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

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Introduced by M. of A. BRONSON, LUPARDO, COLTON, ORTIZ, FAHY, WOERNER -- read once and referred to the Committee on Governmental Operations -- recommitted to the Committee on Governmental Operations in accordance with Assembly Rule 3, sec. 2 -- reported and referred to the Committee on Ways and Means -- reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the state finance law, in relation to the cost effectiveness of consultant contracts by state agencies

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

Section 1. Legislative intent. The legislature hereby finds and declares that it is in the public interest to enact a cost benefit review process when a state agency enters into contracts for personal services. New York State spends over $3.5 billion annually on personal service contracts, over $840 million more than the State spent on these contracts in SFY 2003-04, a 32% increase. Despite an Executive Order that has implemented a post contract review process for some personal service contracts the cost of those contracts continues to escalate every year well above the inflation rate. In addition the State Finance Law does not require state agencies to compare the cost or quality of personal services to be provided by consultants with the cost or quality of providing the same services by the state employees. Numerous audits by the Office of State Comptroller as well as a KPMG study commissioned by the department of transportation have found that consultants hired under personal service contracts can cost between fifty percent and seventy-five percent more than state employees that do the exact same work including the cost of state employee benefits. The Contract Disclosure Law (Chapter 10 of the laws of 2006) required consultants who provide personal services to file forms for each contract that outline how many consultants they hired, what titles they employed them in and

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

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how much they paid them. A review of these forms show that the average consultant makes about fifty percent more than state employees doing comparable work. It is in the public interest for state agencies to compare the cost of doing work by consultants with the cost of doing the same work with state employees as well as document whether or not that such work can be done by state employees. If state government is to be smarter, more efficient, and transparent then a cost benefit analysis process that makes its findings public should be required by law.

S 2. Section 163 of the state finance law is amended by adding a new subdivision 16 to read as follows:

16. CONSULTANT SERVICES. A. BEFORE A STATE AGENCY ENTERS INTO A CONTRACT FOR CONSULTANT SERVICES WHICH IS ANTICIPATED TO COST MORE THAN SEVEN HUNDRED FIFTY THOUSAND DOLLARS IN A TWELVE MONTH PERIOD THE STATE AGENCY SHALL CONDUCT A COST COMPARISON REVIEW TO DETERMINE WHETHER THE SERVICES TO BE PROVIDED BY THE CONSULTANT CAN BE PERFORMED AT EQUAL OR LOWER COST BY UTILIZING STATE EMPLOYEES, UNLESS THE CONTRACT MEETS ONE OF THE EXCEPTIONS SET FORTH IN PARAGRAPH G OF THIS SUBDIVISION. AS USED IN THIS SECTION, THE TERM "CONSULTANT SERVICES" SHALL MEAN ANY CONTRACT ENTERED INTO BY A STATE AGENCY FOR ANALYSIS, EVALUATION, RESEARCH, TRAINING, DATA PROCESSING, COMPUTER PROGRAMMING, THE DESIGN, DEVELOPMENT AND IMPLEMENTATION OF TECHNOLOGY, COMMUNICATIONS OR TELECOMMUNICATIONS SYSTEMS OR THE INFRASTRUCTURE PERTAINING THERETO, INCLUDING HARDWARE AND SOFTWARE, ENGINEERING INCLUDING INSPECTION AND PROFESSIONAL DESIGN SERVICES, HEALTH SERVICES, MENTAL HEALTH SERVICES, ACCOUNTING, AUDITING, OR SIMILAR SERVICES AND SUCH SERVICES THAT ARE SUBSTANTIALLY SIMILAR TO AND IN LIEU OF SERVICES PROVIDED, IN WHOLE OR IN PART, BY STATE EMPLOYEES, BUT SHALL NOT INCLUDE LEGAL SERVICES OR SERVICES IN CONNECTION WITH LITIGATION INCLUDING EXPERT WITNESSES AND SHALL NOT INCLUDE CONTRACTS FOR CONSTRUCTION OF PUBLIC WORKS. FOR PURPOSES OF THIS SUBDIVISION, THE COSTS OF PERFORMING THE SERVICES BY STATE EMPLOYEES SHALL INCLUDE ANY SALARY, PENSION COSTS, ALL OTHER BENEFIT COSTS, COSTS THAT ARE REQUIRED FOR EQUIPMENT, FACILITIES AND ALL OTHER OVERHEAD. THE COSTS OF CONSULTANT SERVICES SHALL INCLUDE THE TOTAL COST OF THE CONTRACT INCLUDING COSTS THAT ARE REQUIRED FOR EQUIPMENT, FACILITIES AND ALL OTHER OVERHEAD AND ANY CONTINUING STATE COSTS DIRECTLY ASSOCIATED WITH A CONTRACTOR PROVIDING A CONTRACTED FUNCTION INCLUDING, BUT NOT LIMITED TO, THOSE COSTS FOR INSPECTION, SUPERVISION, MONITORING OF THE CONTRACTOR'S WORK AND ANY PRO RATA SHARE OF EXISTING COSTS OR EXPENSES, INCLUDING ADMINISTRATIVE SALARIES AND BENEFITS, RENT, EQUIPMENT COSTS, UTILITIES AND MATERIALS. THE COST COMPARISON SHALL BE EXPRESSED WHERE FEASIBLE AS AN HOURLY RATE, OR WHERE SUCH A CALCULATION IS NOT FEASIBLE, AS A TOTAL ESTIMATED COST FOR THE ANTICIPATED TERM OF THE CONTRACT.

