

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

SECOND REGULAR SESSION - 1990

Legislative Document

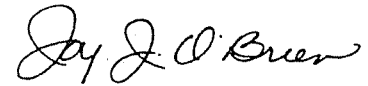
No. 2277

S.P. 895

In Senate, February 5, 1990

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Reference to the Committee on State and Local Government suggested and ordered printed.


JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator BERUBE of Androscoggin.

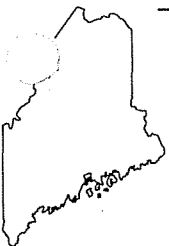
Cosponsored by Senator CLARK of Cumberland and Representative JOSEPH of Waterville.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY

An Act to Create an Appeals Procedure for the State Bidding Process.

(EMERGENCY)



Emergency preamble. Whereas, Acts of the Legislature do not
become effective until 90 days after adjournment unless enacted
as emergencies; and

Whereas, the procurement of materials and services through
competitive bidding is essential to the State for achieving the
greatest efficiency and economy; and

Whereas, clear and consistent standards governing the
competitive bidding process are necessary to ensure an effective
competitive bidding process; and

Whereas, the right of bidders aggrieved by a state contract
award decision to a fair and timely appeals hearing must be
ensured; and

Whereas, in the judgment of the Legislature, these facts
create an emergency within the meaning of the Constitution of
Maine and require the following legislation as immediately
necessary for the preservation of the public peace, health and
safety; now, therefore,

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

Sec. 1. 5 MRSA §1816, as amended by PL 1989, c. 6; c. 9, §2;
c. 104, Pt. C, §§8 and 10; and c. 501, Pt. J, §§1 to 5, is
repealed.

Sec. 2. 5 MRSA c. 155, sub-c. I-A is enacted to read:

SUBCHAPTER I-A

RULES GOVERNING THE COMPETITIVE BID PROCESS

§1825-A. Definitions

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

1. Aggrieved person. "Aggrieved person" means any person
adversely affected, financially, professionally or personally, by
a contract award decision.

2. Approved equal. "Approved equal" means any material or
service other than specified in the bid proposal that in the
opinion of the State Purchasing Agent is equivalent in character,
quality and performance to the material or service specified in
the bid proposal.

3. Competitive bidding. "Competitive bidding" means the
transmission of a written proposal or invitation to bid to at
least 3 responsible suppliers that is to be replied to at a

2 stated time. In obtaining competitive bids, if the State
3 Purchasing Agent finds that 3 responsible bidders are not
4 available, the State Purchasing Agent may make such exceptions to
5 this subsection as are in the best interests of the State.

6 4. In-state bidder. "In-state bidder" means a person or
7 group of persons whose principal place of business, or a branch
8 of whose business, is located in the State.

10 5. Person. "Person" means any individual, business,
11 corporation, association, firm, partnership or other
12 organization, whether for profit or not for profit, but does not
13 include the State or any agency of the State.

14 6. Petitioner. "Petitioner" means any person who has
15 requested a stay of a contract award decision or a hearing of
16 appeal.

17 7. Significantly vary. "Significantly vary" means to
18 change, modify, add to, subtract from, substitute or otherwise
19 change a proposal or invitation to bid to an extent that may
20 affect the price of goods or services requested.

21 8. Stay. "Stay" means the temporary suspension of a
22 contract award pending an appeal under this subchapter.

24 **§1825-B. Bids, awards and contracts**

26
27
28 1. Purchases by competitive bidding. The State Purchasing
29 Agent shall purchase collectively all services, supplies,
30 materials and equipment for the State or any department or agency
31 of the State in a manner that best secures the greatest possible
32 economy consistent with the required grade or quality of the
33 services, supplies, materials or equipment. Except as otherwise
34 provided by law, the State Purchasing Agent shall make purchases
35 of services, supplies, materials and equipment needed by the
36 State or any department or agency of the State through
37 competitive bidding.

38
39 2. Waiver. The requirement of competitive bidding may be
40 waived by the State Purchasing Agent when:

41
42 A. The procurement of services, supplies, materials or
43 equipment required involves the expenditure of less than
44 \$1,000 or, for purchases by county commissioners pursuant to
45 Title 30-A, section 124, of \$1,000 or less, and the
46 interests of the State would best be served;

47
48 B. The State Purchasing Agent is authorized by the Governor
49 to make purchases without competitive bidding because in the
50 opinion of the Governor an emergency exists that requires

2 the immediate procurement of services, supplies, materials
3 or equipment;

4 C. After reasonable investigation by the State Purchasing
5 Agent, it appears that any required unit or item of supply,
6 or brand of that unit or item, is procurable by the State
7 from only one source;

8 D. It appears to be in the best interest of the State to
9 negotiate for the procurement of petroleum products; or

10 E. The purchase is part of a cooperative project between
11 the State and the University of Maine System involving:

12 (1) An activity assisting a state agency and enhancing
13 the ability of the university system to fulfill its
14 mission of teaching, research and public service; and

15 (2) A sharing of project responsibilities and, when
16 appropriate, costs.

