

5059

2009-2010 Regular Sessions

I N A S S E M B L Y

February 10, 2009

Introduced by M. of A. BRENNAN, MILLMAN, CLARK, DINOWITZ, ORTIZ, FIELDS, JOHN, COLTON -- Multi-Sponsored by -- M. of A. CAHILL, CHRISTENSEN, ESPAILLAT, GALEF, GLICK, GOTTFRIED, GREENE, KOON, MARKEY, PHEFFER, ROSENTHAL, SWEENEY -- read once and referred to the Committee on Local Governments

AN ACT to amend the general municipal law and the state finance law, in relation to ensuring compliance with the competitive bidding law

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

1 Section 1. Short title. This act shall be known and may be cited as
2 the "Municipal competitive bidding enforcement act."
3 S 2. The general municipal law is amended by adding a new section
4 103-g to read as follows:
5 S 103-G. ENFORCEMENT OF COMPETITIVE BIDDING LAW. 1. DEFINITIONS. (A)
6 "PROCUREMENT ACTION" MEANS ANY TRANSACTION WHICH IS CLAIMED TO CONSTI-
7 TUTE A CONTRACT FOR PUBLIC WORK INVOLVING AN EXPENDITURE OF MORE THAN
8 TWENTY THOUSAND DOLLARS OR A PURCHASE CONTRACT INVOLVING THE EXPENDITURE
9 OF MORE THAN TEN THOUSAND DOLLARS WHICH SHOULD BE AWARDED TO THE LOWEST
10 RESPONSIBLE BIDDER, AS PROVIDED BY SECTION ONE HUNDRED THREE OF THIS
11 ARTICLE.
12 (B) "GOOD FAITH BIDDER" MEANS ANY PERSON WHO HAS SUBMITTED A BID IN
13 RESPONSE TO AN ADVERTISEMENT FOR SEALED BIDS, OR WHO COULD SUBMIT A GOOD
14 FAITH BID ON A PROCUREMENT ACTION.
15 2. COMPTROLLER'S OPINIONS. UPON A COMPLAINT FILED BY A TAXPAYER OF THE
16 POLITICAL SUBDIVISION OR BY A GOOD FAITH BIDDER, THE OFFICE OF THE STATE
17 COMPTROLLER SHALL ISSUE AN OPINION ON WHETHER A PROPOSED PROCUREMENT
18 ACTION BY A POLITICAL SUBDIVISION COMPLIES WITH THE COMPETITIVE BIDDING
19 REQUIREMENTS OF SECTION ONE HUNDRED THREE OF THIS ARTICLE. THE COMPLAINT
20 SHALL SPECIFY THE PROCUREMENT ACTION THAT IS CLAIMED TO VIOLATE SECTION
21 ONE HUNDRED THREE OF THIS ARTICLE. THE TAXPAYER OR GOOD FAITH BIDDER
22 SHALL SERVE A COPY OF THE COMPLAINT ON THE POLITICAL SUBDIVISION PRIOR

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

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1 TO SERVING THE COMPLAINT ON THE COMPTROLLER. UPON THE FILING OF A PRIMA
2 FACIE VALID COMPLAINT WITH THE COMPTROLLER, THE COMPTROLLER SHALL NOTIFY
3 THE POLITICAL SUBDIVISION. UPON RECEIPT OF SUCH NOTICE FROM THE COMP-
4 TROLLER, THE POLITICAL SUBDIVISION MAY NOT PROCEED WITH THE COMPLAINT OF
5 PROCUREMENT ACTION FOR A PERIOD OF THIRTY DAYS. IN RENDERING HIS OR HER
6 OPINION, THE COMPTROLLER MAY CONSULT WITH THE OFFICE OF GENERAL SERVICES
7 AS TO THE REASONABLENESS AND VALIDITY OF ANY BID SPECIFICATIONS. THE
8 COMPTROLLER SHALL ISSUE A WRITTEN OPINION PURSUANT TO THIS SUBDIVISION
9 WITHIN THIRTY DAYS OF SUCH NOTICE TO THE POLITICAL SUBDIVISION AND SHALL
10 PROMPTLY SERVE COPIES OF THE OPINION ON THE POLITICAL SUBDIVISION AND ON
11 THE COMPLAINING PARTY.