B. PRIOR TO ENTERING ANY CONSULTATION SERVICES CONTRACT FOR THE PRIVATIZATION OF A STATE SERVICE THAT IS NOT CURRENTLY PRIVATIZED, THE STATE AGENCY SHALL DEVELOP A COST COMPARISON REVIEW IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH A OF THIS SUBDIVISION.

C. (I) IF SUCH COST COMPARISON REVIEW IDENTIFIES A COST SAVINGS TO THE STATE OF TEN PERCENT OR MORE, AND SUCH CONSULTANT SERVICES CONTRACT WILL NOT DIMINISH THE QUALITY OF SUCH SERVICE, THE STATE AGENCY SHALL DEVELOP A BUSINESS PLAN, IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH D OF THIS SUBDIVISION, IN ORDER TO EVALUATE THE FEASIBILITY OF ENTERING ANY SUCH CONTRACT AND TO IDENTIFY THE POTENTIAL RESULTS, EFFECTIVENESS AND EFFICIENCY OF SUCH CONTRACT.

(II) IF SUCH COST COMPARISON REVIEW IDENTIFIES A COST SAVINGS OF LESS THAN TEN PERCENT TO THE STATE AND SUCH CONSULTANT SERVICES CONTRACT WILL NOT DIMINISH THE QUALITY OF SUCH SERVICE, THE STATE AGENCY MAY DEVELOP A

BUSINESS PLAN, IN ORDER TO EVALUATE THE FEASIBILITY OF ENTERING ANY SUCH CONTRACT AND TO IDENTIFY THE POTENTIAL RESULTS, EFFECTIVENESS AND EFFICIENCY OF SUCH CONTRACT, PROVIDED THERE IS A SIGNIFICANT PUBLIC POLICY REASON TO ENTER INTO SUCH CONSULTANT SERVICES CONTRACT.

(III) IF ANY SUCH PROPOSED CONSULTANT SERVICES CONTRACT WOULD RESULT IN THE LAYOFF, TRANSFER OR REASSIGNMENT OF FIFTY OR MORE STATE AGENCY EMPLOYEES, AFTER CONSULTING WITH THE POTENTIALLY AFFECTED BARGAINING UNITS, IF ANY, THE STATE AGENCY SHALL NOTIFY THE STATE EMPLOYEES OF SUCH BARGAINING UNIT, AFTER SUCH COST COMPARISON REVIEW IS COMPLETED. SUCH STATE AGENCY SHALL PROVIDE AN OPPORTUNITY FOR SAID EMPLOYEES TO REDUCE THE COSTS OF CONDUCTING THE OPERATIONS TO BE PRIVATIZED AND PROVIDE REASONABLE RESOURCES FOR THE PURPOSE OF ENCOURAGING AND ASSISTING SUCH STATE EMPLOYEES TO ORGANIZE AND SUBMIT A BID TO PROVIDE THE SERVICES THAT ARE THE SUBJECT OF THE POTENTIAL CONSULTANT SERVICES CONTACT.

