

3617

2011-2012 Regular Sessions

I N A S S E M B L Y

January 26, 2011

Introduced by M. of A. BRENNAN, MILLMAN, CLARK, DINOWITZ, ORTIZ, COLTON, SPANO, JAFFEE -- Multi-Sponsored by -- M. of A. CAHILL, GALEF, GLICK, GOTTFRIED, 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
23 TO SERVING THE COMPLAINT ON THE COMPTROLLER. UPON THE FILING OF A PRIMA

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

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

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

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

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

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

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

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

54 S 3. Section 103 of the general municipal law is amended by adding a
55 new subdivision 14 to read as follows:

1 14. 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 newspaper
40 or newspapers, if any, or otherwise in a newspaper or newspapers desig-
41 nated for such purpose. Such advertisement shall contain a statement of
42 the time when and place where all bids received pursuant to such notice
43 will be publicly opened and read. Such board or agency may by resolution
44 designate any officer or employee to open the bids at the time and place
45 specified in the notice. Such designee shall make a record of such bids
46 in such form and detail as the board or agency shall prescribe and pres-
47 ent the same at the next regular or special meeting of such board or
48 agency. All bids received shall be publicly opened and read at the time
49 and place so specified. ALL BIDS RECEIVED AND OPENED SHALL BE PUBLIC
50 RECORDS AND SHALL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING. At
51 least five days shall elapse between the first publication of such
52 advertisement and the date so specified for the opening and reading of
53 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.