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2009-2010 Regular Sessions

I N  A S S E M B L Y

(PREFILED)

January 7, 2009

Introduced by M. of A. CAHILL -- Multi-Sponsored by -- M. of A. GREENE -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law, the economic development law, the general municipal law and the public authorities law, in relation to considering net economic impact in procurement contracts

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

Section 1. Short title. This act shall be known and may be cited as the "competitive procurement act".

S 2. Legislative findings. The legislature hereby finds that in order to assure the economically sound use of public funds for the benefit of the entire state and to facilitate the acquisition of facilities and commodities of maximum quality, this article shall require the negotiation of such procurement contracts for public works and public purchases to make the net economic impact of such contract a priority in awarding such procurement contracts. Although the economic impact traditionally includes evaluation of the direct, indirect, and induced impacts of a contract on the economy of this state, the legislature further finds that the "net economic impact" must include consideration of the lowest responsible bid and best value as additional component criteria in determining the overall economic impact of a contract on the state's economy. Therefore, it is in the public's best interest to incorporate the lowest responsible bid and best value criteria into the net economic impact criterion in order to award the most economically viable procurement contracts in New York state.

S 3. The state finance law is amended by adding a new section 139-l to read as follows:

S 139-L. NET ECONOMIC IMPACT IN PROCUREMENT CONTRACTS. 1. NOTWITHSTANDING ANY OTHER PROVISION OF LAW TO THE CONTRARY, WHERE A CONTRACT IS TO BE AWARDED BY A STATE AGENCY, PUBLIC AUTHORITY OR MUNICIPALITY PURSU-

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

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ANT TO A COMPETITIVE BIDDING PROCESS OR A REQUEST FOR PROPOSAL PROCESS, SUCH STATE AGENCY, PUBLIC AUTHORITY OR MUNICIPALITY SHALL REQUIRE THAT ANY PROPOSAL SUBMITTED BY A PROSPECTIVE CONTRACTOR IN RESPONSE THERETO INCLUDE AN ECONOMIC IMPACT STATEMENT DETAILING HOW AN AWARD OF THE CONTRACT TO THE PARTICULAR CONTRACTOR WOULD BENEFIT THE ECONOMY OF NEW YORK STATE AND SHALL PROVIDE THAT NET ECONOMIC IMPACT WILL BE CONSIDERED IN MAKING THE AWARD. THE WEIGHT TO BE GIVEN TO SUCH NET ECONOMIC IMPACT CRITERION RELATIVE TO OTHER CRITERIA USED TO EVALUATE THE PROPOSALS, INCLUDING LOWEST RESPONSIBLE BIDDER AND BEST VALUE, SHALL BE DETERMINED BY THE CONTRACTING AGENCY, AUTHORITY OR MUNICIPALITY ON A CASE BY CASE BASIS. THE STATE AGENCY, PUBLIC AUTHORITY, OR MUNICIPALITY SHALL GIVE PRIORITY TO THE NET ECONOMIC IMPACT CRITERION WHEREVER PRACTICABLE AND SET FORTH THE BASIS FOR ITS AWARD IN WRITING.

2. FOR THE PURPOSES OF THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING DEFINITIONS:

(A) "NET ECONOMIC IMPACT" MEANS THE MEASURE OF ECONOMIC STIMULATION THAT OCCURS FROM PURCHASING TRANSACTIONS THAT HAVE OCCURRED WITHIN THE LOCAL ECONOMY OF NEW YORK STATE AND THE LOWEST RESPONSIBLE BID. NET ECONOMIC IMPACT SHALL BE MEASURED BY DIRECT IMPACT, INDIRECT IMPACT AND INDUCED IMPACT, AS WELL AS LOWEST RESPONSIBLE BID AND BEST VALUE, WHICH ARE DEFINED AS:

(1) "DIRECT IMPACT" MEANS THE AMOUNT OF DIRECT ECONOMIC ACTIVITY GENERATED BY THE PURCHASING TRANSACTION, OR BUSINESS TRANSACTIONS, IN QUESTION. THE SETS OF NUMBERS USED TO DETERMINE DIRECT IMPACT ARE A RESULT OF DEVELOPING PER CAPITA NUMBERS BASED ON ACTUAL ECONOMIC DATA SUPPLIED BY TRANSACTION MANAGEMENT, ATTENDANCE FIGURES, AND OTHER FINANCIAL INFORMATION FOR ALL TRANSACTION-RELATED ACTIVITIES, AS WELL AS USING AVAILABLE TRANSACTION INDUSTRY AVERAGE PER CAPITA EXPENDITURE LEVELS FOR VARIOUS ITEMS.