D. ANY BUSINESS PLAN DEVELOPED BY A STATE AGENCY FOR THE PURPOSE OF COMPLYING WITH PARAGRAPH C OF THIS SUBDIVISION SHALL INCLUDE: (I) THE COST COMPARISON REVIEW AS DESCRIBED IN PARAGRAPH B OF THIS SUBDIVISION, (II) A DETAILED DESCRIPTION OF THE SERVICE OR ACTIVITY THAT IS THE SUBJECT OF SUCH BUSINESS PLAN, (III) A DESCRIPTION AND ANALYSIS OF THE STATE AGENCY'S CURRENT PERFORMANCE OF SUCH SERVICE OR ACTIVITY, (IV) THE GOALS TO BE ACHIEVED THROUGH THE PROPOSED CONSULTANT SERVICES CONTRACT AND THE RATIONALE FOR SUCH GOALS, (V) A DESCRIPTION OF AVAILABLE OPTIONS FOR ACHIEVING SUCH GOALS, (VI) AN ANALYSIS OF THE ADVANTAGES AND DISADVANTAGES OF EACH OPTION, INCLUDING, AT A MINIMUM, POTENTIAL PERFORMANCE IMPROVEMENTS AND RISKS ATTENDANT TO TERMINATION OF THE CONTRACT OR RESCISSION OF SUCH CONTRACT, (VII) A DESCRIPTION OF THE CURRENT MARKET FOR THE SERVICES OR ACTIVITIES THAT ARE THE SUBJECT OF SUCH BUSINESS PLAN, (VIII) AN ANALYSIS OF THE QUALITY OF SERVICES AS GAUGED BY STANDARDIZED MEASURES AND KEY PERFORMANCE REQUIREMENTS INCLUDING COMPENSATION, TURNOVER, AND STAFFING RATIOS, (IX) A DESCRIPTION OF THE SPECIFIC RESULTS BASED PERFORMANCE STANDARDS THAT SHALL, AT A MINIMUM BE MET, TO ENSURE ADEQUATE PERFORMANCE BY ANY PARTY PERFORMING SUCH SERVICE OR ACTIVITY, (X) THE PROJECTED TIME FRAME FOR KEY EVENTS FROM THE BEGINNING OF THE PROCUREMENT PROCESS THROUGH THE EXPIRATION OF A CONTRACT, IF APPLICABLE, (XI) A SPECIFIC AND FEASIBLE CONTINGENCY PLAN THAT ADDRESSES CONTRACTOR NONPERFORMANCE AND A DESCRIPTION OF THE TASKS INVOLVED IN AND COSTS REQUIRED FOR IMPLEMENTATION OF SUCH PLAN, AND (XII) A TRANSITION PLAN, IF APPROPRIATE, FOR ADDRESSING CHANGES IN THE NUMBER OF AGENCY PERSONNEL, AFFECTED BUSINESS PROCESSES, EMPLOYEE TRANSITION ISSUES, AND COMMUNICATIONS WITH AFFECTED STAKEHOLDERS, SUCH AS AGENCY CLIENTS AND MEMBERS OF THE PUBLIC, IF APPLICABLE. SUCH TRANSITION PLAN SHALL CONTAIN A REEMPLOYMENT AND RETRAINING ASSISTANCE PLAN FOR EMPLOYEES WHO ARE NOT RETAINED BY THE STATE OR EMPLOYED BY THE CONTRACTOR. IF ANY PART OF SUCH BUSINESS PLAN IS BASED UPON EVIDENCE THAT THE STATE AGENCY IS NOT SUFFICIENTLY STAFFED TO PROVIDE THE SERVICES REQUIRED BY THE CONSULTANT SERVICES CONTRACT, THE STATE AGENCY SHALL ALSO INCLUDE WITHIN SUCH BUSINESS PLAN A RECOMMENDATION FOR REMEDIATION OF THE UNDERSTAFFING TO ALLOW SUCH SERVICES TO BE PROVIDED DIRECTLY BY THE STATE AGENCY IN THE FUTURE.

