

# MAINE STATE LEGISLATURE

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# 130th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2021

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Legislative Document

No. 875

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S.P. 289

In Senate, March 8, 2021

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**An Act To Protect Taxpayers in the Privatization of Services and To  
Establish the State Procurement Review Committee**

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

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT  
Secretary of the Senate

Presented by Senator BALDACCI of Penobscot.  
Cosponsored by Senator: RAFFERTY of York, Representatives: CUDDY of Winterport,  
Speaker FECTEAU of Biddeford.

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 organization bid  
7 or contract to provide agency services under section 1816-B.

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 granting  
17 of this exemption to all parties bidding on the contract in question with a statement of  
18 the reason for the exemption and if an opportunity is provided for any party to appeal  
19 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 an employee organization to provide agency services under section  
28 1816-B.

29 **Sec. 3. 5 MRSA §1816-B** is enacted to read:

30 **§1816-B. Privatization of agency services**

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

33 A. "Agency" means a state agency as defined in section 1552, subsection 6, but does  
34 not include the Maine Community College System.

35 B. "Agency cost estimate" means the cost to the agency seeking to privatize services  
36 to provide the services in the most cost-efficient manner. "Agency cost estimate" is the  
37 total of all direct and indirect costs to provide the services, including but not limited to  
38 wages and pension, insurance and other employee benefit costs of agency employees.

39 C. "Agency employee" means an employee of the agency seeking to privatize services.

1 D. "Business day" means any calendar day, excluding Saturdays, Sundays and legal  
2 holidays listed in Title 4, section 1051.

3 E. "Commissioner" means the Commissioner of Administrative and Financial  
4 Services.

5 F. "Contract cost" means the total cost to the agency to privatize services. The total  
6 cost is the sum of the cost of the proposed bid designated pursuant to subsection 7, the  
7 costs of transition from public to private operation, the costs of any additional  
8 unemployment and retirement benefits and the costs of monitoring and otherwise  
9 administering contract performance.

10 G. "Contractor" means a nongovernmental person that has entered into a privatization  
11 contract with the State.

12 H. "Dependent" means the spouse or child of an employee if the spouse or child would  
13 qualify for dependent status under the United States Internal Revenue Code of 1986 or  
14 for whom a support order has been or could be granted under Title 19-A, section 1652,  
15 subsection 2.

16 I. "Employee organization" means an organization that has as its primary purpose the  
17 representation of employees in their employment relations with an employer under  
18 Title 26, chapter 9-B.

19 J. "Privatization contract" means an agreement or a combination or series of  
20 agreements by which a nongovernmental person agrees with an agency to provide  
21 services that are substantially similar to and in lieu of services provided, in whole or in  
22 part, by agency employees and that has an agency cost estimate of at least \$500,000 as  
23 of October 1, 2021 and annually increased by the amount of increase in the Consumer  
24 Price Index compiled by the United States Department of Labor, Bureau of Labor  
25 Statistics for the most recent 12-month period for which data are available.  
26 "Privatization contract" does not include:

27 (1) Any subsequent agreement to a privatization contract, including an agreement  
28 resulting from a rebidding of previously privatized service, or an agreement  
29 renewing or extending a privatization contract;

30 (2) A contract for information technology services provided to an agency if an  
31 employee organization representing the agency employees agrees to the terms of  
32 the contract in writing; or

33 (3) An agreement solely to provide legal, management consulting, planning,  
34 engineering or design services.

35 **2. Privatization of services.** Notwithstanding any provision of this chapter or chapter  
36 156 to the contrary, an agency seeking to enter into a privatization contract shall, in  
37 consultation with the commissioner, comply with the requirements of this section.

