

# MAINE STATE LEGISLATURE

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# 117th MAINE LEGISLATURE

## FIRST REGULAR SESSION-1995

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Legislative Document

No. 1355

S.P. 496

Received by the Secretary, April 13, 1995

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**An Act to Establish Standards for Privatization Contracts.**

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Referred to the Committee on State and Local Government and ordered printed pursuant to Joint Rule 14.

A handwritten signature in cursive script that reads "May M. Ross".

MAY M. ROSS  
Secretary of the Senate

Presented by Senator BUSTIN of Kennebec.

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

4 **Sec. 1. 5 MRSA c. 156-A** is enacted to read:

6 **CHAPTER 156-A**

8 **PRIVATIZATION CONTRACTS**

10 **§1841. Short title**

12 This chapter may be known and cited as the "Privatization Contract Act."

14 **§1842. Findings, intent and construction**

16 1. Findings. The Legislature finds that using private contractors to provide public services formerly provided by state employees does not always promote the public interest.

20 2. Intent. The Legislature does not intend to restrict the use of community facilities to provide care for clients of state agencies if a privatization contract relating to those facilities otherwise complies with the provisions of this chapter.

24 3. Construction. The provisions of this chapter must be construed consistently with all applicable provisions of chapters 153 to 156. In the event of a conflict, the provisions of those chapters prevail.

30 **§1843. Definitions**

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

34 1. Agency. "Agency" means a state department, agency office, board, commission or quasi-independent agency, board, commission, authority or institution.

38 2. Dependent. "Dependent" means the spouse and children of an employee if they qualify for dependent status under the United States Internal Revenue Code or for whom a support order has been or could be granted under Title 19, chapter 7.

44 3. Privatization contract. "Privatization contract" means an agreement or combination or series of agreements by which a nongovernmental person or entity agrees with an agency to provide services valued at \$100,000 or more that are substantially similar to and in lieu of services previously provided, in whole or in part, by regular employees of an agency. Any subsequent

2 agreement, including an agreement resulting from a rebidding of  
3 previously privatized service or an agreement renewing or  
4 extending a privatization contract, is not considered a  
5 privatization contract. An agreement solely to provide legal,  
6 management consulting, planning, engineering or design services  
7 is not a privatization contract.

8 **§1844. Validity of contract**

10 An agency may not make any privatization contract and such a  
11 contract is not valid unless the agency, in consultation with the  
12 Department of Administrative and Financial Services, first  
13 complies with all the requirements of this chapter.

14 **§1845. Contract bid requirements**

16 1. Statement of specifications. The agency shall prepare a  
17 written statement specifying the services subject to the proposed  
18 privatization contract, including the specific quantity and the  
19 standard of quality of those services.

22 2. Competitive bids. The agency shall solicit sealed  
23 competitive bids for the privatization contracts in accordance  
24 with state law based on the statement described in subsection 1.

26 3. Deadline. The date designated for acceptance of the  
27 bids must be the same for all parties.

28 4. Term. The term of a privatization contract may not  
29 exceed 5 years.

32 5. Certain amendments invalid. An amendment to a  
33 privatization contract is not valid if the purpose or effect is  
34 to avoid any requirement of this section.

36 **§1846. Wage and benefit specifications**

38 1. Minimum wage rate. For each position in which a bidder  
39 will employ a person pursuant to the privatization contract and  
40 for which the duties are substantially similar to the duties  
41 performed by a regular agency employee or employees, the  
42 statement required by section 1845, subsection 1, must include  
43 the minimum wage rate to be paid for that position. This rate  
44 must be the lesser of:

46 A. Step one of the grade or classification under which the  
47 comparable regular agency employee is paid; or  
48

2           B. The average private sector wage rate for that position  
3           as determined by the Department of Administrative and  
4           Financial Services from data collected by the Department of  
5           Labor.

6           2. Bids and contracts. Every bid and contract must include  
7           provisions establishing the wage rate for each position described  
8           in subsection 1, which may not be less than the minimum  
9           calculated in accordance with that subsection.

