

# MAINE STATE LEGISLATURE

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# 128th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2017

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Legislative Document

No. 1213

S.P. 407

In Senate, March 28, 2017

### **An Act To Protect Taxpayers in the Privatization of State Services**

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

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST  
Secretary of the Senate

Presented by Senator BELLOWS of Kennebec.

Cosponsored by Senator JACKSON of Aroostook, Representative BLUME of York and Senators: CYRWAY of Kennebec, DESCHAMBAULT of York, KEIM of Oxford, LIBBY of Androscoggin, SAVIELLO of Franklin, Representatives: FECTIONEAU of Biddeford, MARTIN of Eagle Lake, MARTIN of Sinclair.

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

2 **Sec. 1. 5 MRSA §18, sub-§1, ¶D**, as enacted by PL 1979, c. 734, §2, is amended  
3 to read:

4 D. "Proceeding" means a proceeding, application, request, ruling, determination,  
5 award, contract, claim, controversy, charge, accusation, arrest or other matter relating  
6 to governmental action or inaction, but does not include an employee bid or contract  
7 to provide agency services under section 482, subsections 6 and 7.

8 **Sec. 2. 5 MRSA §18-A, sub-§4**, as enacted by PL 2001, c. 203, §2, is amended to  
9 read:

10 **4. Exemptions.** This section does not apply:

11 A. To purchases by the Governor under authority of Title 1, section 814;

12 B. To contracts made with a corporation that has issued shares to the public for the  
13 general benefit of that corporation; ~~or~~

14 C. If an exemption is approved by the Director of the Bureau of General Services  
15 within the Department of Administrative and Financial Services or the director's  
16 designee based upon one of the following and if the director gives notice of the  
17 granting of this exemption to all parties bidding on the contract in question with a  
18 statement of the reason for the exemption and if an opportunity is provided for any  
19 party to appeal the granting of the exemption:

20 (1) When the private entity or party that proposes to contract with the State and  
21 that employs the executive employee, based upon all relevant facts, is the only  
22 reasonably available source to provide the service or product to the State, as  
23 determined by the director; or

24 (2) When the director determines that the amount of compensation to be paid to  
25 the private entity or party providing the service or product to the State is de  
26 minimis; or

27 D. To a contract by employees to provide agency services under section 482,  
28 subsection 7.

29 **Sec. 3. 5 MRSA c. 21** is enacted to read:

30 **CHAPTER 21**

31 **PRIVATIZATION OF AGENCY SERVICES**

32 **§481. Definitions**

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

35 **1. Agency.** "Agency" means a state agency as defined in section 1552, subsection 6.

1           **2. Business day.** "Business day" means any calendar day excluding Saturdays,  
2 Sundays and legal holidays.

3           **3. Contractor.** "Contractor" means a nongovernmental person who has entered into  
4 a privatization contract with the State.

5           **4. Dependent.** "Dependent" means the spouse or child of an employee if the spouse  
6 or child would qualify for dependent status under the United States Internal Revenue  
7 Code of 1986 or for whom a support order has been or could be granted under Title 19-A,  
8 section 1653, subsection 2.

9           **5. Employee organization.** "Employee organization" means an organization that  
10 has as its primary purpose the representation of employees in their employment relations  
11 with an employer under Title 26, chapter 9-B.

12           **6. Privatization contract.** "Privatization contract" means an agreement or  
13 combination or series of agreements by which a nongovernmental person agrees with an  
14 agency to provide services that are of at least \$500,000 in value as of October 1, 2017 and  
15 annually increased by the amount of increase in the Consumer Price Index calculated by  
16 the United States Department of Labor, Bureau of Labor Statistics for the most recent 12-  
17 month period for which data are available and that are substantially similar to and in lieu  
18 of services provided, in whole or in part, by regular employees of the agency.  
19 "Privatization contract" does not include:

20           A. Any subsequent agreement to a privatization contract, including any agreement  
21 resulting from a rebidding of previously privatized service, or any agreement  
22 renewing or extending a privatization contract;

23           B. A contract for information technology services if an employee organization agrees  
24 to the terms of the contract in writing; or

25           C. An agreement solely to provide legal, management consulting, planning,  
26 engineering or design services.

27           **§482. Privatization contracts**

28           **1. Privatization contracts.** Notwithstanding the provisions of chapters 155 and 156,  
29 an agency entering into a privatization contract shall, in consultation with the  
30 Commissioner of Administrative and Financial Services, follow the requirements of this  
31 section.

