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

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I N A S S E M B L Y

February 21, 2012

Introduced by M. of A. ENGLEBRIGHT, GLICK, COOK, LAVINE, JAFFEE, TITONE, LINARES, ROBERTS, HOOPER -- Multi-Sponsored by -- M. of A. BRENNAN, BRINDISI, BRONSON, GOTTFRIED, P. RIVERA, RUSSELL, SWEENEY -- (at request of the State Comptroller) -- read once and referred to the Committee on Governmental Operations -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the state finance law, in relation to program procurements, clarifying the definition of services and allowing the state comptroller to excuse non-material deviations in procurement procedures

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

Section 1. The state finance law is amended by adding a new article 11-C to read as follows:

ARTICLE XI-C
PROGRAM PROCUREMENTS

SECTION 179-FF. DEFINITIONS.
179-GG. PROGRAM PROCUREMENTS.
179-HH. REQUEST FOR EXEMPTION.
179-II. PROGRAM PROCUREMENT PROCESS.

S 179-FF. DEFINITIONS. AS USED IN THIS ARTICLE THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS UNLESS OTHERWISE SPECIFIED:

1. "COSTS" SHALL BE QUANTIFIABLE AND MAY INCLUDE, WITHOUT LIMITATION, THE PRICE OF PROVIDING THE GIVEN GOOD OR SERVICE AND THE ADMINISTRATIVE, TRAINING, STORAGE, MAINTENANCE OR OTHER OVERHEAD EXPENSE ASSOCIATED WITH A GIVEN GOOD OR SERVICE.

2. "EMERGENCY" MEANS AN URGENT AND UNEXPECTED REQUIREMENT WHERE PUBLIC HEALTH, SAFETY, OR WELFARE OR THE CONSERVATION OF PUBLIC RESOURCES IS AT RISK.

3. "PRICE" MEANS THE AMOUNT OF MONEY SET AS CONSIDERATION FOR A GOOD OR SERVICE AND MAY INCLUDE WHEN APPLICABLE AND WHEN SPECIFIED IN THE PROPOSAL/APPLICATION, DELIVERY CHARGES, INSTALLATION CHARGES AND OTHER COSTS.

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

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4. "PROCUREMENT RECORD" MEANS DOCUMENTATION OF THE DECISIONS MADE AND THE APPROACH TAKEN IN THE PROCUREMENT PROCESS.

5. "PROGRAM" MEANS A PROVISION OF LAW AUTHORIZING A STATE AGENCY TO UNDERTAKE ACTIVITIES THAT ARE TO BE ACCOMPLISHED IN WHOLE OR IN PART THROUGH CONTRACTS WITH CERTAIN ENTITIES INCLUDING, BUT NOT LIMITED TO, NOT-FOR-PROFIT ORGANIZATIONS, FOR-PROFIT ORGANIZATIONS, MUNICIPALITIES OR ANY COMBINATION THEREOF.

6. "PROGRAM PROCUREMENT" MEANS A PROCUREMENT WHICH:

A. SEEKS A CONTRACT PURSUANT TO WHICH THE VENDOR WOULD PROVIDE SERVICES OR COMMODITIES DIRECTLY TO THE PUBLIC OR A SEGMENT OF THE PUBLIC AND NOT DIRECTLY TO A STATE AGENCY, PROVIDED THAT SUCH SERVICE SHALL NOT INCLUDE THE CONSTRUCTION OR RECONSTRUCTION OF BUILDINGS, BRIDGES, ROADS, AND APPURTENANCES FOR USE BY THE STATE;

B. PROVIDES THE APPLICANT WITH DISCRETION IN THE MANNER IN WHICH THE PURPOSE IS TO BE ACCOMPLISHED WITH FEW SPECIFIC LIMITATIONS ON THE MANNER OF DELIVERY; AND

C. HAS BEEN GRANTED AN EXEMPTION PURSUANT TO THE PROVISIONS OF SECTION ONE HUNDRED SEVENTY-NINE-HH OF THIS ARTICLE WHERE SUCH EXEMPTION IS REQUIRED BY SECTION ONE HUNDRED SEVENTY-NINE-GG OF THIS ARTICLE.

A PROGRAM PROCUREMENT PROVIDES THE PROPOSER OR APPLICANT WITH WIDE DISCRETION AND LATITUDE IN THE MANNER IN WHICH THE PURPOSE IS TO BE ACCOMPLISHED WITH FEW SPECIFIC LIMITATIONS ON THE SCOPE OF THE PROPOSAL OR APPLICATION.