10           3. Health insurance costs. Every bid and contract must  
11           also include provisions for the contractor to pay a percentage of  
12           the cost of health insurance for every employee employed pursuant  
13           to the contract for at least 20 hours per week. The percentage  
14           of the cost must be at least equal to the percentage paid by the  
15           State for state employees for a comparable plan. The health  
16           insurance plan must:

17                   A. Provide coverage comparable to that in the state plan;

18                   B. Satisfy all requirements of Title 24-A, chapter 33; and

19                   C. Provide coverage for the employee and the employee's  
20                   spouse and dependent children.

21           4. Payroll records. Each contractor shall submit quarterly  
22           payroll records listing the name, address, social security  
23           number, hours worked and hourly wage paid for each employee in  
24           the previous quarter.

25           5. Enforcement. The Attorney General may bring a civil  
26           action for equitable relief in Superior Court to enforce this  
27           section or to prevent or remedy the dismissal, demotion or other  
28           action prejudicing an employee as a result of an alleged  
29           violation of this section.

30           §1847. Hiring requirements

31           1. Displaced state employees; priority. Every  
32           privatization contract must require the contractor, before  
33           advertising generally, to offer available positions pursuant to  
34           the contract to qualified regular former employees of the agency  
35           who meet the following criteria.

36                   A. Their employment was terminated because of the  
37                   privatization contract.

38                   B. They satisfy the hiring criteria of the contractor.

2           2. Equal opportunity. Every privatization contract must  
3 require the contractor to comply with a policy of  
4 nondiscrimination and equal opportunity for all persons protected  
5 by section 4552 and to take affirmative steps to provide equal  
6 opportunity for those persons.

7           **§1848. Cost estimate; comparable agency services**

8           1. Estimate specifications. At the same time that an  
9 agency prepares the written statement required under section  
10 1845, subsection 1, the agency shall prepare a comprehensive,  
11 detailed written estimate of the costs for regular agency  
12 employees to provide the subject services in the most  
13 cost-efficient manner possible. These costs must include, but  
14 are not limited to, pension, insurance and other employee benefit  
15 costs.

16           2. Collective bargaining agreement amendments. For the  
17 purpose of the estimate described in subsection 1, an employee  
18 organization may, at any time before the final day for bid  
19 submission, propose amendments to any relevant collective  
20 bargaining agreement to which it is a party. These amendments  
21 would take effect only if necessary to reduce the cost estimate  
22 under subsection 1 below the contract cost determined under  
23 section 1849.

24           3. Confidentiality. The estimate determined under this  
25 section remains confidential until after the final day for the  
26 agency to receive sealed bids for that privatization contract, at  
27 which time the estimate becomes a public record to be filed both  
28 in the agency and in the Department of Administrative and  
29 Financial Services and to be transmitted to the State Auditor for  
30 review under section 1850-A.

31           **§1849. Award of contract**

32           1. Public award. After soliciting and receiving bids, the  
33 agency shall publicly designate the bidder to which it proposes  
34 to award the contract.

35           2. Cost analysis. The agency shall prepare a comprehensive  
36 written analysis of the contract cost based on the bid,  
37 specifically including the costs of:

38           A. Transition from public to private operation;

39           B. Additional unemployment and retirement benefits, if any;  
40 and

2           C. Monitoring and otherwise administering contract  
3           performance.

4           3. Added cost; performance outside the State. If the  
5           bidder proposes to perform any of the contract outside of this  
6           State, the contract cost must be increased by the amount of  
7           income tax revenue, if any, that will be lost to the State by the  
8           corresponding elimination of agency employees, as determined by  
9           the Department of Administrative and Financial Services.

