

# MAINE STATE LEGISLATURE

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# 127th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2015

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Legislative Document

No. 1347

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H.P. 916

House of Representatives, April 16, 2015

**An Act To Implement Recommendations of the Government  
Oversight Committee To Clarify That Competitive Bid Provisions  
Apply to Grant Awards**

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Reported by Representative KRUGER of Thomaston for the Government Oversight Committee pursuant to the Maine Revised Statutes, Title 3, section 997, subsection 2.

Reference to the Committee on State and Local Government suggested and ordered printed pursuant to Joint Rule 218.

Handwritten signature of Robert B. Hunt in cursive.

ROBERT B. HUNT  
Clerk

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

2 **Sec. 1. 5 MRSA §1825-A, sub-§§1, 6 and 8**, as enacted by PL 1989, c. 785, §2,  
3 are amended to read:

4 **1. Aggrieved person.** "Aggrieved person" means any person who bids on a contract  
5 or grant and who is adversely affected, financially, professionally or personally, by that  
6 contract or grant award decision.

7 **6. Petitioner.** "Petitioner" means any person who has requested a stay of a contract  
8 or grant award decision or a hearing of appeal.

9 **8. Stay.** "Stay" means the temporary suspension of a contract or grant award  
10 pending an appeal under this subchapter.

11 **Sec. 2. 5 MRSA §1825-B**, as amended by PL 2011, c. 555, §1, is further amended  
12 to read:

13 **§1825-B. Bids, awards, contracts and grants**

14 **1. Purchases by competitive bidding.** The Director of the Bureau of General  
15 Services shall purchase collectively all goods and services for the State or any department  
16 or agency of the State in a manner that best secures the greatest possible economy  
17 consistent with the required grade or quality of the goods or services. Except as  
18 otherwise provided by law, the Director of the Bureau of General Services shall make  
19 purchases of goods or services needed by the State or any department or agency of the  
20 State through competitive bidding.

21 **2. Waiver.** The requirement of competitive bidding may be waived by the Director  
22 of the Bureau of General Services when:

23 A. The procurement of goods or services by the State for county commissioners  
24 pursuant to Title 30-A, section 124, involves the expenditure of \$2,500 or less, and  
25 the interests of the State would best be served;

26 B. The Director of the Bureau of General Services is authorized by the Governor or  
27 the Governor's designee to make purchases without competitive bidding because in  
28 the opinion of the Governor or the Governor's designee an emergency exists that  
29 requires the immediate procurement of goods or services;

30 C. After reasonable investigation by the Director of the Bureau of General Services,  
31 it appears that any required unit or item of supply, or brand of that unit or item, is  
32 procurable by the State from only one source;

33 D. It appears to be in the best interest of the State to negotiate for the procurement of  
34 petroleum products;

35 E. The purchase is part of a cooperative project between the State and the University  
36 of Maine System, the Maine Community College System, the Maine Maritime  
37 Academy or a private, nonprofit, regionally accredited institution of higher education  
38 with a main campus in this State involving:

1 (1) An activity assisting a state agency and enhancing the ability of the  
2 university system, community college system, Maine Maritime Academy or a  
3 private, nonprofit, regionally accredited institution of higher education with a  
4 main campus in this State to fulfill its mission of teaching, research and public  
5 service; and

6 (2) A sharing of project responsibilities and, when appropriate, costs;

7 F. The procurement of goods or services involves expenditures of \$10,000 or less, in  
8 which case the Director of the Bureau of General Services may accept oral proposals  
9 or bids; or

10 G. The procurement of goods or services involves expenditures of \$10,000 or less,  
11 and procurement from a single source is the most economical, effective and  
12 appropriate means of fulfilling a demonstrated need.

13 **3. Report.** By January 15th of each year the Director of the Bureau of General  
14 Services shall submit to the joint standing committee of the Legislature having  
15 jurisdiction over state and local government a report concerning any waivers from the  
16 competitive bidding provisions established in subsection 2, paragraph E.

17 **4. Registry of suppliers.** Suppliers desiring to have their names entered on a  
18 registry of suppliers must submit a request to the Director of the Bureau of General  
19 Services in writing. The Director of the Bureau of General Services may prescribe the  
20 manner and form in which such a request must be submitted and may limit the number of  
21 names of out-of-state bidders on any registry. The name of any supplier entered in such a  
22 registry who fails to submit a bid on 3 consecutive proposals or invitations to bid may be  
23 removed from the registry at the discretion of the Director of the Bureau of General  
24 Services, except that the Department of Corrections remains on any registry until the  
25 Department of Corrections requests that the department be removed from that registry.

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

40 **6. Record of bids.** Each bid, with the name of the bidder, must be entered on a  
41 record. Each record, with the successful bid indicated, must be open to public inspection  
42 after the letting of the contract or grant. A bond for the proper performance of each  
43 contract or grant may be required of each successful bidder at the discretion of the

1 Director of the Bureau of General Services, with the approval of the Commissioner of  
2 Administrative and Financial Services.