(2) "INDIRECT IMPACT" INCLUDES ECONOMIC ACTIVITY FELT BY BUSINESSES AS AN INDIRECT RESULT OF THE PURCHASING OR BUSINESS TRANSACTION.

(3) "INDUCED IMPACT" IS THE IMPACT GENERATED WHEN THOSE SURROUNDING BUSINESSES PURCHASE ADDITIONAL PRODUCTS AND SERVICES, AND HIRE MORE EMPLOYEES TO MEET THE DEMAND BROUGHT ON BY DIRECT AND INDIRECT IMPACTS.

(4) "LOWEST RESPONSIBLE BIDDER" MEANS ANY PERSON, FIRM, CORPORATION, SUCCESSOR CORPORATION, CONTRACTOR OR SUBCONTRACTOR WHO (I) SUBMITS THE LOWEST RESPONSIBLE BID AND (II) IS NOT DISQUALIFIED ON ANY OF THE GROUNDS PROVIDED BY LAW, RULE OR REGULATION.

(5) "BEST VALUE" MEANS THE SAME AS IN SUBDIVISION ONE OF SECTION ONE HUNDRED SIXTY-THREE OF THIS CHAPTER.

(B) "MUNICIPALITY" SHALL MEAN ANY CITY, TOWN, VILLAGE, COUNTY, MUNICIPAL CORPORATION, DISTRICT CORPORATION, DISTRICT OR ANY OFFICE, DEPARTMENT OR AGENCY, THEREOF.

(C) "STATE AGENCY" SHALL, NOTWITHSTANDING ANY OTHER PROVISION OF LAW, MEAN ANY STATE DEPARTMENT, BOARD, BUREAU, DIVISION, OFFICE, COUNCIL, COMMITTEE OR OFFICER OF THE STATE, OR THE STATE UNIVERSITY OF NEW YORK, OR THE SENIOR COLLEGES OF THE CITY UNIVERSITY OF NEW YORK, OR ANY PUBLIC BENEFIT CORPORATION OR COMMISSION AT LEAST ONE OF WHOSE MEMBERS ARE APPOINTED BY THE GOVERNOR.

3. THE COMPTROLLER AND THE COMMISSIONER OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT SHALL ESTABLISH, THROUGH THE PROMULGATION OF RULES AND REGULATIONS, AND IN CONSULTATION WITH THE HEADS OF STATE AGENCIES, A METHOD FOR STRUCTURING REQUESTS FOR PROPOSALS TO REQUIRE INCLUSION OF AN ECONOMIC IMPACT STATEMENT AND IN EVALUATING RESPONSES TO SUCH REQUESTS FOR PROPOSALS. THE COMPTROLLER SHALL ALSO ESTABLISH THROUGH THE PROMULGATION OF RULES AND REGULATIONS GUIDELINES FOR AGENCIES, AUTHORITIES AND

MUNICIPALITIES TO INCORPORATE CONSIDERATION OF THE LOWEST RESPONSIBLE BIDDER CRITERIA INTO THE NET ECONOMIC IMPACT FORMULA. SUCH NET ECONOMIC IMPACT SHALL INCLUDE, BUT NOT BE LIMITED TO, CONSIDERATION OF WHERE SUBCONTRACTORS USED BY CONTRACTORS TO FULFILL A CONTRACT ARE LOCATED, HOW MANY JOBS IN THE STATE, IF ANY, WILL BE CREATED BY THE AWARDING OF SUCH A CONTRACT, AND THE ESTIMATED TAX REVENUE AND ANCILLARY ECONOMIC ACTIVITY THAT WOULD BE GENERATED IN THE STATE THROUGH THE AWARDING OF SUCH CONTRACTS AND SUBSEQUENT SUBCONTRACTS, LOWEST RESPONSIBLE BID, AND BEST VALUE. SUCH RULES AND REGULATIONS SHALL INCLUDE A PROCEDURE WHEREBY A STATE AGENCY, PUBLIC AUTHORITY OR MUNICIPALITY MAY REQUEST A WAIVER FROM THE REQUIREMENTS OF THIS SECTION.