10           **§1850. Certification to State Auditor**

11           The head of the agency and the Commissioner of  
12           Administrative and Financial Services shall each certify in  
13           writing to the State Auditor that:

14           1. Compliance. Each has complied with all provisions of  
15           this chapter and of other applicable laws;

16           2. Quality of services. The quality of the services to be  
17           provided by the designated bidder is likely to satisfy the  
18           quality requirements of the statement prepared pursuant to  
19           section 1845, subsection 1 and to equal or exceed the quality of  
20           services that could be provided by regular agency employees  
21           pursuant to section 1848;

22           3. Cost. The contract cost pursuant to section 1849 will  
23           be less than the estimated cost pursuant to section 1848, taking  
24           into account all comparable types of costs;

25           4. Record. The designated bidder and its supervisory  
26           employees while in the employ of that designated bidder have no  
27           adjudicated record of substantial or repeated willful  
28           noncompliance with any relevant federal or state regulatory  
29           statute, including, but not limited to, statutes concerning labor  
30           relations, occupational safety and health, nondiscrimination and  
31           affirmative action, environmental protection and conflicts of  
32           interest; and

33           5. Public interest. The proposed privatization contract is  
34           in the public interest in that it meets the applicable quality  
35           and fiscal standards of this chapter.

36           A copy of the proposed privatization contract must accompany  
37           the certificate transmitted to the State Auditor.

38           **§1850-A. Validity of contract; objection by State Auditor**

39           1. Notification of objection. An agency may not make a  
40           privatization contract and a privatization contract is not valid

2 if, within 30 days after receiving the certificate required by  
3 section 1850, the State Auditor notifies the agency of an  
4 objection. An objection must be in writing and must state  
5 specifically the State Auditor's finding that the agency has  
6 failed to comply with one or more requirements of this Act or  
7 that, based on independent review of all the relevant facts, the  
8 State Auditor finds any of the findings required by section 1850  
9 to be incorrect.

10 2. Subpoena. In accordance with section 9060, the State  
11 Auditor may require by subpoena the attendance and testimony  
12 under oath of witnesses and the production of books, papers and  
13 other relevant records in order to review the agency's compliance  
14 and certificate.

15 3. Rules. The State Auditor may adopt rules and prescribe  
16 forms to carry out the provisions of this section and section  
17 1850.

18 4. Binding. The objection of the State Auditor is final  
19 and binding on the agency unless the State Auditor in writing  
20 withdraws the objection, stating the specific reasons, based upon  
21 a revised certificate by the agency and by the Commissioner of  
22 Administrative and Financial Services and reviewed by the State  
23 Auditor.

24 **§1850-B. Ethics; conflicts of interest**

25 The Department of Administrative and Financial Services  
26 shall adopt rules to ensure ethical conduct and the avoidance of  
27 conflicts of interest under section 18 for executive employees or  
28 former executive employees who participate in privatization  
29 contracts under this chapter after the effective date of this Act.

30 **Sec. 2. 12 MRSA §598-C is enacted to read:**

31 **§598-C. Municipal option to purchase**

32 Notwithstanding any law to the contrary, the State may not  
33 sell, lease, rent or otherwise dispose of any designated lands or  
34 recreational facilities or recreational lands or facilities owned  
35 by the Department of Transportation unless the municipality  
36 within which the land or facility is located is given first  
37 option to purchase, lease or rent the land or operate the  
38 recreational facility at fair market value.

39 A municipality taking ownership or operating rights under  
40 this section shall maintain the land and facilities in good order  
41 and repair without any additional aid from the State except aid  
42 agreed on at the time of the transfer.



2           **Sec. 3. 22 MRSA §5306**, as amended by PL 1981, c. 493, §2, is  
further amended to read:

4  
6           **§5306. Agreements with community agencies**

8           All funds disbursed by the department to a community agency  
for the purpose of financially supporting a human service shall  
10       must be covered by a written agreement, pursuant to the same  
provisions specified for the Department of Mental Health and  
Mental Retardation in Title 34 34-B, section 12 1208.