17 3. Report. By January 15th of each year the State
18 Purchasing Agent shall submit to the joint standing committee of
19 the Legislature having jurisdiction over state and local
20 government a report concerning any waivers from the competitive
21 bidding provisions established in subsection 2.

22 4. Registry of suppliers. Suppliers desiring to have their
23 names entered on a registry of suppliers must submit a request to
24 the State Purchasing Agent in writing. The State Purchasing
25 Agent may prescribe the manner and form in which such a request
26 must be submitted and may limit the number of names of
27 out-of-state bidders on any registry. The name of any supplier
28 entered in such a registry who fails to submit a bid on 3
29 consecutive proposals or invitations to bid may be removed from
30 the registry at the discretion of the State Purchasing Agent.

31 5. Alternate bids. When, in bid forms and specifications,
32 an article or material is identified by using a trade name and
33 catalog number of a manufacturer or vendor, the term "or approved
34 equal," if not inserted with the identification, is implied.
35 There is a presumption that any reference to a particular
36 manufacturer's product either by trade name or by limited
37 description has been made solely for the purpose of more clearly
38 indicating the minimum standard of quality desired.
39 Consideration must be given to proposals submitted on approved
40 equal alternate commodities to the extent that such action serves
41 the best interest of the State. The bidder submitting a proposal
42 on a commodity other than as specified shall furnish complete
43 identification, descriptive literature or data with respect to
44 the alternate commodity that the bidder proposes to furnish.
45 Lack of such information on the bid must be construed to mean
46

2 that the bidder proposes to furnish the exact commodity
3 described. The State reserves the right to reject any bids, in
4 whole or in part, to waive any formality or technicality in any
5 bid and to accept any item in any bid.

6 6. Record of bids. Each bid, with the name of the bidder,
7 must be entered on a record. Each record, with the successful
8 bid indicated, must be open to public inspection after the
9 letting of the contract. A bond for the proper performance of
10 each contract may be required of each successful bidder at the
11 discretion of the State Purchasing Agent, with the approval of
12 the Commissioner of Administration.

13 7. Awards to lowest bidder. Except as otherwise provided
14 by law, orders awarded or contracts made by the State Purchasing
15 Agent or by any department or agency of the State must be awarded
16 to the lowest responsible bidder, taking into consideration the
17 qualities of the services, supplies, materials or equipment to be
18 supplied, their conformity with the specifications, the purposes
19 for which they are required, the date of delivery and the
20 ultimate cost to the State. The bidding process must be reopened
21 if the bidder that was initially awarded the order or contract
22 does not perform. Unless the bidding process is reopened, the
23 order or contract may not be awarded to a bidder that the State
24 Purchasing Agent determined was not in compliance at the time the
25 initial bid was submitted.

26 8. Preference for in-state bidders. The State Purchasing
27 Agent shall award contracts or purchases to in-state bidders or
28 to bidders offering commodities produced or manufactured in the
29 State if the price, quality, availability and other factors are
30 equivalent.

31 §1825-C. Rulemaking

32 The State Purchasing Agent shall adopt rules under this
33 subchapter governing the purchase of services, the awarding of
34 grants or contracts, and the procedure by which aggrieved persons
35 may appeal contract award decisions made by any department or
36 agency of State Government. These rules must be adopted in
37 accordance with the Maine Administrative Procedure Act and apply
38 to all departments and agencies of State Government subject to
39 the authority of the Department of Administration as set forth in
40 chapter 153 and this chapter.

41 §1825-D. Public notice and review of bids

42 The State Purchasing Agent shall make the public aware of
43 contracts for which bids are being requested and the procedure to
44 be used in reviewing bids. Rules adopted under this subchapter
45 must include a clear procedure:

1 1. Notice. For informing the public about contracts for
2 which bids are being requested;

4 2. Review process. To be used when reviewing competitive
6 bids, including the requirement that written records be kept by
each person directly reviewing or ranking bids;

8 3. Contract award. For determining successful bidders and
10 awarding contracts, including written notification to all bidders
upon an award decision and criteria to be used to resolve tie
12 bids; and

14 4. Criteria for appeals. For the review of any contract
award decision appealed under this subchapter.

