

MAINE STATE LEGISLATURE

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L.D. 1639

Date: 3/9/10

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TRANSPORTATION

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**STATE OF MAINE
HOUSE OF REPRESENTATIVES
124TH LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT "A" to H.P. 1167, L.D. 1639, Bill, "An Act To Stimulate the Maine Economy and Promote the Development of Maine's Priority Transportation Infrastructure Needs"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'PART A

Sec. A-1. 23 MRSA c. 410, sub-c. 5 is enacted to read:

SUBCHAPTER 5

PUBLIC-PRIVATE PARTNERSHIPS

§4251. Public-private partnerships; transportation projects

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

A. "Agreement" means a contract between the department and a private entity to create a public-private partnership that allows for private sector participation in the financing, development, operation, management, ownership, leasing or maintenance of a transportation facility and that sets forth rights and obligations of the department and the private entity in that partnership.

B. "Project" means the initial capital development of a transportation facility.

C. "Proposal" means a conditional offer of a private entity that, after review, negotiation, documentation and legislative approval, may lead to an agreement as provided in this subchapter.

COMMITTEE AMENDMENT

1 D. "Transportation facility" means a facility that is or if developed would be within
2 the jurisdiction of the department including a highway, bridge, railroad line, pier,
3 airport, trail, ferry vessel, building or other improvement.

4 **2. Applicability.** This subchapter applies to a proposal or agreement for a private
5 entity to form a public-private partnership when the department estimates that the initial
6 capital cost of a project is \$25,000,000 or more or when the proposal includes placing
7 tolls on existing transportation facilities that were not previously subject to tolls. Nothing
8 in this section is intended to prohibit or otherwise affect programs that do not meet the
9 criteria of this subsection.

10 **3. Authorization.** Notwithstanding any other provision of law, the department is
11 authorized to receive or solicit proposals to form a public-private partnership with respect
12 to a transportation facility. Proposals must be reviewed in accordance with this
13 subchapter. Upon approval of the Legislature as provided in this subchapter, the
14 department may enter into an agreement.

15 **4. Standards for review.** Before submitting a proposal to the Legislature for
16 approval the department must find that the proposal meets the following standards.

17 A. The purpose of and need for the transportation facility must be consistent with the
18 long-term planning of the department.

19 B. The private entity must have the financial, technical and operational capacity to
20 discharge the responsibilities set forth in the proposal cost-effectively and responsibly
21 as determined by the department. This capacity must include, but is not limited to,
22 meeting department prequalification standards for professional engineering services
23 and general contracting.

24 C. The proposed transportation facility must be owned, controlled, operated and
25 maintained in a manner satisfactory to the department.

26 D. The proposal must be cost-effective in the long term.

27 E. The proposal must limit the use of state capital funding to less than 50% of the
28 initial capital cost of the transportation facility and to the extent practicable minimize
29 the use of transportation funding sources such as the Highway Fund, general
30 obligation bonds supported by the Highway Fund, the TransCap Trust Fund under
31 Title 30-A, section 6006-G and program funding provided by the Federal Highway
32 Administration.

33 F. If the proposed transportation facility is to be supported by tolls or other user fees,
34 the private entity must provide a traffic and revenue study prepared by an expert
35 acceptable to the department and national bond rating agencies. The private entity
36 must also provide a finance plan consistent with the traffic and revenue study that
37 identifies the proposal costs, revenues by source, financing, major assumptions,
38 internal rate of return on private investments and whether any government funds are
39 assumed to deliver a cost-feasible project and that provides a total cash flow analysis
40 beginning with implementation of the project and extending for the term of the
41 agreement.

1 G. The proposal must demonstrate safeguards adequate to ensure that no significant
2 additional costs or service disruptions would be borne by the traveling public and
3 residents of the State if the private entity defaults or cancels the agreement.

4 H. The proposal must include provisions guaranteeing performance by the private
5 entity and payment of subcontractors, including, but not limited to, performance and
6 payment bonds, letters of credit, parent company guarantees and lender and equity
7 partner guarantees.

8 I. The proposal and the transportation facility must comply with all requirements of
9 applicable federal, state and local laws and department rules, policies and procedures.

10 J. The proposal must identify the law enforcement jurisdictions and responsibilities
11 relative to the transportation facility.