4. (A) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO CONTRACTS FOR WHICH A STATE AGENCY, PUBLIC AUTHORITY, OR MUNICIPALITY RECEIVES FUNDS ADMINISTERED BY THE FEDERAL GOVERNMENT, EXCEPT TO THE EXTENT THAT THE FEDERAL GOVERNMENT WOULD NOT WITHHOLD SUCH FUNDS OWING TO THE STATE AGENCY'S, PUBLIC AUTHORITY'S, OR MUNICIPALITY'S COMPLIANCE WITH THIS SECTION.

(B) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO CONTRACTS BETWEEN A STATE AGENCY, PUBLIC AUTHORITY, OR MUNICIPALITY IN NEGOTIATED RECIPROCITY FOR GOODS OR SERVICES, EXCEPT TO THE EXTENT THAT SUCH NET ECONOMIC IMPACT SHALL NOT UNDERMINE SUCH RECIPROCAL CONTRACT AGREEMENT.

5. 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. UPON RECEIPT OF SUCH APPLICATION, THE COMPTROLLER, OR HIS OR HER DESIGNEE, SHALL CONDUCT A HEARING TO DETERMINE THE VALIDITY OF THE APPLICATION. NOTICE SHALL BE GIVEN TO THE APPLICANT AND TO THE PROPOSED CONTRACT BID AWARDEE OF THE DATE, TIME AND PLACE OF THE HEARING. THE APPLICANT AND THE PROPOSED CONTRACT BID AWARDEE SHALL BE GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE AND WITNESSES ON THEIR BEHALF. THE COMPTROLLER, OR HIS OR HER DESIGNEE, PRESIDING OVER SUCH HEARING SHALL ISSUE A WRITTEN DECISION WITH FINDINGS OF FACT WHETHER THE PROPOSED CONTRACT BID AWARDEE IS VALID DETERMINATION. SUCH CONTRACT SHALL NOT BE AWARDED PRIOR TO SUCH DECISION. THE AWARDING AGENCY, AUTHORITY, OR MUNICIPALITY SHALL NOTIFY ALL BIDDERS REGARDING THE SELECTION OF ITS PROPOSED CONTRACT BID AWARDEE.

S 4. The opening paragraph and paragraph c of subdivision 2, the opening paragraph and subparagraphs (ii), (v) and (vi) of paragraph a and subparagraph (i) of paragraph b of subdivision 3 of section 163 of the state finance law, as added by chapter 83 of the laws of 1995, are amended to read as follows:

The objective of state procurement is to facilitate each state agency's mission while protecting the interests of the state and its taxpayers and promoting fairness in contracting with the business community. The state's procurement process shall be guided by the NET ECONOMIC IMPACT, PURSUANT TO SECTION ONE HUNDRED THIRTY-NINE-L OF THIS CHAPTER, OF A CONTRACT ON THE STATE AND THE following principles:

c. To encourage the investment of the private and not-for-profit sectors in New York state by making reasonable efforts to ensure that offerers are apprised of procurement opportunities; by specifying the elements of a responsive bid and disclosing the process for awarding contracts including, if applicable, the relative importance and/or weight of [cost] NET ECONOMIC IMPACT and the overall technical criterion for evaluating offers; and by ensuring the procurement is conducted accordingly.

State agency procurement practices for commodities shall incorporate NET ECONOMIC IMPACT, PURSUANT TO SECTION ONE HUNDRED THIRTY-NINE-L OF THIS CHAPTER, AND THEN the following:

(ii) Commodities contracts shall be awarded on the basis of [lowest price to] NET ECONOMIC IMPACT OF a responsive and responsible offerer; or, in the case of multiple awards, in accordance with paragraph c of subdivision ten of this section.

(v) Consistent with guidelines issued by the state procurement council, state agencies may competitively purchase commodities procured in accordance with this article in lieu of using centralized contracts when the resultant [price is less] NET ECONOMIC IMPACT IS GREATER than the centralized contract [price].

