

7372

2015-2016 Regular Sessions

I N A S S E M B L Y

May 6, 2015

Introduced by M. of A. PICHARDO -- 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-h to read as follows:

5 S 103-H. 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 STATE COMPTROLLER
17 SHALL ISSUE AN OPINION ON WHETHER A PROPOSED PROCUREMENT ACTION BY A
18 POLITICAL SUBDIVISION COMPLIES WITH THE COMPETITIVE BIDDING REQUIREMENTS
19 OF SECTION ONE HUNDRED THREE OF THIS ARTICLE. THE COMPLAINT SHALL SPECI-
20 FY THE PROCUREMENT ACTION THAT IS CLAIMED TO VIOLATE SECTION ONE HUNDRED
21 THREE OF THIS ARTICLE. THE TAXPAYER OR GOOD FAITH BIDDER SHALL SERVE A
22 COPY OF THE COMPLAINT ON THE POLITICAL SUBDIVISION PRIOR TO SERVING THE
23 COMPLAINT ON THE COMPTROLLER. UPON THE FILING OF A PRIMA FACIE VALID
24 COMPLAINT WITH THE COMPTROLLER, THE COMPTROLLER SHALL NOTIFY THE POLI-
25 TICAL SUBDIVISION. UPON RECEIPT OF SUCH NOTICE FROM THE COMPTROLLER, THE

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

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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 NOT 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 SHALL NOT REQUIRE THAT BIDS CONFORM TO UNDULY RESTRICTIVE SPECIFICATIONS. ALL SPECIFICATIONS SHALL BE DRAFTED SO AS TO

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

13 S 4. Subdivision 2 of section 103 of the general municipal law, as
14 amended by section 1 of chapter 367 of the laws of 2014, is amended to
15 read as follows:

16 2. Advertisement for bids and offers shall be published in the offi-
17 cial newspaper or newspapers, if any, or otherwise in a newspaper or
18 newspapers designated for such purpose and may be published in the
19 procurement opportunities newsletter pursuant to article four-C of the
20 economic development law. Such advertisement shall contain a statement
21 of the time when and place where all bids received pursuant to such
22 notice will be publicly opened and read and where the identity of all
23 offerers will be publicly disclosed, and the designation of the receiv-
24 ing device if the political subdivision or district has authorized the
25 receipt of bids and offers in an electronic format. Such board or agency
26 may by resolution designate any officer or employee to open the bids and
27 offers at the time and place specified in the notice. Such designee
28 shall make a record of such bids and offers in such form and detail as
29 the board or agency shall prescribe and present the same at the next
30 regular or special meeting of such board or agency. All bids received
31 shall be publicly opened and read at the time and place so specified and
32 the identity of all offerers shall be publicly disclosed at the time and
33 place so specified. ALL BIDS RECEIVED AND OPENED SHALL BE PUBLIC RECORDS
34 AND SHALL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING. At least five
35 days shall elapse between the first publication of such advertisement
36 and the date so specified for the opening and reading of bids and
37 offers.

38 S 5. Subdivision 2 of section 103 of the general municipal law, as
39 amended by section 2 of chapter 367 of the laws of 2014, is amended to
40 read as follows:

41 2. Advertisement for bids and offers shall be published in the offi-
42 cial newspaper or newspapers, if any, or otherwise in a newspaper or
43 newspapers designated for such purpose and may be published in the
44 procurement opportunities newsletter pursuant to article four-C of the
45 economic development law. Such advertisement shall contain a statement
46 of the time when and place where all bids received pursuant to such
47 notice will be publicly opened and read and where the identity of all
48 offerers will be publicly disclosed. Such board or agency may by resol-
49 ution designate any officer or employee to open the bids and offers at
50 the time and place specified in the notice. Such designee shall make a
51 record of such bids and offers in such form and detail as the board or
52 agency shall prescribe and present the same at the next regular or
53 special meeting of such board or agency. All bids received shall be
54 publicly opened and read at the time and place so specified and the
55 identity of all offerers shall be publicly disclosed at the time and
56 place so specified. ALL BIDS RECEIVED AND OPENED SHALL BE PUBLIC RECORDS

1 AND SHALL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING. At least five
2 days shall elapse between the first publication of such advertisement
3 and the date so specified for the opening and reading of bids and
4 offers.

5 S 6. Subparagraph 1 of paragraph (b) of subdivision 4 of section 35 of
6 the general municipal law, as amended by chapter 692 of the laws of
7 1989, is amended to read as follows:

8 (1) Not later than ninety days after presentation to the governing
9 board of a report of examination performed by the office of the state
10 comptroller, or receipt by the governing board of any report of an
11 external audit performed by an independent public accountant or any
12 management letter in conjunction with such an audit, the governing board
13 may, in its discretion, provide to the comptroller, and file in the
14 office of the clerk, or with the secretary if there is no clerk, of the
15 municipal corporation, industrial development agency, district, agency
16 or activity, a written response to the findings and recommendations, if
17 any, in the report or letter. PROVIDED, HOWEVER, THAT IF SUCH REPORT OR
18 LETTER CONTAINS A FINDING THAT THE COMPETITIVE BIDDING REQUIREMENTS OF
19 SECTION ONE HUNDRED THREE OF THIS CHAPTER WERE VIOLATED, THE GOVERNING
20 BOARD MUST FILE A WRITTEN RESPONSE. In the case of municipal corpo-
21 rations, industrial development agency, districts, agencies or activ-
22 ities subject to examination by the commissioner of education, any writ-
23 ten response shall also be provided to such commissioner.

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

26 S 164-A. PROVIDING BID SPECIFICATIONS TO POLITICAL SUBDIVISIONS. THE
27 COMMISSIONER OF GENERAL SERVICES SHALL PROVIDE TO ANY POLITICAL SUBDIVI-
28 SION, AT NO CHARGE, ANY SPECIFICATION THAT THE COMMISSIONER HAS DEVEL-
29 OPED FOR ITEMS TO BE LET FOR BIDS IN PURCHASE CONTRACTS. THE COMMISSION-
30 ER MAY DEVELOP ADDITIONAL SPECIFICATIONS AT THE REQUEST OF ANY POLITICAL
31 SUBDIVISION AND MAY PROVIDE SUCH SPECIFICATIONS TO THE POLITICAL SUBDI-
32 VISION AND MAY CHARGE THE POLITICAL SUBDIVISION FOR THE COST OF DEVELOP-
33 ING SUCH SPECIFICATIONS.

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

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