E. UPON THE COMPLETION OF SUCH BUSINESS PLAN, THE STATE AGENCY SHALL SUBMIT THE BUSINESS PLAN TO THE STATE COMPTROLLER.

F. (I) NOT LATER THAN SIXTY DAYS AFTER RECEIPT OF ANY BUSINESS PLAN, THE STATE COMPTROLLER SHALL TRANSMIT A REPORT DETAILING ITS REVIEW, EVALUATION AND DISPOSITION REGARDING SUCH BUSINESS PLAN TO THE STATE AGENCY THAT SUBMITTED SUCH COST COMPARISON REVIEW. SUCH SIXTY-DAY PERIOD MAY BE EXTENDED FOR AN ADDITIONAL THIRTY DAYS UPON A SHOWING OF GOOD CAUSE.

(II) THE STATE COMPTROLLER'S REPORT SHALL INCLUDE THE BUSINESS PLAN PREPARED BY THE STATE AGENCY, THE REASONS FOR APPROVAL OR DISAPPROVAL, ANY RECOMMENDATIONS OR OTHER INFORMATION TO ASSIST THE STATE AGENCY IN DETERMINING IF ADDITIONAL STEPS ARE NECESSARY TO MOVE FORWARD WITH A CONSULTANT SERVICES CONTRACT.

(III) IF THE STATE COMPTROLLER DOES NOT ACT ON A BUSINESS PLAN SUBMITTED BY A STATE AGENCY WITHIN NINETY DAYS OF RECEIPT OF SUCH BUSINESS PLAN, SUCH BUSINESS PLAN SHALL BE DEEMED APPROVED.

G. A COST COMPARISON SHALL NOT BE REQUIRED IF THE CONTRACTING AGENCY DEMONSTRATES:

(I) THE SERVICES ARE INCIDENTAL TO THE PURCHASE OF REAL OR PERSONAL PROPERTY; OR

(II) THE CONTRACT IS NECESSARY IN ORDER TO AVOID A CONFLICT OF INTEREST ON THE PART OF THE AGENCY OR ITS EMPLOYEES; OR

(III) THE SERVICES ARE OF SUCH A HIGHLY SPECIALIZED NATURE THAT IT IS NOT FEASIBLE TO UTILIZE STATE EMPLOYEES TO PERFORM THEM OR REQUIRE SPECIAL EQUIPMENT THAT IS NOT FEASIBLE FOR THE STATE TO PURCHASE OR LEASE; OR

(IV) THE SERVICES ARE OF SUCH AN URGENT NATURE THAT IT IS NOT FEASIBLE TO UTILIZE STATE EMPLOYEES; OR

(V) THE SERVICES ARE ANTICIPATED TO BE SHORT TERM AND ARE NOT LIKELY TO BE EXTENDED OR REPEATED AFTER THE CONTRACT IS COMPLETED; OR

(VI) A QUANTIFIABLE IMPROVEMENT IN SERVICES THAT CANNOT BE REASONABLY DUPLICATED.

H. NOTHING IN THIS SECTION SHALL BE DEEMED TO AUTHORIZE A STATE AGENCY TO ENTER INTO A CONTRACT WHICH IS OTHERWISE PROHIBITED BY LAW.

I. ALL DOCUMENTS RELATED TO THE COST COMPARISON AND BUSINESS PLAN REQUIRED BY THIS SUBDIVISION AND THE DETERMINATIONS MADE PURSUANT TO PARAGRAPH G OF THIS SUBDIVISION SHALL BE PUBLIC RECORDS SUBJECT TO DISCLOSURE PURSUANT TO ARTICLE SIX OF THE PUBLIC OFFICERS LAW.

S 3. On or before December 31, 2019 the state comptroller shall prepare a report, to be delivered to the governor, the temporary president of the senate and the speaker of the assembly. Such report shall include, but need not be limited to, an analysis of the effectiveness of the cost comparison review program and an analysis of the cost savings associated with performing such cost comparison.

S 4. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to all contracts solicited or entered into by state agencies after the effective date of this act; provided, however, the amendments to section 163 of the state finance law made by section two of this act shall not affect the repeal of such section and shall be deemed repealed therewith.