7. "PUBLIC CORPORATION" MEANS A CITY, TOWN, VILLAGE, SCHOOL DISTRICT, A DISTRICT CORPORATION OR A PUBLIC BENEFIT CORPORATION AS THOSE TERMS ARE DEFINED IN SECTION SIXTY-SIX OF THE GENERAL CONSTRUCTION LAW.

8. "RESPONSIBLE" OR "RESPONSIBILITY" MEANS THE FINANCIAL ABILITY, LEGAL CAPACITY, INTEGRITY, AND PAST PERFORMANCE OF A BUSINESS ENTITY AND AS SUCH TERMS HAVE BEEN INTERPRETED RELATIVE TO PUBLIC PROCUREMENTS.

9. "RESPONSIVE" MEANS A PROPOSER OR APPLICANT MEETING THE MINIMUM SPECIFICATIONS OR REQUIREMENTS AS PRESCRIBED IN A SOLICITATION ISSUED BY A STATE AGENCY.

10. "SINGLE SOURCE" MEANS A PROGRAM PROCUREMENT IN WHICH ALTHOUGH TWO OR MORE PROPOSERS OR APPLICANTS CAN SUPPLY THE REQUIRED GOODS OR SERVICES, THE STATE AGENCY, UPON WRITTEN FINDINGS SETTING FORTH THE MATERIAL AND SUBSTANTIAL REASONS THEREFOR, MAY AWARD THE CONTRACT TO ONE PROPOSER OR APPLICANT OVER ANOTHER. THE STATE AGENCY SHALL DOCUMENT IN THE PROCUREMENT RECORD THE CIRCUMSTANCES LEADING TO THE SELECTION OF THE PROPOSER OR APPLICANT, INCLUDING THE ALTERNATIVES CONSIDERED, THE RATIONALE FOR SELECTING THE SPECIFIC PROPOSER OR APPLICANT AND THE BASIS UPON WHICH THE STATE AGENCY DETERMINED THAT THE COST WAS REASONABLE.

11. "SOLICITATION DOCUMENT" MEANS THE DOCUMENT ISSUED BY A STATE AGENCY NOTIFYING PROSPECTIVE PROPOSERS OR APPLICANTS THAT THE STATE AGENCY WISHES TO RECEIVE PROPOSALS OR APPLICATIONS FOR PROVIDING GOODS OR SERVICES.

12. "SOLE SOURCE" MEANS A PROGRAM PROCUREMENT IN WHICH ONLY ONE PROPOSER OR APPLICANT IS CAPABLE OF SUPPLYING THE REQUIRED GOODS OR SERVICES.

13. "SPECIFICATION" OR "REQUIREMENT" MEANS ANY DESCRIPTION OF THE PHYSICAL OR FUNCTIONAL CHARACTERISTICS OR THE NATURE OF A GOOD OR SERVICE, ANY DESCRIPTION OF THE SERVICES TO BE PERFORMED, THE GOODS OR SERVICES TO BE PROVIDED, THE NECESSARY QUALIFICATIONS OF THE PROPOSER OR APPLICANT, THE CAPACITY AND CAPABILITY OF THE PROPOSER OR APPLICANT TO COMPLETE THE PROPOSED CONTRACT SUCCESSFULLY, OR THE PROCESS FOR ACHIEVING SPECIFIC RESULTS OR ANTICIPATED OUTCOMES, OR BOTH, OR ANY OTHER REQUIREMENT NECESSARY TO PERFORM THE WORK. IT MAY INCLUDE A DESCRIPTION OF ANY OBLIGATORY TESTING, INSPECTION OR PREPARATION FOR DELIVERY AND

USE, AND MAY INCLUDE FEDERALLY REQUIRED PROVISIONS AND CONDITIONS WHERE THE ELIGIBILITY FOR FEDERAL FUNDS IS CONDITIONED UPON THE INCLUSION OF SUCH FEDERALLY REQUIRED PROVISIONS AND CONDITIONS. SPECIFICATIONS SHALL BE DESIGNED TO ENHANCE COMPETITION AND, WHERE APPROPRIATE, SET FORTH THE RELATIVE IMPORTANCE OR WEIGHT OF GEOGRAPHIC DISTRIBUTION AND ASSESSMENT OF NEED.