38 A. Prior to issuing a request for proposals under subsection 5 for the privatization of  
39 services, an agency seeking to enter into a privatization contract shall prepare a written  
40 statement that includes:

41 (1) A summary of the services proposed to be the subject of the privatization  
42 contract, including the specific quantity and standard of quality of the services;

1                   (2) The minimum wage rate for each position for which a contractor may employ  
2                   a person pursuant to the privatization contract and for which the duties are  
3                   substantially similar to the duties performed by an agency employee. The  
4                   minimum wage rate must be the lowest classification under chapter 372 under  
5                   which the comparable agency employee is paid or the average private sector wage  
6                   rate for the position as determined by the commissioner from data collected by the  
7                   Department of Administrative and Financial Services, Bureau of Human  
8                   Resources and Bureau of General Services, whichever is lower; and

9                   (3) The percentage paid by the State for the costs of health insurance plan coverage  
10                  for the agency employees who are employed for not less than 20 hours per week  
11                  and the percentage paid by the State for such costs for any dependent of such an  
12                  employee.

13                  B. A written statement created by an agency under paragraph A is a public record and  
14                  must be filed, prior to issuance of a request for proposals, with the commissioner, the  
15                  Attorney General and employee organizations that represent agency employees.

16                  C. Prior to issuing a request for proposals under subsection 5 for the privatization of  
17                  services, an agency seeking to enter into a privatization contract shall determine the  
18                  agency cost estimate. The agency cost estimate is confidential and not a public record  
19                  until the day after the final day for the agency to receive sealed bids for the privatization  
20                  contract pursuant to subsection 5, at which time the agency cost estimate becomes a  
21                  public record and must be filed with the commissioner and the Attorney General.

22                  **3. Employee organization request for review; final agency action.** An employee  
23                  organization representing agency employees may file a written request for review with the  
24                  commissioner regarding the contents of the written statement required in subsection 2,  
25                  paragraph A within 10 business days of the date the statement was filed. The commissioner  
26                  shall issue a written decision on the request for review within 15 business days of receiving  
27                  the request for review. The commissioner's decision under this subsection constitutes final  
28                  agency action for the purposes of judicial review under chapter 375, subchapter 7.

29                  **4. Collective bargaining agreement amendment.** An employee organization  
30                  representing agency employees may at any time before the final day for the agency to  
31                  receive sealed bids pursuant to subsection 5 propose an amendment to any relevant  
32                  collective bargaining agreement to which the employee organization is a party, but such a  
33                  proposed amendment may take effect only if the effect of the proposed amendment is to  
34                  reduce the agency cost estimate below the contract cost. A proposed amendment under this  
35                  subsection is confidential and not a public record until the day after the final day for the  
36                  agency to receive sealed bids for the privatization contract pursuant to subsection 5, at  
37                  which time the proposed amendment becomes a public record and must be filed with the  
38                  agency, the commissioner and the Attorney General.

39                  **5. Request for proposals.** An agency seeking to enter into a privatization contract  
40                  shall solicit competitive sealed bids for the privatization contract through the request for  
41                  proposals process. The day designated by the agency upon which it will accept sealed bids  
42                  must be the same for all parties.

43                  A. The request for proposals for a privatization contract and the privatization contract  
44                  must require the contractor to:

1           (1) Pay a rate no less than the minimum wage rate established pursuant to  
2           subsection 2, paragraph A, subparagraph (2) for each position subject to a  
3           minimum wage rate;

4           (2) Provide, to an employee employed for not less than 20 hours per week and to  
5           any dependent of the employee, health insurance plan coverage that is comparable  
6           to the health insurance plan coverage provided to agency employees;

7           (3) Pay not less than the percentage established pursuant to subsection 2, paragraph  
8           A, subparagraph (3) toward the cost of health insurance plan coverage for an  
9           employee employed for not less than 20 hours per week and for any dependent of  
10           such an employee;

11           (4) Submit quarterly payroll records to the agency, listing the name, address, social  
12           security number, hours worked and hourly wage rate paid for each employee in the  
13           previous quarter. Employee names, addresses and social security numbers are  
14           confidential;

15           (5) Offer available employee positions under the privatization contract to qualified  
16           agency employees who are displaced or terminated because of the privatization  
17           contract and who satisfy the nondiscriminatory hiring criteria of the contractor  
18           under subparagraph (6); and

19           (6) Comply with a policy of nondiscrimination and take affirmative steps to  
20           provide equal opportunity for any person protected by the Maine Human Rights  
21           Act.