12 3. ATTORNEY GENERAL. IF THE COMPTROLLER'S OPINION IS THAT THE PROCURE-
13 MENT ACTION WOULD VIOLATE SECTION ONE HUNDRED THREE OF THIS ARTICLE, THE
14 COMPTROLLER SHALL TRANSMIT A COPY OF THE OPINION TO THE ATTORNEY GENER-
15 AL. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE ATTORNEY GENERAL IS
16 AUTHORIZED TO BRING A SPECIAL PROCEEDING IN THE SUPREME COURT TO HAVE A
17 PROCUREMENT ACTION ENJOINED OR DECLARED NULL AND VOID ON THE GROUND THAT
18 IT IS IN VIOLATION OF SECTION ONE HUNDRED THREE OF THIS ARTICLE.

19 4. DAMAGES TO GOOD FAITH BIDDER. A GOOD FAITH BIDDER MAY BRING AN
20 ACTION IN THE SUPREME COURT TO RECOVER DAMAGES AND ATTORNEY'S FEES FROM
21 A POLITICAL SUBDIVISION, WHICH ENGAGES IN A VIOLATION OF SECTION ONE
22 HUNDRED THREE OF THIS ARTICLE. THE COURT SHALL AWARD DAMAGES AND ATTOR-
23 NEY'S FEES IF THE COURT FINDS THAT THE GOOD FAITH BIDDER WOULD HAVE BEEN
24 THE LOWEST RESPONSIBLE BIDDER, BUT FOR THE POLITICAL SUBDIVISION'S
25 VIOLATION OF SECTION ONE HUNDRED THREE OF THIS ARTICLE. THE COURT IS
26 AUTHORIZED IN ANY SUCH ACTION TO DECLARE AN ILLEGALLY AWARDED CONTRACT
27 TO BE NULL AND VOID.

28 (A) IF THE COMPTROLLER HAS ISSUED AN OPINION THAT THE PROCUREMENT
29 ACTION WOULD BE IN VIOLATION OF SECTION ONE HUNDRED THREE OF THIS ARTI-
30 CLE AND THE POLITICAL SUBDIVISION HAS THEREAFTER PROCEEDED WITH THE
31 PROCUREMENT ACTION, THE MEASURE OF DAMAGES SHALL BE THREE TIMES THE GOOD
32 FAITH BIDDER'S LOST PROFITS.

33 (B) IF THE COMPTROLLER HAS NOT ISSUED AN OPINION THAT THE PROCUREMENT
34 ACTION WOULD BE IN VIOLATION OF SECTION ONE HUNDRED THREE OF THIS ARTI-
35 CLE, THE MEASURE OF DAMAGES SHALL BE THE LESSER OF (I) THE GOOD FAITH
36 BIDDER'S LOST PROFITS AND (II) THE DIFFERENCE BETWEEN THE PRICE OF THE
37 NULLIFIED CONTRACT AND ANY AMOUNT THAT THE COURT AWARDS TO THE PERSON
38 WHO PERFORMED ON THE NULLIFIED CONTRACT.

39 5. CIVIL PENALTY. ANY PERSON WHO SHALL WILFULLY AND INTENTIONALLY
40 VIOLATE THE COMPETITIVE BIDDING REQUIREMENTS OF SECTION ONE HUNDRED
41 THREE OF THIS ARTICLE SHALL BE PERSONALLY LIABLE FOR A CIVIL PENALTY OF
42 NO MORE THAN ONE THOUSAND DOLLARS. IN A PROCEEDING BROUGHT PURSUANT TO
43 THIS SECTION, THE COMPTROLLER'S OPINIONS AND AUDITS MAY BE ADMITTED INTO
44 EVIDENCE ON THE ISSUE OF THE RESPONDENT'S STATE OF MIND, PROVIDED THAT
45 (A) THE OPINION OR AUDIT WAS ISSUED PRIOR TO THE ALLEGED VIOLATION, (B)
46 THE OPINION OR AUDIT WAS ISSUED NO MORE THAN TEN YEARS PRIOR TO THE
47 ALLEGED VIOLATION, AND (C) THE OPINION OR AUDIT CONCERNED THE SAME KIND
48 OF ITEM OR SAME KIND OF PRACTICE AS THE ALLEGED VIOLATION.