14. "STATE AGENCY" OR "STATE AGENCIES" MEANS ALL STATE DEPARTMENTS, BOARDS, COMMISSIONS, OFFICES OR INSTITUTIONS BUT EXCLUDES, HOWEVER, FOR THE PURPOSES OF SUBDIVISION FIVE OF SECTION THREE HUNDRED FIFTY-FIVE OF THE EDUCATION LAW, THE STATE UNIVERSITY OF NEW YORK, AND EXCLUDES, FOR THE PURPOSES OF SUBDIVISION A OF SECTION SIXTY-TWO HUNDRED EIGHTEEN OF THE EDUCATION LAW, THE CITY UNIVERSITY OF NEW YORK. FURTHERMORE, SUCH TERM SHALL NOT INCLUDE THE LEGISLATURE OR THE JUDICIARY.

S 179-GG. PROGRAM PROCUREMENTS. THE PROGRAM PROCUREMENT PROCESS SET FORTH IN THIS ARTICLE, RATHER THAN THE REQUIREMENTS OF ARTICLE ELEVEN OF THIS CHAPTER, SHALL APPLY TO:

1. PROGRAM PROCUREMENTS OPEN ONLY TO NOT-FOR-PROFIT ORGANIZATIONS OR PUBLIC CORPORATIONS OR BOTH, AND

2. THOSE PROGRAM PROCUREMENTS OPEN TO PROFIT-SEEKING ENTITIES WHERE THE STATE AGENCY HAS OBTAINED FROM THE STATE COMPTROLLER, IN ACCORDANCE WITH SECTION ONE HUNDRED SEVENTY-NINE-HH OF THIS ARTICLE, AN EXEMPTION FROM THE REQUIREMENTS OF ARTICLE ELEVEN OF THIS CHAPTER.

S 179-HH. REQUEST FOR EXEMPTION. BEFORE THE ISSUANCE OF A SOLICITATION DOCUMENT, A STATE AGENCY CONDUCTING A PROCUREMENT OPEN TO PROFIT-SEEKING ENTITIES WHICH THE STATE AGENCY BELIEVES FALLS WITHIN THE MEANING OF A PROGRAM PROCUREMENT, AS DEFINED IN THIS ARTICLE, SHALL MAKE A WRITTEN REQUEST TO THE STATE COMPTROLLER FOR AN EXEMPTION FROM THE REQUIREMENTS OF ARTICLE ELEVEN OF THIS CHAPTER. THE STATE COMPTROLLER SHALL MAKE A WRITTEN DETERMINATION AS TO WHETHER THE PROPOSED PROCUREMENT FALLS WITHIN THE DEFINITION OF A PROGRAM PROCUREMENT AS SET FORTH IN SECTION ONE HUNDRED SEVENTY-NINE-FF OF THIS ARTICLE AND IS IN THE BEST INTEREST OF THE STATE, AND SHALL EITHER GRANT OR DENY THE EXEMPTION ON THE BASIS OF SUCH DETERMINATION. IF THE STATE COMPTROLLER GRANTS A STATE AGENCY AN EXEMPTION FROM THE REQUIREMENTS OF ARTICLE ELEVEN OF THIS CHAPTER, THE PROGRAM PROCUREMENT SHALL BE CONDUCTED IN ACCORDANCE WITH THE REQUIREMENTS OF THIS ARTICLE.

S 179-II. PROGRAM PROCUREMENT PROCESS. 1. METHOD OF PROCUREMENT. THE STATE AGENCY SHALL DOCUMENT IN THE PROCUREMENT RECORD AND IN ADVANCE OF THE INITIAL RECEIPT OF PROPOSALS/APPLICATIONS THE DETERMINATION OF THE EVALUATION CRITERIA, AND THE WEIGHT ASSIGNED TO EACH, AND THE PROCESS TO BE USED IN THE DETERMINATION OF AWARD OR FUNDING, AND THE MANNER IN WHICH THE EVALUATION AND SELECTION SHALL BE CONDUCTED.

2. PUBLIC NOTICE. ALL PROGRAM PROCUREMENTS BY STATE AGENCIES OR AN AWARD OR FUNDING IN EXCESS OF FIFTEEN THOUSAND DOLLARS SHALL BE ADVERTISED IN THE STATE'S PROCUREMENT OPPORTUNITIES NEWSLETTER IN ACCORDANCE WITH ARTICLE FOUR-C OF THE ECONOMIC DEVELOPMENT LAW.