22           B. The Attorney General may bring a civil action for equitable relief in Superior Court  
23           to enforce paragraph A or to prevent or remedy the dismissal, demotion or other action  
24           prejudicing any employee as a result of a report of a violation of paragraph A.

25           C. The term of a privatization contract, including renewals provided for in a  
26           privatization contract, may not exceed 5 years unless a longer term is approved by the  
27           commissioner.

28           D. A privatization contract may not be amended for the purpose or effect of avoiding  
29           a requirement of this section.

30           **6. Employee organization bids.** Agency employees who are represented by an  
31           employee organization may organize and request that the employee organization submit a  
32           bid on their behalf to provide the services to be privatized.

33           A. An employee organization, after consulting with any agency employees seeking to  
34           bid on a privatization contract, shall provide adequate resources for the purpose of  
35           encouraging and assisting agency employees to organize and submit a bid to provide  
36           the services to be privatized. For purposes of this paragraph, "adequate resources"  
37           means no less than the minimum level of assistance provided for in:

38           (1) The terms of the existing collective bargaining agreement covering the agency  
39           employees seeking to submit a bid;

40           (2) The terms of the expired collective bargaining agreement covering the agency  
41           employees seeking to submit a bid during the period of collective bargaining  
42           negotiations for a new agreement; or

1           (3) The terms of a comparable collective bargaining agreement covering  
2           individuals who provide similar services if the existing or expired collective  
3           bargaining agreement does not provide for a minimum level of assistance.

4           B. An employee organization bid under this subsection may be made as a joint venture  
5           with other persons.

6           C. An employee organization bid under this subsection is confidential and not a public  
7           record until the day after the agency designates the proposed winning bidder under  
8           subsection 7.

9           **7. Review of bids; designation of winning bidder.** After soliciting and receiving the  
10          submitted bids, an agency shall:

11          A. Publicly designate the bidder to which the agency proposes to award a privatization  
12          contract;

13          B. Determine the contract cost of the designated bid and file a cost analysis with the  
14          commissioner and the Attorney General. If the proposed bidder under paragraph A  
15          proposes to perform any or all of the contract outside the boundaries of the State, the  
16          contract cost must be increased by the amount of any lost income tax revenue to the  
17          State caused by the corresponding elimination of agency employees, as determined by  
18          the State Tax Assessor; and

19          C. Determine whether the contract cost under paragraph B is less than the agency cost  
20          estimate prepared pursuant to subsection 2, paragraph C. If the contract cost is equal  
21          to or more than the agency cost estimate, the agency may not enter into a privatization  
22          contract.

23          If a bid is received from an employee organization, the commissioner, or the  
24          commissioner's designee, may include staff from the Department of Administrative and  
25          Financial Services, Bureau of Human Resources in the bid review process authorized by  
26          section 1825-D.

27          **8. Negotiation of privatization contract.** If the contract cost calculated pursuant to  
28          subsection 7, paragraph B is less than the agency cost estimate, the agency may begin  
29          negotiating the terms of the privatization contract except that, if an employee organization  
30          bid is awarded the privatization contract pursuant to subsection 7, the Department of  
31          Administrative and Financial Services, Bureau of Human Resources shall negotiate the  
32          terms of the privatization contract with the employee organization. If the contract cost is  
33          equal to or more than the agency cost estimate, the agency may not enter into a privatization  
34          contract. The privatization contract must be filed with the commissioner and the Attorney  
35          General prior to execution.

36          **9. Attorney General authority.** The authority of the Attorney General over the  
37          privatization of services is governed by this subsection.

