

2009-2010 Regular Sessions

I N S E N A T E

(PREFILED)

January 7, 2009

Introduced by Sen. KRUGER -- read twice and ordered printed, and when printed to be committed to the Committee on Local Government

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  
23 TO SERVING THE COMPLAINT ON THE COMPTROLLER. UPON THE FILING OF A PRIMA  
24 FACIE VALID COMPLAINT WITH THE COMPTROLLER, THE COMPTROLLER SHALL NOTIFY

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

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

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

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

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

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

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

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

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

55 13. EXCEPT AS OTHERWISE EXPRESSLY AUTHORIZED BY THIS ARTICLE, A POLI-  
56 TICAL SUBDIVISION MAY NOT REQUIRE THAT BIDS CONFORM TO UNDULY RESTRIC-

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

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

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

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

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

54 S 6. Subparagraph 1 of paragraph (b) of subdivision 4 of section 35 of  
55 the general municipal law, as amended by chapter 692 of the laws of  
56 1989, is amended to read as follows:

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

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

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

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

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