3. SOLICITING AND ACCEPTING PROPOSALS OR APPLICATIONS. A SOLICITATION DOCUMENT ISSUED BY A STATE AGENCY SHALL PRESCRIBE THE MINIMUM SPECIFICATIONS OR REQUIREMENTS THAT MUST BE MET 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 DOCUMENT SHALL IDENTIFY THE RELATIVE IMPORTANCE OR WEIGHT OF COST AND THE OVERALL TECHNICAL CRITERIA TO BE CONSIDERED BY A STATE AGENCY IN MAKING A PROGRAM PROCUREMENT DETERMINATION. CONSIDERATION, WHERE APPROPRIATE, SHOULD INCLUDE GEOGRAPHIC DISTRIBUTION OF FUNDING BASED ON ASSESSED NEEDS OF THE COMMUNITY.

4. SELECTION AND CONTRACT AWARD. A. SELECTION AND CONTRACT AWARD SHALL BE CONSISTENT WITH: (I) THE TERMS OF THE SOLICITATION DOCUMENT ISSUED BY THE STATE AGENCY; AND (II) THE CONTRACT AWARD METHODOLOGY SET FORTH IN THE PROCUREMENT RECORD BEFORE THE INITIAL RECEIPT OF PROPOSALS OR APPLICATIONS.

B. PROGRAM PROCUREMENT AWARDS SHALL BE MADE TO A PROPOSER OR APPLICANT ON THE BASIS OF TECHNICAL MERIT WITH THE CONSIDERATION GIVEN TO THE REASONABLENESS OF COSTS. THE CONTRACT AWARD OR AWARDS OR FUNDING SHALL BE ALLOCATED TO THE HIGHEST RANKED PROPOSAL OR PROPOSALS. NOTHING IN THIS SECTION, HOWEVER, SHALL BE DEEMED TO PROHIBIT A STATE AGENCY FROM EVALUATING COST SEPARATELY IN ITS SELECTION AND CONTRACT AWARD.

C. A PROCUREMENT RECORD SHALL BE MAINTAINED FOR EACH PROGRAM PROCUREMENT IDENTIFYING, WITH SUPPORTING DOCUMENTATION, DECISIONS MADE BY THE STATE AGENCY DURING THE PROCUREMENT PROCESS.

D. SELECTION AND CONTRACT AWARD SHALL BE A WRITTEN DETERMINATION IN THE PROCUREMENT RECORD MADE BY THE STATE AGENCY.

E. PRIOR TO MAKING A PROGRAM PROCUREMENT AWARD, THE STATE AGENCY SHALL MAKE A DETERMINATION OF THE RESPONSIBILITY OF THE PROPOSER OR APPLICANT.

5. REDUCTION OF AWARD. A STATE AGENCY MAY REDUCE THE MONETARY AMOUNT OF THE AWARDS MADE UNDER A PROGRAM PROCUREMENT IF THE STATE AGENCY RESERVES THE RIGHT TO MAKE SUCH A REDUCTION IN THE SOLICITATION DOCUMENT AND SUCH REDUCTION IS CONSISTENT WITH A PREDEFINED METHODOLOGY SET FORTH IN THE PROCUREMENT RECORD PRIOR TO THE RECEIPT OF INITIAL PROPOSALS OR APPLICATIONS.

6. DISCRETIONARY PROGRAM PROCUREMENT AWARDS. A STATE AGENCY MAY MAKE A PROGRAM PROCUREMENT AWARD IN AN AMOUNT NOT EXCEEDING FIFTY THOUSAND DOLLARS WITHOUT A FORMAL COMPETITIVE PROCESS. THE STATE AGENCY SHALL, HOWEVER, DOCUMENT THAT THE AMOUNT OF THE AWARD OR FUNDING IS REASONABLE.

7. CONTRACT AWARDS. A. CONTRACT AWARDS SHALL BE MADE ON THE BASIS OF HIGHEST RANK IN ACCORDANCE WITH THE SELECTION AND AWARD METHODOLOGY ESTABLISHED IN ACCORDANCE WITH THE PROGRAM REQUIREMENTS SET FORTH BY EACH AGENCY FOR SUCH PROGRAM.