38          A. At any time during the process of privatizing any services pursuant to this section,  
39          the Attorney General may:

40                  (1) Intervene in the process;

41                  (2) Require by summons the attendance and testimony under oath of state  
42                  employees and the production of documents for the purpose of investigating  
43                  whether the provisions set forth in this chapter and chapter 156 are met. All

1 documents produced and testimony given to the Attorney General pursuant to this  
2 subparagraph are confidential. The Attorney General may seek an order from the  
3 Superior Court compelling compliance with a summons issued under this  
4 subparagraph; and

5 (3) Bring an action in Superior Court in the name of the State against an agency  
6 when the Attorney General has reason to believe that a requirement of this section  
7 has not been met, the agency has acted unlawfully or beyond the scope of its  
8 authority, the actions or inactions of the agency are not supported by the record  
9 required by this section or the privatization of services is not in the public interest.

10 B. After the filing of a court action under this subsection, further action by an agency  
11 under this section must be stayed unless the court orders otherwise. During the period  
12 of the stay, any time period specified for agency action under this chapter or chapter  
13 156 is tolled until the court action is dismissed by the Attorney General or the Superior  
14 Court orders an agency to take further action. Relief from the stay may be granted only  
15 upon a showing of compelling justification.

16 C. Except as provided in this paragraph, at least 10 business days prior to  
17 commencement of an action under this subsection, the Attorney General shall notify  
18 the agency and the commissioner of the proposed action and shall provide the  
19 commissioner and the agency an opportunity to confer with the Attorney General in  
20 person or by counsel or other representative as to the proposed action. The Attorney  
21 General may proceed without notice upon a showing by affidavit of immediate  
22 irreparable harm to the citizens of the State.

23 D. An action by the Attorney General under this subsection may seek to, among other  
24 things, restrain by temporary or permanent injunction the privatization of services  
25 under this section, and the court may make such other orders or judgments as may be  
26 necessary to prevent the privatization of services.

27 **10. Rules; forms.** The Department of Administrative and Financial Services may  
28 prescribe forms and adopt rules to carry out the provisions of this section and to ensure that  
29 the competitive bidding process under this section is consistent with the provisions of  
30 competitive bids under subchapter 1-A. Rules adopted pursuant to this subsection are  
31 routine technical rules as defined in chapter 375, subchapter 2-A.

32 **Sec. 4. 5 MRSA §1824-B** is enacted to read:

33 **§1824-B. State Procurement Review Committee**

34 The State Procurement Review Committee, referred to in this section as "the  
35 committee," is established to oversee, subject to the provisions of section 1825-B,  
36 subsection 2, the purchase of services subject to this chapter that cost \$1,000,000 or more.  
37 The purchase of services that cost less than \$1,000,000 may be subject to this section at the  
38 discretion of the chair of the committee.

39 **1. Membership.** The membership of the committee includes:

40 A. A member of the Governor's staff, appointed by the Governor;

41 B. The director of the division of procurement services within the Department of  
42 Administrative and Financial Services or the director's designee;

43 C. The State Budget Officer or the State Budget Officer's designee;



- 1           D. The State Controller or the State Controller's designee; and
- 2           E. The Attorney General or the Attorney General's designee, serving as a nonvoting
- 3           member.

4           The Chief Information Officer or the Chief Information Officer's designee is a committee  
5           member when the services to be purchased by a department or agency are within the Chief  
6           Information Officer's responsibilities and duties under chapter 163.

7           **2. Chair.** The director of the division of procurement services within the Department  
8           of Administrative and Financial Services or the director's designee shall serve as chair of  
9           the committee.

10          **3. Unanimous consent.** A decision by the committee requires unanimous consent.

11          **4. Requests for review.** Prior to issuing a request for proposals, executing a contract  
12          or grant or renewing, extending, amending or otherwise altering an existing contract or  
13          grant to purchase services that cost \$1,000,000 or more, a department or agency shall  
14          submit a request for review to the chair of the committee. The department or agency shall  
15          submit to the chair the request for proposals, proposed contract, contract amendment and  
16          related contract bid documents, as appropriate. The committee may request additional  
17          information and documentation from the department or agency.