49 6. COMPLAINT FEE. WHENEVER THE COMPTROLLER ACCEPTS A COMPLAINT FOR
50 FILING PURSUANT TO THIS SECTION, THE COMPTROLLER SHALL REQUIRE AND
51 COLLECT A FEE OF ONE HUNDRED DOLLARS, WHICH SHALL BE PAID INTO THE STATE
52 TREASURY AND WHICH SHALL, SO FAR AS IS NECESSARY, BE APPROPRIATED ANNU-
53 ALLY BY THE LEGISLATURE TO THE COMPTROLLER TO BE USED IN IMPLEMENTING
54 THIS ARTICLE.

55 S 3. Section 103 of the general municipal law is amended by adding a
56 new subdivision 13 to read as follows:

1 13. EXCEPT AS OTHERWISE EXPRESSLY AUTHORIZED BY THIS ARTICLE, A POLI-
2 TICAL SUBDIVISION MAY NOT REQUIRE THAT BIDS CONFORM TO UNDULY RESTRIC-
3 TIVE SPECIFICATIONS. ALL SPECIFICATIONS SHALL BE DRAFTED SO AS TO
4 PROMOTE OVERALL ECONOMY FOR THE PURPOSES INTENDED AND TO ENCOURAGE
5 COMPETITION IN SATISFYING THE NEEDS OF THE POLITICAL SUBDIVISION. A
6 BRAND NAME MAY BE USED AS A SPECIFICATION ONLY IF THE SPECIFICATION
7 CLEARLY STATES THAT THE BRAND NAME OR EQUIVALENT IS ACCEPTABLE. WHERE A
8 BRAND NAME OR EQUIVALENT SPECIFICATION IS USED IN A BID SOLICITATION,
9 THE SOLICITATION SHALL CONTAIN EXPLANATORY LANGUAGE THAT THE USE OF A
10 BRAND NAME IS FOR THE PURPOSE OF DESCRIBING THE STANDARD OF QUALITY,
11 PERFORMANCE AND CHARACTERISTICS DESIRED AND IS NOT INTENDED TO LIMIT OR
12 RESTRICT COMPETITION. IN ANY OPINION, PROCEEDING OR ACTION BROUGHT
13 PURSUANT TO SECTION ONE HUNDRED THREE-G OF THIS ARTICLE, A BID SPECIFI-
14 CATION DEVELOPED AND PROVIDED BY THE OFFICE OF GENERAL SERVICES SHALL BE
15 DEEMED VALID.

16 S 4. Subdivision 2 of section 103 of the general municipal law, as
17 amended by section 5 of part X of chapter 62 of the laws of 2003, is
18 amended to read as follows:

19 2. Advertisement for bids shall be published in the official newspa-
20 per or newspapers, if any, or otherwise in a newspaper or newspapers
21 designated for such purpose. Such advertisement shall contain a state-
22 ment of the time when and place where all bids received pursuant to such
23 notice will be publicly opened and read, and the designation of the
24 receiving device if the political subdivision or district has authorized
25 the receipt of bids in an electronic format. Such board or agency may by
26 resolution designate any officer or employee to open the bids at the
27 time and place specified in the notice. Such designee shall make a
28 record of such bids in such form and detail as the board or agency shall
29 prescribe and present the same at the next regular or special meeting of
30 such board or agency. All bids received shall be publicly opened and
31 read at the time and place so specified. ALL BIDS RECEIVED AND OPENED
32 SHALL BE PUBLIC RECORDS AND SHALL BE AVAILABLE FOR PUBLIC INSPECTION AND
33 COPYING. At least five days shall elapse between the first publication
34 of such advertisement and the date so specified for the opening and
35 reading of bids.