(vi) When justified by [price] NET ECONOMIC IMPACT, state agencies, and hospitals and facilities managed and controlled by state agencies eligible pursuant to section twenty-eight hundred three-a of the public health law, shall be eligible to make purchases pursuant to guidelines issued by the state procurement council from a consortium or comparable entity in lieu of using centralized contracts for commodities.

(i) determine, in cooperation with the state procurement council and state agencies, the identity, form, function and utility of those commodities which shall be made available on or through centralized contracts. CRITERIA SHALL INCLUDE THE NET ECONOMIC IMPACT, AS DEFINED IN SECTION ONE HUNDRED THIRTY-NINE-L OF THIS CHAPTER, ON NEW YORK STATE'S ECONOMY. Criteria may include, but need not be limited to, the availability of a volume discount, prior use of the commodity among state agencies and the relative cost of establishing the contract, its anticipated use and expected actual savings for the state. The commissioner may also act as a broker for state agencies to procure commodities.

S 5. The opening paragraph and paragraph d of subdivision 4 of section 163 of the state finance law, as added by chapter 83 of the laws of 1995, are amended to read as follows:

State agency procurement practices for services shall incorporate THE NET ECONOMIC IMPACT, AS DEFINED IN SECTION ONE HUNDRED THIRTY-NINE-L OF THIS CHAPTER, AND THEN the following:

d. Service contracts shall be awarded on the basis of [best value to] NET ECONOMIC IMPACT OF a responsive and responsible offerer; or, in the case of multiple awards, in accordance with paragraph c of subdivision ten of this section.

S 6. Subdivision 7, paragraphs a and b of subdivision 9, the opening paragraph and paragraph a of subdivision 10, the opening paragraph of subdivision 11 and paragraph (i) of subdivision 14 of section 163 of the state finance law, as added by chapter 83 of the laws of 1995, subdivision 7 as separately amended by sections 12 and 20 of chapter 137 of the laws of 2008, and paragraph (i) of subdivision 14 as amended by chapter 95 of the laws of 2000, are amended to read as follows:

7. Method of procurement. Consistent with the requirements of subdivisions three and four of this section, state agencies shall select among permissible methods of procurement including, but not limited to, an invitation for bid, request for proposals or other means of solicitation pursuant to guidelines issued by the state procurement council. State agencies may accept bids electronically and may, for technology contracts only, require electronic submission as the sole method for the submission of bids for the solicitation, provided that the agency has made a determination, which shall be documented in the procurement record, that such method affords a fair and equal opportunity for offerers to submit responsive offers. Except where otherwise provided by law,

procurements shall be competitive, and state agencies shall conduct formal competitive procurements to the maximum extent practicable. State agencies shall document the determination of the method of procurement and the basis of award in the procurement record. Where the basis for award is the best [value] NET ECONOMIC IMPACT offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best [value] NET ECONOMIC IMPACT and the manner in which the evaluation process and selection shall be conducted.

a. The commissioner or a state agency shall select a formal competitive procurement process in accordance with guidelines established by the state procurement council and document its determination in the procurement record. The process shall include, but is not limited to, a clear statement of need; a description of the required specifications governing performance and related factors; a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award. Where the basis for the award is best [value] NET ECONOMIC IMPACT, documentation in the procurement record shall, where practicable, include a quantification of the application of the criteria to the rating of proposals and the evaluation results, or, where not practicable, such other justification which demonstrates that best [value] NET ECONOMIC IMPACT will be achieved.

b. The solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the relative importance and/or weight of [cost] NET ECONOMIC IMPACT and the overall technical criterion to be considered by a state agency in its determination of best [value] NET ECONOMIC IMPACT.

