance has not been continued or renewed, unless the
36 cancellation, failure to continue or nonrenewal is due to a substantial change in the
37 employer's operations that is unrelated to the classification of individuals as employees or
38 independent contractors; the employer has been notified in writing by the board of the
39 need for workers' compensation insurance; the employer has had one or more previous
40 violations of the requirement to secure the payment of the compensation provided for by
41 this Act; or the employer misclassifies an employee as an independent contractor despite
42 a contrary determination by the board.

43 Prosecution under paragraph A does not preclude action under paragraph B or C, D or E.

44 If the employer is a corporation, partnership, limited liability company, professional
45 corporation or any other legal business entity recognized under the laws of the State, any

1 agent of the corporation or legal business entity having primary responsibility for
2 obtaining insurance coverage is liable for punishment under this section. Criminal
3 liability must be determined in conformity with Title 17-A, sections 60 and 61.

4 **PART C**

5 **Sec. C-1. 26 MRSA §1317** is enacted to read:

6 **§1317. Project labor agreements**

7 **1. Policy.** It is declared to be the policy of the State to encourage public authorities
8 to consider requiring the use of project labor agreements in connection with large-scale
9 construction projects in order to promote economy and efficiency in state procurement.

10 **2. Definitions.** As used in this section, unless the context otherwise indicates, the
11 following terms have the following meanings.

12 **A. "Labor organization"** means an organization of any kind, or an agency or
13 employee representation committee or plan, in which employees participate and that
14 exists for the purpose, in whole or in part, of dealing with employers concerning
15 grievances, labor disputes, wages, rates of pay, hours of employment or conditions of
16 work.

17 **B. "Large-scale construction project"** means a construction project of which the total
18 cost to the State is \$10,000,000 or more.

19 **C. "Project labor agreement"** means a prehire collective bargaining agreement with
20 one or more labor organizations that establishes the terms and conditions of
21 employment for a specific construction project and is an agreement described in 29
22 United States Code, Section 158(f).

23 **3. Project labor agreement may be required.** A public authority may require a
24 project labor agreement as follows.

25 **A.** When awarding a contract in connection with a large-scale construction project,
26 or obligating funds pursuant to such a contract, a public authority may, on a project-
27 by-project basis, require the use of a project labor agreement by a contractor if use of
28 such an agreement will:

29 **(1)** Advance the State's interest in achieving economy and efficiency in State
30 procurement by producing labor-management stability and ensuring compliance
31 with laws governing safety and health, equal employment opportunity, labor and
32 employment standards and other matters; and

33 **(2)** Be consistent with law.

34 **B.** If a public authority determines under paragraph A that the use of a project labor
35 agreement will satisfy the criteria in subparagraphs (1) and (2), the public authority
36 may, if appropriate, require that every contractor or subcontractor on the project
37 agree, for that project, to negotiate or become a party to a project labor agreement
38 with one or more appropriate labor organizations.

39 **4. Terms.** A project labor agreement reached pursuant to this section must:

1 A. Bind all contractors and subcontractors on the construction project through the
2 inclusion of appropriate specifications in all relevant solicitation provisions and
3 contract documents;

4 B. Allow all contractors and subcontractors to compete for contracts and
5 subcontracts without regard to whether they are otherwise parties to collective
6 bargaining agreements;

7 C. Contain guarantees against strikes, lockouts and similar job disruptions;

8 D. Set forth effective, prompt and mutually binding procedures for resolving labor
9 disputes arising during the term of the project labor agreement;

10 E. Provide other mechanisms for labor-management cooperation on matters of
11 mutual interest and concern, including productivity, quality of work, safety and
12 health; and

13 F. Fully conform to all relevant state and federal statutes, rules and regulations.

14 **5. Limitations.** Nothing in this section may be construed to:

15 A. Require a public authority to use a project labor agreement on any construction
16 project;

17 B. Preclude the use of a project labor agreement in circumstances not covered by this
18 section;

19 C. Require contractors or subcontractors to enter into a project labor agreement with
20 any particular labor organization; or

21 D. Impair or otherwise affect authority granted by law to a public authority.

22 **6. Application; rights or benefits.** This section must be implemented consistent
23 with applicable law and subject to the availability of state funding. This section does not
24 create any right or benefit, substantive or procedural, enforceable at law or in equity by
25 any party against the State, its departments, agencies or entities, its officers, employees or
26 agents or any other person.

27 **Sec. C-2. Report.** The Department of Labor, in consultation with the
28 Commissioner of Administrative and Financial Services, the Department of
29 Transportation and the Maine Turnpike Authority, shall submit to the joint standing
30 committee of the Legislature having jurisdiction over labor matters a report no later than
31 January 1, 2021 with recommendations about whether broader use of project labor
32 agreements, as defined in the Maine Revised Statutes, Title 26, section 1317, with respect
33 to both construction projects undertaken under state contracts and construction projects
34 receiving state financial assistance, would help to promote the economical, efficient and
35 timely completion of such projects.