36 S 5. Subdivision 2 of section 103 of the general municipal law, as
37 amended by chapter 296 of the laws of 1958, is amended to read as
38 follows:

39 2. Advertisement for bids shall be published in the official newspa-
40 per or newspapers, if any, or otherwise in a newspaper or newspapers
41 designated for such purpose. Such advertisement shall contain a state-
42 ment of the time when and place where all bids received pursuant to such
43 notice will be publicly opened and read, and the designation of the
44 receiving device if the political subdivision or district has authorized
45 the receipt of bids in an electronic format. Such board or agency may by
46 resolution designate any officer or employee to open the bids at the
47 time and place specified in the notice. Such designee shall make a
48 record of such bids in such form and detail as the board or agency shall
49 prescribe and present the same at the next regular or special meeting of
50 such board or agency. All bids received shall be publicly opened and
51 read at the time and place so specified. ALL BIDS RECEIVED AND OPENED
52 SHALL BE PUBLIC RECORDS AND SHALL BE AVAILABLE FOR PUBLIC INSPECTION AND
53 COPYING. At least five days shall elapse between the first publication
54 of such advertisement and the date so specified for the opening and
55 reading of bids.

1 S 6. Subparagraph 1 of paragraph (b) of subdivision 4 of section 35 of
2 the general municipal law, as amended by chapter 692 of the laws of
3 1989, is amended to read as follows:

4 (1) Not later than ninety days after presentation to the governing
5 board of a report of examination performed by the office of the state
6 comptroller, or receipt by the governing board of any report of an
7 external audit performed by an independent public accountant or any
8 management letter in conjunction with such an audit, the governing board
9 may, in its discretion, provide to the comptroller, and file in the
10 office of the clerk, or with the secretary if there is no clerk, of the
11 municipal corporation, industrial development agency, district, agency
12 or activity, a written response to the findings and recommendations, if
13 any, in the report or letter. PROVIDED, HOWEVER, THAT IF SUCH REPORT OR
14 LETTER CONTAINS A FINDING THAT THE COMPETITIVE BIDDING REQUIREMENTS OF
15 SECTION ONE HUNDRED THREE OF THIS CHAPTER WERE VIOLATED, THE GOVERNING
16 BOARD MUST FILE A WRITTEN RESPONSE. In the case of municipal corpo-
17 rations, industrial development agency, districts, agencies or activ-
18 ities subject to examination by the commissioner of education, any writ-
19 ten response shall also be provided to such commissioner.

20 S 7. The state finance law is amended by adding a new section 164-a to
21 read as follows:

22 S 164-A. PROVIDING BID SPECIFICATIONS TO POLITICAL SUBDIVISIONS. THE
23 COMMISSIONER OF GENERAL SERVICES SHALL PROVIDE TO ANY POLITICAL SUBDIVI-
24 SION, AT NO CHARGE, ANY SPECIFICATION THAT THE COMMISSIONER HAS DEVEL-
25 OPED FOR ITEMS TO BE LET FOR BIDS IN PURCHASE CONTRACTS. THE COMMISSION-
26 ER MAY DEVELOP ADDITIONAL SPECIFICATIONS AT THE REQUEST OF ANY POLITICAL
27 SUBDIVISION AND MAY PROVIDE SUCH SPECIFICATIONS TO THE POLITICAL SUBDI-
28 VISION AND MAY CHARGE THE POLITICAL SUBDIVISION FOR THE COST OF DEVELOP-
29 ING SUCH SPECIFICATIONS.

30 S 8. If any clause, sentence, paragraph, section or part of this act
31 shall be adjudged by any court of competent jurisdiction to be invalid,
32 such judgment shall not affect, impair or invalidate the remainder ther-
33 eof, but shall be confined in its operation to the clause, sentence,
34 paragraph, section or part thereof directly involved in the controversy
35 in which such judgment shall have been rendered.

36 S 9. This act shall take effect on the first of January next succeed-
37 ing the date on which it shall have become a law; provided, however, the
38 amendments to subdivision 2 of section 103 of the general municipal law
39 made by section four of this act shall not affect the expiration and
40 reversion of such subdivision as provided in subdivision (a) of section
41 41 of part X of chapter 62 of the laws of 2003, as amended, when upon
42 such date the provisions of section five of this act shall take effect.