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

3052

2011-2012 Regular Sessions

I N S E N A T E

February 7, 2011

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:

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

S 2. The general municipal law is amended by adding a new section 103-g to read as follows:

S 103-G. ENFORCEMENT OF COMPETITIVE BIDDING LAW. 1. DEFINITIONS. (A) "PROCUREMENT ACTION" MEANS ANY TRANSACTION WHICH IS CLAIMED TO CONSTITUTE A CONTRACT FOR PUBLIC WORK INVOLVING AN EXPENDITURE OF MORE THAN TWENTY THOUSAND DOLLARS OR A PURCHASE CONTRACT INVOLVING THE EXPENDITURE OF MORE THAN TEN THOUSAND DOLLARS WHICH SHOULD BE AWARDED TO THE LOWEST RESPONSIBLE BIDDER, AS PROVIDED BY SECTION ONE HUNDRED THREE OF THIS ARTICLE.

(B) "GOOD FAITH BIDDER" MEANS ANY PERSON WHO HAS SUBMITTED A BID IN RESPONSE TO AN ADVERTISEMENT FOR SEALED BIDS, OR WHO COULD SUBMIT A GOOD FAITH BID ON A PROCUREMENT ACTION.

2. COMPTROLLER'S OPINIONS. UPON A COMPLAINT FILED BY A TAXPAYER OF THE POLITICAL SUBDIVISION OR BY A GOOD FAITH BIDDER, THE OFFICE OF THE STATE COMPTROLLER SHALL ISSUE AN OPINION ON WHETHER A PROPOSED PROCUREMENT ACTION BY A POLITICAL SUBDIVISION COMPLIES WITH THE COMPETITIVE BIDDING REQUIREMENTS OF SECTION ONE HUNDRED THREE OF THIS ARTICLE. THE COMPLAINT SHALL SPECIFY THE PROCUREMENT ACTION THAT IS CLAIMED TO VIOLATE SECTION ONE HUNDRED THREE OF THIS ARTICLE. THE TAXPAYER OR GOOD FAITH BIDDER SHALL SERVE A COPY OF THE COMPLAINT ON THE POLITICAL SUBDIVISION PRIOR TO SERVING THE COMPLAINT ON THE COMPTROLLER. UPON THE FILING OF A PRIMA FACIE VALID COMPLAINT WITH THE COMPTROLLER, THE COMPTROLLER SHALL NOTIFY THE POLITICAL SUBDIVISION. UPON RECEIPT OF SUCH NOTICE FROM THE COMP-

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

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TROLLER, THE POLITICAL SUBDIVISION MAY NOT PROCEED WITH THE COMPLAINT OF PROCUREMENT ACTION FOR A PERIOD OF THIRTY DAYS. IN RENDERING HIS OR HER OPINION, THE COMPTROLLER MAY CONSULT WITH THE OFFICE OF GENERAL SERVICES AS TO THE REASONABLENESS AND VALIDITY OF ANY BID SPECIFICATIONS. THE COMPTROLLER SHALL ISSUE A WRITTEN OPINION PURSUANT TO THIS SUBDIVISION WITHIN THIRTY DAYS OF SUCH NOTICE TO THE POLITICAL SUBDIVISION AND SHALL PROMPTLY SERVE COPIES OF THE OPINION ON THE POLITICAL SUBDIVISION AND ON THE COMPLAINING PARTY.

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

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

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

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

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

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

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

14. EXCEPT AS OTHERWISE EXPRESSLY AUTHORIZED BY THIS ARTICLE, A POLITICAL SUBDIVISION MAY NOT REQUIRE THAT BIDS CONFORM TO UNDULY RESTRICTIVE SPECIFICATIONS. ALL SPECIFICATIONS SHALL BE DRAFTED SO AS TO

PROMOTE OVERALL ECONOMY FOR THE PURPOSES INTENDED AND TO ENCOURAGE COMPETITION IN SATISFYING THE NEEDS OF THE POLITICAL SUBDIVISION. A BRAND NAME MAY BE USED AS A SPECIFICATION ONLY IF THE SPECIFICATION CLEARLY STATES THAT THE BRAND NAME OR EQUIVALENT IS ACCEPTABLE. WHERE A BRAND NAME OR EQUIVALENT SPECIFICATION IS USED IN A BID SOLICITATION, THE SOLICITATION SHALL CONTAIN EXPLANATORY LANGUAGE THAT THE USE OF A BRAND NAME IS FOR THE PURPOSE OF DESCRIBING THE STANDARD OF QUALITY, PERFORMANCE AND CHARACTERISTICS DESIRED AND IS NOT INTENDED TO LIMIT OR RESTRICT COMPETITION. IN ANY OPINION, PROCEEDING OR ACTION BROUGHT PURSUANT TO SECTION ONE HUNDRED THREE-G OF THIS ARTICLE, A BID SPECIFICATION DEVELOPED AND PROVIDED BY THE OFFICE OF GENERAL SERVICES SHALL BE DEEMED VALID.

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

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

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

2. Advertisement for bids shall be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose. Such advertisement shall contain a statement of the time when and place where all bids received pursuant to such notice will be publicly opened and read. Such board or agency may by resolution designate any officer or employee to open the bids at the time and place specified in the notice. Such designee shall make a record of such bids in such form and detail as the board or agency shall prescribe and present the same at the next regular or special meeting of such board or agency. All bids received shall be publicly opened and read at the time and place so specified. ALL BIDS RECEIVED AND OPENED SHALL BE PUBLIC RECORDS AND SHALL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING. At least five days shall elapse between the first publication of such advertisement and the date so specified for the opening and reading of bids.

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

(1) Not later than ninety days after presentation to the governing board of a report of examination performed by the office of the state comptroller, or receipt by the governing board of any report of an

external audit performed by an independent public accountant or any management letter in conjunction with such an audit, the governing board may, in its discretion, provide to the comptroller, and file in the office of the clerk, or with the secretary if there is no clerk, of the municipal corporation, industrial development agency, district, agency or activity, a written response to the findings and recommendations, if any, in the report or letter. PROVIDED, HOWEVER, THAT IF SUCH REPORT OR LETTER CONTAINS A FINDING THAT THE COMPETITIVE BIDDING REQUIREMENTS OF SECTION ONE HUNDRED THREE OF THIS CHAPTER WERE VIOLATED, THE GOVERNING BOARD MUST FILE A WRITTEN RESPONSE. In the case of municipal corporations, industrial development agency, districts, agencies or activities subject to examination by the commissioner of education, any written response shall also be provided to such commissioner.

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

S 164-A. PROVIDING BID SPECIFICATIONS TO POLITICAL SUBDIVISIONS. THE COMMISSIONER OF GENERAL SERVICES SHALL PROVIDE TO ANY POLITICAL SUBDIVISION, AT NO CHARGE, ANY SPECIFICATION THAT THE COMMISSIONER HAS DEVELOPED FOR ITEMS TO BE LET FOR BIDS IN PURCHASE CONTRACTS. THE COMMISSIONER MAY DEVELOP ADDITIONAL SPECIFICATIONS AT THE REQUEST OF ANY POLITICAL SUBDIVISION AND MAY PROVIDE SUCH SPECIFICATIONS TO THE POLITICAL SUBDIVISION AND MAY CHARGE THE POLITICAL SUBDIVISION FOR THE COST OF DEVELOPING SUCH SPECIFICATIONS.

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

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