18          **5. Attorney General review.** If the cost of the request for proposals, contract or grant  
19          or renewal, extension, amendment or other alteration to an existing contract or grant is  
20          likely to equal or exceed \$3,000,000, the department or agency shall give the Attorney  
21          General the opportunity to review the proposal, contract or grant or the renewal, extension,  
22          amendment or other alteration to an existing contract or grant prior to submitting a request  
23          for review pursuant to subsection 4. The Attorney General, or the Attorney General's  
24          designee, may review the terms of the proposal, contract or grant or the renewal, extension,  
25          amendment or other alteration to an existing contract or grant and notify the department or  
26          agency of any concerns with the terms.

27          **6. Duties.** The committee may approve a request to issue a request for proposals,  
28          execute a contract or grant or renew, extend, amend or otherwise alter an existing contract  
29          or grant subject to this section if the committee finds that:

30                A. The service to be provided under the contract or grant cannot be economically  
31                provided by a department or agency;

32                B. The contract or grant is the most economical, effective and appropriate means of  
33                providing the service;

34                C. The contract or grant will not impair the ability of a department or agency to meet  
35                its statutory duties and responsibilities under state or federal laws, rules or regulations;  
36                and

37                D. The contract or grant will not diminish the impact of statewide or other budgetary  
38                cost-saving initiatives.

39          **7. Rules; forms.** The Department of Administrative and Financial Services may  
40          prescribe forms and adopt rules to carry out the provisions of this section. Rules adopted  
41          pursuant to this subsection are routine technical rules as defined in chapter 375, subchapter  
42          2-A.

1

## SUMMARY

2 This bill sets out requirements for certain state agencies seeking to enter into a contract  
3 to privatize services. Prior to issuing a request for proposals, an agency must determine  
4 the minimum wage rate it pays the employees providing the services, the percentage of  
5 health insurance plan coverage provided by the State for those employees and their  
6 dependents and the cost to the agency to provide the services. All bids and subsequent  
7 privatization contracts must pay the established minimum wage rate, provide comparable  
8 health insurance coverage and pay at least the same percentage for health insurance plan  
9 coverage as paid by the agency to employees providing the services and their dependents  
10 prior to the privatization. The bid and successful contractor must offer employment to any  
11 agency employee displaced or terminated because of the privatization of services who  
12 meets the contractor's nondiscriminatory hiring criteria. The bill allows agency employees,  
13 through an employee organization, to submit a bid to provide the services. The bill allows  
14 an employee organization representing employees who will be displaced or terminated if  
15 the services are privatized to offer an amendment to the collective bargaining agreement  
16 that will lower the agency's cost to provide the services. A privatization contract may not  
17 be executed if the total cost of the contract, including transition costs to move services from  
18 the agency to the contractor, is more than the agency's estimation of its cost to provide the  
19 services. The bill requires all calculations, documents and other relevant materials to be  
20 submitted to the Attorney General. The Attorney General may choose to review the  
21 materials and may request additional information during the review. The bill grants  
22 authority to the Attorney General to intervene at any stage of the privatization process. The  
23 bill also gives an employee organization the authority to request a review of the written  
24 statement prepared by the agency seeking to privatize services. The Commissioner of  
25 Administrative and Financial Services is required to provide a response to such a request  
26 within 15 business days, and the decision is considered final agency action for purposes of  
27 judicial review. The Attorney General has the authority to bring an action to prevent or  
28 enjoin privatization in appropriate cases.

29 The bill also establishes the State Procurement Review Committee to oversee requests  
30 for proposals and contracts and grants and renewals, extensions, amendments and other  
31 alterations to existing contracts and grants valued over \$1,000,000. The Office of the  
32 Attorney General must be consulted when the value equals or exceeds \$3,000,000.