S T A T E O F N E W Y O R K

2137

2011-2012 Regular Sessions

I N S E N A T E

January 18, 2011

Introduced by Sen. SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law and the general municipal law, in relation to the definition of lowest responsible bidder and unfair labor practices for purposes of public works projects

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The labor law is amended by adding a new section 201-g to read as follows:

S 201-G. DETERMINATION OF LOWEST RESPONSIBLE BIDDER. 1. WHENEVER SELECTION OF THE LOWEST RESPONSIBLE BIDDER IS REQUIRED UNDER SECTION ONE HUNDRED THREE OF THE GENERAL MUNICIPAL LAW, A PERSON, FIRM, CORPORATION, SUCCESSOR CORPORATION, CONTRACTOR OR SUBCONTRACTOR SHALL NOT QUALIFY AS A RESPONSIBLE BIDDER IF IT HAS COMMITTED ANY OF THE FOLLOWING VIOLATIONS WITHIN A THREE YEAR PERIOD PRECEDING THE AWARD OF THE CONTRACT:

(A) A VIOLATION OF ANY PROVISION OF ARTICLE EIGHT OF THIS CHAPTER;

(B) A VIOLATION OF ANY STATE OR FEDERAL LABOR LAW INCLUDING BUT NOT LIMITED TO OCCUPATIONAL SAFETY AND HEALTH; WAGES; CHILD LABOR; WORKERS' COMPENSATION; UNEMPLOYMENT COMPENSATION; ORGANIZATIONAL RIGHTS; AND LABOR STANDARDS;

(C) A VIOLATION OF ANY STATE OR FEDERAL LAW RELATING TO BID COLLUSION OR RESTRAINT OF TRADE;

(D) A VIOLATION OF ANY STATE OR FEDERAL ENVIRONMENTAL LAW;

(E) A CRIMINAL CONVICTION OF ANY STATE OR FEDERAL LAW FOR ANY CONDUCT RELATING TO BIDDING OR CONSTRUCTION-RELATED WORK BY THE BIDDER;

(F) AN OUTSTANDING DISQUALIFICATION FROM BIDDING ON ANY PUBLIC WORK CONTRACT; OR

(G) A VIOLATION OF ANY STATE OR FEDERAL CIVIL RIGHTS, EMPLOYMENT DISABILITY OR MINORITY PREFERENCE LAW.

2. THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION SHALL NOT DIMINISH THE DISCRETION OF THE AWARDING AUTHORITY TO DISQUALIFY A BIDDER ON

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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OTHER GROUNDS WHICH THE AUTHORITY FINDS APPROPRIATE WHICH SHALL INCLUDE BUT NOT BE LIMITED TO:

(A) LACK OF SUFFICIENT EXPERTISE, PRIOR EXPERIENCE WITH COMPARABLE PROJECTS, OR SUFFICIENT RESOURCES TO PERFORM THE CONTRACT IN A TIMELY AND COMPETENT MANNER;

(B) WHETHER THE BIDDER'S EMPLOYEES ARE PROPERLY TRAINED AND WHETHER THE EQUIPMENT TO BE USED IS SAFE AND IN GOOD OPERATING CONDITION;

(C) WHETHER THE BIDDER HAS SUBMITTED A BID THAT IS MATHEMATICALLY OR MATERIALLY UNBALANCED;

(D) SUBMISSION OF A BID SO MUCH LOWER THAN THE AGENCY'S ENGINEER'S ESTIMATE THAT IT SEEMS UNLIKELY THAT THE BIDDER WILL BE ABLE TO PERFORM THE CONTRACT SATISFACTORILY AT THE PRICE BID; OR

(E) PRESENTATION OF ANY FALSE OR MISLEADING STATEMENTS TO THE AGENCY AWARDING THE CONTRACT IN CONNECTION WITH THE BID.

3. NO PERSON ACTING ON BEHALF OF A BIDDER SHALL LOBBY THE CONSTRUCTING GOVERNMENTAL ENTITY FOR THE PURPOSE OF ASSISTING SUCH BIDDER IN SECURING A BID. NO BID SHALL INCLUDE ANY COSTS ATTRIBUTABLE TO LOBBYING.

4. ANY PERSON, FIRM, CORPORATION, SUCCESSOR CORPORATION, LABOR ORGANIZATION, CONTRACTOR OR SUBCONTRACTOR MAY, WITHIN TEN DAYS AFTER A BID IS ACCEPTED, FILE AN APPLICATION TO CHALLENGE THE DETERMINATION UNDER SECTION ONE HUNDRED THREE OF THE GENERAL MUNICIPAL LAW THAT THE BIDDER CHOSEN WAS THE LOWEST RESPONSIBLE BIDDER. UPON RECEIPT OF SUCH APPLICATION, THE COMMISSIONER OR CHIEF EXECUTIVE OFFICER OF THE PUBLIC ENTITY SHALL CONDUCT A HEARING TO DETERMINE THE VALIDITY OF THE APPLICATION. NOTICE SHALL BE GIVEN TO THE APPLICANT AND TO THE PROPOSED LOWEST RESPONSIBLE BIDDER OF THE DATE, TIME AND PLACE OF THE HEARING. THE APPLICANT AND THE PROPOSED LOWEST RESPONSIBLE BIDDER SHALL BE GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE AND WITNESSES ON THEIR BEHALF. THE COMMISSIONER OR CHIEF EXECUTIVE OFFICER PRESIDING OVER SUCH HEARING SHALL ISSUE A WRITTEN DECISION WITH FINDINGS OF FACT WHETHER THE PROPOSED LOWEST RESPONSIBLE BIDDER IS RESPONSIBLE. SUCH CONTRACT SHALL NOT BE AWARDED PRIOR TO SUCH DECISION. THE AWARDING AUTHORITY SHALL NOTIFY ALL BIDDERS REGARDING THE SELECTION OF ITS PROPOSED LOWEST RESPONSIBLE BIDDER.