36 **Sec. C-3. Application.** This Part applies to all solicitations for contracts issued by
37 a public authority on or after the effective date of this Part.

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PART D

Sec. D-1. 26 MRSA §1318 is enacted to read:

§1318. Occupational Safety and Health Administration certification

1. Mandatory safety training. A contractor or subcontractor employing laborers in the construction of public works shall provide to all employees that will be on the construction work site a construction safety training program that uses a curriculum approved by the United States Department of Labor, Occupational Safety and Health Administration and is at least 10 hours in duration. All employees at the construction work site are required to have completed the program prior to beginning work.

2. Enforcement. The Bureau of Labor Standards shall enforce this section.

3. Penalty. A contractor or subcontractor that violates this section commits a civil violation for which a fine of up to \$2,500 may be assessed. A contractor or subcontractor that violates this section may also be assessed an additional fine of \$100 per employee for each day of noncompliance.

An employee subject to the requirements of this section who has not completed the construction safety training program is subject to immediate removal from the work site by the Bureau of Labor Standards.

4. Exemptions. The following employees are exempt from the requirements of this section:

A. Employees involved with work site security;

B. Flaggers who have completed the training required by Title 23, section 701; and

C. Employees who are not considered to be on the site of work under the federal Davis-Bacon Act, including, but not limited to, construction and nonconstruction delivery personnel.

5. Rules. The Department of Labor may adopt rules to implement and administer this section. Rules adopted pursuant to this subsection are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A.

Sec. D-2. Application. This Part applies only to contracts for construction on public works let after the effective date of this Part.

PART E

Sec. E-1. 26 MRSA §1314, as amended by PL 1997, c. 757, §11, is further amended to read:

§1314. Exceptions

Whenever a public works construction is built in whole or in part by federal funds and is under the jurisdiction of the Davis-Bacon or other Federal Act that requires the Secretary of Labor to establish the minimum wage and benefits and those minimum

1 wages and benefits are established by the Secretary of Labor, sections 1304 to 1313 do
2 not apply, unless application of those sections would result in higher total wages under
3 the contract.

4 This section does not apply to public works construction funded with funds for low-
5 income public housing under the United States Housing Act of 1937, as amended, 42
6 United States Code, Section 1437, et seq., if the application of the wage and benefits rate
7 required by this section is expressly preempted under 24 Code of Federal Regulations,
8 Section 965.101.

9 SUMMARY

10 Part A, for the purpose of ensuring that the work on public construction contracts is
11 performed by responsible, qualified contractors that maintain the capacity, expertise,
12 personnel and other qualifications and resources necessary to successfully perform public
13 contracts in a timely, reliable and cost-effective manner, establishes responsible
14 contractor requirements for publicly funded construction projects that receive state funds.
15 The Part outlines a responsible contractor certification process to be administered by the
16 Department of Administrative and Financial Services, Bureau of General Services.

17 Part A also clarifies that, for the purpose of the law requiring fair minimum rate of
18 wages and benefits on public works contracts, "public works" includes any construction
19 projects funded all or in part with state funds.

20 Part A also amends the method of determining the prevailing wage and benefits rate
21 paid in the construction industry to require the Department of Labor, Bureau of Labor
22 Standards to ascertain the applicable wage and benefits rates established in collective
23 bargaining agreements in private construction and includes in benefits wages paid to
24 apprentices in apprenticeship programs registered with the department.

25 Part B requires the Executive Director of the Workers' Compensation Board or the
26 executive director's designee to immediately issue a stop-work order to an employer who
27 fails to procure workers' compensation insurance coverage. It requires the executive
28 director or the executive director's designee to issue a stop-work order to an employer if
29 the executive director or the executive director's designee finds after a hearing that the
30 employer knowingly misrepresented employees as independent contractors or provided
31 false, incomplete or misleading information to an insurance company on the numbers of
32 employees the employer has for the purpose of paying a lower payment.

33 Part C encourages the State to use project labor agreements for large-scale state-
34 funded construction projects of \$10,000,000 or more. A project labor agreement is a
35 prehire collective bargaining agreement with one or more labor unions that establishes the
36 terms and conditions of employment for a specific construction project.

37 Part D requires an employer with a public works contract with the State of \$50,000 or
38 more to provide to all employees who will be on the construction work site a safety
39 training program that uses a curriculum approved by the United States Department of
40 Labor, Occupational Safety and Health Administration and that is at least 10 hours in
41 duration. Flaggers, security workers and certain other employees not considered to be on

1 the work site are exempt from this requirement. A contractor that violates this safety
2 training program requirement may be assessed a fine of up to \$2,500 and an additional
3 fine of \$100 per employee for each day of noncompliance.

4 Part E provides that for public works construction contracts that involve funding from
5 the Federal Government the prevailing wage requirements in state law apply unless the
6 prevailing wage requirements that would otherwise apply under the federal Davis-Bacon
7 Act would result in higher total wages under the contract. An exception is provided for
8 funds received under the United States Housing Act of 1937 if the application of a state
9 prevailing wage is expressly preempted by federal law.