B. SINGLE OR SOLE SOURCE CONTRACT AWARDS, OR CONTRACT AWARDS MADE TO MEET EMERGENCIES ARISING FROM UNFORESEEN CAUSES, MAY BE MADE WITHOUT A FORMAL COMPETITIVE PROCESS AND SHALL ONLY BE MADE UNDER UNUSUAL CIRCUMSTANCES AND SHALL BE BASED UPON A DETERMINATION BY THE STATE AGENCY THAT THE SPECIFICATIONS OR REQUIREMENTS FOR SUCH AWARD HAVE BEEN DESIGNED IN A FAIR AND EQUITABLE MANNER. THE STATE AGENCY SHALL DOCUMENT IN THE PROCUREMENT RECORD, SUBJECT TO REVIEW BY THE STATE COMPTROLLER, THE BASIS FOR A DETERMINATION TO MAKE AN AWARD TO A SINGLE SOURCE OR SOLE SOURCE, OR THE NATURE OF THE EMERGENCY GIVING RISE TO THE AWARD.

8. CONTRACTS. ANY CONTRACT RESULTING FROM A PROGRAM PROCUREMENT AWARDED PURSUANT TO THE PROVISIONS OF THIS ARTICLE THAT INCLUDES FUNDING FOR COMMODITIES OR CONSTRUCTION SERVICES IN EXCESS OF FIFTY THOUSAND DOLLARS SHALL INCLUDE CONTRACT LANGUAGE REQUIRING THE CONTRACTOR TO ACQUIRE SUCH COMMODITIES AND/OR CONSTRUCTION SERVICES PURSUANT TO A COMPETITIVE BIDDING PROCESS.

9. REVIEW BY THE OFFICE OF THE STATE COMPTROLLER. REVIEW BY THE OFFICE OF THE STATE COMPTROLLER SHALL BE IN ACCORDANCE WITH SECTION ONE HUNDRED TWELVE OF THIS CHAPTER.

S 2. Subdivision 7 of section 160 of the state finance law, as amended by section 30 of part L of chapter 55 of the laws of 2012, is amended to read as follows:

7. "Service" or "services" means the performance of a task or tasks and may include a material good or a quantity of material goods, and which is the subject of any purchase or other exchange. For the purposes

of this article, technology shall be deemed a service. Services, as defined in this article, shall not apply to those contracts for (I) architectural, engineering or surveying services, [or those contracts approved] (II) SERVICES PROVIDED BY A NOT-FOR-PROFIT ORGANIZATION in accordance with article eleven-B of this chapter, OR (III) SERVICES OBTAINED THROUGH PROGRAM PROCUREMENTS IN ACCORDANCE WITH ARTICLE ELEVEN-C OF THIS CHAPTER.

S 3. Subdivision 12 of section 163 of the state finance law, as added by chapter 83 of the laws of 1995, is amended to read as follows:

12. Review by the office of the state comptroller. Review by the office of the state comptroller shall be in accordance with section one hundred twelve of this chapter. WHERE THE CONTRACTING AGENCY HAS NOT COMPLIED WITH ONE OR MORE PROVISIONS OF THIS ARTICLE, THE COMPTROLLER MAY APPROVE THE AWARDED CONTRACT IF:

A. THE CONTRACTING AGENCY DETERMINES AND CERTIFIES, BASED UPON A PREPONDERANCE OF THE EVIDENCE DOCUMENTED IN THE PROCUREMENT RECORD, THAT THE NONCOMPLIANCE WAS A NON-MATERIAL DEVIATION FROM ONE OR MORE PROVISIONS OF THIS ARTICLE. FOR THE PURPOSES OF THIS SUBDIVISION "NON-MATERIAL DEVIATION" SHALL MEAN THAT SUCH NONCOMPLIANCE DID NOT PREJUDICE OR FAVOR ANY VENDOR OR POTENTIAL VENDOR, SUCH NONCOMPLIANCE DID NOT SUBSTANTIALLY AFFECT THE FAIRNESS OF THE COMPETITIVE PROCESS, AND THAT A NEW PROCUREMENT WOULD NOT BE IN THE BEST INTEREST OF THE STATE. SUCH DETERMINATION BY THE CONTRACTING AGENCY AND THE COMPTROLLER SHALL BE DOCUMENTED IN THE PROCUREMENT RECORD; AND

B. THE STATE COMPTROLLER CONCURS IN SUCH DETERMINATION.

S 4. This act shall take effect immediately and shall apply to any procurement initiated on or after such date; provided, however, that the amendments to section 163 of the state finance law made by section three of this act shall not affect the repeal of such section as provided in subdivision 5 of section 362 of chapter 83 of the laws of 1995, as amended, and shall be deemed repealed therewith.