S 2. Subdivision 1 of section 103 of the general municipal law, as amended by section 1 of part FF of chapter 56 of the laws of 2010, is amended to read as follows:

1. Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than thirty-five thousand dollars and all purchase contracts involving an expenditure of more than twenty thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section. In any case where a responsible bidder's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the low bid. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may award the contract to any of such bidders. Such officer, board or agency may, in his or her or its discretion, reject all bids and readvertise for new bids in the manner provided by this section. In determining whether a purchase is an

expenditure within the discretionary threshold amounts established by this subdivision, the officer, board or agency of a political subdivision or of any district therein shall consider the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within the twelve-month period commencing on the date of purchase. Purchases of commodities, services or technology shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds established by this subdivision. A change to or a renewal of a discretionary purchase shall not be permitted if the change or renewal would bring the reasonably expected aggregate amount of all purchases of the same commodities, services or technology from the same provider within the twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount. For purposes of this section, "sealed bids", as that term applies to purchase contracts, shall include bids submitted in an electronic format including submission of the statement of non-collusion required by section one hundred three-d of this article, provided that the governing board of the political subdivision or district, by resolution, has authorized the receipt of bids in such format. Submission in electronic format may, for technology contracts only, be required as the sole method for the submission of bids. Bids submitted in an electronic format shall be transmitted by bidders to the receiving device designated by the political subdivision or district. Any method used to receive electronic bids shall comply with article three of the state technology law, and any rules and regulations promulgated and guidelines developed thereunder and, at a minimum, must (a) document the time and date of receipt of each bid received electronically; (b) authenticate the identity of the sender; (c) ensure the security of the information transmitted; and (d) ensure the confidentiality of the bid until the time and date established for the opening of bids. The timely submission of an electronic bid in compliance with instructions provided for such submission in the advertisement for bids and/or the specifications shall be the responsibility solely of each bidder or prospective bidder. No political subdivision or district therein shall incur any liability from delays of or interruptions in the receiving device designated for the submission and receipt of electronic bids. FOR PURPOSES OF THIS SECTION, THE TERM "LOWEST RESPONSIBLE BIDDER" SHALL MEAN ANY PERSON, FIRM, CORPORATION, SUCCESSOR CORPORATION, CONTRACTOR OR SUBCONTRACTOR WHO (I) SUBMITS THE LOWEST BID FOR A PUBLIC WORK CONTRACT AND (II) IS NOT DISQUALIFIED ON GROUNDS PROVIDED IN SECTION TWO HUNDRED ONE-G OF THE LABOR LAW.

S 3. Subdivision 1 of section 103 of the general municipal law, as amended by section 2 of part FF of chapter 56 of the laws of 2010, is amended to read as follows:

1. Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than thirty-five thousand dollars and all purchase contracts involving an expenditure of more than twenty thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section. In determining whether a purchase is an expenditure within the discretionary threshold amounts established by this subdivision, the officer, board or agency of a political subdivi-

sion or of any district therein shall consider the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within the twelve-month period commencing on the date of purchase. Purchases of commodities, services or technology shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds established by this subdivision. A change to or a renewal of a discretionary purchase shall not be permitted if the change or renewal would bring the reasonably expected aggregate amount of all purchases of the same commodities, services or technology from the same provider within the twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount. In any case where a responsible bidder's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the low bid. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may award the contract to any of such bidders. Such officer, board or agency may, in his, her or its discretion, reject all bids and readvertise for new bids in the manner provided by this section. FOR PURPOSES OF THIS SECTION, THE TERM "LOWEST RESPONSIBLE BIDDER" SHALL MEAN ANY PERSON, FIRM, CORPORATION, SUCCESSOR CORPORATION, CONTRACTOR OR SUBCONTRACTOR WHO (A) SUBMITS THE LOWEST BID FOR A PUBLIC WORK CONTRACT AND (B) IS NOT DISQUALIFIED ON GROUNDS PROVIDED IN SECTION TWO HUNDRED ONE-G OF THE LABOR LAW.

S 4. This act shall take effect on the first of September next succeeding the date on which it shall have become a law; provided that the amendments to subdivision 1 of section 103 of the general municipal law made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 41 of part X of chapter 62 of the laws of 2003, as amended, when upon such date the provisions of section three of this act shall take effect.