Contracts for commodities shall be awarded on the basis of [lowest price to] NET ECONOMIC IMPACT OF a responsive and responsible offerer, PURSUANT TO SECTION ONE HUNDRED THIRTY-NINE-L OF THIS CHAPTER. Contracts for services shall be awarded on the basis of best [value] NET ECONOMIC IMPACT from a responsive and responsible offerer, PURSUANT TO SECTION ONE HUNDRED THIRTY-NINE-L OF THIS CHAPTER. Multiple awards for services and commodities shall be conducted in accordance with paragraph c of this subdivision.

a. Selection and award shall be a written determination in the procurement record made by the commissioner or a state agency in a manner consistent with the provisions of the solicitation. In the event two offers are found to be substantially equivalent, [price] NET ECONOMIC IMPACT shall be the basis for determining the award recipient or, when [price] NET ECONOMIC IMPACT and other factors are found to be substantially equivalent, the determination of the commissioner or agency head to award a contract to one or more of such bidders shall be final. The basis for determining the award shall be documented in the procurement record.

It shall be the responsibility of the head of each state agency to periodically sample the results of the procurement process to test for reasonableness; to ensure that the results withstand public scrutiny and that the quality and the price of the purchase makes sense; and to ensure that purchasing is conducted in a manner consistent with the best NET ECONOMIC IMPACT interests of the state.

(i) a listing of individual and centralized contracts, including vendor name, comptroller approval dates, NET ECONOMIC IMPACT OF SUCH CONTRACTS, dollar value of such contracts, the state agency which let the contract and/or state agencies which purchased off centralized contracts, expenditures made on each such contract and by which agencies during the fiscal year and life to date, citing contract category codes, source selection method, including ["lowest price", "best value",] NET ECONOMIC IMPACT, sole source, single source, negotiated and emergency procurement subtotaled by agency and by type of commodity or service;

S 7. Subdivision 1 of section 142 of the economic development law, as amended by chapter 137 of the laws of 2008, is amended to read as follows:

1. The commissioner shall publish on a daily basis a procurement opportunities newsletter, which shall contain notices of procurement contract opportunities and any other information the commissioner deems necessary to effectuate the purposes of this article INCLUDING, BUT NOT LIMITED TO, ANY CHANGES IN THE LAW, RULES AND REGULATIONS REGARDING PROCUREMENT CONTRACTS. Notices of procurement contract opportunities shall be available on the internet for at least fifteen days.

S 8. Section 100-a of the general municipal law, as added by chapter 363 of the laws of 1964, is amended to read as follows:

S 100-a. Declaration of policy. [It] NOTWITHSTANDING ANY PROVISION OF THIS ARTICLE TO THE CONTRARY, IT is hereby declared to be the policy of this state that this article shall [be construed] CONSIDER THE NET ECONOMIC IMPACT, AS DEFINED IN SECTION ONE HUNDRED THIRTY-NINE-L OF THE STATE FINANCE LAW, AS THE PRIORITY in the negotiation of contracts for public works and public purchases to which political subdivisions [or and district] AND/OR DISTRICTS therein [is] ARE a party so as to assure the prudent and economical use of public moneys for the benefit of all the inhabitants of the state and to facilitate the acquisition of facilities and commodities of maximum quality [at the lowest possible cost].

S 9. Subdivision 1 of section 2879 of the public authorities law, as amended by chapter 564 of the laws of 1988, is amended to read as follows:

1. Every public authority and public benefit corporation, a majority of the members of which consist of persons either appointed by the governor or who serve as members by virtue of holding a civil office of the state, or a combination thereof, (such entities to be hereinafter in this section referred to as "corporation") shall adopt by resolution comprehensive guidelines which detail the corporation's operative policy and instructions regarding the use, awarding, monitoring and reporting of procurement contracts. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, RULE OR REGULATION, SUCH GUIDELINES SHALL INCLUDE, BUT NOT BE LIMITED TO, MAKING CONSIDERATION OF THE NET ECONOMIC IMPACT, AS DEFINED IN SECTION ONE HUNDRED THIRTY-NINE-L OF THE STATE FINANCE LAW, THE PRIORITY IN AWARDING PROCUREMENT CONTRACTS. Guidelines approved by the corporation shall be annually reviewed and approved by the corporation.

S 10. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, the provisions of this act shall be applied to all contracts entered into on or after April 1, 2009; provided, further, however, that the amendments to the provisions of section 163 of the state finance law made by sections four, five and six of this act shall not affect the repeal of such section and shall be deemed repealed therewith; and provided, further, that section seven of this act shall take effect on the same date and in the same manner as section 6 of chapter 137 of the laws of 2008, takes

effect. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such date.