12 K. The proposal must provide that all reasonable costs of substantially affected local
13 governments and utilities related to the transportation facility are borne by the private
14 entity or are otherwise provided for to the satisfaction of the department.

15 L. The proposal and transportation facility are in the best interest of the public.

16 **5. Proposal and selection processes; solicited and unsolicited.** The department
17 may request proposals from private entities for a public-private partnership for a
18 transportation facility or may accept unsolicited proposals pursuant to this subsection.

19 A. If the department receives an unsolicited proposal and determines that it meets the
20 standards in this subchapter, the department shall publish a notice of the receipt of the
21 proposal on the department's publicly accessible website or through advertisements in
22 newspapers. If a notice is published exclusively in newspapers, the notice must
23 appear in 2 or more public newspapers circulated wholly or in part in the State and in
24 one public newspaper circulated wholly or in part in the county where the proposed
25 transportation facility is to be located if any such newspaper is circulated in that
26 county. The notice must provide that the department will accept, for 120 days after
27 the initial date of publication, proposals meeting the standards in subsection 4 from
28 other private entities for transportation facilities that satisfy the same basic purpose
29 and need. A copy of the notice must be mailed to each local government in the area
30 affected by the proposal.

31 B. After the proposal or proposals have been received, and any public notification
32 period has expired, the department shall rank the proposals in order of preference. In
33 ranking the proposals, the department may consider factors that include, but are not
34 limited to, professional qualifications, general business terms, innovative engineering
35 or cost-reduction terms, finance plans and the need for state funds to deliver the
36 project and discharge the agreement. The department shall undertake negotiations
37 with the private entity submitting the 1st-ranked proposal. If the department is not
38 satisfied with the results of the negotiations, the department may, at its sole
39 discretion, terminate negotiations with that entity and the department may negotiate
40 with the other entities in order of the ranking of their proposals. If only one proposal
41 is received, the department shall negotiate in good faith and, if the department is not
42 satisfied with the results of the negotiations, the department may, at its sole
43 discretion, terminate negotiations.

1 C. The department may require that the private entity assume responsibility for all
2 costs incurred by the State or local governments before execution of the agreement,
3 including costs of retaining independent experts to review, analyze and advise the
4 department with respect to the proposal.

5 **6. Tolls; fares.** An agreement may authorize the private entity to impose tolls or
6 fares for the use of the transportation facility. The following provisions apply to such an
7 agreement.

8 A. The agreement must be consistent with the traffic and revenue study required
9 under subsection 4, paragraph F.

10 B. The agreement must ensure that the transportation facility and any related toll
11 facility are properly operated and maintained in accordance with department
12 standards or standards generally accepted in the transportation industry.

13 C. The agreement must include provisions governing changes in tolls or fares.

14 D. The department may require provisions in the agreement that ensure that a
15 negotiated portion of revenues from a toll-generating or a fare-generating
16 transportation facility is returned to the department over the life of the agreement.

17 **7. Exercise of powers.** If the department exercises its power of eminent domain for
18 the development and construction of a transportation facility pursuant to this subchapter,
19 the department must retain ownership rights and interests taken. The State may provide
20 maintenance, law enforcement and other services with respect to a transportation facility
21 owned by a private entity when the agreement provides for reasonable reimbursement for
22 such services.

23 **8. Term of agreement.** An agreement may not exceed a term of 50 years unless the
24 Legislature, upon the recommendation of the Commissioner of Transportation, approves
25 a longer term.

26 **9. Legislative approval.** If the department determines that a public-private
27 partnership proposal and draft agreement meets the standards of this subchapter, the
28 department shall submit to the Legislature a bill that authorizes the agreement. The bill
29 must include a statement that the proposal meets the standards in subsection 4, a
30 summary of the substance of the draft agreement and a description of the nature and
31 amount of state investment, if any, including effects on programmed capital work.

32 **10. Confidentiality of proposals and negotiations.** All records, notes, summaries,
33 working papers, plans, interoffice and intraoffice memoranda or other materials prepared,
34 used or submitted in connection with any proposal considered under this subchapter are
35 confidential and not subject to public review until the department determines that the
36 proposal meets the standards of this subchapter or until the proposal is finally rejected by
37 the department.