3 **7. Awards to best-value bidder.** Except as otherwise provided by law,  
4 competitively awarded orders ~~awarded~~, grants or contracts made by the Director of the  
5 Bureau of General Services or by any department or agency of the State must be awarded  
6 to the best-value bidder, taking into consideration the qualities of the goods or services to  
7 be supplied, their conformity with the specifications, the purposes for which they are  
8 required, the date of delivery and the best interest of the State. If the bidder that was  
9 initially awarded the order, grant or contract does not perform, the Director of the Bureau  
10 of General Services may cancel the order, grant or contract and award a new order, grant  
11 or contract to the 2nd best-value bidder. The order, grant or contract may not be awarded  
12 to a bidder that the Director of the Bureau of General Services determined was not in  
13 compliance at the time the initial bid was submitted.

14 **8. Tie bids.** The Director of the Bureau of General Services shall award contracts,  
15 grants or purchases to in-state bidders or to bidders offering commodities produced or  
16 manufactured in the State if the price, quality, availability and other factors are  
17 equivalent.

18 **9. Determination of best-value bidder.** In determining the best-value bidder, the  
19 Director of the Bureau of General Services or any department or agency of the State shall,  
20 for the purpose of competitively awarding a contract or grant, add a percent increase on  
21 the bid of a nonresident bidder equal to the percent, if any, of the preference given to that  
22 bidder in the state in which the bidder resides.

23 **10. List of state preferences published.** The Director of the Bureau of General  
24 Services on or before January 1st of each year shall publish a list of states that give  
25 preference to in-state bidders with the percent increase applied in each such state. The  
26 Director of the Bureau of General Services or any department or agency of the State may  
27 rely on the names of states and percentages as published in determining the best-value  
28 bidder without incurring any liability to any bidder.

29 **11. Rulemaking; unfair competition.** State departments and agencies may not  
30 achieve cost savings due to cost differentials that derive from a bidder's failure to provide  
31 health and retirement benefits to its employees. The State Purchasing Agent shall adopt  
32 rules governing the purchase of services and the awarding of grants or contracts for  
33 personal services to establish a basis for bid price and cost comparison among businesses  
34 that provide health and retirement benefits to their employees and those that do not  
35 provide these benefits. The rules must include a methodology for calculating bid price  
36 and cost differentials for services provided by businesses and state employees due to the  
37 provision of health and retirement benefits for employees. The rules must adjust the bid  
38 prices to establish an equivalent basis for bid price and cost comparison among  
39 businesses when awarding contracts or grants and between businesses and state  
40 employees when determining whether or not a contract or grant is permitted under section  
41 1816-A. These rules must apply to all state departments and agencies. Rules adopted  
42 pursuant to this subsection are routine technical rules as defined in chapter 375,  
43 subchapter 2-A.

1           **12. Vendor's fee.** The State Purchasing Agent may collect a fee in an amount equal  
2 to 1% of the bid from a supplier of apparel, footwear or textiles with a winning bid under  
3 this section. The State Purchasing Agent shall apply the fee under this subsection to the  
4 costs of implementing and administering the state purchasing code of conduct under  
5 section 1825-L, including developing a consortium to monitor and investigate alleged  
6 violations of the code of conduct. The State Purchasing Agent shall adopt routine  
7 technical rules under chapter 375, subchapter 2-A to carry out the purposes of this  
8 subsection.

9           **13. Vendor's fee report.** By January 15th of each year the Director of the Bureau of  
10 General Services shall submit a report to the joint standing committee of the Legislature  
11 having jurisdiction over state and local government matters concerning revenue generated  
12 by the vendor's fee established in subsection 12.

13           **14. Condition of doing business with the State.** Notwithstanding any provision of  
14 law to the contrary, any purchase by the State of \$100,000 or more of tangible personal  
15 property, except for public utility purchases, as defined in Title 36, section 1752,  
16 subsection 17, or emergency purchases pursuant to subsection 2, paragraph B, may be  
17 made only from a person who is registered as a seller pursuant to Title 36, section  
18 1754-B. As a condition of doing business with the State, the seller must collect, report  
19 and remit taxes in accordance with Title 36, Part 3. As provided in this subsection, the  
20 State is prohibited from doing business with a person who is not registered as a seller  
21 pursuant to Title 36, section 1754-B and is not in compliance with the requirement to  
22 collect, report and remit taxes pursuant to Title 36, Part 3. After notification of the  
23 award, the seller must provide the State Purchasing Agent with a valid retailer certificate  
24 issued by the State Tax Assessor within 7 business days. If the seller fails to provide the  
25 registration certificate within 7 business days, the State Purchasing Agent may cancel the  
26 award and make a new award pursuant to subsection 7. The State Purchasing Agent shall  
27 provide the State Tax Assessor with a copy of all contracts and grants awarded pursuant  
28 to this section. The State Tax Assessor shall notify the State Purchasing Agent if at any  
29 time during the term of the contract or grant the person is no longer registered or is not  
30 collecting, reporting and remitting taxes in compliance with the requirements of Title 36,  
31 Part 3. Until the noncompliance is corrected, the State Purchasing Agent may withhold  
32 any payments to the person.