16 A department or agency of State Government may not
18 significantly vary the content, nature or requirements of a
proposal or invitation to bid issued under this subchapter
20 without immediately notifying all bidders of those changes in
writing and allowing sufficient time for bidders to reflect those
22 changes in their bid packages.

24 A department or agency of State Government may not change or
26 substitute the procedures adopted under this subchapter without
the State Purchasing Agent first adopting those changes or
28 substitutions as rules under this subchapter in accordance with
the Maine Administrative Procedure Act, chapter 375.

30 §1825-E. Appeal procedures

32 The State Purchasing Agent shall ensure that every
34 department or agency of State Government affords aggrieved
persons an opportunity to appeal a contract award decision. As
36 provided by this section, rules adopted under this subchapter
must establish clear procedures by which an aggrieved person may
appeal a contract award decision.

38 1. Stay. Persons aggrieved by a contract award decision
40 may request a stay of a contract award decision. Such a request
must be made to the State Purchasing Agent in writing within 30
42 days of notification of the contract award and must state the
nature of the grievance.

44 The State Purchasing Agent shall issue a stay of a contract award
46 decision, pending appeal, upon a showing of irreparable injury to
the petitioner, a reasonable likelihood of success on the merits,
48 and no substantial harm to adverse parties or to the general
public.

50 The State Purchasing Agent shall notify the petitioner in writing
52 of the State Purchasing Agent's decision regarding the issuance
of a stay within 10 days of receipt of the request.

2 Failure of the petitioner to obtain a stay does not affect the
4 petitioner's right to a hearing of appeal under this subchapter.

6 2. Request for hearing of appeal. Persons aggrieved by an
8 agency contract award decision under this subchapter may request
10 a hearing of appeal. Such a request must be made to the State
12 Purchasing Agent in writing within 30 days of notification of the
14 contract award. The State Purchasing Agent shall grant a hearing
16 of appeal unless:

18 A. The State Purchasing Agent determines that:

20 (1) The petitioner is not an aggrieved person;

22 (2) A prior request by same petitioner relating to
24 the same contract award has been granted;

26 (3) The request was made more than 30 days after
28 notice of contract award; or

30 (4) The request is capricious; or

32 B. No contract award was granted.

34 The State Purchasing Agent shall notify the petitioner in writing
36 of the State Purchasing Agent's decision regarding a request for
38 a hearing of appeal within 30 days of receipt of the request. If
40 a request for a hearing is granted, notification must be made at
42 least 15 days before the hearing date and must include the date
44 and location of the hearing and the names of the appeal committee
46 members.

48 3. Appeal committee. A committee of 3 members shall hear a
50 petitioner's appeal within 60 days of receipt of the request for
52 an appeal. The State Controller shall appoint the members of an
appeal committee, except that persons who have any direct or
indirect personal, professional or financial conflict of interest
in the appeal or employees of any department affected by the
contract may not serve on the appeal committee.

Members of an appeal committee appointed by the State Controller
shall meet at the appointed time and place in the presence of the
petitioner and such individuals as the petitioner determines
necessary for a full and fair hearing. The petitioner may
present to the appeal committee any materials the petitioner
considers relevant to the appeal.

The appeal committee shall keep a written record of each hearing
and shall submit its decision and the reasons for its decision to
the State Purchasing Agent in writing no later than 15 days
following the hearing of appeal.

2 Subject to the requirements of rules adopted under this section
3 and evidence presented during a hearing of appeal, the appeal
4 committee may decide either to:

5 A. Validate the contract award decision under appeal; or

6 B. Invalidate the contract award decision under appeal.

7
8 Except as provided in paragraph B, an appeal committee may not
9 modify the contract award under appeal, or make a new contract
10 award. Contracts found invalid by an appeal committee under this
11 subchapter become immediately void and of no legal effect.

12
13 **§1825-F. Final agency action**

14
15 Decisions made by an appeal committee under section 1825-E,
16 subsection 3, constitute final agency action on the petitioner's
17 appeal for the purposes of judicial review under chapter 375,
18 subchapter VII. The State Purchasing Agent shall notify a
19 petitioner of a final agency action made under this subchapter in
20 writing within 10 days of the final agency action. Notification
21 of final agency action must include:

22
23 1. Complaint. A brief summary of the nature of the
24 petitioner's appeal;

25
26 2. Decision. Notification of the decision of the appeal
27 committee;

28
29 3. Reasons. An explanation of the reasons for the
30 decision; and

31
32 4. Right to judicial review. An explanation of the
33 petitioner's right to judicial review of final agency action.