12           **Sec. 4. 34-B MRSA §1208, sub-§§7 and 8** are enacted to read:

14           7. Additional rules. The commissioner shall adopt rules  
16       under this section in accordance with the Maine Administrative  
Procedure Act to ensure that agreements between governmental  
18       units and community agencies for the provision of human services  
contain provisions that accomplish the following:

20           A. Require that all transactions between community agencies  
22       and related parties be disclosed in writing in advance to  
the department and interested governmental units, any of  
24       which may prohibit the transaction by written notice to the  
community agency;

26           B. Require that a reduction in a rate of reimbursement or  
28       other payment method or in total expenditure be applied  
first against expenditures on managerial personnel,  
30       including, but not limited to, management fees, salaries,  
benefits and other compensation paid to managers, and last  
32       against expenditures on direct service workers;

34           C. Require that any contracts under which funds spent by  
the State reimburse or compensate the community agency for  
36       the amortization of mortgages for the ownership of property,  
whether owned directly or indirectly by the community  
38       agency, contain provisions for the recoupment of that  
reimbursement or compensation by the State in the event the  
40       property is sold and, if necessary, allow for the execution  
of liens to ensure recoupment;

42           D. Require a complete inventory of equipment purchased by  
44       the community agency on behalf of the State and the return  
of that equipment to the proper governmental unit on the  
46       completion or termination of the contract;

48           E. Require that the uniform financial report include a  
subsidiary schedule for each component cost and a related

2 party disclosure statement from each officer, director and  
trustee of the community agency;

4 F. Prohibit any subcontract or consultant contract for  
services from a parent organization or parent agency at the  
6 national, state or local level;

8 G. Prohibit refusing to service any case or type of case or  
restricting or limiting those services after the  
10 finalization of the contract, when the provision of those  
services was mutually agreed to in the contract;

12 H. Prohibit the use of state funding for investment  
14 counseling, fund raising, management consultants and other  
services that are not directly related to the servicing of  
16 clients, patients and other persons served by the community;  
and

18 I. State that if, after a hearing, the department finds a  
20 violation of any rule adopted under this subsection, the  
department may order that the contract be terminated or may  
22 assess a civil penalty of not more than \$2,000 or 10% of the  
amount payable under the contract, whichever is greater,  
24 which the department shall withhold from payments otherwise  
due under the contract.

26 **8. Debarment.** Notwithstanding any other provision of this  
28 section, a community agency aggrieved under this section may  
exercise any legal remedies or cause of action available to such  
30 a community agency under law. If the department determines after  
a hearing that a community agency has committed repeated willful  
32 violations of this section, it may debar the community agency  
from further state contracts for a period of up to 5 years.

34 **Sec. 5. Study commission; performance review.** The Performance  
36 Review Commission is established to study the successes and  
failures of public and private performance in the delivery of  
38 human services in the State and elsewhere.

40 **1. Membership; appointments.** The commission consists of 9  
42 members appointed as follows:

- 44 A. Three by the Governor;
- 46 B. Three by the President of the Senate; and
- 48 C. Three by the Speaker of the House of Representatives.

2           **2. Report.** The commission shall submit a report of the  
3 results of its study, which may include recommendations for  
4 legislation or changes in the procedures of the executive branch  
5 to the Second Regular Session of the 117th Legislature no later  
6 than October 1, 1996.

7           **Sec. 6. Application.** Section 1 of this Act applies to all  
8 privatization contracts executed after the effective date of this  
9 Act.

10

12

## STATEMENT OF FACT

14

This bill accomplishes the following.

16

1. It establishes the Department of Administrative and  
17 Financial Services as the overseer of contracts privatizing state  
18 services.

20

2. It limits those contracts to 5 years in duration.

22

3. It requires the contractor to pay a minimum wage that is  
23 the lesser of the wage paid by the State for a similar position  
24 and the average private sector wage rate for that position.

26

4. It requires the contractor to pay a percentage of  
27 employee health insurance costs at least equal to the percentage  
28 paid by the State.

30

5. It gives qualified state employees displaced by the  
31 contract priority for hiring by the contractor.

32

6. It requires the agency to provide a cost estimate for  
33 having regular agency employees provide the contract services.

36

7. It requires State Auditor certification of all  
37 privatization contracts.

38

8. It has additional provisions relating to state employee  
39 conflicts of interest; giving first option on purchase of state  
40 recreational lands to municipalities; requiring the Departments  
41 of Human Services and of Mental Health and Mental Retardation to  
42 adopt additional rules concerning contracts for the provision of  
43 human services; and establishing a study commission to report  
44 back with an evaluation of public and private provision of human  
45 services in Maine.  
46