38 **11. Report of proposals.** By February 1st, annually, the department shall provide to
39 the joint standing committee of the Legislature having jurisdiction over transportation
40 matters a report summarizing all proposals that the department has determined meet the
41 standards of this subchapter or that have been finally rejected during the previous
42 calendar year.

1 12. Rules. The department may adopt rules to implement this subchapter. Rules
2 adopted pursuant to this subsection are routine technical rules as defined in Title 5,
3 chapter 375, subchapter 2-A.

4 **PART B**

5 **Sec. B-1.** 23 MRSA §753-A, as amended by PL 2007, c. 306, §3, is repealed.

6 **Sec. B-2.** 23 MRSA §4244 is enacted to read:

7 **§4244. Design-build contracting**

8 **1. Definitions.** As used in this section, unless the context otherwise indicates, the
9 following terms have the following meanings.

10 A. "Best value" means the highest overall value to the State, considering quality and
11 cost.

12 B. "Design-build contracting" means a method of project delivery whereby a single
13 firm is contractually responsible for performing design, construction and related
14 services.

15 C. "Major participant" means a firm that would have a major role in the design or
16 construction of a project as specified by the department in its procurement
17 documents.

18 D. "Project" means the highway, bridge, railroad, pier, airport, trail, ferry vessel,
19 building or other improvement being constructed or rehabilitated, including all
20 professional services, labor, equipment, materials, tools, supplies, warranties and
21 incidentals needed for a complete and functioning product.

22 E. "Proposal" means an offer by the proposer to design and construct the project in
23 accordance with all request-for-proposals provisions.

24 F. "Proposer" means an individual, firm, corporation, limited liability company,
25 partnership, joint venture, sole proprietorship or other entity that submits a proposal.

26 G. "Public notice" means notice given electronically through the department's
27 publicly accessible website or through advertisements in newspapers. If notice is to
28 be given exclusively in newspapers, the notice must appear in 2 or more public
29 newspapers circulated wholly or in part in the State and in one public newspaper
30 circulated wholly or in part in the county where the proposed project is located if any
31 such newspaper is circulated in that county.

32 H. "Quality" means those features that the department determines are most important
33 to the project. Quality criteria include design, constructability, long-term
34 maintenance costs, aesthetics, local impacts, traveler and other user costs, service life,
35 time to construct and other factors that the department considers to be in the best
36 interest of the State.

37 **2. Authorization.** Notwithstanding section 4243 or any other provision of law, the
38 department may use design-build contracting to deliver projects. The department may
39 evaluate and select proposals on either a best-value or low-bid basis. If the scope of work

1 requires substantial engineering judgment, the quality of which may vary significantly, as
2 determined by the department, then the basis of award must be the best value.

3 The department retains the authority to terminate the contracting process at any time, to
4 reject any proposal, to waive technicalities or to solicit new proposals if the department
5 determines that doing so is in the best interest of the State.

6 **3. Prequalification.** A proposer must be prequalified to be eligible to submit a
7 proposal. A proposer must be prequalified by a project-specific request-for-qualifications
8 process described in this subsection, or a proposer may be a team formed of contractors
9 and designers that are each prequalified separately for design-build contracting in
10 accordance with ongoing prequalification procedures established by the department. The
11 department shall specify the method of prequalification in its discretion, except that if the
12 basis of award is the best value, then prequalification must be through a project-specific
13 request-for-qualifications process.

14 The department shall give public notice of a project-specific request-for-qualifications
15 process. The department shall issue a request-for-qualifications package to all firms
16 requesting one in accordance with the notice. Interested firms shall supply, for
17 themselves and all major participants, all information required by the department. The
18 department may investigate and verify all information received. All financial
19 information, trade secrets or other information customarily regarded as confidential
20 business information submitted to the department is confidential. The department shall
21 evaluate and rate all firms submitting a conforming statement of qualifications and select
22 the most qualified firms to receive a request for proposals. The department may select
23 any number of firms, except that, if the department fails to prequalify at least 2 firms, the
24 department shall repeat the request-for-qualifications process or select a different project
25 delivery method.