32           **2. Written statement of services; sealed bids; contract terms.** An agency shall  
33 prepare a specific written statement of the services proposed to be the subject of a  
34 privatization contract, including the specific quantity and standard of quality of the  
35 subject services. The agency shall solicit competitive sealed bids for the privatization  
36 contracts based upon this statement. The day designated by the agency upon which it will  
37 accept these sealed bids must be the same for all parties. The statement of services is a  
38 public record and must be filed in the agency and with the Commissioner of  
39 Administrative and Financial Services and transmitted to the State Auditor for review  
40 pursuant to section 483. The term of a privatization contract may not exceed 5 years. A

1 privatization contract may not be amended for the purpose or effect of avoiding a  
2 requirement of this section.

3 **3. Wage rate and benefits for employees in bids for privatization and**  
4 **privatization contracts.** For each position for which a bidder under subsection 2 will  
5 employ a person pursuant to the privatization contract and for which the duties are  
6 substantially similar to the duties performed by a regular agency employee or employees,  
7 the statement required by subsection 2 must include a statement of the minimum wage  
8 rate to be paid for the position. The minimum wage rate must be the lowest classification  
9 under chapter 372 under which the comparable regular agency employee is paid or the  
10 average private sector wage rate for the position as determined by the Commissioner of  
11 Administrative and Financial Services from data collected by the Department of  
12 Administrative and Financial Services, Bureau of Human Resources and Bureau of  
13 General Services. A bid for a privatization contract and a privatization contract must  
14 establish the wage rate for each position subject to a minimum wage rate under this  
15 subsection at no less than the minimum wage rate for that position. A bid for a  
16 privatization contract and a privatization contract must include provisions for the  
17 contractor to pay not less than a percentage, comparable to the percentage paid by the  
18 State for state employees, of the costs of health insurance plans with coverage  
19 comparable to the coverage provided by the State for state employees for every employee  
20 employed for not less than 20 hours per week pursuant to the contract and for a dependent  
21 of the employee. A contractor shall submit quarterly payroll records to the agency, listing  
22 the name, address, social security number, hours worked and hourly wage paid for each  
23 employee in the previous quarter. The Attorney General may bring a civil action for  
24 equitable relief in the Superior Court to enforce this subsection or to prevent or remedy  
25 the dismissal, demotion or other action prejudicing any employee as a result of a report of  
26 a violation of this subsection.

27 **4. Offers of employment to terminated state employees.** A privatization contract  
28 must contain a provision requiring the contractor to offer available employee positions  
29 pursuant to the contract to qualified regular employees of the agency whose state  
30 employment is terminated because of the privatization contract and who satisfy the hiring  
31 criteria of the contractor. A privatization contract must contain provisions requiring the  
32 contractor to comply with a policy of and to take affirmative steps to provide  
33 nondiscrimination and equal opportunity for any person protected by chapter 337.

34 **5. Estimate of subject services.** An agency seeking to enter into a privatization  
35 contract shall prepare a comprehensive written estimate of the costs of regular agency  
36 employees providing the subject services in the most cost-efficient manner. The estimate  
37 must include all direct and indirect costs of regular agency employees providing the  
38 subject services, including, but not limited to, pension, insurance and other employee  
39 benefit costs. For the purpose of reducing this estimate, an employee organization  
40 representing employees of the agency may at any time before the final day for the agency  
41 to receive sealed bids pursuant to subsection 2 propose an amendment to any relevant  
42 collective bargaining agreement to which the employee organization is a party, but such  
43 an amendment may take effect only if the effect of the amendment is to reduce the  
44 estimate below the contract cost pursuant to subsection 7. An estimate under this  
45 subsection remains confidential until after the final day for the agency to receive sealed

1 bids for the privatization contract pursuant to subsection 2, at which time the estimate  
2 becomes a public record and must be filed in the agency and with the Commissioner of  
3 Administrative and Financial Services and transmitted to the State Auditor for review  
4 pursuant to section 483.

5 **6. Employee bids.** Employees of an agency seeking a privatization contract under  
6 subsection 1 and who are represented by an employee organization may organize and  
7 submit a bid to provide the subject services under this section. After consulting any  
8 relevant employee organizations, an agency seeking to enter into a privatization contract  
9 shall provide adequate resources for the purpose of encouraging and assisting agency  
10 employees to organize and submit a bid to provide the subject services. In determining  
11 what resources are adequate for this purpose, the agency shall refer to an existing  
12 collective bargaining agreement of a similar employee organization whose members  
13 perform the subject services that provides similar resources in the same or other agencies,  
14 except that, if no such collective bargaining agreement exists, the agency shall refer to  
15 any existing comparable collective bargaining agreement providing similar resources and  
16 shall provide such resources at the minimum level of assistance provided in the similar  
17 agreement. The agency shall consider an employee bid under this subsection on the same  
18 basis as all other bids received under subsection 2. An employee bid under this subsection  
19 is not a public record under Title 1, chapter 13, subchapter 1 before the designation of the  
20 winning bidder under subsection 7. An employee bid under this subsection may be made  
21 as a joint venture with other persons.