34
35 **§1825-G. Failure to act**

36
37 Failure or refusal of the State Purchasing Agent to adopt
38 rules under this subchapter is sufficient grounds for an
39 aggrieved person to request judicial review of agency rulemaking
40 pursuant to section 8058. In the event that a judicial
41 declaration of an invalid rule is made under this section and
42 section 8058, the contract award under appeal becomes immediately
43 void and of no legal effect.

44
45 **§1825-H. Deadline for adoption of rules**

46
47 The State Purchasing Agent shall adopt rules implementing
48 this subchapter no later than January 1, 1991.

49
50 Sec. 3. 5 MRSA §1831, as amended by PL 1989, c. 165, §2, is
51 further amended to read:

2 **§1831. Rules**

4 **1. Adoption of rules.** Every department or agency of State
6 Government, subject to chapters 141 to 152, purchasing services
8 or awarding grants or contracts which are not subject to the
10 authority of the Department of Administration, as defined in
12 chapters 153 and 155, shall establish a procedure by which these
14 services ~~shall-be~~ are purchased or by which grants or contracts
16 ~~shall-be~~ are awarded. This procedure shall must be adopted in
18 accordance with the Maine Administrative Procedure Act, chapter
375, no later than January 1, 1991 and shall must be approved by
the State Purchasing Agent prior to their adoption. The State
Purchasing Agent shall ensure that the rules adopted under this
section meet the standards of public notice, administrative
review, and rights to appeal as set forth in chapter 155,
subchapter I-A. ~~The procedure shall include, among any other
provisions deemed necessary by the State Purchasing Agent:~~

20 ~~A.--A notification process to inform prospective bidders
22 about contracts for which bids are being requested;~~

24 ~~B.--A process by which bid applications shall be reviewed;~~

26 ~~C.--Criteria for the selection of bids for any additional
review prior to any award of contracts;~~

28 ~~D.--Criteria for the award of a contract;~~

30 ~~E.--A definition of the procedure by which a person,
32 aggrieved by the decision of a department or agency under
this chapter, may appeal the decision; and~~

34 ~~F.--Criteria for the review of any decision that has been
36 appealed under this chapter.~~

38 **Sec. 4. 30-A MRS §124, 2nd ¶,** as enacted by PL 1987, c. 737,
Pt. A, §2 and Pt. C, §106 and as amended by PL 1989, c. 6; c. 9,
§2; and c. 104, Pt. C, §§8 and 10, is further amended to read:

40 Except for purchases through the State, the county
42 commissioners shall make all purchases over \$1,000 of services,
supplies, materials and equipment needed by the county, or any
44 department or agency of the county, by competitive bidding.
Title 5, ~~section 1816~~ chapter 155, subchapter I-A governs these
46 purchases as far as applicable. Title 5, section 1816 1825-B,
subsection 2, paragraph A, governs purchases through the State.

48 **Emergency clause.** In view of the emergency cited in the
50 preamble, this Act takes effect when approved.

2 STATEMENT OF FACT

4 Concern has been raised that the current absence of clear,
6 written standards governing the competitive bidding process and
8 the appeal of contract award decisions is affecting the
10 efficiency and equity of State Government's competitive bidding
12 process. The purpose of this bill is to make those competitive
14 bidding standards clear, fair and consistent among all
16 departments and agencies of State Government.

18 This bill requires the State Purchasing Agent to adopt rules
20 governing the procedures for administration of the competitive
22 bidding process and the appeal of contract award decisions for
24 all departments and agencies of State Government under its
26 purchasing authority. It also requires departments and agencies
28 of State Government not under the purchasing authority of the
30 State Purchasing Agent to adopt similar rules.

32 The bill outlines specific standards for the competitive
34 bidding appeals procedure, including:

36 1. Notification in writing to all bidders upon a contract
38 award decision;

40 2. The right of aggrieved persons to request the temporary
42 suspension of a contract award pending an appeal; and

44 3. The right of aggrieved persons to have their appeal
46 heard within 60 days by an appeal committee composed of unbiased
members. Based on the merit of the appeal, the appeal committee
may either validate or invalidate the contract award decision
under appeal, but may not modify the contract award under appeal
or award a new contract. The decision of an appeal committee
constitutes final agency action on the appeal.

The bill also requires that departments or agencies notify
all bidders in writing of any changes to the content, nature or
requirements of an invitation to bid that may affect the price of
the goods or services bid upon, and to allow bidders additional
time to reflect those changes in their bid packages.

The State Purchasing Agent and all departments and agencies
not under the purchasing authority of the Department of
Administration are required to adopt rules to implement this Act
by January 1, 1991.