26 **4. Request for proposals.** If prequalification is through project-specific
27 prequalification, the department shall issue a request for proposals to those firms
28 prequalified. If prequalification is through ongoing prequalification procedures
29 established by the department, the department shall give public notice of the request for
30 proposals. The request for proposals must set forth the scope of work, design parameters,
31 construction requirements, time constraints and all other requirements that have a
32 substantial impact on the cost or quality of the project and the project development
33 process, as determined by the department. The request for proposals must include the
34 criteria for acceptable proposals and must include a request-for-information process that
35 allows for clarification of such criteria. For projects to be awarded on a best-value basis,
36 the scoring process and quality criteria must also be contained in the request for
37 proposals. The request for proposals may also provide for a process for the department to
38 meet with each proposer individually to review conceptual technical elements of each
39 proposal before full proposal submittal for the purposes of identifying design or other
40 technical elements that are unacceptable to the department or that obviously would cause
41 rejection of the proposal as nonresponsive. All such conceptual technical meetings,
42 including submittals and responses, are confidential until award of the contract, but the
43 department may issue addenda to all proposers to clarify design or other technical
44 elements that will or will not be allowed. Upon award of the contract and after resolution
45 of any procurement disputes, the department shall return documents submitted by
46 unsuccessful proposers upon request. The request for proposals may also provide for a

1 stipend upon specified terms to unsuccessful proposers that submit proposals conforming
2 to all material request-for-proposals requirements as determined by the department.

3 **5. Low-bid award.** If the basis of the award is lowest cost, then each proposal must
4 be submitted by the proposer to the department in 2 separate components, a sealed
5 technical proposal and a sealed price proposal. These 2 components must be submitted
6 simultaneously. The department shall first review technical proposals for responsiveness.
7 The department shall award the contract to the proposer that submits a responsive
8 proposal with the lowest price, if the proposal meets all material request-for-proposals
9 requirements as determined by the department.

10 **6. Best-value award.** If the basis of the award is best value, then each proposal
11 must be submitted by the proposer to the department in 2 separate components, a sealed
12 technical proposal and a sealed price proposal. These 2 components must be submitted
13 simultaneously.

14 The department shall open first each technical proposal and evaluate and score it based on
15 the quality criteria contained in the request for proposals. The request for proposals may
16 provide that the range between the highest and lowest quality score of responsive
17 technical proposals must be limited to an amount certain. During this evaluation process,
18 the price proposals must remain sealed and all technical proposals are confidential.

19 After completion of the review for responsiveness, the department shall publicly open
20 and read each price proposal associated with each responsive technical proposal. The
21 department shall calculate the overall value rating for each proposal, which is the total
22 price divided by the quality score. The department shall award the contract to the
23 proposer with the lowest price per quality score point, if the proposal meets all material
24 request-for-proposals requirements as determined by the department.

25 **7. Procurement disputes.** The request for proposals must provide for resolution of
26 disputes that may arise before award of the contract by including a dispute review board
27 procedure in accordance with the department's standard specifications. Except in
28 extraordinary circumstances as determined by the department, including emergency work
29 or situations in which delay could result in the loss of funding, the request for proposals
30 must include a provision that requires that the procurement process be suspended pending
31 final resolution of such disputes. In cases involving such extraordinary circumstances
32 when suspension of the procurement process does not occur, proposers that are not
33 selected may seek monetary damages directly related to such nonselection.'

34 **SUMMARY**

35 This amendment replaces the bill.

36 The purpose of Part A of this amendment is to stimulate the Maine economy by
37 allowing the Department of Transportation to receive and solicit proposals and, with
38 legislative approval, enter into agreements with private entities for the building,
39 ownership, leasing or financing of certain transportation facilities.

40 Part B makes changes to the design-build procurement statutes for the Department of
41 Transportation.

FISCAL NOTE REQUIRED
(See Attached)



Approved: 03/05/10 *MAC*

124th MAINE LEGISLATURE

LD 1639

LR 2033(02)

An Act To Stimulate the Maine Economy and Promote the Development of Maine's Priority Transportation Infrastructure Needs

Fiscal Note for Bill as Amended by Committee Amendment "A"

Committee: Transportation

Fiscal Note Required: Yes

Fiscal Note

Potential current biennium cost increase - Highway Fund

Potential current biennium cost increase - Federal Expenditures Funds

Fiscal Detail and Notes

This legislation allows the Department of Transportation, with Legislative approval, to enter into agreements with private entities for the building, ownership, leasing or financing of certain transportation facilities. Until potential proposals from private entities are received, it is not possible to determine whether or not there would be a cost to the State.