22 **7. Designation of winning bidder.** After soliciting and receiving all bids under  
23 subsection 2, an agency shall publicly designate the bidder to which it proposes to award  
24 the privatization contract. The agency shall prepare a comprehensive written analysis of  
25 the contract cost based upon the designated bid, specifically including the costs of  
26 transition from public to private operation, of any additional unemployment and  
27 retirement benefits and of monitoring and otherwise administering contract performance.  
28 If the designated bidder proposes to perform any or all of the contract outside the  
29 boundaries of the State, the contract cost must be increased by the amount of any lost  
30 income tax revenue to the State by the corresponding elimination of agency employees,  
31 as determined by the State Tax Assessor.

32 **8. Certification to State Auditor.** For a privatization contract of a designated  
33 bidder under subsection 7, the head of the agency and the Commissioner of  
34 Administrative and Financial Services shall each certify in writing to the State Auditor  
35 that:

36 A. The contract complies with all provisions of this section and of all other  
37 applicable laws;

38 B. The quality of the services to be provided by the designated bidder is likely to  
39 satisfy the quality requirements of the statement prepared pursuant to subsection 2  
40 and to equal or exceed the quality of services that could be provided by regular  
41 agency employees pursuant to subsection 5;

42 C. The contract cost pursuant to subsection 7 will be less than the estimated cost  
43 pursuant to subsection 5;

1           D. The designated bidder and its supervisory employees while in the employ of the  
2           designated bidder have no adjudicated record of substantial or repeated willful  
3           noncompliance with any relevant federal or state regulatory statute, including, but not  
4           limited to, statutes concerning labor relations, occupational safety and health,  
5           nondiscrimination and affirmative action, environmental protection and conflicts of  
6           interest; and

7           E. The proposed privatization contract is in the public interest and meets all  
8           applicable quality and fiscal standards.

9           A copy of the proposed privatization contract must accompany the certification  
10           transmitted to the State Auditor under this subsection.

11           **9. Rules.** The Department of Administrative and Financial Services may adopt rules  
12           to carry out the provisions of this chapter and to ensure that the competitive bidding  
13           process under this section is consistent with the provisions of competitive bids under  
14           section 1825-B.

15           **§483. Review by State Auditor**

16           **1. Review by State Auditor.** A privatization contract submitted to the State Auditor  
17           becomes valid 30 business days after receipt of the certification for the contract required  
18           by section 482, subsection 8 unless the State Auditor notifies the agency of an objection  
19           to the contract within 30 business days of receipt of the certification. An objection by the  
20           State Auditor under this subsection must be in writing and state specifically the State  
21           Auditor's finding that the agency has failed to comply with one or more of the  
22           requirements of section 482, including that based on independent review of all the  
23           relevant facts the State Auditor finds incorrect any of the findings required by section  
24           482, subsection 8. The State Auditor may extend the time for objections for an additional  
25           period of 30 business days beyond the original 30 business days by written notice to the  
26           agency stating the reason for the extension.

27           **2. Summonses by State Auditor.** For the purpose of reviewing an agency's  
28           compliance and certification pursuant to section 482, the State Auditor or the State  
29           Auditor's designee may require by summons the attendance and testimony under oath of  
30           witnesses and the production of books, papers and other records relating to the review.  
31           All provisions of law relative to summonses in Title 14, chapter 203 apply to a summons  
32           under this subsection.

33           **3. Forms; rules.** The State Auditor may prescribe forms and adopt routine technical  
34           rules as defined in chapter 375, subchapter 2-A to carry out the provisions of this chapter.

35           **4. Finality of State Auditor objection.** An objection of the State Auditor pursuant  
36           to subsection 1 is final and binding, unless the State Auditor in writing withdraws the  
37           objection. If the State Auditor objects to a contract under subsection 1, the privatization  
38           process under section 482 is terminated unless the agency submits a revised certified  
39           contract to the State Auditor within 30 days of the date of the objection. The State  
40           Auditor shall review a revised certified contract in the same manner as a certified contract  
41           under subsection 1.

1 **SUMMARY**

2 This bill creates a process by which a state agency can enter a privatization contract  
3 with a nongovernmental entity to perform basic agency services for up to 5 years if a  
4 number of criteria are met, including:

5 1. Wages and benefits for employees of the contractor are comparable to state  
6 employees performing the same services;

7 2. The contractor endeavors to hire agency employees terminated due to the  
8 privatization;

9 3. The agency provides an estimate of its costs in providing the subject services in  
10 the most efficient manner;

11 4. The agency provides support and resources to allow agency employees to submit a  
12 competing bid to provide the privatized services;

13 5. The agency considers as a contract cost any income tax revenue lost to the State as  
14 a result of services to be performed out of state under the contract; and

15 6. A review by the State Auditor to determine that all of the requirements of the  
16 bidding and privatization contract have been met.