

4076--A

2013-2014 Regular Sessions

I N S E N A T E

March 7, 2013

Introduced by Sen. MARCELLINO -- (at request of the State Comptroller)
-- read twice and ordered printed, and when printed to be committed to
the Committee on Finance -- 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 procure-
ments, clarifying the definition of services and allowing the state
comptroller to excuse non-material deviations in procurement proce-
dures

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

1 Section 1. The state finance law is amended by adding a new article
2 11-C to read as follows:

3 ARTICLE XI-C

4 PROGRAM PROCUREMENTS

5 SECTION 179-FF. DEFINITIONS.

6 179-GG. PROGRAM PROCUREMENTS.

7 179-HH. REQUEST FOR EXEMPTION.

8 179-II. PROGRAM PROCUREMENT PROCESS.

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

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

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

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

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

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

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

8 6. "PROGRAM PROCUREMENT" MEANS A PROCUREMENT WHICH:

9 A. SEEKS A COMPETITIVE CONTRACT PURSUANT TO WHICH THE VENDOR WOULD
10 PROVIDE SERVICES OR COMMODITIES DIRECTLY TO THE PUBLIC OR A SEGMENT OF
11 THE PUBLIC AND NOT DIRECTLY TO A STATE AGENCY, PROVIDED THAT SUCH
12 SERVICE SHALL NOT INCLUDE THE CONSTRUCTION OR RECONSTRUCTION OF BUILD-
13 INGS, BRIDGES, ROADS, AND APPURTENANCES FOR USE BY THE STATE;

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

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

20 A PROGRAM PROCUREMENT PROVIDES THE PROPOSER OR APPLICANT WITH WIDE
21 DISCRETION AND LATITUDE IN THE MANNER IN WHICH THE PURPOSE IS TO BE
22 ACCOMPLISHED WITH FEW SPECIFIC LIMITATIONS ON THE SCOPE OF THE PROPOSAL
23 OR APPLICATION. A PROGRAM PROCUREMENT SHALL NOT INCLUDE ANY NON-COMPETI-
24 TIVE, SINGLE SOURCE OR SOLE SOURCE CONTRACT.

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

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

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

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

43 11. "SOLICITATION DOCUMENT" MEANS THE DOCUMENT ISSUED BY A STATE AGEN-
44 CY NOTIFYING PROSPECTIVE PROPOSERS OR APPLICANTS THAT THE STATE AGENCY
45 WISHES TO RECEIVE PROPOSALS OR APPLICATIONS FOR PROVIDING GOODS OR
46 SERVICES.

47 12. "SOLE SOURCE" MEANS A PROGRAM PROCUREMENT IN WHICH ONLY ONE PROPO-
48 SER OR APPLICANT IS CAPABLE OF SUPPLYING THE REQUIRED GOODS OR SERVICES.

49 13. "SPECIFICATION" OR "REQUIREMENT" MEANS ANY DESCRIPTION OF THE
50 PHYSICAL OR FUNCTIONAL CHARACTERISTICS OR THE NATURE OF A GOOD OR
51 SERVICE, ANY DESCRIPTION OF THE SERVICES TO BE PERFORMED, THE GOODS OR
52 SERVICES TO BE PROVIDED, THE NECESSARY QUALIFICATIONS OF THE PROPOSER OR
53 APPLICANT, THE CAPACITY AND CAPABILITY OF THE PROPOSER OR APPLICANT TO
54 COMPLETE THE PROPOSED CONTRACT SUCCESSFULLY, OR THE PROCESS FOR ACHIEV-
55 ING SPECIFIC RESULTS OR ANTICIPATED OUTCOMES, OR BOTH, OR ANY OTHER
56 REQUIREMENT NECESSARY TO PERFORM THE WORK. IT MAY INCLUDE A DESCRIPTION

1 OF ANY OBLIGATORY TESTING, INSPECTION OR PREPARATION FOR DELIVERY AND
2 USE, AND MAY INCLUDE FEDERALLY REQUIRED PROVISIONS AND CONDITIONS WHERE
3 THE ELIGIBILITY FOR FEDERAL FUNDS IS CONDITIONED UPON THE INCLUSION OF
4 SUCH FEDERALLY REQUIRED PROVISIONS AND CONDITIONS. SPECIFICATIONS SHALL
5 BE DESIGNED TO ENHANCE COMPETITION AND, WHERE APPROPRIATE, SET FORTH THE
6 RELATIVE IMPORTANCE OR WEIGHT OF GEOGRAPHIC DISTRIBUTION AND ASSESSMENT
7 OF NEED.

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

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

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

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

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

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

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

48 3. SOLICITING AND ACCEPTING PROPOSALS OR APPLICATIONS. A SOLICITATION
49 DOCUMENT ISSUED BY A STATE AGENCY SHALL PRESCRIBE THE MINIMUM SPECIFICA-
50 TIONS OR REQUIREMENTS THAT MUST BE MET TO BE CONSIDERED RESPONSIVE AND
51 SHALL DESCRIBE AND DISCLOSE THE GENERAL MANNER IN WHICH THE EVALUATION
52 AND SELECTION SHALL BE CONDUCTED. WHERE APPROPRIATE, THE SOLICITATION
53 DOCUMENT SHALL IDENTIFY THE RELATIVE IMPORTANCE OR WEIGHT OF COST AND
54 THE OVERALL TECHNICAL CRITERIA TO BE CONSIDERED BY A STATE AGENCY IN
55 MAKING A PROGRAM PROCUREMENT DETERMINATION. CONSIDERATION, WHERE APPRO-

1 PRIATE, SHOULD INCLUDE GEOGRAPHIC DISTRIBUTION OF FUNDING BASED ON
2 ASSESSED NEEDS OF THE COMMUNITY.

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

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

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

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

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

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

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

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

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

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

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

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

1 7. "Service" or "services" means the performance of a task or tasks
2 and may include a material good or a quantity of material goods, and
3 which is the subject of any purchase or other exchange. For the purposes
4 of this article, technology shall be deemed a service. Services, as
5 defined in this article, shall not apply to those contracts for (I)
6 architectural, engineering or surveying services, [or those contracts
7 approved] (II) SERVICES PROVIDED BY A NOT-FOR-PROFIT ORGANIZATION in
8 accordance with article eleven-B of this chapter, OR (III) SERVICES
9 OBTAINED THROUGH PROGRAM PROCUREMENTS IN ACCORDANCE WITH ARTICLE
10 ELEVEN-C OF THIS CHAPTER.

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

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

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

28 B. THE STATE COMPTROLLER CONCURS IN SUCH DETERMINATION.

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