33           **Sec. 3. 5 MRSA §1825-C**, as amended by PL 2007, c. 466, Pt. A, §12, is further  
34 amended to read:

35           **§1825-C. Rulemaking**

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

1           **Sec. 4. 5 MRSA §1825-D, first ¶**, as enacted by PL 1989, c. 785, §2, is amended  
2 to read:

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

6           **Sec. 5. 5 MRSA §1825-D, sub-§§1, 3 and 4**, as enacted by PL 1989, c. 785, §2,  
7 are amended to read:

8           **1. Notice.** For informing the public about contracts and grants for which proposals  
9 are being requested;

10           **3. Contract or grant award.** For determining successful bidders and awarding  
11 contracts and grants, including written notification to all bidders upon an award decision  
12 made pursuant to a request for proposals and criteria to be used to resolve tie bids; and

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

15           **Sec. 6. 5 MRSA §1825-E**, as amended by PL 1993, c. 192, §1, is further amended  
16 to read:

17           **§1825-E. Appeal procedures**

18           The Director of the Bureau of General Services shall ensure that every department or  
19 agency of State Government affords aggrieved persons an opportunity to appeal a  
20 contract or grant award decision. As provided by this section, rules adopted under this  
21 subchapter must establish clear procedures by which an aggrieved person may appeal a  
22 contract or grant award decision.

23           **1. Stay.** Persons aggrieved by a contract or grant award decision may request a stay  
24 of ~~a contract~~ an award decision. Such a request must be made to the Director of the  
25 Bureau of General Services in writing within 10 days of notification of the contract or  
26 grant award and must state the nature of the grievance.

27           The Director of the Bureau of General Services shall issue a stay of a contract or grant  
28 award decision, pending appeal, upon a showing of irreparable injury to the petitioner, a  
29 reasonable likelihood of success on the merits, and no substantial harm to adverse parties  
30 or to the general public.

31           The Director of the Bureau of General Services shall notify the petitioner in writing of the  
32 director's decision regarding the issuance of a stay within 7 days of receipt of the request.

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

35           **2. Request for hearing of appeal.** Persons aggrieved by an agency contract or grant  
36 award decision under this subchapter may request a hearing of appeal. Such a request  
37 must be made to the Director of the Bureau of General Services in writing within 15 days

1 of notification of the ~~contract~~ award. The Director of the Bureau of General Services  
2 shall grant a hearing of appeal unless:

3 A. The Director of the Bureau of General Services determines that:

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

5 (2) A prior request by the same petitioner relating to the same contract or grant  
6 award has been granted;

7 (3) The request was made more than 15 days after notice of contract or grant  
8 award; or

9 (4) The request is capricious, frivolous or without merit; or

10 B. No contract ~~award was granted~~ or grant was awarded.

11 The Director of the Bureau of General Services shall notify the petitioner in writing of the  
12 director's decision regarding a request for a hearing of appeal within 15 days of receipt of  
13 the request. If a request for a hearing is granted, notification must be made at least 10  
14 days before the hearing date and must include the date and location of the hearing and the  
15 names of the appeal committee members.

16 **3. Appeal committee.** A committee of 3 members shall hear a petitioner's appeal  
17 within 60 days of receipt of the request for an appeal. The Commissioner of  
18 Administrative and Financial Services shall appoint 2 members of an appeal committee,  
19 except that persons who have any direct or indirect personal, professional or financial  
20 conflict of interest in the appeal or employees of any department affected by the contract  
21 or grant may not serve on the appeal committee. The 3rd member is the Director of the  
22 Bureau of General Services or the director's designee.

23 Members of an appeal committee appointed under this section shall meet at the appointed  
24 time and place in the presence of the petitioner and such individuals as the petitioner  
25 determines necessary for a full and fair hearing. The petitioner may present to the appeal  
26 committee any materials the petitioner considers relevant to the appeal.

27 The appeal committee shall keep a written record of each hearing and shall submit its  
28 decision and the reasons for its decision to the Director of the Bureau of General Services  
29 in writing no later than 15 days following the hearing of appeal.

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

32 A. Validate the contract or grant award decision under appeal; or

33 B. Invalidate the contract or grant award decision under appeal.

34 Except as provided in paragraph B, an appeal committee may not modify the contract or  
35 grant award under appeal, or make a new ~~contract~~ award. Contracts or grants found  
36 invalid by an appeal committee under this subchapter become immediately void and of no  
37 legal effect.

38 **Sec. 7. 5 MRSA §1825-G**, as enacted by PL 1989, c. 785, §2, is amended to read:

